ORDER PROHIBITING PUBLICATION OF THE MEDIA RELEASE; OF THE MINUTES; AND OF THE JUDGMENT OR ANY INFORMATION THEREIN UNTIL THE JUDGMENT IS DELIVERED AT 4.00 PM ON 23 APRIL 2024.

ORDER PROHIBITING PUBLICATION OF ANY REFERENCE TO MENTAL HEALTH ISSUES BEYOND THOSE MADE IN THE JUDGMENT WHICH IS MADE PUBLICLY AVAILABLE.

ORDER REDACTING PART OF THE EXCERPT SET OUT AT [74] FROM THE JUDGMENT WHICH IS MADE PUBLICLY AVAILABLE.

ORDER PROHIBITING SEARCH OF THE FILES FOR THESE APPEALS WITHOUT THE LEAVE OF A JUDGE OF THIS COURT.

NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF M PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE SECOND, THIRD AND FOURTH VICTIMS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE SECOND, THIRD AND FOURTH VICTIMS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 13/2025
[2024] NZSC 29

BETWEEN	M (SC 13/2023) Appellant
AND	THE KING Respondent

SC 14/2023

BETWEEN	LUCA FAIRGRAY Appellant

AND THE KING
Respondent

Hearing:	19 October 2023
Further Submissions:	20 February 2024
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ
Counsel:	E P Priest, S A Mandeno and P D Wilks for Appellants Z R Johnston and H G Clark for Respondent T C Goatley and K M Wilson for NZME Publishing Ltd as Interested Party
Judgment:	23 April 2024
Reissued:	3 March 2025

JUDGMENT OF THE COURT

A **The application by the appellant LF to adduce evidence updating the position in terms of social media and other coverage relating to LF's case is granted.**

B **M's appeal is dismissed.**

C **LF's appeal is dismissed.**

D **Order prohibiting publication of LF's name, address, occupation or identifying particulars until 5.00 pm on 14 June 2024 or on earlier order of the Court quashing or varying this order.**

E **Order prohibiting publication of the media release; of the minutes; and of this judgment or any information therein until the judgment is delivered at 4.00 pm on 23 April 2024.**

F **Order prohibiting publication of any reference to mental health issues beyond those made in the judgment which is made publicly available.**

G **Order redacting part of the excerpt set out at [74] of the judgment which is made publicly available.**

H Order made that the files for these appeals are not to be searched without the leave of a Judge of this Court.

REASONS
(Given by Ellen France J)

Table of Contents

Introduction

[1] These appeals raise issues about the way in which youth justice principles interact with the principle of open justice in decisions about name suppression under ss 200 and 202 of the Criminal Procedure Act 2011. Section 200 sets out when the court may make a suppression order prohibiting publication of the name and other

identifying particulars of a defendant in criminal proceedings. Section 202(1)(c) provides for the court to make a suppression order in respect of a person who is connected with the defendant.

[2] These issues arise in this way. The appellant Luca Fairgray was convicted after pleading guilty to sexual offending over several years in relation to six victims.[1] LF's offending took place when he was aged between 14–17 years. The victims were of a similar age. Charges were laid in the Youth Court. In that Court, LF's name was automatically suppressed.[2] But some of the charges (those relating to the fifth victim) had to be transferred to the District Court because LF was 17 years old at the time of the incidents giving rise to these charges and the charges included sexual violation.[3] Further, after LF decided not to deny the Youth Court charges, the Crown successfully applied under s 283(o) of the Oranga Tamariki Act 1989 to have LF brought before the District Court for sentencing.[4] By that point LF was 18 years old.

[3] LF pleaded guilty and was subsequently sentenced in the District Court to a term of 12 months' home detention.[5] He sought permanent name suppression under subss 200(2)(a) and (e) of the Criminal Procedure Act on the basis that publication would be likely to cause him extreme hardship or endanger his safety. The sentencing Judge declined the application.[6] LF appealed from the decision declining name suppression to the High Court. Moore J dismissed the appeal.[7] Leave to bring a second appeal was declined by the Court of Appeal.[8]

[4] The High Court also considered name suppression for M. M comes within the statutory definition of a connected person in accordance with s 202(1)(c) of the

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1 For consistency with previous judgments, including reported judgments, of this Court and the Courts below, in the body of this judgment we largely maintain the use of the initials "LF" in reference to this appellant.

2 Oranga Tamariki Act 1989, s 438(3)(a).

3 Oranga Tamariki Act, subss 275(1)(ba) and (2)(aa); and sch 1A. As the Court of Appeal noted, indecent assault is not an offence specified in sch 1A: *LF (CA596/2022) v R* [2022] NZCA 656 (Miller, Gilbert and Palmer JJ) [CA judgment] at [12], n 8. The Court also said that it appears the indecent assault charge involving the sixth victim was transferred to the District Court by consent.

4 *New Zealand Police v L F* [2021] NZYC 395 (Judge Ryan) [DC transfer judgment] at [83]–[84].

5 *R v L F* [2022] NZDC 7356 (Judge Ryan) [DC sentencing remarks] at [133].

6 *R v L F* [2022] NZDC 8361 (Judge Ryan) [DC name suppression judgment] at [77]. However, permanent name suppression was granted to LF's school: *R v L F* [2022] NZDC 7191 at [29].

7 *Fairgray v R* [2022] NZHC 2547 [HC judgment] at [111]–[112].

8 CA judgment, above n 3, at [51].

Criminal Procedure Act, although M is unconnected to LF's offending. They sought suppression of their name on the basis that publication would be likely to cause them undue hardship.[9] If M's identity was to be suppressed, LF argued that his name also should be suppressed as otherwise publication would be likely to lead to the identification of another person (that is, M) whose name was suppressed.[10] Moore J rejected M's application and accordingly also rejected the additional basis for suppression advanced by LF.[11]

[5] On appeal, the Court of Appeal accepted M's name should be suppressed under s 202(2)(a) on the basis that publication of their name would cause them undue hardship.[12] However, although the Court acknowledged suppression of M's name on its own might not be effective to prevent them undue hardship, the Court did not consider suppression of LF's name necessary to protect M from that hardship.[13]

[6] Both M and LF sought leave to appeal to this Court. Leave to appeal from the decision of the Court of Appeal was granted to M.[14] In terms of LF, the Court decided that his case was one of those rare, and exceptional, cases where leave should be granted to appeal directly from the decision of the High Court.[15] This was so that the Court could address the way in which youth justice principles, rehabilitation prospects and the risks arising from publication for both applicants intersect with the principles of open justice.

[7] Before addressing the approach to youth justice and the way it applies to the two appeals, we make some observations about the approach to name suppression under the Criminal Procedure Act. We then consider, first, LF's argument that the High Court was wrong not to conclude that publication would be likely to cause him extreme hardship, and second, whether a permanent suppression order should have

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9 Criminal Procedure Act 2011, s 202(2)(a).
10 Section 200(2)(f).
11 HC judgment, above n 7, at [40]–[41].
12 CA judgment, above n 3, at [49].
13 At [44] and [48].
14 *[M] (SC 13/2023) v R* [2023] NZSC 61 (O'Regan, Ellen France and Kós JJ).
15 At [4]. See Senior Courts Act 2016, s 75. The Court cannot hear an appeal from a decision of the Court of Appeal to decline leave: s 68(b).

been made in respect of LF's name and other identifying particulars. We will then deal with M's appeal.

