NOTE: THE SUPPRESSION ORDERS MADE IN THE EMPLOYMENT COURT ON 27 MAY 2014 AND 4 JUNE 2014, PROHIBITING PUBLICATION OF THE NAME AND ANY OTHER IDENTIFYING PARTICULARS OF APPELLANT, REMAIN IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2016
[2017] NZSC 59

BETWEEN	ASG Appellant
AND	HARLENE HAYNE, VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Respondent

Hearing: 8 February 2017

Court: William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ

Counsel: C R Carruthers QC and P Cranney for the Appellant
R E Harrison QC for the Respondent

Judgment: 3 May 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay to the respondent costs of $25,000 plus usual disbursements (to be fixed by the Registrar if necessary).

REASONS
(Given by Ellen France J)

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Introduction

[1] The primary issue on this appeal is whether the actions of the respondent, the Vice-Chancellor of the University of Otago, breached an order made under s 200 of the Criminal Procedure Act 2011 preventing "publication" of the appellant's name and other details. The issue arises in this way.

[2] The appellant, ASG, is employed by the respondent as a campus security guard. Whilst in this employment he pleaded guilty to one count of wilful damage and another of assaulting a female. Both charges related to an incident with ASG's wife, from whom he is now separated. ASG appeared before Judge Flatley in the District Court for sentencing on these charges in 2013. The Judge discharged ASG without conviction on both charges.[1] In addition, Judge Flatley made an order under s 200 of the Criminal Procedure Act suppressing the respondent's name and all details relating to ASG and the offending. Section 200(1) allows a Court to make an order "forbidding publication" of the name and other details of persons charged with, convicted or acquitted of an offence.

[3] As it happened, the Deputy Proctor of the University of Otago was in Court whilst ASG was being sentenced. He had been told, not by ASG, that ASG was being sentenced that day. The Deputy Proctor made notes during the hearing.

[4] Once the sentencing was completed, the Deputy Proctor sought some advice from a registry officer as to the implications of the suppression order. It was suggested he obtain legal advice, which he did. The University's lawyer's advice was that the suppression order did not encompass the bare communication of information to genuinely interested people on a one-to-one basis. The lawyer also said there was a legitimate interest for an employer in the fact an employee had

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[1] Under ss 106 and 107 of the Sentencing Act 2002: *New Zealand Police v [ASG]* DC Dunedin CRI-2013-012-184, 14 June 2013 [Sentencing remarks].

pleaded guilty to a charge involving the type of behaviour the employee is engaged to prevent. The advice was that the Deputy Proctor could discuss the charges against ASG and the Court's response with the appropriate personnel in the University.

[5] The Deputy Proctor duly disclosed ASG's name and details about the charges to the University's relevant Divisional Human Resources Manager, to the Proctor as well as to ASG's immediate manager. This information was then given to the Vice-Chancellor, to the Director of Human Resources and to the Proctor's assistant.

[6] The University undertook an investigation. ASG was suspended until the Vice-Chancellor reached the provisional view a final written warning was appropriate. At that point, on or about 3 October 2013, ASG returned to work. The final written warning was set out in a letter dated 17 October 2013.

[7] ASG brought a personal grievance in relation to his employer, the Vice-Chancellor. He said he had been unjustifiably disadvantaged in two ways: first, by his suspension and, secondly, by the final written warning.

[8] The Employment Relations Authority found ASG was unjustifiably disadvantaged in his employment by the decision to give him a final warning but not by his suspension from office.[2] The Authority took the view the University had breached the name suppression order and its actions were not those of a fair and reasonable employer.

[9] Both parties lodged challenges to the Authority's decision with the Employment Court.

[10] The Employment Court concluded the University's actions in conducting an investigation, suspension and the issuing of a final warning were all justified.[3] In reaching that view, the Employment Court considered there was no breach of the name suppression order. That was because the University as employer had

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2 *B v Hayne, Vice-Chancellor of University of Otago* [2014] NZERA Christchurch 73 (Member Loftus) [*Hayne* (ERA)].

3 *Hayne, Vice-Chancellor of the University of Otago v ASG* [2014] NZEmpC 208, [2014] ERNZ 562 (Chief Judge Colgan, Judge Inglis and Judge Corkill) [*Hayne* (EmpC)].

"a genuine (i.e. legitimate and objectively justifiable) interest" in the circumstances relating to the charges.[4] The disclosure of the information about the charges in that situation did not constitute "publication". The steps undertaken, that is disclosure to a small number of persons within the University all of whom had a genuine interest, and the subsequent action were steps a fair and reasonable employer could have taken.[5]

[11] Leave to appeal to the Court of Appeal was granted by that Court.[6] The Court of Appeal dismissed the appeal.[7] The Court took the view "publication" in s 200 meant distribution to the public at large, not dissemination "to persons with a genuine interest in conveying or receiving the information".[8]

The statutory scheme

[12] Section 200 is found in pt 5 of the Criminal Procedure Act. Part 5 sets out a number of general provisions, subpt 3 of which relates to "[p]ublic access and restrictions on reporting".

[13] The features of the scheme set out in subpt 3 can be summarised as follows. First, the Act makes it clear that proceedings are generally open to the public.[9] There is a power to clear the Court but that does not, in most cases, allow for the exclusion of the media.[10] Section 197(2) sets out the prerequisites for making an order clearing the Court. For example, the Court must be satisfied the order is necessary to avoid "undue disruption to the conduct of the proceedings"[11] or "a real risk of prejudice to a fair trial".[12] In each case, the Court must also be satisfied that a suppression order is not sufficient to avoid the risk.[13]

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4 At [49].
5 At [59].
6 *ASG v Hayne, Vice-Chancellor of the University of Otago* [2015] NZCA 115.
7 *ASG v Hayne* [2016] NZCA 203, [2016] 3 NZLR 289 (Harrison, Wild and Kós JJ) [*Hayne* (CA)].
8 At [43].
9 Criminal Procedure Act 2011, s 196.
10 Sections 197 and 198.
11 Section 197(2)(a)(i).
12 Section 197(2)(a)(iii).
13 Section 197(2)(b).

