# AB (a pseudonym) v CD (a pseudonym) - [2019] HCA 6

# HIGH COURT OF AUSTRALIA

NETTLE J

**Matter No M73/2018**

AB (A PSEUDONYM)  APPELLANT

AND

CD (A PSEUDONYM) & ORS  RESPONDENTS

**Matter No M74/2018**

EF (A PSEUDONYM)  APPELLANT

AND

*AB (a pseudonym) v CD (a pseudonym)*
*EF (a pseudonym) v CD (a pseudonym)*
[2019] HCA 6
*27 February 2019*
M73/2018 & M74/2018

**ORDER**

*Pursuant to s 77RE(1)(a) of the* Judiciary Act 1903 *(Cth) , by reason of the necessity to protect the safety of a person or persons within the meaning of s 77RF(1)(c) of the* Judiciary Act *, there be no publication of the real names or images of EF's children or either of them in connection with EF, or in connection with these proceedings or the subject matter of these proceedings, until publication of the final report of the Royal Commission into the Management of Police Informants and thereafter for a period of not less than 15 years.*

**Representation**

P J Hanks QC with E M Nekvapil and D P McCredden for AB in both matters (instructed by Victorian Government Solicitor)

T K Jeffrie for CD in both matters (instructed by Solicitor for Public Prosecutions (Vic))

P W Collinson QC with C M Harris QC for EF in both matters (instructed by MinterEllison)

R J Sharp with M R Wilson for the Commonwealth Director of Public Prosecutions in both matters (instructed by Director of Public Prosecutions (Cth))

No appearance for the Victorian Equal Opportunity and Human Rights Commission

W B Zichy-Woinarski QC with J M Davidson appearing as amici curiae in both matters (instructed by Russell Kennedy Lawyers)

S Mukerjea for the Royal Commission into the Management of Police Informants, intervening (instructed by Holding Redlich)

O P Holdenson QC for The Herald and Weekly Times Pty Ltd, The Age Company Ltd, Nationwide News Pty Ltd and Seven Network (Operations) Limited, intervening (instructed by Macpherson Kelley)



**CATCHWORDS**

**AB (a pseudonym) v CD (a pseudonym)**
**EF (a pseudonym) v CD (a pseudonym)**

Practice and procedure – High Court – Suppression and non-publication orders – Power to make – Where risk of harm to persons associated with party to proceeding "acute" – Whether non-publication order necessary to protect safety of persons.

Words and phrases – "administration of justice", "necessary to protect the safety of any person", "non-publication order", "public interest in open justice".

*Judiciary Act 1903* (Cth), ss 77RE, 77RF(1)(c) .

1. NETTLE J. This is an application by EF for orders pursuant to s 77RE of the *Judiciary Act 1903* (Cth) ("the Judiciary Act") to prohibit publication of the names and images of her children ("HI" and "JK") in connection with these proceedings or the subject matter of these proceedings.

2. The application is supported by a substantial body of affidavit evidence of which, relevantly, the effect is that, because of EF's previous role as a police informant, she and her children are now at grave risk of harm from persons disaffected by her actions.

**The application to the Court of Appeal**

3. Substantially the same evidence was recently tendered in support of an application by AB in the Court of Appeal of the Supreme Court of Victoria, pursuant to ss 17 and 18(1)(c) of the *Open Courts Act 2013* (Vic) ("the Open Courts Act") and the inherent jurisdiction of the Supreme Court, for orders including that there be no publication of the real names or images of EF, HI or JK in connection with the Supreme Court proceedings.

4. The Court of Appeal rejected the application to prohibit publication of EF's name and image, for reasons which included the presumption under s 4 of the Open Courts Act in favour of disclosure of material to which the court must have regard, and the requirement under s 18(1) of the Open Courts Act that such an order be "necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means" (s 18(1)(a)), or, alternatively, "necessary to protect the safety of any person" (s 18(1)(c)). The Court of Appeal held in substance that, far from prejudicing the proper administration of justice, publication of EF's name and image by the Royal Commission into the Management of Police Informants would be calculated to ensure to the greatest extent possible that the administration of justice is advanced by identification of cases which may be affected by EF's previous conduct, and that a non-publication order with an exception that permitted the Royal Commission to do its job would be ineffective and unenforceable. The Court of Appeal were also not satisfied that the orders sought were necessary to protect the safety of EF, because, in substance, their Honours said, given previous publication of EF's name and image, their Honours were not persuaded that the increase in publication of EF's name and image likely to occur upon termination of existing suppression orders would materially increase any risk to EF's safety.

5. The Court of Appeal similarly rejected the application to prohibit publication of the names and images of HI and JK, but for less extensive reasons. The Court of Appeal observed that the names and images of HI and JK are not relevant to the Royal Commission's inquiry, the details had been redacted from the court files, and the media interests had stated that it was unlikely that they would wish to publish those details. But, as against that, the Court of Appeal stated that the assessment of risk of harm to EF and her children involved an element of speculation, and it was relevant that, although a number of people with convictions for serious offending had known for some time about EF's previous activities, there was no evidence to date of any attempt having been made to harm EF or her children. On that basis,

the Court of Appeal concluded that they were not satisfied that the orders sought were necessary to protect the children's safety.

6. The application to this Court is not in any sense an appeal from the orders of the Court of Appeal. It is a new and different application for orders under different statutory provisions. But it is significant that the relevant statutory criteria are not dissimilar to some of those considered by the Court of Appeal. For that reason, their Honours' reasons are pertinent.

**Relevant statutory provisions**

7. Section 77RD of the Judiciary Act provides that in deciding whether to make a suppression order or non-publication order, the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

8. Section 77RE of the Judiciary Act provides so far as is relevant that the Court, by making a suppression order or non-publication order on grounds hereafter mentioned, may prohibit or restrict the publication or other disclosure of information tending to reveal the identity of or otherwise concerning any person associated with any party to or witness in a proceeding before the Court, or of information that relates to a proceeding before the Court and is information that comprises evidence, or of information about evidence, or of information lodged with or filed in the Court.