Background

[8] To put the issues in context, we first need to say a little more about the offending and LF's circumstances, the statutory framework, and to outline the approach in the Courts below to each of the appellants.

The offending and LF's circumstances

[9] LF pleaded guilty to a total of 10 charges. Three of those charges were for rape; three were charges of sexual violation (one of anal intercourse and the others involving digital penetration); two were charges of indecent assault; and two were charges of sexual conduct with a person under 16 years.

[10] The offending was serious and took place over an extended period of time. Those features are apparent from the Court of Appeal's summary of what happened. That summary was in these terms:[16]

> (a) It began in September 2017, when the first [victim] and the applicant were aged 14. He held her down and digitally penetrated her, desisting only when another boy pulled him away. He chased and threatened the other boy. This resulted in one charge of unlawful sexual connection.
>
> (b) The following year he indecently assaulted the second [victim], climbing on top of her and groping her as she lay intoxicated on a bed. Both were aged 15.
>
> (c) He offended against the third [victim] in 2018, when they were both aged 15. On the first occasion he digitally penetrated her in a park. On the second he raped her when she was unconscious from intoxication.
>
> (d) The offending against the fourth [victim] happened at the beginning of 2019 and involved consensual intercourse. She was aged 13. This resulted in two charges of sexual connection with a young person.
>
> (e) The offending against the fifth [victim] happened at an end of a lockdown party on 16 May 2020. He and the [victim] were aged 17. They engaged in consensual intercourse during which she asked him

[16] CA judgment, above n 3, at [11].

to stop. He continued, then turned her over and penetrated her anally, causing her considerable pain.

(f) Later the same night he offended against the sixth [victim], also aged 17. He lay on a bed with her when she was intoxicated, got on top of her and restrained her when she tried to move. He was interrupted by the fifth [victim] entering the room.

[11] In sentencing LF, the District Court Judge acknowledged first the harm caused to the victims and their families by the offending and their courage in speaking out.[17]

[12] The Judge then discussed the various reports received in respect of LF, beginning with the pre-sentence report prepared by the Department of Corrections | Ara Poutama o Aotearoa.[18] LF was interviewed for that report with the aid of a communication assistant (LF is an autistic person, having been diagnosed with Autism Spectrum Disorder (ASD) after the offending took place). The corrections officer assessed LF as at a low risk of reoffending because of the absence of prior convictions and because he had taken steps to address his behaviour by completing drug and alcohol counselling.[19] Alcohol abuse was one of the factors contributing to the offending.[20] The Judge also noted LF had undertaken treatment with a psychotherapist over an eight to 10-month period to address his sexual offending and had started a programme with Safe Network (now completed) in February 2022.[21]

[13] The second report considered by the Judge was dated 13 April 2022 and was from Dr Anne Huddleston, a psychologist.[22] Among other things, that report canvassed LF's late ASD diagnosis and his mental health issues. Dr Huddleston also discussed the fact LF has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Dr Huddleston considered that:

> … based on his youth, diagnosis and mental health factors … Mr Fairgray presents as a young man who is in need of guidance and support, rather than a sentence that does not promote such.

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17 DC sentencing remarks, above n 5, at [63].

18 At [64]–[66].

19 LF completed the "Altered High" Drug and Alcohol Treatment Programme through Community Alcohol and Drug Services: DC sentencing remarks, above n 5, at [69].

20 The Judge considered the other contributing factors were "offending-related sexual arousal … misuse of drugs, admitted access to pornography, mixing among young men who see that sexual acts with women, consensual or not, are a rite of passage, lack of social cues and boundaries and until now a lack of accountability": at [66].

21 At [70].

22 At [74].

[14] Finally, the Judge noted that Dr Huddleston's report drew on the reports of the two health assessors, Dr Mhairi Duff and Dr Martyn Matthews.[23] Those reports will be discussed further when we turn to the approach to name suppression.

[15] The sentencing Judge took as the starting point seven and a half years' imprisonment.[24] From that point there were discounts for the guilty pleas (25 per cent), youth and mental health (40 per cent), and remorse and rehabilitation (eight per cent).[25] That left a sentence of two years' imprisonment, which allowed the imposition of the alternative sentence of 12 months' home detention.[26]

The statutory framework

[16] Section 200 of the Criminal Procedure Act deals with suppression of the identify of a defendant. Under s 200(1), the court may make an order for name suppression. Section 200(2) states that an order under subsection (1) may be made "only if the court is satisfied that publication would be likely to" have one of the effects listed in that section. Relevantly, a name suppression order may be made where publication would be likely to:

> (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
>
> …
>
> (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 …

[17] Section 200(6) applies here and provides that:

> When determining whether to make an order or further order under subsection (1) that is to have effect permanently, a court must take into account any views of a victim of the offence conveyed in accordance with section 16B of the Victims' Rights Act 2002.

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23 At [98].
24 At [119]. This figure included an uplift of three years and six months.
25 At [120]–[127].
26 At [128]–[130].

[18] Section 16B(2) of the Victims' Rights Act 2002 in turn provides that where a defendant seeks permanent name suppression, the prosecutor must "make all reasonable efforts" to ensure the views of the victims are ascertained, and they must inform the court of those views.

[19] Section 202 of the Criminal Procedure Act is relevant to M's application for name suppression. Under s 202(1) an order may be made for name suppression for a person who:[27]

> …
>
> (c) is connected with the proceedings, or is connected with the person who is accused of, or convicted of, or acquitted of the offence.

[20] Section 202(2) provides that the court may make an order for name suppression in relation to a connected person only where, among other matters, the court is satisfied that publication would be likely to "cause undue hardship to the … connected person"[28] or "endanger the safety of any person".[29] Section 202(4) emphasises that an order for name suppression of a defendant can be made only under s 200.

[21] We note that the Act also provides for automatic suppression in certain situations. For instance, s 201 makes provision for the automatic name suppression of a defendant charged with or convicted of incest or sexual conduct with a dependent family member.[30] The purpose of this is to protect the complainant.[31] Sections 203 and 204 respectively provide for automatic name suppression of the identity of a victim in specified sexual cases and of child victims and witnesses. A victim can, however, waive name suppression.[32] Here, three of the victims waived name suppression and there has been publicity canvassing their names and the impact of the offending on them.

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27 This subsection applies whether or not the court has made an order under s 200 of the Criminal Procedure Act suppressing the identity of the defendant: s 202(3).
28 Section 202(2)(a).
29 Section 202(2)(c).
30 Crimes Act 1961, ss 130–131.
31 Criminal Procedure Act, s 201(2). Publication of the identifying particulars of the defendant in these cases is prohibited unless the court makes an order permitting publication.
32 Section 203(4).

Decisions in the Courts below on name suppression — LF

The District Court

[22] In declining LF's application for permanent name suppression, Judge Ryan rejected LF's argument that publication would cause him extreme hardship in terms of s 200(2)(a). In reaching that view, the Judge focused on LF's mental health issues. The Judge considered the relevant risk was reduced and there was nothing to suggest that any remaining risks could not be managed. The Judge was, however, satisfied that publication would be likely to endanger LF's safety in terms of s 200(2)(e). That was because publication would cause LF's mental health to deteriorate. On this basis, the Judge determined that the first, jurisdictional, requirement under s 200 was met; that is, one of the threshold requirements under s 200(2) was satisfied.