[14] The Court also has power to suppress names and other identifying particulars of the defendant, witnesses, victims and connected persons as well as evidence and submissions where the statutory thresholds are met.[14] Section 200(1) states that a Court "may make an order forbidding publication of the name, address or occupation of a person who is charged with, or convicted or acquitted of, an offence".[15]

[15] There is no extended definition of "publication", but s 195 provides that:

> For the purposes of this subpart, **publication** means publication in the context of any report or account relating to the proceeding in respect of which the section applies or the order was made (as the case may be), and **publish** has a corresponding meaning.

[16] Before making a suppression order, the Court must be "satisfied that publication would be likely to" give rise to one of the listed effects, namely:[16]

> (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
>
> (b) cast suspicion on another person that may cause undue hardship to that person; or
>
> (c) cause undue hardship to any victim of the offence; or
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> (d) create a real risk of prejudice to a fair trial; or
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> (e) endanger the safety of any person; or
>
> (f) lead to the identification of another person whose name is suppressed by order or by law; or
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> (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
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> (h) prejudice the security or defence of New Zealand.

[17] Reasons must be given for suppression decisions.[17]

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[14] Sections 200, 202 and 205. Section 206 deals with the Registrar's power to make and renew interim suppression orders.

[15] Unless the context otherwise requires, "name" is defined to mean "the person's name and any particulars likely to lead to the person's identification": s 194.

[16] Section 200(2).

[17] Section 207. Access to court records where there is a suppression order is dealt with in rr 6.8 and 6.9 of the Criminal Procedure Rules 2012.

[18] The next feature of the statutory scheme is that there is provision for automatic suppression in some cases.[18] For example, s 201 provides for automatic suppression of the identity of a person accused or convicted of either incest or sexual conduct with a dependant family member.[19] Where s 201 applies, s 201(3) states that:

> No person may publish the name, address or occupation of [the] person accused or convicted of [either of the specified offences] unless the court, by order, permits that publication.

[19] Further, s 203 provides for the automatic suppression of the identity of the complainant where a person is accused or convicted of various sexual offences including sexual violation. In those cases s 203(3) prohibits persons from publishing:

> … the name, address, or occupation of the complainant, unless—
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> (a) the complainant is aged 18 years or older; and
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> (b) the court, by order, permits such publication.

[20] Reference should also be made to the ability to vary or revoke suppression orders. The effect of s 208(1) is that a suppression order may be made permanently or for a specified period. If a suppression order is made permanently it may be revoked by the court at any time.[20] It is also clear that a suppression order may be "reviewed and varied by the court at any time".[21] In addition, there is provision for the court to permit publication of information otherwise automatically suppressed, for example, where the complainant is 18 years or older and applies for such an order and the court is satisfied the complainant "understands the nature and effect of his or her decision" to seek permission for publication.[22]

[21] Section 209 sets out some communications which do not comprise publication in breach of a suppression order. The section provides as follows:

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18 Sections 201, 203 and 204.
19 Under ss 130 and 131 of the Crimes Act 1961.
20 Criminal Procedure Act, s 208(1)(c).
21 Section 208(3).
22 Section 201(4).

> (1) Nothing in sections 200 to 205 prevents publication by or at the request of any Police employee of the name, address, or occupation of any person who has escaped from lawful custody or has failed to attend any court when lawfully required to do so if that publication is made for the purpose of facilitating that person's recapture or arrest.
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> (2) Nothing in sections 200 to 205 prevents publication of the name, address, or occupation of any person, or any details of the offences charged to—
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> (a) any person assisting with the administration of the sentence imposed on the person or with the rehabilitation of the person; or
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> (b) any Police employee, or any officer or employee of the Department of Corrections or of the Ministry of Justice, who requires the information for the purposes of his or her official duties; or
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> (ba) any specified agency, corresponding Registrar, corresponding overseas agency, or affected person within the meaning of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 in accordance with sections 43 to 45 of that Act; or
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> (c) any person who is conducting or proposing to conduct a public prosecution against the person for an offence, and who requires the information for the purposes of—
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> (i) deciding whether or not to commence proceedings; or
>
> (ii) conducting that public prosecution.

[22] Finally, we note that breaching a suppression order is an offence.[23] The Act creates two categories of offences. First, s 211(1), makes it an offence to "knowingly or recklessly" publish any "name, address, occupation, or other information in breach of a suppression order or in breach of any of" the sections providing for automatic suppression.[24] Secondly, it is an offence under s 211(2) to publish "any name, address, occupation or other information in breach of a suppression order or in breach of any of" the sections providing for automatic suppression.[25] Section 211(6) provides that in a prosecution for an offence under

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23 Section 211.

24 A "suppression order" is defined to mean "an order under any of sections 200, 202 and 205": section 194.

25 Section 211(2).

s 211(2), it is not necessary for the prosecution to prove that the defendant intended to commit the offence.

[23] A person who commits an offence in the first category, breach with knowledge or recklessly, is liable to a maximum of six months imprisonment or, in the case of a body corporate, to a maximum fine of $100,000.[26] A person who commits an offence under s 211(2) is liable to a maximum fine of $25,000 or, if a body corporate, a fine to a maximum of $50,000.[27]

Did disclosure to the respondent breach s 200?

[24] Whether or not there was a breach of s 200 in this case depends on whether the respondent's actions comprised "publication" of the suppressed information. As counsel for the respondent submits, it is possible to identify at least three possible interpretations of the phrase "forbid publication" in the context of a report or account of the proceedings: namely, suppression of any disclosure beyond the courtroom; suppression of disclosure to the public or to a section of the public; or prohibition of disclosure beyond the courtroom except that the "bare communication" to persons with a genuine interest, assessed objectively, is permitted.