9. "Publish" is defined in s 77RA of the Judiciary Act in substance as disseminating or providing access to the public or a sector of the public by any means including publication in a newspaper or other written publication, broadcast by radio or television, public exhibition, or broadcast or publication by means of the internet.

10. "Non-publication order" is defined in the same section in substance as an order that prohibits or restricts publication of information.

11. "Suppression order" is defined in the same section in substance as an order that prohibits or restricts disclosure of information by publication or otherwise.

12. Section 77RF(1) of the Judiciary Act provides so far as is relevant that the grounds for making a suppression order or non-publication order include that:

> "(a) the order is necessary to prevent prejudice to the proper administration of justice;
>
> (b) ...
>
> (c) the order is necessary to protect the safety of any person".

13. Section 77RI of the Judiciary Act provides so far as is relevant that, in deciding the period for which a suppression order or non-publication order is to operate, "the High Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made".

**Necessary to protect the safety of HI and JK**

14. **Following paragraph cited by:**

MJ v the Australian Criminal Intelligence Commission (17 August 2022) (W J Neville J)

22. Secondly, in dealing with an Application for suppression Orders under the *Judiciary Act 1903* (Cth) , in *AB (a pseudonym) v CD (a pseudonym)* ( "AB"), Nettle J said, at [14] and [15] (internal citations omitted; emphasis added): [3]

> [14] This application is made on the basis that the orders sought are *necessary* to protect the safety of HI and JK. As this Court has observed, "necessary" is a word which denotes more than what is merely convenient, reasonable or sensible. As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. It has been suggested that "necessary" in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm. As it appears to me, the latter construction is to be preferred.
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> [15] The criterion is *not one of necessity to prevent harm* to a person but of *necessity to protect the safety of a person*. And *safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence*. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, *because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of* ***the existence of a possibility*** *of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable*.

SZTKE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (22 July 2022) (Taglieri J)

29. I was referred to *AWU15 v Minister for Immigration and Border Protection (No.2)* [2019] FCA 2132. Kerr J referred to a number of statements of judges of the Federal Court, the High Court and New South

Wales Supreme Court on legal principles that apply when suppression and non-publication orders are sought. Drawing on the authorities cited, I consider the following summary of principles apply in determining whether suppression or non-publication orders should be made under the F CFCOA Act :

(a) There are two alternate constructions to the relevant statutory provisions. To obtain an order it is necessary to show that, absent an order being made, it would be probable that the person in question will suffer harm, or whether all that is required is satisfaction that that on the balance of probabilities the order sought is necessary to protect the person's safety. [5]

(b) The preferred resolution of the alternative constructions referred to at a) is the latter and proof of the probability of harm as a precondition to making an order is not required. Instead, **necessity** for such an order will be informed by the nature, imminence and degree of the likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk is a possibility as opposed to a probability. [6]

(c) A party seeking a suppression or non-publication order needs to show more than embarrassment, inconvenience, annoyance or unreasonable or groundless fears. [7]

(d) "Necessary" is a word which denotes more than what is merely convenient, reasonable, desirable or sensible. [8]

(e) As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. [9]

(f) Such orders should only be made in exceptional circumstances; [10]

(g) The onus borne by an applicant seeking such an order is a heavy one. [11]

*via*

[8] *AB v CD* [2019] HCA 6 at [14] citing *Hogan v Australian Crime Commission* [2010] HCA 21.

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*via*

[9] *AB v CD* [2019] HCA 6 at [14] citing *Hogan v Australian Crime Commission* [2010] HCA 21 and *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228.

Huikeshoven v Secretary, Department of Education, Skills and Employment (05 November 2021) (Jackson J)

27. The parties differed as to the relevance and applicability of other authorities, so it is necessary to go to them in some detail. One was *AB (a*

*pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 ( ***A B v CD*** ). There Nettle J held (at [14] ) that the ground of necessity to protect the safety of any person (in equivalent legislation, namely s 77RF (1)(c) of the *Judiciary Act 1903* (Cth) ) did not require that it be established on the balance of probabilities that, absent the order, the person would suffer harm. Rather, it required 'satisfaction on the balance of probabilities that the order is necessary to protect the person's safety … being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm'. At [15] his Honour went on to explain:

> The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

State of New South Wales v Avakian (No 2) (17 June 2021) (Davies J)

19. The joint judgment of the Court (Hoeben CJ at CL, Price & Adamson JJ) said:

> [56] The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called “calculus of risk” approach and the “probable harm” approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).

[57] The differences between the two approaches can be illustrated by the following example. The probable harm approach would require an applicant to prove that death threats made to him or her would be likely to be carried out. Under the calculus of risk approach the nature of the harm (death) would carry weight in the calculus of risk which would have the effect that it would not be necessary for the court to be satisfied that it was probable that the threats would be carried out. The fact that the possible harm was so serious would lead to the court's being satisfied under s 8(1)(c) that an order was necessary in circumstances where it could not be said to be probable that the threats would be carried out.

[58] We regard the statement extracted from *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* at [46] as consistent with the calculus of risk approach. We do not consider the second approach to be consistent with the words of s 8(1)(c) . The evident purpose of s 8(1)(c) is to provide a mechanism to protect the safety of persons who would otherwise be endangered by publication of proceedings in accordance with the principles of open justice. This purpose is more effectively advanced by the calculus of risk approach which is, therefore, to be preferred: s 33 of the *Interpretation Act 1987* (NSW) . As Nettle J said in *AB (A Pseudonym) v CD (A Pseudonym)* at [15]:

> "The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

Roberts-Smith v Fairfax Media Publications Pty Limited (No 14) (24 May 2021) (Abraham J)

42. The IGADF submitted as to the safety of witnesses, a calculus of risk approach is to be applied, citing *R v Khayat (No 2)* [2019] NSWSC 1315. Adamson J at [20] observed:

> The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person or persons. If the prospective harm is very severe, as in the present case, it may more readily be concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The calculus of risk approach has been endorsed in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46 at [56]- [58] (Hoeben CJ at CL, Price and Adamson JJ); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]- [17] (Besanko J).