[23] The Judge then addressed whether the balance between the public interest and LF's interest favoured name suppression. The Judge decided that the balance did not favour suppression. The key factors in this balancing exercise included the fact LF was "being well managed in the community", had "professional supports in place" and that the risks to his mental health had "lessened".[33] Further, the charges were serious and there was a public interest in publication.

The High Court

[24] Like the District Court, the High Court rejected LF's submission that publication would cause extreme hardship to LF. We come back later to discuss the detail of the reasoning on this aspect when we consider the correctness of the approach taken.

[25] As we have indicated, the High Court did not accept the argument for LF that his name should be suppressed to avoid extreme hardship to M. The Judge accepted M would "likely suffer a degree of hardship" on publication of LF's name.[34] However, while the situation in which M was placed was "unenviable", largely, the consequences for M were the ordinary consequences suffered by those connected to

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33 DC name suppression judgment, above n 6, at [76].
34 HC judgment, above n 7, at [91].

someone convicted of serious sexual offending.[35] Moreover, much of the potential hardship to M that went beyond an ordinary consequence had been already caused by the difficulties that had arisen earlier in terms of LF's mental health. Regardless of publication of LF's name, M's anxiety appeared likely to remain. Moore J said that "[a]lthough publication may elevate [M's] stress for a period", the "heightened media attention following publication" did not meet the threshold of extreme hardship.[36]

[26] Nevertheless, the Judge agreed with Judge Ryan that the threshold of endangering safety under s 200(2)(e) was met where publication inevitably would be likely to result in a deterioration of LF's mental health. The evidence of vigilante-type incidents at LF's family home was another factor to "be added in the calculus".[37]

[27] Turning then to the balancing exercise in relation to LF, the High Court accepted there was some risk to LF's safety beyond the ordinary consequences of publication. There were supports in place to mitigate this risk, although the Judge acknowledged the resultant "heavy burden of responsibility" on his family.[38] Weighing against these factors were the principle of open justice, the seriousness of the offending and the high public interest in publication of cases involving sexual offending. The risk of reoffending had to be assessed on the basis that the offending was not a one-off occurrence. The other factor favouring publication was that the victims opposed name suppression, supporting publishing LF's name as a means of ensuring his accountability. Following consideration of these factors, the Judge upheld Judge Ryan's conclusion that the balance did not favour name suppression.

The Court of Appeal

[28] Because it was a second appeal, LF had to seek leave to appeal in the Court of Appeal.[39] In declining leave, the Court of Appeal rejected the argument that leave should be given so that the Court could consider the inter-relationship between name suppression principles and youth justice. While accepting that this raised an issue of policy, the Court did not consider the issue arose in this case. Rather, the

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35 At [92].
36 At [93].
37 At [99].
38 At [103].
39 Criminal Procedure Act, s 289(1).

policy question was linked to the treatment of youth offenders in connection with trial and sentence. The present application did not address either. There was no complaint from LF about his sentence. Nor was there any evidence that courts were not dealing with suppression in an age-appropriate manner. In addition, the Court attached some weight to the fact that this offending was not "adolescent experimentation with sex and intoxicants that has led to offending" but rather was "persistent or repeated offending extending to sexual violation".[40]

[29] Further, while LF saw publication as a punishment, the Court said that was not its purpose. Rather, publication serves other purposes, including open justice. The Court referred in this context to the recognition in the District Court that the victims' perspective was that members of the public were entitled to make their own character assessment of LF. To do so, they must know LF's identity.

[30] The Court of Appeal also said it was not seriously arguable that the assessment of risk arising from publication made in the Courts below was incorrect. That dealt with LF's argument that leave to appeal was necessary to prevent a miscarriage of justice. In this context, the Court of Appeal said that the Courts below had properly addressed the factors relied on by LF for the proposition that publication would lead to extreme hardship. Although the Court granted the application to admit fresh evidence relating to a more recent mental health issue affecting LF, the Court observed that the medical notes confirmed "he is now hopeful for the future".[41]

[31] Similarly, the Court considered the argument that an order should be made suppressing LF's name to prevent identification of M did not have "real prospects of success".[42]

Decisions in the Courts below on name suppression — M

[32] In addressing M's application, the High Court first satisfied itself there was jurisdiction to deal with the application for the first time in that Court. The Court then addressed whether publication of M's name was likely to cause M undue hardship

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40 CA judgment, above n 3, at [34].
41 At [38].
42 At [44].

under s 202(2)(a). In rejecting M's argument that the s 202(2)(a) threshold was met, the Judge found there was "no direct evidence" going to the question of undue hardship to M.[43] The Judge also accepted the submissions for Stuff Ltd and NZME Publishing Ltd (NZME) that the risk of M's name being published was low, especially given M was unconnected to LF's offending.

[33] As the High Court did not suppress M's name, it followed that LF's additional ground of appeal, namely, that publication of his name would lead to identification of a person whose name is suppressed, was unsuccessful.

[34] As we have noted, the Court of Appeal, in allowing M's appeal, accepted that publication would cause undue hardship to M. The Court noted that although M was not connected at all with LF's offending, it had already had a serious effect on them. Accordingly, an order was made for permanent suppression of M's name in connection with LF's offending. In dismissing M's appeal insofar as it sought suppression of LF's name under ss 200(1) and 200(2)(f), the Court considered it could be expected the order granting M name suppression would be respected.

The approach to name suppression decisions under the Criminal Procedure Act

[35] The approach to be taken to name suppression under the Criminal Procedure Act is that set out in *Robertson v New Zealand Police*.[44] The Court of Appeal in that case confirmed that s 200 envisages a two-stage inquiry.[45] At the first stage, the court will consider whether one of the threshold requirements in s 200(2) has been established. This is often referred to as the "threshold" or "jurisdictional" determination. It is clear from the wording of s 200(2) that an order for suppression under the Act may not be made unless the court is satisfied publication is likely to have one of the effects set out in that subsection.[46] Applying this approach in relation to

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43 HC judgment, above n 7, at [37].

44 *Robertson v New Zealand Police* [2015] NZCA 7. This was in the context of an application for leave to appeal.

45 At [39]. See also *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].

46 This Court in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [174]–[175] per McGrath, William Young and Glazebrook JJ confirmed the inherent power of a court in a criminal case to make non-party suppression orders to protect a defendant's rights to a fair trial. See also *Re Siemer* [2021] NZSC 50.

LF, the Courts below first considered whether either the extreme hardship threshold under s 200(2)(a) or the endangering safety threshold under s 200(2)(e) was met.

[36] If the court is satisfied a threshold requirement has been met, the second stage of the inquiry involves consideration of whether the court should make an order for name suppression.[47] Name suppression does not automatically follow from the establishment of a threshold requirement. That is apparent from the wording of both subss 200(1) and (2), which state that a court "may" make an order for name suppression. And, as we have also noted, there are other provisions in the Act which expressly provide for automatic suppression.[48]

[37] The Court of Appeal in *Robertson* said that, at the second stage, the court has to weigh "the competing interests of the applicant and the public", taking into account matters such as whether the applicant has been convicted, the seriousness of the offending, the views of victims, and the public interest in knowing the offender's character.[49]

[38] In that case, the Court went on to discuss whether the Criminal Procedure Act had changed the approach applied prior to the Act, noting that it could not be seriously contended that the Act had "displaced the presumption of open reporting identified in case law" prior to the enactment of s 200.[50] Rather, the main change was specifying the grounds on which the power to grant name suppression could be exercised. The Court however agreed with the submission for the appellant in the case that "the presumption of open justice is not directly relevant to the first stage of the s 200 analysis".[51] The Court said that:[52]

> While the presumption underlies the fact of the existence of a threshold requirement in the section, it will only be pertinent for judges to consider the presumption in the exercise of the second stage discretion. As outlined above, the first stage is an absolute threshold requirement; it does not involve a balancing exercise.