[25] The first approach was effectively the approach taken by the Employment Authority. The Authority took the view the respondent's use of the information was contrary to the Judge's suppression order. Because the documents prepared by the Deputy Proctor provided a "narrative or description" of what had transpired in the District Court, they comprised an account.[28] That account, the Authority concluded, was communicated to others in a formal way. So, while "not generally promulgated", given publication includes communication to a third party, the documents were published.[29]

[26] Both the Employment Court and the Court of Appeal have adopted the third of the approaches. After considering the relevant case law and the legislative history, the Employment Court concluded that given the "special nature of an employment

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26 Section 211(4).
27 Section 211(5).
28 *Hayne* (ERA), above n 2, at [17].
29 At [19].

relationship which requires employers to have trust and confidence in their employees", the term "publication" should be interpreted to exclude communication of information to "genuinely interested people".[30] The Court considered an employer will have the requisite interest, that is both legitimate and objectively justifiable "where there is a potential nexus between the circumstances relating to the charge or charges faced by the employee and the obligations of the employee to his/her employer".[31]

[27] In upholding the decision of the Employment Court, the Court of Appeal drew on the legislative background, the relevant jurisprudence, and the circumstances of the case. The Court considered the legislative history "demonstrate[d] that the meaning of publication is flexible and depends on the circumstances".[32] The jurisprudence was seen as supporting the view publication encompassed "dissemination to the public at large rather than to persons with a genuine interest in conveying or receiving the information".[33] Finally, the Court took the view ASG had breached his duty of good faith under s 4 of the Employment Relations Act 2000 in not informing the respondent of his offending.[34] That was a relevant circumstance telling against the conclusion the disclosure was in breach of s 200.[35]

[28] In deciding on the correct approach, s 200 must be considered in context. That requires some understanding of the legislative history and the approach that has been taken to similar provisions as well as the terms of the statutory scheme.

The legislative history

[29] Section 200 has a lengthy provenance. By virtue of the Criminal Code Amendment Act 1905, the courts had power to exclude persons from hearings and to prohibit publication of a report or an account of the whole or part of the evidence.[36] In the debates on the 1905 Amendment Act, the Attorney-General Hon Albert Pitt

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30 *Hayne* (EmpC), above n 3, at [47]–[48].
31 At [49].
32 *Hayne* (CA), above n 7, at [42].
33 At [43].
34 At [32].
35 At [44]–[45].
36 Criminal Code Amendment Act 1905, ss 3 and 4.

MP made reference to the similar powers in the Divorce and Matrimonial Causes Act 1904 (ss 66 and 67). He noted that those provisions applied only to proceedings in the Divorce Court and that these new provisions would "make it apply to all judicial proceedings in Court".[37]

[30] Section 9 of the Offenders Probation Act 1920 provided that if a person charged with an offence had not previously been convicted of any offence, the Court could prohibit "the publication of his name in any report or account of his arrest, trial, or conviction, or of his release on probation".

[31] The Hon Sir Francis Bell MP, Attorney-General, in debate on the Offenders Probation Bill 1920 (100), explained he wanted to change the law so that a person "brought up for a first offence" should be given probation, "with a fair chance".[38] In terms of the provision for name suppression, Sir Francis Bell continued:[39]

> It should not be forgotten there was a section of the Press which lived on the blackguard stuff which they got from the back yards of the Police Courts. It was that kind of publication that they wanted to prohibit, and that class of publisher that they wanted to deal with.

[32] The Criminal Justice Act 1954 maintained the discretion of the Court to prohibit "the publication, in any report relating to any proceedings in respect of any offence" of the name of the person accused or convicted of the offence, or the name of any other person connected with the proceedings.[40] There was a proviso to this subsection preventing the making of a non-publication order if the person had a previous conviction for any imprisonable offence. In the debate on the Criminal Justice Bill 1954 (48), the Hon Thomas Webb MP explained that the press had made representations that the power of suppression should be limited to first offenders.[41] The proviso reflected an agreement to limit the discretion in this way.[42]

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37 (14 July 1905) 132 NZPD 581.

38 (20 October 1920) 188 NZPD 743.

39 At 743.

40 Criminal Justice Act 1954, s 46(1). The legislative history from 1954 is discussed in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [126]–[138] per McGrath and William Young JJ delivering the judgment of McGrath, William Young and Glazebrook JJ.

41 (23 September 1954) 304 NZPD 1930–1931.

42 The proviso was removed in 1967: Criminal Justice Amendment Act 1967, s 9.

[33] The immediate predecessor to subpt 3 of pt 5 of the Criminal Procedure Act was ss 138 to 141 of the Criminal Justice Act 1985. Section 138 continued the power to clear the court and forbid any report of the proceedings. A similar approach to the current Act was adopted in that the starting point was that court proceedings were open with the court having a power to close the court if the statutory pre-requisites were met. The nature of the order that could be made to prohibit publication was in very similar terms to s 200. Section 140(1) provided that subject to other statutory provisions:

> … a Court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

[34] It was an offence to breach non-publication orders.[43] The 1985 Act also made similar provision to that in the current Act for automatic suppression in cases involving sexual offending.[44]

[35] Finally, there was an exception permitting publication by or at the request of the police and by others involved in the administration of the criminal justice system.[45] The final version of s 141 prior to its repeal permitted the following: publication by or at the request of the police of details about persons who had escaped from custody or had failed to attend court for the purpose of facilitating their recapture or arrest; publication to persons assisting with the administration of the sentence imposed or rehabilitation of the defendant; and publication to police employees, officers or employees of the Department of Corrections or of the Department for Courts necessary for the purposes of their official duties.[46]

[36] There are similar provisions in other legislation. In particular, a number of statutes, both currently in force and repealed, give the relevant court, tribunal or other decision-maker the power to prohibit publication of any "report or account" of

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43 Criminal Justice Act 1985, s 140(5).
44 Section 139.
45 Section 141.
46 This version was in force from 1 October 2008 to 4 March 2012: Policing Act 2008, s 130(1); and Criminal Procedure Act, s 393.

the proceedings.[47] There are also provisions which define the nature of the publication which is prohibited. For example, s 29(1) of the Inspector-General of Intelligence and Security Act 1996 generally restricts the ability to publish reports or accounts of an inquiry by the Inspector-General "in any newspaper or other document or broadcast by radio or television or otherwise distributed or disclosed".[48]

The law reform process

[37] Reform of the provisions in the Criminal Justice Act 1985 was the subject of consideration by the Law Commission in an issues paper and in a report on the topic of suppression of names and evidence.[49] In the Issues Paper, the Commission examined specifically the question of the meaning of "publication". Importantly, the Commission's view was that as a matter of policy the prohibition ought to encompass word of mouth communication. The Commission explained:[50]

> This is consistent with the meaning of publication in a defamation context, where a statement is "published" if it is communicated to a third party. While publication of suppressed information by way of broadcast, print publication or placement on the Internet breaches an order on a wide scale, widespread gossip can also undermine a suppression order. Nor does the word of mouth communication need to be widespread to render a suppression order pointless in some cases.