Council of the Law Society of New South Wales v XX (No 4) (08 March 2021) (Davies J)

14. The joint judgment of the Court (Hoeben CJ at CL; Price & Adamson JJ) said:

> [56] The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).
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> [60] In the present case the risk to the applicant's psychological safety had a real potential to affect his physical safety. The evidence that the publicity had given rise to suicidal ideation and caused the applicant to make plans for his own death was sufficient to require the Court below to consider whether the ground under s 8(1)(c) was made out. His Honour failed to do so. This matter alone is sufficient to warrant a grant of leave and oblige this Court to embark on a rehearing of the application to determine for itself whether a non-publication order ought be made.

Secretary of the Department of Communities and Justice and X & Ors (08 August 2019) (Aldridge J)

> 65. The word "necessary" must be given its appropriate weight. It is insufficient that the proposed order be seen as "convenient, reasonable or sensible" ( *Hogan v Australian Crime Commission* (2010) 240 CLR 651 per French CJ, Gummow, Hayne, Heydon & Kiefel JJ at [31]–[32]. This led Nettle J to observe that the relevant sections are not concerned with trivialities ( *AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202 (" *AB v CD* ") at [14] ).

Darren Brown (a pseudonym) v The Queen (No 2) (05 April 2019) (Payne JA, Johnson and N Adams JJ)

37. There had been a debate in the cases about whether the probability of harm is a precondition to making an order. That debate has now been concluded by a recent decision of this Court in *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46. The correct approach is a "calculus of risk" approach which the Court described in the following way:

> "[56] The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).
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[59] In the present case, the Court below purported to adopt the probable harm approach and required the applicant to prove that the social media posts would probably cause a real risk to safety as the highlighted passage in [32] of its reasons set out above indicates. It is implicit in his Honour's reasons that he focussed on physical safety. At [30], the Court below characterised the evidence adduced by the applicant from Ms Howell as focussing on "distress and psychological condition", which his Honour found was not the subject of an application under s 8(1)(c) . It is plain from this paragraph of the reasons that his Honour failed to take account of the largely uncontroverted evidence adduced as to the risks of physical and mental injury including the possibility of the applicant's death (through suicide) or catastrophic harm (by attempted suicide) from aggravation of the applicant's mental condition. His Honour also discounted the evidence that not making the order would seriously affect the applicant's wife's mental condition. The Court below was in error in not taking this evidence into account under s 8(1)(c) . There is nothing in the statutory wording of the section to indicate that it is intended to be limited to physical safety. The wording is apt to include psychological safety, including aggravation of a pre-existing mental condition as well as the risk of physical harm, by suicide or other self-harm, consequent on the worsening of a psychiatric condition.

[60] In the present case the risk to the applicant's psychological safety had a real potential to affect his physical safety. The evidence that the publicity had given rise to suicidal ideation and caused the applicant to make plans for his own death was sufficient to require the Court below to consider whether the ground under s 8(1)(c) was made out. His Honour failed to do so. This matter alone is sufficient to warrant a grant of leave and oblige this Court to embark on a rehearing of the application to determine for itself whether a non-publication order ought be made."

R v Khayat (No 2) (11 March 2019) (Adamson J)

20. On the basis of Mr McCartney's and Ms Cook's evidence, I am also satisfied that, if the sensitive information were available to potential terrorists, there is a risk that it will be used to endanger the safety of, and potentially kill, members of the public. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person or persons. If the prospective harm is very severe, as in the present case, it may more readily be concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The calculus of risk approach has been endorsed in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J ) ; *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46 at [56] -[58] (Hoeben CJ at CL, Price and Adamson JJ); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J).

AB (A Pseudonym) v R (No 3) (08 March 2019) (Hoeben CJ, Cl, Price and Adamson JJ)

56. The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).

This application is made on the basis that the orders sought are *necessary* to protect the safety of HI and JK. As this Court has observed, "necessary" is a word which denotes more than what is merely convenient, reasonable or sensible [1] . As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities [2] . It has been suggested that "necessary" in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm [3] . As it appears to me, the latter construction is to be preferred.

[1] *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [31]-[32] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ; [2010] HCA 21 .

[2] See and compare *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 234 per Bowen CJ; *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [31]-[32] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

[3] *D1 v P1* [2012] NSWCA 314 at [49]-[51] per Bathurst CJ (McColl JA and McClellan CJ at CL agreeing at [92], [93]).

15. **Following paragraph cited by:**

Lucas v State of New South Wales (16 May 2024) (Campbell J)

> 11. Mr McGirr emphasised that by reference to the analysis of the Court of Criminal Appeal that even a risk of significant harm which does not arise above a mere possibility of materialisation might render an order for the protection of the safety of a person "necessary" in the statutory sense. And I bear in mind Nettle J's decision in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 at [15] that the risk need be more than trivial.

AB v Director of Public Prosecutions (15 May 2024) (Campbell J)

> 17. A useful description of the application of the test is provided by Nettle J in a single-justice decision in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 93 ALJR 321. His Honour gave the following prosaic (his expression) example at [15] :
>
> > "The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while traveling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for the wearing of a seat belt, it is more probable than not that an occupant of a moving car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of

such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

Director of Public Prosecutions (Cth) v Weaver (a pseudonym) (Suppression Order) (11 April 2024) (Berman J)

29 Nettle J posed the test this way in *AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202 ( ***AB*** ) , at [15] :

… because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Commonwealth of Australia v De Pyle (26 March 2024) (O'Callaghan, Raper and Button JJ)

28. Further, as Nettle J said in *AB v CD* (2019) 364 ALR 202; [2019] HCA 6 at [15] in relation to a provision equivalent to s 37AG(1)(c) of the Federal Court Act , "[t]he criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence".

Lehrmann v Queensland Police Service (26 October 2023) (Applegarth J)

40. Reference was made to *AB v CD* [4] in which Nettle J observed that the criterion "is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person". Nettle J also observed:

"… because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable'."

*via*

[4] (2019) 364 ALR 202 at [15] (" *AB v CD*").