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47 *Robertson v New Zealand Police*, above n 44, at [41].
48 See discussion above at [21].
49 *Robertson v New Zealand Police*, above n 44, at [41].
50 At [43].
51 At [46].
52 At [46].

[39] The latter point is the primary distinction being drawn by the Court, that is, at the first stage the requirement is a threshold one: there is no balancing of the various factors. However, at the second stage, the court must decide whether, balancing the various interests, a name suppression order should be made. We endorse this two-stage approach. We add that we see the use of the term "presumption" in these excerpts from *Robertson* as simply a recognition of the fact that open justice remains a strong and important value because it is fundamental.

[40] As to the fundamental nature of open justice, this Court restated the importance of the open justice principles in this way in *Erceg v Erceg [Publication restrictions]*:[53]

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.

[41] The important role of the media in reporting proceedings referred to in this excerpt is reinforced by ss 210 and 283 of the Criminal Procedure Act. Section 210 grants standing to accredited members of the media and any other person permitted by the court to be heard in relation to various suppression applications. Section 283 gives members of the media coming within the definition in s 210(1) the right to bring a first appeal in relation to name suppression decisions.[54]

[42] The right to freedom of expression, affirmed in s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), is, of course, a fundamental feature of open

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[53] *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 (footnotes omitted). The requirement on the court to give reasons for a decision, in this context found in s 207 of the Criminal Procedure Act, reflects these principles.

[54] See also s 289(1) under which any party to a first appeal (which may include members of the media) has a right to seek leave to bring a second appeal.

justice. It is important to reiterate that the right to freedom of expression is highly relevant to name suppression decisions.

[43] Reflecting the focus on open justice in the determination of criminal charges and the requirements for accountability in that context, s 25(a) of the Bill of Rights protects the right of those charged with offences to a "fair and public" hearing by an independent and impartial court. As a correlative, s 196 of the Criminal Procedure Act provides that court hearings are generally to be open to the public.

[44] Open justice will accordingly be the starting point in decisions about name suppression. That is the framework within which the various factors in a particular case are to be weighed. Obviously, the statutory scheme contemplates that the grounds relied on for suppression are capable of overcoming the interests in open justice. But any counter-balancing factors must still be weighed on a case-by-case basis against the principle of open justice and the underlying interests that principle serves.

[45] We add that, to date, the decision at the second stage of the name suppression inquiry is commonly treated as discretionary rather than evaluative.[55] The correct characterisation of the decision was raised with the Court of Appeal in *Singh v R*.[56] The Court in that case maintained the status quo but did so on the basis that the appeal "[did] not squarely confront the difference between an appeal against discretion and a general appeal".[57]

[46] The characterisation of a decision as discretionary, rather than evaluative, has implications for the appellate standard. A discretionary decision involves the exercise of discretion (choice) by the court, and the basis for intervention by an appellate court is more limited than that for an evaluative decision, in which a court must assess

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55 See, for example, *D (CA443/2015) v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 at [12]; *Parker v R* [2019] NZCA 350 at [4]; and Matthew Downs (ed) *Adams on Criminal Law – Procedure* (looseleaf ed, Thomson Reuters) at [CPA200.11]. For a contrary view, see *R v New Zealand Police* [2019] NZHC 2901 at [38]–[41].

56 *Singh v R* [2020] NZCA 487. The appellant in that case argued that questions about the second limb of the test should be treated as a general appeal: at [38] citing the observation in *R v New Zealand Police*, above n 55, at [38]–[41].

57 *Singh v R*, above n 56, at [38]. We note also that in a recent decision, the Court of Appeal has departed from its previous position, holding that a decision to grant a non-publication order in a civil case is an evaluative decision: *Peter T. Rex LLC v NZME Publishing Ltd* [2023] NZCA 469 at [46]–[47].

relevant factors and evaluate them. An appellate court can substitute its decision if it considers the evaluation is wrong. The parties in this case approached the decision as discretionary, meaning an appeal will only be allowed where the appellant is able to demonstrate either an error of law or principle; that the court failed to take into account a relevant matter or took into account an irrelevant matter; or that the decision is plainly wrong.[58]

[47] During the hearing, we raised with counsel whether the decision was truly discretionary, rather than evaluative. As this question had not been put in issue by either party, counsel were not in a position to address it in any substantive way. In any event, as matters have transpired it has not proved necessary for us to consider the nature of the decision at the second stage. As we shall come to, we express the youth justice principles in a different way from the High Court but, nonetheless, having made our own assessment we reach the same conclusion as that Court. Whether or not the decision is treated as discretionary is accordingly immaterial in this case. The question is better addressed in a case in which it truly arises.

[48] We turn then to how youth justice principles apply.

How do youth principles fit within the scheme of s 200?

[49] The issue under this heading is how youth justice principles apply to the name suppression decision when the young person is dealt with outside of the Youth Court, as here. While the parties advocate for differing approaches on this aspect, on analysis, there is arguably less difference between them than initially appears, as we now explain.

Submissions

[50] The appellants argue that there should be a presumption in favour of suppression for young people. The appellants point to developments in relation to the interpretation of the relevant provisions of the United Nations Convention on the

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[58] Applying *May v May* (1982) 1 NZFLR 165 (CA) at 170. See also *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ.

Rights of the Child, to which New Zealand is a party.[59] They say those developments support their submission that the need to protect the privacy interests of young people in the criminal justice system is stronger now than had been recognised by the Court of Appeal in *DP v R*.[60] The Court in that case confirmed the need for a court, when dealing with a child charged with a criminal offence, to treat the child's best interests as a primary consideration.[61]

[51] The appellants nonetheless recognise that there will be exceptions to any presumption. This appears to bring the appellants' position closer to that of the respondent, although how close would depend on the nature of the exceptions. The example of an exception discussed at the hearing was the situation where, despite an opportunity for rehabilitation, the young person subsequently offended again in a relevant way. However, the scope of possible exceptions was not fully fleshed out by the appellants.

[52] The respondent asked the Court to endorse *DP* as appropriate recognition that youth is a primary consideration, but not the primary or governing consideration.

[53] NZME says that whether or not there should be a presumption of name suppression for youth is a matter for Parliament. Further, NZME submits that the United Nations Convention on the Rights of the Child does not require name suppression for youth.

Our approach

[54] It is settled law that legislation should be interpreted in a manner consistent with New Zealand's obligations under applicable international instruments like the United Nations Convention on the Rights of the Child.[62] The starting point in terms of the relevant provisions in that Convention is art 3. Under art 3(1), in actions undertaken by the courts and other institutions concerning children, "the best interests

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59 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

60 *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306.

61 At [10].

62 See, for example, *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ.

of the child shall be a primary consideration". For these purposes, "child" is defined in art 1 as those below the age of 18.[63]

[55] Article 16(1) protects a child from "arbitrary or unlawful interference with his or her privacy" and art 16(2) provides for a "right to the protection of the law against such interference or attacks".