[38] To illustrate the concern about the effect of even limited word of mouth disclosure, the Commission gave this example:[51]

> … one can imagine situations in which breaching a suppression order by telling just one person may cause substantial damage, for example where an accused wishes to avoid an employer learning about pending charges.

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47 For example: Evidence Act 1908, s 13B; Hawke's Bay Earthquake Act 1931, s 24; Armed Forces Discipline Act 1971, s 139; Education Act 1989, s 405; Criminal Investigations (Bodily Samples) Act 1995, s 14; Bail Act 2000, s 19; Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 30; Criminal Records (Clean Slate) Act 2004, s 13; Prisoners' and Victims' Claims Act 2005, ss 20 and 41; Evidence Act 2006, ss 111 and 113; Court Martial Act 2007, s 39; Immigration Act 2009, s 259; and Public Safety (Public Protection Orders) Act 2014, s 110.

48 See also: Adoption Act 1955, s 2 dealing with the meaning of "publish" in relation to the prohibition on publication of certain advertisements; Copyright Act 1994, s 10(1) dealing with the meaning of "publication of works"; and Patents Act 2013, s 5(1) dealing with the meaning of "publish" in the journal setting out details about patents.

49 Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) [Issues Paper]; and Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) [Report].

50 Issues Paper, above n 49, at [8.32].

51 At [8.32].

[39] The Commission went on to discuss whether the legislation should attempt to give a clearer definition of publication. This question was seen as raising two competing interests, as follows:[52]

> Providing a statutory definition has the advantage of legal clarity and certainty. If publication is explicitly defined, for the reasons set out above in our view it would be inappropriate to exclude one-to-one communication from the definition. However, including one-to-one communication potentially extends the ambit of the offence much too far. Technically a person would be in breach of an order if they were present in court, heard the name of a defendant, which was suppressed, and told their own spouse, but no one else. Putting aside questions of proof and enforcement, is it the intention of the legislature that this conduct should breach a suppression order? To avoid the law being brought into disrepute, the system would be reliant on police deciding not to prosecute trivial breaches, or the courts discharging without conviction.

[40] The Commission described the alternative as omitting any statutory definition and, rather, leaving it "to the courts to make decisions on a case by case basis".[53] It was envisaged the courts would take "a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act".[54] This option was seen as having the advantage of reducing the risk that persons would be charged and/or convicted even if discharged "with trivial breaches of suppression orders".[55] The Commission acknowledged that the disadvantage of this approach was that there would continue to be "a degree of uncertainty about the precise meaning of publication".[56]

[41] In its final report, the Commission said it did not favour including a statutory definition of publication. That approach was seen to potentially create more problems than it would solve. The Commission said this:[57]

> It would be preferable to leave it to the courts to make decisions on a case by case basis, taking a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act.

[42] That appears to have been the approach adopted in the Criminal Procedure (Reform and Modernisation) Bill 2010 (243). In discussion on what became s 195[58]

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52 At [8.33].
53 At [8.34].
54 At [8.34].
55 At [8.34].
56 At [8.34].
57 Report, above n 49, at [7.18].

(which confines publication to publication in the context of a report or account of the proceeding) the explanatory note to the Bill recorded that this was not intended to be a definition of the term publication or publish. That was because "it is considered preferable that the meaning of these terms continue to be developed at common law rather than specified in the legislation".[59] The note continued:[60]

> Instead the clause is designed to clarify that publication of a person's name is not prohibited in any context that is unrelated to a report or account of the criminal proceedings. Phrases along the lines of "may not publish, in any report or account relating to any proceedings in respect of an offence," are used in a number of places in those sections of the Criminal Justice Act that relate to name suppression. *Clause 199* is a device designed to avoid the need to repeatedly use this phrase in the following clauses that prohibit the publication of particular details.

The relevant jurisprudence

[43] The two most influential decisions in terms of the current argument are the judgment of Panckhurst J in *Director-General of Social Welfare v Christchurch Press Company Ltd*[61] and that of the Full Court of the High Court in *Solicitor-General v Smith*.[62] Both cases, in essence, approach the prohibition on publication in provisions similar to s 200 of the Criminal Procedure Act on the basis that the prohibition does not prevent "bare communication … to genuinely interested people" who have some need for the information.[63] We discuss each of these cases in turn before considering other authorities on similar provisions.

[44] In *Director-General v Christchurch Press* Panckhurst J was considering an application for discharge of an interim injunction issued to prevent publication of an article in the Christchurch Press. The injunction had been issued to ensure there was no breach of s 438 of the Children, Young Persons, and Their Families Act 1989. The version of s 438(3) of that Act then in force provided that "[i]n no case shall it be lawful to publish, in any report of proceedings under this Act,– (a) the name of

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58 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1), cl 199.
59 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 56.
60 At 56–57.
61 *Director-General of Social Welfare v Christchurch Press Company Ltd* HC Christchurch CP31/98, 29 May 1998.
62 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC).
63 *Director-General v Christchurch Press*, above n 61, at 10.

any child …".[64] There are various exceptions to that prohibition including, for example, reports in any publication intended for circulation amongst the various named professionals carrying out duties under the Act.[65]

[45] The background to this case is that custody and guardianship orders had been made in 1993 in relation to a child, NM, in the Family Court in favour of the Director-General. Some years later, NM's parents alleged that while he was in Social Welfare care he had been abused in a foster home and assaulted by authorities at a residential centre. The parents complained about these events. NM was returned to their care. The parents made applications in the Family Court and then, in early 1998, approached the Christchurch Press with their story. A draft article for publication was prepared but publication was halted by the granting of the injunction. Panckhurst J said that, in its initial form, the article contained sufficient particulars to enable some readers to identify the child.