Commissioner of Taxation v [Respondent] (03 October 2023) (Kennett J)

28. The evidence in support of this ground goes no higher than evidence given on information and belief that [**the respondent**] has suffered "immense anxiety and stress" and has consulted a psychologist, who recommended "ongoing sessions". There is no evidence capable of being

tested concerning the effect of the potential disclosures on [**the respondent's**] mental health. This material falls well short of establishing that the proposed suppression orders—or any particular orders—are "necessary" to avoid unacceptable risk to [**the respondent's**] health (cf *A B v CD* [2019] HCA 6; 93 ALJR 321 at [15] (Nettle J) ).

SafeWork NSW v Edstein Creative Pty Ltd (No. 3) (29 August 2023) (Russell SC DCJ)

27. At [58] the Court of Criminal Appeal referred with approval to what was said by Nettle J in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6. His Honour said at [15] :

> "The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

De Pyle v Commonwealth of Australia (09 June 2023) (Sarah C Derrington J)

17. Nor did the parties disagree as to the meaning of the phrase "necessary to protect the safety of any person". As was said by Nettle J in *AB v CD* [2019] HCA 6; 364 ALR 202 at [15] :

> The criterion is not one of necessity to prevent harm to a person of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence.

In the matter of the application of TSK (a pseudonym) (11 May 2023) (Campbell J)

18. Turning specifically to s 8(1)(c) , it is unnecessary for the plaintiff to prove that, absent an order, the relevant risk of harm would probably materialise. Rather, what is called for is a "calculus of risk" approach "requiring the Court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person": *AB (a pseudonym) v R (No 3)* (2019) 97 NSWLR 1046; [2019] NSWCCA 46 (at [56]–[58] ,

per the Court). Protection of the safety of a person extends to a person's psychological safety as well as physical safety: *AB v R (No 3)* at [59]. However, as Nettle J said in *AB (a pseudonym) v CD* (*a pseudonym)* [2019 ] HCA 6 at [15] :

> "… it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm *of such gravity and likelihood* that, without the orders sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable". (My emphasis)

Application of Connelly; The Estate of Nancy Allwood Connelly (04 May 2023) (Hallen J)

78. In *AB v CD* (2019) 93 ALJR 321; [2019] HCA 6 at [15] , Nettle J wrote in relation to when assessing whether an order is necessary to protect a person's safety, the Court must be satisfied:

> "…of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

DFT22 v Australian Taxation Office (26 October 2022) (Laing J)

12. In considering whether a suppression order was *"necessary to protect the safety of any person",* Nettle J stated in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 93 ALJR 321 at [15] :

> 15. The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

SZTKE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (22 July 2022) (Taglieri J)

29. I was referred to *AWU15 v Minister for Immigration and Border Protection (No.2)* [2019] FCA 2132. Kerr J referred to a number of statements of judges of the Federal Court, the High Court and New South Wales Supreme Court on legal principles that apply when suppression and non-publication orders are sought. Drawing on the authorities cited, I consider the following summary of principles apply in determining whether suppression or non-publication orders should be made under the F CFCOA Act :

    (a) There are two alternate constructions to the relevant statutory provisions. To obtain an order it is necessary to show that, absent an order being made, it would be probable that the person in question will suffer harm, or whether all that is required is satisfaction that that on the balance of probabilities the order sought is necessary to protect the person's safety. [5]

    (b) The preferred resolution of the alternative constructions referred to at a) is the latter and proof of the probability of harm as a precondition to making an order is not required. Instead, **necessity** for such an order will be informed by the nature, imminence and degree of the likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk is a possibility as opposed to a probability. [6]

    (c) A party seeking a suppression or non-publication order needs to show more than embarrassment, inconvenience, annoyance or unreasonable or groundless fears. [7]

    (d) "Necessary" is a word which denotes more than what is merely convenient, reasonable, desirable or sensible. [8]

    (e) As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. [9]

    (f) Such orders should only be made in exceptional circumstances; [10]

    (g) The onus borne by an applicant seeking such an order is a heavy one. [11]

*via*

[6] *Roberts-Smith v Fairfax Media Publications Pty Limited* [2019] FCA 36 at [17] and [18] ; per Nettle J in *AB v CD* [2019] HCA 6 at [15] .

Huikeshoven v Secretary, Department of Education, Skills and Employment (05 November 2021) (Jackson J)

51. I do not accept that the applicant has established that the orders she seeks are necessary to protect the safety of any person. Proceeding on the construction of the legislation adopted by Nettle J in *AB v CD* , it is still necessary for the court to be 'satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable': *AB v CD* at [15] .

Fletcher v Brown (No 2) (25 June 2021) (Jackson J)

37. In relation to the specific ground of suppression in relation to the safety of a person, in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 at [15] , Nettle J said of an equivalent provision (s 77RF(1)(c) of the *Judiciary Act 1903* (Cth) ):

> The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Secretary of the Department of Communities and Justice and X and Ors (No. 2) (08 July 2020) (Aldridge J)

69. In the 2019 reasons for judgment, I said:

> 73. I do not propose to recite all the evidence. Some examples shall suffice. The page references are to the tender bundles referred to in Ms [P's] affidavit filed 1 July 2019:
>
> · [Redacted]
>
> 74. [Redacted]
>
> 75. [Redacted]

76. In assessing the need to protect the safety of a person, one must take account of the risks involved. A particular risk, such as those just discussed, may not be likely or imminent, nevertheless, a real risk of harm. That harm could well include violence or death. A risk of very severe harm which, however, may not be likely, but nonetheless, falls within the need for protection described in s 102PF(1)(c) of the Act .

77. The analogy of the seatbelt described by Nettle J in *AB v CD* at [15] aptly applies.

78. A more likely risk of harm, and one that is likely to be psychological rather than physical, is the intrusion of the public into the children's lives. That intrusion could take many forms but could well include name-calling, baiting and verbal abuse. None of that would assist any children, let alone children now trying to adjust to a new life after particularly trying circumstances.

79. I am, however, of the view that publicity of itself is not helpful for these children. That, indeed, is one of the premises upon which s 121 of the Act is based – the need for privacy in the interests of the parties to proceedings and, in particular, their children. Of course, there is little public interest in most Family Court cases but, in those in which public interest is taken, the actual identity of the parties is not relevant.