[56] Article 40(1) requires parties to the Convention to:

> … recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[57] Finally, art 40(2)(vii) states that a child has the right to have their "privacy fully respected at all stages of the proceedings". The General Comment on art 40(2)(b)(vii) directs States Parties to "respect the rule that child justice hearings are to be conducted behind closed doors" and that any exceptions should be "very limited and clearly stated in the law".[64] The General Comment continues by noting that:[65]

> … the right to privacy also means that the court files and records of children … should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.

[58] In addition, s 25(i) of the Bill of Rights protects the rights of a child charged with an offence to be dealt with in a manner that takes account of their age.[66]

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63 The passage of time since LF first appeared in the District Court means he is now over 18 but, as the Court of Appeal said in *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [98], "youth is seen as a larger concept", extending beyond the age of 18.

64 United Nations Committee on the Rights of the Child *General comment No 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at [67].

65 At [67]. See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* GA Res 40/33 (1985), annex r 8 (right to privacy at all stages of youth justice). These Rules have been seen as providing helpful guidance in determining the requirements under UNCROC: see, for example, *Television New Zealand v R* HC Auckland CRI-2005-92-14652, 30 June 2006 at [13]–[15].

66 "Child" is not defined in the New Zealand Bill of Rights Act 1990. The appellants also relied on the 1 July 2019 amendment to the Oranga Tamariki Act (s 5(1)(b)(i)) which refers to the need to respect and uphold rights of children and young people under UNCROC and the United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008). However, that provision is not directly applicable here given we are not dealing with Youth Court proceedings.

[59] Finally, as LF is a person with autism, reference should also be made to the United Nations Convention on the Rights of Persons with Disabilities.[67] Article 7(2) of that Convention provides that in actions relating to children with disabilities, "the best interests of the child shall be a primary consideration". A person with disabilities is defined to include those having "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[68]

[60] Both the relevant articles of the United Nations Convention on the Rights of the Child and s 25(i) of the Bill of Rights are underpinned by recognition of the importance attached to promoting the rehabilitation of child offenders and their reintegration into society.[69] The position is more explicit in art 14(4) of the International Covenant on Civil and Political Rights, which New Zealand has also ratified.[70] Article 14(4) provides that, in the determination of criminal charges, the procedure adopted for juvenile persons shall "take account of their age and the desirability of promoting their rehabilitation".[71]

[61] Expert evidence, albeit discussed in the sentencing context, also supports the need for special care for the protection of children. This Court in *H v R* endorsed the various matters referred to by the Court of Appeal in *Churchward v R* in relation to sentencing.[72] The passage cited by the Court in *H*, reflecting the discussion in *Churchward*, canvassed several matters including that:[73]

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67 Convention on the Rights of Persons with Disabilities, above n 66.

68 Article 1.

69 NZME raises an issue about the extent to which art 40 of UNCROC applies here where LF's criminal case has been dealt with, but we need not resolve that given the clear focus on the desirability of rehabilitation and reintegration underpinning the Convention.

70 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). It needs to be noted also that art 14(1) provides that criminal judgments "shall be made public except where the interest of juvenile persons otherwise requires".

71 See also Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand: A principled framework for reform* (Michael & Suzanne Borrin Foundation, April 2022) at 57, suggesting that "the best protection for society is a young adult who has been reintegrated successfully into society and where the causes of the offending have been addressed".

72 *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [33].

73 At [33] citing *Churchward v R*, above n 63, at [77]–[78]; and, among others, *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [210], n 150 per Glazebrook J.

(a) there are age-related neurological differences between young people and adults and young people may be more impulsive;

(b) young people have a greater capacity for rehabilitation, especially because the character of a juvenile is not as well formed as that of an adult; and

(c) offending by a young person is often a phase which passes fairly rapidly, which means a well-balanced reaction is necessary to avoid alienating the young person from society.

[62] The Court of Appeal in *Churchward* also referred to research suggesting that during the development process the adolescent brain is affected by psychosocial, emotional and other external influences which can contribute to immature judgements.[74]

[63] The factors discussed in *H* and *Churchward* also provide the reasons why there may be greater hope of rehabilitation in relation to a child offender, and so greater likelihood of reintegration into society.

[64] Drawing these threads together, the various obligations to which New Zealand is committed recognise the desirability of rehabilitation and reintegration of young offenders. Those obligations, and what we know from the expert evidence relating to youth offending, support a requirement to treat the interests of youth as a primary consideration in name suppression decisions. There is nothing in the wording of the Criminal Procedure Act precluding recognition of the particular interests of youth in either the threshold inquiry or at the second stage of the s 200 analysis, and giving these interests what will, necessarily, be powerful weight. There is also nothing new in recognising that the child's best interests should weigh powerfully in the context of s 200. The special importance of those interests has been recognised at least since the Court of Appeal judgment in *DP* in 2015.[75]

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74 *Churchward v R*, above n 63, at [52]–[54].

75 *DP v R*, above n 60, at [10]. See also *NZME Publishing Ltd v R* [2018] NZCA 363 at [22] and [29]; *H (CA651/2021) v R* [2022] NZCA 132 at [23]–[26]; and *Harris v R* [2023] NZCA 462 at [30]–[34].

[65] That said, we agree with the respondent and NZME that to treat youth interests as comprising the governing presumption in favour of name suppression for young offenders outside of the Youth Court would not fit with the statutory scheme for name suppression in the Criminal Procedure Act and the importance it places on open justice. It is a part of the context in which that scheme is to be construed that, if the child or young person was appearing in the Youth Court, they would have automatic name suppression. But to establish youth principles as a governing presumption for name suppression decisions under the Act would require specific statutory provision.

Summary

[66] We summarise our approach to youth justice principles in this way. The framework of the Criminal Procedure Act reflects, as we have said, that open justice is the starting point in determining questions of name suppression. Within that statutory framework, youth principles are a primary consideration to be given powerful weight. The Court must therefore carefully assess what those principles require in terms of name suppression in each case where youth are involved. Interpreting the Act in this way is consistent with New Zealand's relevant international obligations, with the Bill of Rights, and with the policy considerations embodied in those obligations; particularly, the desirability of rehabilitating and reintegrating into society youth who commit offences. It is also aligns with what the expert evidence tells us about offending involving young people and their development. Finally, we agree with the respondent and NZME that it would not be consistent with the statutory scheme to interpose a governing presumption in favour of name suppression for youth.[76]

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[76] As this Court said in *Ye v Minister of Immigration*, above n 62, at [24]–[25] per Blanchard, Tipping, McGrath and Anderson JJ, in a case concerning the Immigration Act 1987, "the best interests of the child shall be 'a primary consideration'. *A* primary consideration does not mean *the* primary consideration, much less the paramount consideration. … The words 'a primary consideration' in art 3(1) do not denote how this consideration ranks against any other relevant consideration such as the public interest." (emphasis in original). That approach is consistent with observations of the United Nations Committee on the Rights of the Child *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* UN Doc CRC/C/GC/14 (29 May 2013) at [36]–[40]. John Eekelaar and John Tobin also note that the wording of the *Declaration of the Rights of the Child* GA Res 1386 (1959), the predecessor to UNCROC, and earlier drafts of UNCROC used the word "paramount" rather than "primary": see John Eekelaar and John Tobin "Article 3: The Best Interests of the Child" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) 73 at 95.

LF's appeal

Was the threshold of extreme hardship met?