[46] By the time Panckhurst J dealt with the application to discharge the injunction, the draft article had been amended. The amendments sought to remove any reference to past or pending Family Court proceedings. Panckhurst J said that "[a]t most [the amended article] contains reference to an allegation of abuse which is under police investigation, and which may require separate consideration by the Family Court in due course".[66]

[47] In discharging the injunction, Panckhurst J accepted the approach taken by Gault J in *Director-General of Social Welfare v Television New Zealand Ltd* as to what constitutes a "report of proceedings".[67] Gault J took the view that proceedings under the 1989 Act must include "all matters in which the jurisdiction of a Court is invoked for adjudication or determination and … extend[s] to the execution of enforcement of judgments or orders".[68] However, Gault J did not accept that proceedings would encompass the "continuing status of the person" consequent on

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64 This subsection was subsequently amended by the Children, Young Persons, and Their Families Amendment Act 2008, s 9 by substituting "Part 4" for "this Act".
65 Children, Young Persons, and Their Families Act 1989, s 438(2).
66 *Director-General v Christchurch Press*, above n 61, at 11.
67 *Director-General of Social Welfare v Television New Zealand Ltd* (1989) 5 FRNZ 594 (HC).
68 At 596.

the determination of the proceedings.[69] In that case, the complaint was about the publication of the fact the child was a foster child. That fact did not come within the prohibition on publication of a report of proceedings.

[48] In endorsing the approach taken in *Director-General of Social Welfare v Television New Zealand Ltd*, Panckhurst J rejected that of Holland J in *Television New Zealand Ltd v Department of Social Welfare*.[70] In the latter case, Holland J concluded that a report of a proceeding encompassed reports of what took place in the courtroom and did not include the fact proceedings had been commenced or the result.[71] Holland J also considered that it did not mean that witnesses and others could not be told of matters such as the date of a hearing or that others with a similar interest could not be told that the child had been placed under supervision or in the custody of the Director-General, for example.[72]

[49] Panckhurst J accordingly concluded that the prohibition on publication was such "as to prohibit reporting of all stages of a proceeding under the Act".[73] But the issues of workability identified by Holland J were met by a focus on the publication of reports. Those words, the Judge said were not:[74]

> … apt to capture the bare communication of information to genuinely interested people, like social workers, foster parents and teachers, who of necessity must be given some information on account of their involvement with a child involved in the proceeding.

[50] The High Court in *Solicitor-General v Smith* adopted the approach taken by Panckhurst J. In that case, the Solicitor-General sought orders that Dr Smith, a Member of Parliament, TV3 and Radio New Zealand be fined for contempt of court. The allegations were of improper pressure on a litigant to forgo her legal rights or to alter her approach to a proceeding, improperly seeking to influence the Court and prejudicing the ability of the Court to perform its function. As part of his defence,

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69 At 596.
70 *Television New Zealand Ltd v Department of Social Welfare* [1990] NZFLR 150 (HC).
71 At 157. That case arose under the Children and Young Persons Act 1974. Section 24(1) was in similar terms to s 438 of the Children, Young Persons, and Their Families Act.
72 At 157.
73 *Director-General v Christchurch Press*, above n 61, at 9.
74 At 10.

Dr Smith said that he had not published "any report of proceedings" as prohibited by s 27A of the Guardianship Act 1968 (now repealed).[75]

[51] The background to this matter was that Dr Smith became an advocate for the parents of a child who had been placed in the care of another person for a considerable period of time. The custody of the child had been the subject of ongoing litigation in the Family Court and, at the time Dr Smith became involved, the Court had made an interim custody order in favour of the caregiver. Dr Smith provided a media release accompanied by a "summary of facts" to Radio New Zealand regarding the case, and later gave interviews to the media about the family's situation. The summary, the Court found, could "only be viewed as a report of the case" and it was released to all media.[76] The Court concluded therefore that this was sufficient to constitute a publication of "any report of proceedings" in terms of s 27A. The Court said it agreed with Panckhurst J's approach noting:[77]

> As he pointed out, s 27A focuses on the publication of reports, and its wording is not "apt to capture the bare communication of information to genuinely interested people".

[52] The High Court said it was not necessary to reach a concluded view on whether Radio New Zealand's broadcasts comprised a breach of s 27A but took the view the broadcasts were a report of proceedings in the Family Court.[78] The broadcasts involved interviews with the child's mother, Dr Smith and Judge Mahony, the Principal Family Court Judge. Aspects of the particular case were discussed. The Court did not endorse Radio New Zealand's argument s 27A was inapplicable because the broadcasts disseminated information which existed "independently" of the Family Court proceeding "simply because that information also forms part of the evidence in the proceeding".[79]

[53] The way in which the prohibition was construed in the *Christchurch Press* case and in *Solicitor-General v Smith* is consistent with the notion that the question

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75 Section 27A(1) of the Guardianship Act 1968 provided that "[n]o person shall publish any report of proceedings under this Act (other than criminal proceedings) except with leave of the Court …".

76 *Smith*, above n 62, at [63].

77 At [62].

78 At [131].

79 At [129].

of whether what has occurred constitutes "publication" is a matter of fact and degree.[80] That was the approach adopted in *Ali v The Deportation Review Tribunal*.[81]

[54] That case also concerned an alleged breach of s 27A of the Guardianship Act. Parts of a judgment of the Family Court which was subject to a suppression order under s 27A(1) were made available to the Minister of Immigration, as part of a report on deportation of Mr Ali, and to the Deportation Review Tribunal. The Tribunal referred to passages of the Family Court judgment in their decision which was available for unrestricted publication.

[55] Tompkins J found that "[w]hether or not a report of proceedings under the Guardianship Act had been published, must in any case be a matter of fact and degree."[82] Because the Tribunal decision was available for unrestricted publication, Tompkins J said that at least part of the Family Court judgment had become available to the public. As a result, the judgment had been published within the meaning of s 27A.[83]

[56] Some reference should also be made to *Taylor v Attorney-General*.[84] That case arose out of the trial of William Sutch on charges under the Official Secrets Act 1951. Mr Taylor was present at the trial when orders were made prohibiting the publication of anything that might lead to the identification of officers of the New Zealand Security Service. Mr Taylor, when taking part in a discussion broadcast on radio, had disclosed the name of a security officer who had given evidence at trial but did not otherwise try to give a "report" of the events at the trial.