80. [Redacted]

ELA18 v Minister for Home Affairs (No 2) (05 June 2020) (Abraham J)

17. The relevant principles in relation to the making of suppression or non-publication orders under s 37AF of the Federal Court Act are well settled. While the appellant has not identified which limb of s 37AG is relied on in support of his application, it is presumed it is s 37AG(1)(c) . The question therefore in this instance is whether the making of a suppression or non-publication order is "necessary to protect the safety of any person": s 37AG(1)(c) . The word "necessary" in that context is a "strong word": *H ogan v Australian Crime* Commission [2010] HCA 21; (2010) 240 CLR 651 ( *Hogan* ) at [30] , although it is not to be given an unduly narrow construction: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; (2012) 83 NSWLR 52; (2012) 293 ALR 384 at [8] , citing Hodgson JA in *R v Kwok* [2005] NSWCCA 245; (2005) 64 NSWLR 335 at [13] . The threshold which an appellant must satisfy is high. Mere embarrassment, inconvenience, annoyance or unreasonable or groundless fears will not suffice to found a suppression or non-publication order: *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd (No 1)* [2015] FCA 607; (2015) 331 ALR 68 at [30] ; *Chen v Migration Agents Registration Authority (No 1)* [2016] FCA 649 at [11] . Although an appellant is not required to prove that the harm which he or she fears would be an inevitable consequence in the absence of such an order: *AWU15* at [32] citing *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 at [15] per Nettle J .

> Once the court is satisfied that an order is necessary, it would be an error not to make it: *Hogan* at [33] . There is no exercise of discretion or balancing exercise involved: *Australian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430 at [21] . The onus is on the appellant to persuade the Court to make the order has been described as “a very heavy one”: *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 at [8] .
>
> AWU15 v Minister for Immigration and Border Protection (No 2) (19 December 2019) (Kerr J)
>
> 32. While unreasonable or groundless fears will not suffice to justify the making of a suppression order I accept, as Nettle J observed in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 at [15] wh en referring to an analogous provision of the Judiciary Act , that an applicant is not required to prove that the harm which he or she fears would be the inevitable consequence in the absence of such an order:
>
> > … [I]t should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.
>
> Secretary of the Department of Communities and Justice and X & Ors (08 August 2019) (Aldridge J)
>
> 77. The analogy of the seatbelt described by Nettle J in *AB v CD* at [15] aptly applies.
>
> State of New South Wales v Wilmot (21 June 2019) (Lonergan J)
>
> 11. AB (A Pseudonym) v CD (A Pseudonym) [2019] HCA 6 at [15] .

The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

16. As was submitted on behalf of The Age Company Ltd, which opposed the application, EF faces the difficulty that the Court of Appeal found that it was not necessary in order to protect the safety of HI and JK to make an order prohibiting publication of their names and images in connection with the Supreme Court proceedings. Other things being equal, I should be hesitant to depart from that finding. But, as it appears to me, there are a number of compelling considerations which lead to the conclusion that it is necessary in order to protect HI and JK's safety to make an order prohibiting publication of their names and images in connection with these proceedings.

17. **Following paragraph cited by:**

> Huikeshoven v Secretary, Department of Education, Skills and Employment (05 November 2021) (Jackson J)
>
> > 29. In *AB v CD* Nettle J decided that suppression orders were necessary in order to protect the safety of the applicant and her children. His Honour did so (at [17] ) on the basis of:
> >
> > > unchallenged opinion evidence of very senior and appropriately experienced police officers that the current level of risk to the safety of HI and JK [the children] is 'acute' and will further increase with publication of EF's name and image upon expiration of current non-publication orders on 1 March 2019.

I agree with respect with the Court of Appeal that any assessment of the risk to HI and JK involves a degree of conjecture. In this case, however, it is a degree of conjecture that is informed by the unchallenged opinion evidence of very senior and appropriately experienced police officers that the current level of risk to the safety of HI and JK is "acute" and will further increase with publication of EF's name and image upon expiration of current non-publication orders on 1 March 2019. It was contended on behalf of The Age Company Ltd that the police evidence was "undermined" by evidence that, so far, there has been relatively limited interest shown in the matter abroad as measured by reference to the number of overseas computer searches of and in relation to the matter conducted since the revocation of special leave in November 2018. I note, however, that The Age Company Ltd eschewed an opportunity to cross-examine the police deponents and, in any event, as is explained in the police evidence, public interest in the matter is predicted to surge once the identity of EF is publicly disclosed.

18. It is true that those persons most likely to be disaffected by EF's conduct as a police informant have known for some time of what she did in that capacity, and either have known or could easily have ascertained the fact that she has children. And to date no harm has been done to her or to them. Unlike the Court of Appeal, however, I do not regard that as a particularly significant consideration, and certainly not as something sufficient to undermine the unchallenged police assessment of the risk to HI and JK. Some of EF's former clients most affected by her activities as a police informant are still in gaol and likely to be so for a considerable time. Others with a motive for revenge may well have reason to wait, as it were,

until the smoke has cleared. Even now, the Royal Commission is only beginning its inquiry, and common sense and ordinary experience suggest that the risk of retaliatory action will remain and very possibly increase during the inquiry and for a substantial period of time thereafter. As was observed at the time of revocation of special leave in November 2018, this is a wholly exceptional case.

19. Naturally, orders of the kind sought will not entirely eliminate the risk to HI and JK. But as is disclosed in one of the confidential affidavits filed in support of the application, which was not before the Court of Appeal, unless publication of HI and JK's names and images is prohibited, the publication of that information will surely aid in identifying HI and JK's location, erode the effectiveness of measures likely to be implemented to protect HI and JK, and thus maintain, and potentially increase, the risk of harm being done to them.

20. **Following paragraph cited by:**

> Huikeshoven v Secretary, Department of Education, Skills and Employment (05 November 2021) (Jackson J)
>
> > 55. As I have said, the applicant went on to rely on the further passage from *A B v CD* at [20] , which is quoted at [30] above, concerning the effect on the administration of justice of nonpublication of the names and images of children. However I do not consider that the passage supports the orders sought here. The suppression orders which Nettle J made were based on the equivalent to s 37AG(1)(c) concerning the safety of persons, and not on prejudice to the administration of justice. While, as the applicant submitted, Nettle J earlier in the decision referred to the administration of justice ground as relevant, his Honour did not rest his orders on the equivalent to s 37AG(1)(a) or make any assessment of whether that ground was satisfied. As the Secretary submitted, his Honour's comments at [20] are part of his assessment of the safety ground. And in saying that the interests of the administration of justice will not be compromised by non-publication of their names and images, his Honour was not indicating that the obverse had been established before him, that non-publication *was* necessary to prevent prejudice to the proper administration of justice.