[67] We address first the way in which extreme hardship under s 200(2)(a) is measured before turning to the approach taken in the High Court and our assessment of the position.

[68] In conducting this analysis, we do not preclude the possibility that the scale of LF's offending is a factor which should be taken into account in determining whether the extreme hardship threshold has been met, as well as in relation to the second limb of the s 200 analysis. Specifically, it may be that the nature of the relevant offending affects the usual consequences of publication, because it affects what is "usual". It may be therefore that an individual who has committed more, or more serious, offences can expect greater inquiry and, in particular, what amounts to hardship may be proportionally linked to the crimes committed. However, this point does not need to be decided for the purposes of this appeal so we do not treat the scale of the offending as relevant to the first stage in this case.

The approach to extreme hardship

[69] "Hardship" has been treated in the authorities as meaning "severe suffering or privation".[77] When recommending the adoption of a requirement for extreme hardship, the Law Commission | Te Aka Matua o te Ture referred to "hardship that is excessive in the particular circumstances of the case".[78] The use of the word "undue" in s 200(2)(c) suggests something more than simple hardship is necessary, and the word "extreme" in s 200(2)(a) indicates something additional again.[79] Approaching the interpretation of extreme hardship in this way reflects both the statutory language and the requirement in s 200(2) that an order for name suppression may be made "only if" the court is satisfied that the threshold is met.

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77 *Robertson v New Zealand Police*, above n 44, at [48] citing Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 491.

78 Law Commission | Te Aka Matua o te Ture (Law Commission) *Suppressing Names and Evidence* (NZLC R109, 2009) at [3.38].

79 *Robertson v New Zealand Police*, above n 44, at [48] citing, among others, Law Commission, above n 78, at [3.39].

[70] We also adopt the reasoning in *Robertson* that whether the threshold of extreme hardship is met is not to be considered "in a vacuum".[80] Rather, it is a contextual exercise and will involve some comparison between the hardship contended for and the usual consequences of publication.[81] The inquiry is an objective one, in that the court must form its own view.

[71] There is no dispute between the parties that this is the approach to apply. It is also common ground between the parties that the factors LF seeks to rely on to show that publication would be likely to cause extreme hardship were relevant factors, albeit there are differing positions as to the impact of them. In brief, those factors are the risk to his mental health, negative social and mainstream media commentary, the potential for vigilantism, and the effect on his employment and social prospects. LF also says that his youth and autism diagnosis are factors that provide context in which the hardship to him must be addressed. Against this background, the issue raised on the appeal is whether the High Court should have found that the extreme hardship threshold was met, or, as the respondent and NZME contend, that the High Court was right to conclude the threshold was not met.

[72] In developing the submissions on this part of the appeal, LF says that the High Court did not make the necessary cumulative assessment. He contends that it is the combination of particular factors relevant to LF, in light of his youth and autism, that meets the threshold. The case for the respondent, supported by NZME, is that the relevant factors were all considered and given appropriate weight.

Assessment

[73] In dealing with this aspect, the High Court accepted a severe mental health episode of the type that had been experienced by LF was an example of extreme hardship.[82] There is no dispute about that. Nor is there any issue that the question was then whether publication was likely to cause the risk of a significant deterioration of his mental health to eventuate.

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80 At [49]. See also *Jefferies v New Zealand Police* [2014] NZHC 2379 at [24].

81 *Robertson v New Zealand Police*, above n 44, at [49]. The reference to "undue" hardship in subs 200(2)(c) also contemplates the same comparative exercise will be undertaken: see at [48].

82 HC judgment, above n 7, at [46].

[74] In submitting that the Court should proceed on the basis that the risk is likely to eventuate, we apprehend an underlying concern for the appellant is that LF's mental health pathway may not remain settled. This concern finds some support from the report of 10 July 2022 from Dr Duff, who is a consultant psychiatrist. She noted that following on from developing some understanding of "the wrongness of his actions and his identified autistic characteristics", LF had undertaken counselling and skills learning and had "been heavily supported by his family to maintain his safety". Nonetheless, she said, his autism increases the likelihood of cognitive thinking errors. Dr Duff gave as an example the deterioration in his mental health after the District Court declined permanent name suppression. Dr Duff concluded:

> Given the observed effects on Mr Fairgray's mental state of even the current increased leakage, it is my opinion that there will be an inevitable further deterioration of his mental health. The flow on effects of this would be likely to include an increase in autistic processing and thinking errors (as a response to increased stress and anxiety) and a deterioration in his capacity to maintain his personal safety **[REDACTED]**. This will not just be in the short term because there will be media for him to ruminate on the internet permanently which he will be likely to return to in times of stress or difficulty.

[75] In a similar vein, Dr Matthews, a consultant with expertise in autism, in his report of 15 December 2021 prepared in the context of sentencing, notes the issues that have arisen for LF because of the lateness of his ASD diagnosis. Dr Matthews also discussed the serious negative effects on mental health of exposure to anxiety-provoking events for autistic individuals.

[76] However, as the High Court said, the previous episode of a significant deterioration in LF's mental health was not linked to his offending or the related proceedings.[83] The circumstances have changed since then in a number of respects which address at least some of the key factors precipitating the earlier incident. As the Judge said, LF no longer associates with an anti-social peer group; he has taken steps to address factors contributing to the offending; and his need for ongoing psychiatric assistance is "now known and understood".[84] As a result, LF had begun receiving treatment.

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83 At [60].
84 At [61].

[77] In her affidavit, LF's mother refers to a further mental health episode in October 2022 following on from the decision of the High Court to decline permanent name suppression. The respondent points to the clinical notes relating to this episode, also referred to by the Court of Appeal, which indicate that at this time LF was expressing a more hopeful approach. That material supports the approach of the High Court.

[78] It is also relevant that, as the High Court said, LF has "extensive support at home and in the community".[85] We accept that the burden on LF's family in seeking to maintain support for LF is a considerable one. LF's mother described the pressure as "overwhelming" on the family, as well as on LF. But that he is nonetheless supported in this way is a relevant factor in assessing the risk.

[79] The appellant also places weight on the effect on LF, as a young person, of social media commentary. As noted by the Court of Appeal in *X v R*, "young people are particularly vulnerable" to public shaming via social media.[86] The Court went on to note that this vulnerability, while "no doubt psychological", had "both practical and temporal aspects".[87] The practical aspect was that the only means of protection was to go offline, leading to missed social and economic opportunities, while the temporal aspect reflected the fact that "by virtue of being young, the effects of internet shaming will last for longer"; indeed, potentially for a lifetime.[88]

[80] We agree with the High Court that the position for LF is not the same as that addressed by the Court of Appeal in *X v R*, nor is it the same as in the case of *DV (CA451/2021) v R*.[89] As the following brief discussion of *X v R* and *DV v R* indicates, the scale of and interest in the commentary in those two cases was greater than has been the case for LF. Both cases had a number of particular features which contributed to this fact, most of which are not present in LF's case.

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85 At [62].
86 *X v R* [2020] NZCA 387, (2020) 30 CRNZ 296 at [53].
87 At [53].
88 At [53].
89 *DV (CA451/2021) v R* [2021] NZCA 700. See also the discussion of *X v R* in DC name suppression judgment, above n 6, at [74].