[57] At the time, both s 46 of the Criminal Justice Act 1954 and s 375(2) of the Crimes Act 1961 allowed the Court to suppress publication of any report or account

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80 In summarising the approach to the meaning of publishing a recording by playing it in the hearing of the public or "any section of the public" in s 9 of the Contempt of Court Act 1981 (UK), the authors of *Arlidge, Eady and Smith on Contempt* note, amongst other matters, that what is a section of the public is a matter of fact and degree: David Eady and ATH Smith (eds) *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet and Maxwell, London, 2011) at [4–54].

81 *Ali v The Deportation Review Tribunal* HC Auckland HC98/96, 28 November 1996.

82 At 5.

83 At 6.

84 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA).

of the security officer's evidence. Section 46(1) allowed the Court to prohibit the publication "in any report relating to any proceedings" of the name of a person connected with the proceedings. However, counsel for the Attorney-General did not rely on those provisions but, rather, on the inherent powers of the Court. As was observed in *Siemer v Solicitor-General*, this approach appears to have reflected a concern "that the courts might conclude that Mr Taylor's identification of the officer as a witness was not in the nature of a 'report' or 'account' of the proceedings".[85] Again, this suggests the phraseology of publication of a report or account imposes some limits on what is captured by the prohibition.

[58] It is helpful also to refer briefly to four cases decided under s 140 of the Criminal Justice Act 1985.

[59] In *Hero Sportswear Ltd v Underground Fashions Ltd*, Fisher J dismissed a challenge to the admissibility in civil proceedings of an affidavit.[86] The affidavit annexed a judgment of the District Court convicting the defendant's key witness, X, on charges of making erroneous declarations and smuggling under the Customs Act 1966.

[60] A name suppression order was made by the District Court Judge in those proceedings under s 140 of the Criminal Justice Act 1985. It was submitted for the defendant that the filing of the affidavit was a breach of the suppression order. Fisher J rejected this submission, finding that "publication" does not extend to the use of a defendant's name in subsequent court proceedings, rather "[t]he contemplated recipient is the public, whether considered en masse or individually".[87]

[61] *Karam v The Solicitor-General* was an appeal against convictions for offences under s 140(5) of the Criminal Justice Act 1985.[88] The charges alleged breaches of a suppression order made in relation to the trial of David Bain. Mr Karam wrote a book about the Bain case. In the book the name of witness X was

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85 *Siemer v Solicitor-General*, above n 40, at [128].
86 *Hero Sportswear Ltd v Underground Fashions Ltd* (1997) 10 PRNZ 655 (HC).
87 At 656.
88 *Karam v The Solicitor-General* HC Auckland AP50/98, 20 August 1999.

used and her identity disclosed. Witness X's name had been suppressed in the s 140 orders made by the trial Judge.

[62] On appeal the argument was that there was no breach of s 140(5) because the book did not refer to X as having been a witness at the trial and nor was any evidence given by her quoted. Rather, the book quoted information or statements X gave to the police which had been extracted from the police file but not given in evidence at trial.

[63] Gendall J dismissed the appeals against conviction. The Judge did not consider the protection of the suppression order was to restrict publication only for the purpose of trial. He said "proceedings" had a "much wider ambit" and included "preliminary hearings, depositions and the investigation itself".[89] Gendall J stated:[90]

> It is the account or report in respect of which the prohibition exists that the section is directed towards, and if that account or report relates to any proceedings then the section applies. It is significant that the content of what a witness says at trial or, for that matter, to the Police or to anyone, is not the subject of the suppression order and could properly be reported. What could not be reported was the identity of the person who was a witness at the trial and it was that identity of Miss X as Mr Bain's girlfriend that was ordered by Williamson J not to be published. If it were otherwise the case then an order for suppression of identity could be thwarted simply by a publication or report which omitted any reference to trial.

[64] Reference should also be made to the obiter remarks of Hammond J in *Re Victim X*.[91] The Judge was considering whether a suppression order under s 140 should be lifted. As part of his evaluation, Hammond J considered the practicalities of the situation. One practical aspect was that Victim X's name had inadvertently been publicised via the internet. In this context, and with reference to the ongoing trial, Hammond J made the following comments about the meaning of "publication":[92]

> There is a respectable public gallery every day with persons coming and going from the gallery. Who those persons are and what they do outside the Court is no business of the Court. These are private citizens exercising their perfect right to come into Her Majesty's Court, and then go away and talk to

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89 At 8.
90 At 9.
91 *Re Victim X* [2003] 3 NZLR 220 (HC), aff'd *Re Victim X* [2003] 3 NZLR 220 (CA).
92 At [45].

> any other citizen about what they saw and heard. That practical reality is as it should be and cannot be ignored.

[65] Finally, in *Slater v Police* White J considered the meaning of "report or account" in s 140 of the Criminal Justice Act 1985.[93] In that case, Mr Slater argued that information which he had posted on his blog site did not constitute the publication of a "report or account" because those words had a formal meaning linked to the activities of the news media and did not cover information posted on a website by a private individual. White J rejected this argument. He said the correct interpretation of "report" or "account" was a broad one, not limited to media reports of a formal nature. Instead, "a less formal statement of a fact or an event" was included.[94] The Judge placed some emphasis on the use of both words, that is, report and account, the context, and the "fair trial and victim protection purposes" of the provisions.[95] In conclusion, White J found that "the words should cover any statement of fact relating to the proceedings, which is published to the public and contains the proscribed information".[96] As such, a post on a blog site constituted a "report or account".

Discussion

[66] The origins of s 200 suggest the initial concern underlying the prohibition on publication was directed to wider publication via the media. It is clear from the materials we have discussed however that the purpose of the prohibition is now not solely directed to publication in that wider sense but is also intended to capture word of mouth communications. That development is logical given, as the Law Commission noted, there will be situations where a single disclosure to one person or disclosure to a small group of persons may undermine the very purpose of suppression. In that respect, it is relevant that the meaning given to publication will need to apply across all of the situations dealt with in subpt 3 of pt 5.