To that must be added that HI and JK are children of relatively tender years who were not and are not involved in any manner in the Supreme Court proceedings or these proceedings. It is not suggested that the interests or administration of justice would be at all compromised by non-publication of their names and images. There is no evident basis to suppose that public understanding of the judgments of the trial court or the Court of Appeal, or of this Court, would be affected. Nor is there any legitimate public interest in the publication of the details of EF's children in connection with the subject matter of the Supreme Court proceedings or these proceedings. The Royal Commission acknowledges that the names and images of the children are not relevant to its inquiry and that it has no interest in opposing the application. Neither CD nor the Commonwealth Director of Public Prosecutions opposes the application. And apart from The Age Company Ltd, responsible sections of the press and electronic

media, represented in this Court pursuant to s 77RG(2) of the Judiciary Act under the rubric of the media interests, have rightly not sought to say anything against it.

21. **Following paragraph cited by:**

Jenkings v Northern Territory of Australia (No 4) (26 July 2021) (Mortimer J)

24. To this can be added the observation of Nettle J in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 at [21] that

> a primary objective of the administration of justice is to safeguard the public interest in open justice.

Subject, therefore, to one further consideration, I consider that it is necessary to make an order to protect the safety of HI and JK. That one further consideration is the duration of the order. As I have noticed, s 77RI of the Judiciary Act requires the Court to ensure that such an order operate for no longer than is necessary to protect the safety of HI and JK. Exactly how long is necessary is difficult to say. Like the assessment of risk to HI and JK, it involves an element of conjecture. It is also essential to bear in mind that a primary objective of the administration of justice is to safeguard the public interest in open justice. Doing the best I can, however, in light of the seriousness of EF's previous infractions of her obligations to persons who, it is thought, are most likely to seek retribution; the time that some of them may remain in gaol before having free opportunity to take revenge; and HI and JK's ages, I have concluded that it is necessary that the order operate until publication of the final report of the Royal Commission into the Management of Police Informants and thereafter for a period of not less than 15 years.

**Conclusion**

22. I shall make orders accordingly.

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## Cited by:

Lucas v State of New South Wales [2024] NSWSC 600 (16 May 2024) (Campbell J)

II.

Mr McGirr emphasised that by reference to the analysis of the Court of Criminal Appeal that even a risk of significant harm which does not arise above a mere possibility of

materialisation might render an order for the protection of the safety of a person "necessary" in the statutory sense. And I bear in mind Nettle J's decision in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 at [15] that the risk need be more than trivial.

AB v Director of Public Prosecutions [2024] NSWSC 596 (15 May 2024) (Campbell J)

20. I suppose one could try to calculate the risk arithmetically by reference to those numbers. But what is required is a qualitative approach and as the Court in *AB v R* and Nettle J in *AB v CD* contemplated, a threat of catastrophic or lethal harm is a very significant factor to weigh in the calculus of risk. It is often said in other contexts where assessment of risk is required for a legal purpose that a very small risk of catastrophic harm justifies legal intervention, including by way of, for example, an extended supervision order under high risk offender legislation.

AB v Director of Public Prosecutions [2024] NSWSC 596 (15 May 2024) (Campbell J)

17. A useful description of the application of the test is provided by Nettle J in a single-justice decision in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 93 ALJR 321. His Honour gave the following prosaic (his expression) example at [15] :

> "The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while traveling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for the wearing of a seat belt, it is more probable than not that an occupant of a moving car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

Nassif v Harbour Radio Pty Ltd [2024] FCA 466 (07 May 2024) (Abraham J)

35. The principles as to the application of s 37AG are well established and unnecessary to recite here. Suffice to say that s 37AG(1)(c) requires that the applicant establish that the making of the order "is necessary to protect the safety" of the applicant: see *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 at [14]-[17] . See also *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 at [43] . The evidence relied on plainly could not establish that fact. The application was refused.

Kyle-Sailor v Heinke [2024] FCA 431 (29 April 2024) (Horan J)

59. On balance, having regard to the nature and degree of the risk that Group Members might be exposed to a risk of repetition of the conduct that gave rise to the present proceeding, I am not satisfied that the non-publication of the Settlement Sum is necessary to protect the safety of the Group Members. To the extent that the publication of the Settlement Sum involves any such risk to the safety of Group Members, I do not consider that risk to be unacceptable in the circumstances: *cf AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 at [14 ]- [15] (Nettle J) .

Council of the New South Wales Bar Association v Waterstreet (No 2) [2024] NSWCATOD 51 (18 April 2024) (Cole DCJ, H Dixon SC, Senior Member, M Bolt, General Member)

27. In his submissions in reply, Mr Waterstreet argued that the evidence relied upon by C1 and C2 in relation to their mental health did not comprise a sufficient evidentiary basis on which the Tribunal could assess the calculus of risk and assess the nature, imminence and degree of likelihood of harm to them so that it could be determined that it is "desirable" to make the non-publication order. The decision in *Chief Health Officer, NSW Health v FRC (application for continuation of public health order* [2023] NSWCATAD 76 at [11] was referred to. Paragraphs [10] -[12] are also relevant:

> 10. Before we can make a non-publication order, s 64 of the *Civil and Administrative Tribunal Act* requires us to be "satisfied that it is **desirable** to do so" [our emphasis]. This is a less onerous requirement than the requirement which appears in s 8 of the *Court Suppression and Non-publication Orders Act 2010* (NSW), which requires a finding that the non-publication order is "necessary" to achieve the outcomes listed. Those outcomes include "to prevent prejudice to the proper administration of justice", "to protect the safety of any person" and "or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature" or that the order is "otherwise necessary in the public interest ... and that public interest significantly outweighs the public interest in open justice" (see *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136; *Misrachi v Public Guardian* [2019] NSWCA 67 at [13]).
>
> 11. Although the requirement for the Tribunal is less onerous than the requirement which applies in the Courts when considering an application for a non-publication order, the process for considering the application is similar. The process, in so far as the impact upon the party seeking the non-publication order is concerned, was described succinctly in *Council of the New South Wales Bar Association v EFA* [2021] NSWCA 339 at 228:
>
> > 228. ...The "calculus of risk" approach requires a more nuanced consideration, taking into account the nature, imminence and degree of likelihood of harm to occur to the relevant person. The "calculus of risk" approach appears, in the decided cases, to have gained ascendency as the preferred approach: see *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; *AB (No 3)* (NSWCCA); *Wilson v Basson* [2020] NSWSC 512 at [18].
>
> 12. The potential impact of publication upon the person whose name is sought to be the subject of the non-publication order, together with the public interest, must be weighed against the object set out in s 3(f) of the *Civil and Administrative Tribunal Act 2013*, which is that the Tribunal have processes which are open and transparent (see *Corlett v Moubarak (no 2)* [2023] NSWCATAP 54).

Director of Public Prosecutions (Cth) v Weaver (a pseudonym) (Suppression Order) [2024] VCC 439 (11 April 2024) (Berman J)

> 33 When I apply the test as described by Nettle J in *AB* to the present matter, I find that the offender has established that without the order he seeks, the risk of prejudice to his safety ranges above the level that can reasonably be regarded as acceptable.

Director of Public Prosecutions (Cth) v Weaver (a pseudonym) (Suppression Order) [2024] VCC 439 (11 April 2024) (Berman J)

> 29 Nettle J posed the test this way in *AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202 (***AB***), at [15]:
>
> ... because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is

satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Director of Public Prosecutions (Cth) v Weaver (a pseudonym) (Suppression Order) [2024] VCC 439 (11 April 2024) (Berman J)

35 In some cases, such as *EFA* and *AB v R (No 3)* ,[8] the suppression orders expired after 20 years, and in *AB* it expired in 'not less than 15 years'. In this case, Mr Carr seeks an order which expires on the death of his client. Given the offender's age, there is unlikely to be a significant difference between 20 or 15 years' duration in the cases I have mentioned and a suppression order which expires on the offender's death.

Director of Public Prosecutions (Cth) v Weaver (a pseudonym) (Suppression Order) [2024] VCC 439 (11 April 2024) (Berman J)

Cases Cited: *AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202 ; *Council of the New South Wales Bar Association v EFA (a pseudonym)* [2021] NSWCA 339; *Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154.

Re WD (No 4) [2024] VSC 144 (28 March 2024) (Elliott J)

21. In relation to what is encapsulated by the phrase "safety of any person": [24]

> Safety in the context of section 18(1)(c) is to be given a broad construction, and the provision has been held to encompass risks to both physical and psychological safety. However, an important distinction can be drawn between "harm" and "safety", the latter concept being a "conclusion informed by the nature, imminence and degree of likelihood of apprehended harm".
>
> (Citations omitted.)

As such, section 18(1)(c) will only be enlivened where the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that the risk to the person would range above the level that could reasonably be regarded as acceptable if a suppression order were not made. [25]

*via*

[25] *AB v CD* (2019) 364 ALR 202, 205-206 [15] (Nettle J) .

Commonwealth of Australia v De Pyle [2024] FCAFC 43 (26 March 2024) (O'Callaghan, Raper and Button JJ)

28. Further, as Nettle J said in *AB v CD* (2019) 364 ALR 202; [2019] HCA 6 at [15] in relation to a provision equivalent to s 37AG(1)(c) of the Federal Court Act , "[t]he criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence".

[Redacted] v Commissioner of Taxation [2024] FCA 185 (08 March 2024) (Anderson J)

40. In ***AB*** *(a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202 , Nettle J considered an application for a non-publication order under s 77RE of the *Judiciary Act 1903* (Cth) on the ground that it was necessary to protect the safety of the applicant's children. His Honour articulated the following relevant principles at [14]-[15]:

> This application is made on the basis that the orders sought are necessary to protect the safety of HI and JK. As this Court has observed, "necessary" is a word which denotes more than what is merely convenient, reasonable or sensible. As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. It has been suggested that "necessary" in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm. As it appears to me, the latter construction is to be preferred.
>
> The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Re Mokbel (No 4) [2024] VSC 68 (27 February 2024) (Fullerton J)

> 42. The concerns expressed by Mr Hall for Ms Gobbo's safety in the confidential affidavit must, in my view, be heavily qualified given the notoriety that now attends her role as a human source between 2005 and 2009, following revelations of her identity in 2018 and the considerable media attention that resulted from the revelation, [9] the establishment of the Royal Commission where her role as a police informant for Victoria Police was the subject of the Letters Patent [10] and her evidence before the Royal Commission in 2019.

*via*

[9] *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 .

Re WD (No 2) [2023] VSC 790 (22 December 2023) (Elliott J)

> 62. In relation to what is encapsulated by the phrase "safety of any person": [31]
>
> > Safety in the context of section 18(1)(c) is to be given a broad construction, and the provision has been held to encompass risks to both physical and psychological safety. However, an important distinction can be drawn between "harm" and "safety", the latter concept being a "conclusion informed by the nature, imminence and degree of likelihood of apprehended harm".
> >
> > (Citations omitted.)
>
> Accordingly, section 18(1)(c) will not be enlivened unless the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that the risk to the person would range above the level that could reasonably be regarded as acceptable if a suppression order were not made. [32]

*via*

[32] *AB v CD* (2019) 364 ALR 202, 205-206 [15] (Nettle J) .

Director of Public Prosecutions v EN [2023] VSC 724 (06 December 2023) (Elliott J)

27. Safety in the context of section 18(1)(c) is to be given a broad construction, and the provision has been held to encompass risks to both physical and psychological safety. [35] However, an important distinction can be drawn between "harm" and "safety", the latter concept being a "conclusion informed by the nature, imminence and degree of likelihood of apprehended harm". [36] In *AB v CD* , Nettle J observed that "[t]he criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person", adding that: [37]

> ... because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

*via*

[36] *AB v CD* (2019) 364 ALR 202, 205 [14] (Nettle J) , citing *D1 v P1* [2012] NSWCA 314, [49]-[51] (Bathurst CJ, with whom McColl JA and McClellan CJ at CL agreed).