[81] X had been discharged without conviction having pleaded guilty to common assault charges which arose from inappropriate behaviour at a Labour Party youth camp when he was 20.[90] In determining that the threshold of extreme hardship was met, the Court of Appeal referred to the uniqueness of his name and the fact that it identified him as a member of a particular community.[91] That raised the prospect that X would be targeted on social media not only because of the sexual aspect of the charges but also because of his cultural background.

[82] Social media commentary was also identified as a particular issue in that case.[92] There were various factors heightening the interest in the case, including a considerable amount of harmful misinformation.[93] There were also abusive and threatening comments. The Court of Appeal considered there was:[94]

> … every reason to believe that, if X's name was now published, such comments would grow in number and in venom. And an important difference (in terms of harm) is that they would likely then be directly linked to, or directed at, X personally.

It was significant also that there was a clearly held view by a number of social media commentators that the decision to discharge X without conviction was the result of political interference, politically motivated or related to matters such as the colour of X's skin, making X a particular target for "cancelling".[95]

[83] In the case of *DV v R*, the appellants had also been discharged without conviction on charges of indecent assault or inciting indecent assault.[96] In that case, there had also been an initial period without name suppression.[97] A majority of the Court of Appeal concluded that further social media commentary was "likely to be unbalanced and reasonably extensive, resulting in direct abuse and their continued

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90 *X v R*, above n 86, at [1], [4]–[7] and [10].
91 At [44]–[46].
92 At [47].
93 At [55].
94 At [56].
95 At [57]. The Court of Appeal at [51] and [57] noted that "cancel culture" refers to where "social media is weaponised against those deemed to have transgressed the norms of any online group (or mob)" and it is "commonly seen by its perpetrators as a way of bringing justice to those who have escaped it".
96 *DV (CA451/2021) v R*, above n 89, at [2] per Miller and Gilbert JJ.
97 At [3] per Miller and Gilbert JJ.

isolation".[98] In those circumstances, the majority was satisfied that the appellants would be likely to experience extreme hardship should their names again be published in connection with their offending.

[84] While cases like *X v R*, *DV v R* and that of LF can be seen as featuring on a spectrum of severity, the commentary in relation to LF for the most part falls toward the lesser end of this spectrum. It is relevant, as the High Court found, that the media coverage was "victim centric" rather than "about" LF.[99] While the tenor of some media commentary tended to "vilify" LF, the Judge rejected the submission that LF would be treated as epitomising sexual assault in future publicity as "speculative" and "unlikely".[100]

[85] In terms of the appellants' reliance on the prospects of vigilantism, reports were made to the police by LF's family of vigilante incidents, including one in which condoms full of dog excrement were thrown at the family home, and another occasion in which a rock was thrown against the house, landing on the back deck.[101] LF was also subject to an online bullying incident on a Zoom chatroom. However, while, as the High Court said, this is obviously unacceptable, it is the case that those who have undertaken the vigilante activities to date obviously knew LF and of his offending, despite the existing suppression order. Further, the assessment of the High Court was that comments suggesting LF "should be the subject of vigilante justice" were not frequent.[102]

[86] There are illustrations of fairly extreme (and disturbing) responses in the existing social media material but, nonetheless, we essentially agree with the Judge's assessment of the impact of that material overall. As the Judge said, the extent of the responses of this nature can be contrasted to the "considerable amount of harmful misinformation" referred to by the Court of Appeal in *X v R*.[103]

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98 At [57] per Miller and Gilbert JJ.
99 HC judgment, above n 7, at [70].
100 At [71]–[72].
101 The police report in relation to this incident also referred to an earlier occasion where LF reported comments made on a Reddit thread which included a threat by a person who said he knew LF and where he lives, and "might accidentally throw a brick through his window". The police report records speaking to the writer of this comment who said he did not mean it and was remorseful.
102 At [73].
103 At [73] citing *X v R*, above n 86, at [55(c)].

[87] Finally, in terms of youth justice principles, we consider that in focusing on the absence of a governing presumption of name suppression for youth, the High Court took an unduly narrow view of aspects of the youth justice principles. The focus was primarily on employment prospects rather than on the rehabilitation and reintegration into society more generally of someone who offended as a youth and whose name is not a common one. The reality is that if name suppression is not granted it will be very difficult for LF to fully reintegrate himself into society unless he changes his name. The concern is not simply with rehabilitation as a means of preventing further offending, which was the aspect of rehabilitation the respondent saw as particularly relevant.

[88] That said, the High Court was correct to point out that LF's employment prospects will in any event be affected by the fact of his convictions, which are for serious offending.[104] Because LF was convicted of a specified offence in terms of s 7(1)(d) of the Criminal Records (Clean Slate) Act 2004, he will be in the position where he will need to disclose his convictions, for example, in the employment context.[105]

[89] Stepping back and considering all of these factors together we have reached the view that the High Court was right that the extreme hardship threshold is not met.

Should an order for permanent name suppression have been made?

[90] On the basis that the threshold of extreme hardship is not met, the second stage of the inquiry is based on LF having met the endangering safety threshold in s 200(2)(e). As noted earlier, in determining whether name suppression should be granted, at this stage the court must balance the various relevant interests, of which open justice is a fundamental.

[91] The relevant factors to be considered here largely mirror those already discussed. On the one hand, there is the risk of harm to LF, the social media response

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104 HC judgment, above n 7, at [80].
105 See the Criminal Records (Clean Slate) Act 2004, s 4 definition of "specified offence".

and the desirability of his rehabilitation and reintegration. These issues are likely to be exacerbated by his youth.

[92] On the other hand, the High Court was clearly right that there is a public interest in the public identification of LF.[106] In assessing where the balance lies here, the factors of particular relevance are the seriousness of LF's offending and the views of the victims. The two are inter-related.

[93] As to the first, we reject as simply untenable the argument for LF that the Court can proceed on the basis that he had an honest but unreasonable belief in consent. As the High Court said, "[m]any of his victims told him to stop. One in particular was screaming out in pain before he stopped."[107] This was not a case of missing some social cues. Nor does this argument gain any support from the summary of facts which, after all, LF accepted by his guilty plea.

[94] Further, as the High Court and the Court of Appeal said, this is serious offending. It took place over an extended period of time, involved a number of victims and was not simply that of "a teenager who has made some terrible mistakes".[108] The fact the offending was serious contributed to the transfer of the case from the Youth Court to the District Court.[109] It is also clear from the sentencing remarks and the High Court judgment that LF's risk of reoffending must be assessed, at best, as closer to moderate.[110] Further, while we are looking at the assessment of permanent name suppression at the time the decision was made, it is of some relevance here that we do not have the benefit of more recent reports as to the progress of his rehabilitation efforts.

[95] In these circumstances, there is obviously a public interest in knowing of LF's character. There are various ways in which a criminal offender is held accountable for offending. LF, for example, has had to serve the sentence of home detention imposed on him and, as we have discussed, his convictions will be seen as relevant when he

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106 HC judgment, above n 7, at [106].
107 At [105].
108 At [105].
109 DC transfer judgment, above n 4, at [82(a)].
110 See, for example, DC sentencing remarks, above n 5, at [73] and [98]; and HC judgment, above n 7, at [108]–[109].

seeks employment and in other facets of his life. That said, while certainly not the only means of providing accountability for a criminal offender, we accept, as the Court of Appeal said in *DP*, that public identification of an offender also takes account of offender culpability and is an important part of the accountability required in the criminal justice context.[111]

[96] That there is a public interest in knowing of LF's character is supported by the views of the victims. The offending has plainly affected their day-to-day lives and their recovery in a number of respects.