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93 *Slater v Police* HC Auckland CRI-2010-404-379, 10 May 2011. Leave to appeal on the question of whether the information published constituted a report or account was granted by White J in *Slater v New Zealand Police* HC Auckland CRI-2010-404-379, 8 July 2011, but it appears that this appeal has not been heard.

94 At [67].

95 At [68]–[69].

96 At [69].

[67] As the Law Commission's discussion also indicates, the development of the internet and of social media raise different issues than will have been the case at the time the first predecessor to s 200 was enacted. That development too is a reason a more flexible approach to interpretation may have been seen as appropriate.

[68] It is also plain that the decision not to define publication was a deliberate one and that it was thereby intended there would be some flexibility in the interpretation of publication. It was envisaged that the courts would develop the law in this respect. That decision reflected, at least in part, a concern to avoid the over-extension of the criminal law. Moreover, it seems to have been the intention that what would be a trivial breach should not get to the stage where the individual who had disclosed the information would be reliant on a decision not to prosecute.

[69] It follows that it is necessary for the courts to work out the scope of the prohibition on a case-by-case basis. As to that scope, a number of points can be made.

[70] First, the matters we have discussed do not support the view that any disclosure beyond the courtroom is prohibited (the first possible meaning of "forbid publication" we referred to above).[97] Nor do they support the second possibility, that is, suppression of disclosure only to the public or a section of the public. That leaves what Mr Harrison QC called "the middle ground", that is, the approach broadly speaking adopted by the Employment Court and the Court of Appeal under which the meaning of "publication" does not include bare disclosure to those who have, objectively assessed, a genuine interest.

[71] The Law Commission made express reference to the test in *Smith*.[98] We accept, as Mr Carruthers QC submits, that the focus in both *Christchurch Press* and *Smith* was on a slightly different aspect, reflecting the prohibition in the statutory provisions in issue in those cases on publication of a report or an account of proceedings. But if it had been intended that publication of name and other identifying particulars would be given a different meaning in the present context we

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97 Above at [24].

98 *Smith*, above n 62; Issues Paper, above n 49, at [8.28] in the context of discussion about the meaning of publication; and see Report, above n 49, at [7.17].

would have expected some adverse comment by the Law Commission about the approach in *Smith* and there was none.

[72] Secondly, the test adopted by the Court of Appeal is consistent with the text. The ordinary meaning of "publication" is "the action of making publicly known; public notification or announcement; promulgation".[99] That suggests some wider dissemination is envisaged.

[73] As to the other textual pointers, the reference in s 195 to publication in the context of a report or account is of some relevance. There is some force in the Law Commission's view that s 195 clarifies that the prohibition on publication relates to publication in the context of the proceedings and not, for example, to some future, unrelated, publication of the suppressed detail.[100] Nonetheless, the requirement that there be publication in a report or account of the proceedings suggests not all forms of dissemination will be encompassed in the prohibition.

[74] The appellant emphasises the comprehensive nature of subpt 3 of pt 5, referring to the power to vary or revoke suppression orders and to the exceptions in s 209. As to the latter, the Commission took the view that the exception in s 141 of the Criminal Justice Act 1985 allowing disclosure by the police would likely be unnecessary if "publication" or the words "report or account" were to be "interpreted narrowly".[101] We accept these aspects provide some support for the appellant's approach. However, the ability to vary does not of itself necessarily mean publication must be interpreted expansively because the power to vary may be necessary for a range of reasons.

[75] As to the exceptions in s 209, there is some suggestion in the legislative history that they have been included out of an abundance of caution. In brief, in 1975 the Criminal Justice Act 1954 was amended to provide for automatic name suppression of accused persons.[102] At the same time, automatic name suppression

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99 *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol XII at 782.

100 Issues Paper, above n 49, at [8.41]. We accept, however, that *Karam v The Solicitor-General*, above n 88, was correctly decided.

101 At [8.31].

102 Criminal Justice Amendment Act 1975, s 17(1) inserting s 45B.

for victims of specified crimes was introduced.[103] The 1975 Amendment Act also introduced s 45D, the predecessor to s 209 of the Criminal Procedure Act, which provided that nothing in ss 45B or 45C (dealing with automatic name suppression) prevented the publication by or at the request of the police of the name of a person who had escaped from custody or failed to attend court for the purpose of their recapture or arrest. The following year, after a change of government, the Act was amended to revert to the equivalent of the current approach, that is, name suppression for an accused could be ordered where the statutory criteria were met.[104]

[76] The explanatory note to the 1976 Amendment Bill recorded that one of the amendments was to s 45D of the Act, the rationale for which had been to make it clear that "neither section 45B nor section 45C prevents the publication" of any person's name by the police "for the purpose of facilitating that person's recapture or arrest."[105] The change to s 45D expanded its scope to make it clear that a suppression order made by the Court under s 46 of the Criminal Justice Act 1954 (the predecessor to s 200 of the Criminal Procedure Act) would not prevent publication of the names of persons sought by the police in the circumstances provided for in s 45D.

[77] In moving the introduction of the 1976 Amendment Bill, the Minister of Justice Hon David Thomson MP said this:[106]

> The minor amendment in subclause (2) is necessary in view of subclause (1), which repeals section 45B of the principal Act relating, to the blanket suppression provision. Section 45D of the principal Act was inserted last year at the request of the Police to ensure that the name of an accused person who absconded from bail or escaped from a penal institution could be published notwithstanding the blanket suppression provision. Because the prohibition on publishing the name of a person accused or convicted of incest or having intercourse with a child under his care or protection is being retained, section 45D is also being retained. In addition it is extended, for the sake of clarity, to an order made under section 46 of the principal Act.

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103 Section 17(1) inserting s 45C.

104 Criminal Justice Amendment Act 1976, s 2.

105 Criminal Justice Amendment Bill 1976 (10-1) (explanatory note) at i.

106 (30 June 1976) 403 NZPD 114; and see also (21 July 1976) 404 NZPD 854–855 where the Minister referred to the extension of the exception to orders made under s 46 "for the sake of clarity".

[78] Finally, in terms of the statutory scheme more generally, the fact that the default position is one of open proceedings suggests an approach which ascribes a less expansive meaning to publication is appropriate. As does the fact that it will be an offence, in some cases without any requirement of intention, to breach the prohibition. The protection of the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990 supports the same approach.

[79] Drawing these threads together, the focus in s 200 is, generally, on publication beyond the courtroom to the public or a section of the public at large. We say "generally" because it is necessary to ensure the passing on to one other person or to a small number of persons (including dissemination by word of mouth), in the situation where that will undermine the very purpose of the suppression order, is captured by the section. The section does not encompass the dissemination of information to persons with a genuine need to know or, as the Court of Appeal put it, "a genuine interest in knowing", where the genuineness of the need or interest is objectively established.[107]

[80] It is important to maintain an objective test. While the trivial should not be caught up, the approach to the interpretation of publication has to apply across the range of situations governed by subpt 3 of pt 5, including that of automatic suppression. There would be real concerns, for example, for the safety of a witness where one person's disclosure to one other person may be sufficient to lead to harm to the witness or where there are misguided attempts to bring particular allegations to light within a particular group of affected persons. Such dissemination will be caught by the prohibition because, on an objective assessment, there will be no genuine need or interest in the recipient having the information.

[81] We turn then to apply this approach to the present case.

Application to the present case

[82] The Court of Appeal's reasoning was based in large part on its view that there had been a breach of s 4 of the Employment Relations Act, which imposes the duty

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[107] *Hayne* (CA), above n 7, at [43].

to act in good faith, by the appellant in not informing his employer about his offending. We do not have a proper basis for addressing that aspect and do not do so.[108] It is, in any event, apparent to us that given the part of the appellant's employment involved protecting students on campus, particularly at night, his employer had a genuine interest in knowing he had pleaded guilty to an offence of violence against his spouse.[109] It is also relevant that rather than working for a one-person company or similar small enterprise, the appellant worked for a large entity in which a number of people had a legitimate interest in work-related issues raised by his conduct. The disclosure was limited to a small group, all of whom can fairly be said to have a need to know this information. We add that there would be a level of artificiality if the present dissemination of information was punishable. At least in theory, the Vice-Chancellor could have sat in the courtroom herself and then undertaken her own investigation without disclosing information to persons other than the appellant. The fact that she necessarily delegated functions relating to the over-sight of employees and investigation of possible misconduct does not materially change matters.

[83] The appellant submits that this disclosure undermined the very purpose of the suppression order. There is a contrast, it is submitted, between publication to a social worker or a foster parent who needs some information because of their involvement with a child involved in a proceeding and what occurred in the present case.

[84] To address this submission, it is necessary to say a little about the Judge's sentencing remarks.[110] In deciding to grant a discharge without conviction, Judge Flatley dealt with whether the consequences of conviction would be out of all proportion to the gravity of the offending. The Judge took the view the "most relevant" consequence was the potential ASG would lose his job. Given the type of his employment, Judge Flatley said there was "an extremely strong likelihood" ASG

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[108] The job description applicable to the appellant includes under the heading "Person Specification" the following: "Have no criminal convictions and be willing to undergo a Police clearance check".

[109] The job description records the "Prime Function" as "To positively influence personal safety and behaviour on and off campus".

[110] Sentencing remarks, above n 1.

would lose his job.[111] The Judge was also concerned about the impact of that on ASG's ability to support his children. Other relevant consequences related to travel and stigma within ASG's community.

[85] Having concluded a discharge was appropriate, the Judge said an order for final name suppression would be given. The reason given for that decision was that the Judge could "see no argument for there being publication of somebody who has been discharged without conviction".[112] It is, accordingly, not entirely clear to what extent concern about dissemination to the employer was behind the name suppression decision. However, there is force in the submission that there was a concern about the employer learning of the offending. On this the Court of Appeal said:[113]

> Although we cannot be certain, we think the Judge discharged ASG without conviction and then suppressed publication of his name primarily to protect ASG from the University and the possible loss of his job there.

[86] On the information available to us, we agree with the Court of Appeal that this was an incorrect basis for a s 200 order.[114] That is because of the obvious link between ASG's employment and the nature of his offending. Further, the decision proceeded on what has proven to be a false assumption, that is, disclosure to the employer would result in dismissal. This case demonstrates the need to be careful to avoid making suppression orders which over-reach.[115]

[87] It follows that we consider the Court of Appeal was correct to uphold the decision of the Employment Court to the effect that disclosure to the respondent of information relating to the appellant's appearance in the District Court did not breach s 200 of the Criminal Procedure Act. It follows also that we do not need to address the second of the questions on which leave to appeal was granted, namely, whether it

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111 At [8].

112 At [18].

113 *Hayne* (CA), above n 7, at [46].

114 At [47].

115 In some cases, irrespective of the proceedings, it will be clear that information is likely to be published, and there will be no basis for an order to prevent that from occurring. *W v Auckland District Health Board* [2007] NZCA 227, [2007] ERNZ 441 is another illustration of this point. The applicant in that case was a cardiologist who had breached the Health Board's computer policies, as a result of which he was dismissed. In declining leave to appeal against the Employment Court's refusal to order name suppression, the Court observed publicity in the media was "always at least possible": at [16].

was nonetheless open to the respondent to rely on and use that information in relation to the appellant.[116] We do not address this second question. The answer would, in any event, be unlikely to provide much guidance because the proper approach would very much depend on the circumstances.

[88] We add that, as the present case illustrates, the current approach gives rise to some uncertainty. It may be that some legislative clarification could be considered.

Result

[89] The appeal is dismissed. Costs should follow the event. We make an order that the appellant is to pay to the respondent costs of $25,000 plus usual disbursements (to be fixed by the Registrar if necessary).

Solicitors:
Oakley Moran, Wellington for Appellant
Anderson Lloyd, Dunedin for Respondent

[116] *ASG v Hayne* [2016] NZSC 108.