[97] Several themes emerge from the victims' evidence. First, it is said that ongoing name suppression for the offender means their recovery is incomplete. That is linked to the desire for LF to be held accountable for the offending by experiencing both penal and social consequences. Second, reference is made to practical problems experienced by the victims in complying with the existing name suppression order and that their concerns cannot be adequately addressed. Certainly, there is an interest in the victims being able to order their lives without these concerns. The youth and associated vulnerability of the victims at the time of the offending is also a factor. Finally, there is the prospect there may be other victims who might come forward if LF is named. The victims are also concerned about the potential there will be other complainants in the future, absent any ability to warn young women about LF's previous offending.

Conclusion

[98] On balance, we consider permanent name suppression should not be granted.

[99] We interpolate here that, following the hearing, we sought submissions from the parties about the utility of a limited suppression order targeting commentary on social media other than that sourced in the accredited media. We record that there was no support in the submissions for this option which would, in any event, have given rise to some definitional and practical issues.

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111 *DP v R*, above n 60, at [9(b)]. See s 7(1)(a) and (b) of the Sentencing Act 2002.

[100] In conclusion, while our approach to youth justice principles differs to that taken by the High Court in the respects we have identified, we have ultimately reached the same conclusion. LF's appeal is unsuccessful.

M's appeal

[101] As we have noted above, M did not establish that they met the extreme hardship threshold in s 200(2)(a) for the suppression of LF's name. This meant that an issue before the Court of Appeal on M's appeal was whether a court may suppress the name of a defendant where publication would identify a connected person whose name is suppressed under s 202, but who cannot establish extreme hardship for the purposes of s 200(2)(a). The Court of Appeal said that it assumed for the purposes of the appeal that there was jurisdiction to order suppression in those cases but would not decide the point.[112] The Court went on to say that it was "it is unlikely" a court would "exercise the discretion in favour of suppression" where the extreme hardship threshold was not met.[113]

[102] On appeal to this Court, M's case is that the Court of Appeal was wrong not to make an order suppressing LF's name, particularly where the Court acknowledged suppression of M's name on its own may not be effective to prevent undue hardship. M says that, in effect, the Court of Appeal had proceeded on the basis M had to establish extreme hardship.

[103] The respondent argues that the Court of Appeal took the correct approach because extreme hardship is a necessary precondition to name suppression for a connected person. The respondent submits that the statutory scheme and purpose suggest that where a connected person seeks suppression of a defendant's name, the appropriate threshold is extreme hardship and that s 200(2)(f) "should not be used to create an alternative route to suppression in the same circumstances".

[104] NZME also submits that the Court of Appeal approached the question of name suppression for M correctly. NZME says that a defendant can obtain name

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112 CA judgment, above n 3, at [44].
113 At [44].

suppression in reliance on the hardship to a connected person where publication of the defendant's name would cause the connected person extreme hardship under s 200(2)(a) or publication of the defendant's name would identify the connected person under s 200(2)(f). In terms of the balancing exercise, the connected person's interests should take priority.

Assessment

[105] As to the first, jurisdictional, question, we prefer not to address that without the benefit of the Court of Appeal's reasoned views. Rather, we can proceed on the same basis that the Court of Appeal did here and assume, without deciding, that the jurisdictional threshold is met.

[106] In terms of the second issue raised by the submissions, it is sufficient to make the following brief observations. Plainly, it will be easier in a factual sense to establish that a name suppression order should be made at the second stage where the order concerns a connected person if the extreme harm threshold is met. The converse is also true. But the point to be kept to the fore is that the court is still required to undertake the second stage balancing exercise in a careful way, giving appropriate weight to the hardship that is in play and considering all of the other relevant factors.

[107] We turn then to whether the Court of Appeal erred in not granting LF name suppression in the context of M's appeal. It is not disputed that publication would be likely to cause M undue hardship. The issue is whether at the second stage, the balancing favours suppression of LF's name as well.

[108] We are satisfied, essentially for the reasons given by the Court of Appeal, that the balance does not favour suppression of LF's name. While, as the Court of Appeal acknowledged, it cannot be certain that suppression of M's name on its own will be effective to protect M from hardship, a court will not "lightly assume" that a suppression order will not be effective, particularly where (as in M's case) the justification for it is obvious.[114] The media can be expected to respect the name suppression order relating to M, with a flow-on effect to the use of their name on social

[114] At [48].

media. We emphasise that M, while a connected person, has played no part in the offending.

[109] M's appeal also fails.

Other matters

Application to adduce new evidence

[110] An application was made by LF to adduce new evidence. The evidence was in the nature of updating material relating to social media and other coverage of LF's case. That evidence is cogent and fresh and we admit it.[115]

Orders protecting privacy interests and providing for deferral of publication

[111] In the event the appeals were not successful, LF sought an order under s 205 of the Criminal Procedure Act suppressing reference to mental health issues beyond those discussed in this judgment. LF relied in this respect on the unusualness of his family name. We consider it is appropriate to replicate the order made in the High Court prohibiting publication of any reference to mental health issues beyond those made in this judgment, given the nature of the material. In addition, the passage of the judgment which discusses these matters will accordingly be redacted.

[112] Also in the event the appeals were unsuccessful, given LF's mental health issues, deferral of the publication of LF's name and of the judgment to enable his family to put necessary plans in place was sought. It is not uncommon in these types of cases to provide for deferral of publication. We consider deferral of publication is appropriate in this case. We will allow for an extended deferral period, as sought, given the particular combination of circumstances his family will be addressing.[116]

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115 *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649–650.

116 This version of the judgment and the version which will be publicly available from 4.00 pm on 23 April 2024 differs in some minor respects from the embargoed version provided to the parties, the relevant lower courts (that is, the Youth Court, District Court, High Court and the Court of Appeal) and media representatives.

The importance of responsible coverage

[113] It follows from our decision that LF is not entitled to name suppression that there will be commentary on the case. But that commentary, in whatever medium, should be responsible, particularly given the youth and vulnerabilities of both appellants. We express the hope that there is no repetition of the inappropriate commentary that has featured, albeit infrequently, in social media to date.

Interim name suppression

[114] For reasons which will be provided at a later date, interim suppression of LF's identity is granted until 5.00 pm on 14 June 2024 or on earlier order of the Court.[117] For the avoidance of doubt, we note that the District Court may vary this order which may include extending or quashing the existing order; or making a new order.

Result

[115] For the reasons given we make the following orders:

(a) The application by the appellant LF to adduce evidence updating the position in terms of social media and other coverage relating to LF's case is granted.

(b) M's appeal is dismissed.

(c) LF's appeal is dismissed.

(d) Order prohibiting publication of LF's name, address, occupation or identifying particulars until 5.00 pm 14 June 2024 or on earlier order of the Court quashing or varying this order.

(e) Order prohibiting publication of the media release; of the minutes; and of this judgment or any information therein until the judgment is delivered at 4:00 pm on 23 April 2024.

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[117] The parties and NZME have been advised of the reasons for extending the present interim name suppression order.

(f) Order prohibiting publication of any reference to mental health issues beyond those made in the judgment which is made publicly available.

(g) Order redacting part of the excerpt set out at [74] of the judgment which is made publicly available.

(h) Order made that the files for these appeals are not to be searched without the leave of a Judge of this Court.

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