Director of Public Prosecutions v EN [2023] VSC 724 (06 December 2023) (Elliott J)

27. Safety in the context of section 18(1)(c) is to be given a broad construction, and the provision has been held to encompass risks to both physical and psychological safety. [35] However, an important distinction can be drawn between "harm" and "safety", the latter concept being a "conclusion informed by the nature, imminence and degree of likelihood of apprehended harm". [36] In *AB v CD* , Nettle J observed that "[t]he criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person", adding that: [37]

> ... because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

*via*

[37] Ibid , 206 [15] , applied in *Attorney-General v Khan (Suppression Order)* [2022] VSC 627, [8]-[9] (John Dixon J).

Lehrmann v Queensland Police Service [2023] QSC 238 (26 October 2023) (Applegarth J)

*AB v CD* (2019) 364 ALR 202 , cited

Lehrmann v Queensland Police Service [2023] QSC 238 (26 October 2023) (Applegarth J)

40. Reference was made to *AB v CD* [4] in which Nettle J observed that the criterion "is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person". Nettle J also observed:

> "... because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable'."

*via*

[4] (2019) 364 ALR 202 at [15] ("*AB v CD*").

Lehrmann v Queensland Police Service [2023] QSC 238 (26 October 2023) (Applegarth J)

40. Reference was made to *AB v CD* [4] in which Nettle J observed that the criterion "is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person". Nettle J also observed:

> "... because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable'."

Lehrmann v Queensland Police Service [2023] QSC 238 (26 October 2023) (Applegarth J)

70. As noted, the parties before the Magistrate accepted that s 7B(c) required the applicant to satisfy the Court that a non-publication order was necessary to protect the person's safety, and this required the Court to consider "the nature, imminence, and degree of likelihood of harm occurring to the relevant person". These words were drawn from authorities on comparable sections. [22]

*via*

[22] *AB (A Pseudonym) v R (No 3)* (2019) 97 NSWLR 1046 at [56]-[58] in relation to s 8(1)(c) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW). See also *AB v CD* (2019) 364 ALR 202 at 206 [15] in which Nettle J referred to the Court having to be satisfied "of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable".

DSLB v Comcare [2023] FCA 1222 (16 October 2023) (Katzmann J)

111. In ***AB*** *(a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202; 93 ALJR 321 Nettle J considered the requirements for making an order under s 77RE of the Judiciary Act on the ground that it was necessary to protect the safety of the applicant's children. The applicant was a police informant, whose information had contributed to the convictions and imprisonment of numerous individuals for serious crimes. Section 77RE of the Judiciary Act is in relevantly identical terms to s 37AF of the FCA Act. Section 77RF(1)(c), the ground upon which the applicant relied, is relevantly identical to s 37AG(1)(c) of the FCA Act. His Honour made the following pertinent observations at [14]–[17].

DSLB v Comcare [2023] FCA 1222 (16 October 2023) (Katzmann J)

116. The approach to construction favoured by Nettle J in *AB* was followed by the NSW Court of Appeal in *Council of the New South Wales Bar Association v EFA (a pseudonym)* (2021) 106 NSWLR 383 at [228]–[229] (Bathurst CJ, Leeming JA and Simpson AJA), an appeal from orders of the New South Wales Civil and Administrative Tribunal (NCAT) made in a disciplinary proceeding against a barrister. As the Court explained:

> Put briefly, the "probable harm" approach requires proof of the probability of harm in the absence of an order. The "calculus of risk" approach requires a more nuanced consideration, taking into account the nature, imminence and degree of likelihood of harm to occur to the relevant person. The "calculus of risk" approach appears, in the decided cases, to have gained ascendency as the preferred approach: see *AB (a pseudonym) v CD (a pseudonym)* (2019) 93 ALJR 321; [2019] HCA 6 ; *AB (a pseudonym) v R (No 3)*; *Wilson v Basson* [2020] NSWSC 512 at [18] .
>
> We likewise prefer the calculus of risk approach. The evidence established that, were the identity of the respondent to be publicly revealed, his mental health would be at risk. That conclusion would favour the making of an order restricting publication of identifying information. Against that has to be balanced the important consideration of open justice. More particularly, what has to be considered is the degree to which an order that would restrict identification of the respondent would encroach upon that principle. That encroachment would be minimal. Such an order would not restrict publication of the salient facts of the proceedings, that a barrister was the subject of disciplinary proceedings, the nature of the conduct that underlay the disciplinary proceedings, and the outcome of the disciplinary proceedings.

Commissioner of Taxation v [Respondent] [2023] FCA 1176 (03 October 2023) (Kennett J)

28. The evidence in support of this ground goes no higher than evidence given on information and belief that [**the respondent**] has suffered "immense anxiety and stress" and has consulted a psychologist, who recommended "ongoing sessions". There is no evidence capable of being tested concerning the effect of the potential disclosures on [**the respondent's**] mental health. This material falls well short of establishing that the proposed suppression orders—or any particular orders—are "necessary" to avoid unacceptable risk to [**the respondent's**] health (cf *AB v CD* [2019] HCA 6; 93 ALJR 321 at [15] (Nettle J) ).

SafeWork NSW v Edstein Creative Pty Ltd (No. 3) [2023] NSWDC 335 (29 August 2023) (Russell SC DCJ)

27. At [58] the Court of Criminal Appeal referred with approval to what was said by Nettle J in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6. His Honour said at [15] :

> "The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

De Pyle v Commonwealth of Australia [2023] FCA 597 (09 June 2023) (Sarah C Derrington J)

17. Nor did the parties disagree as to the meaning of the phrase "necessary to protect the safety of any person". As was said by Nettle J in *AB v CD* [2019] HCA 6; 364 ALR 202 at [15] :

> The criterion is not one of necessity to prevent harm to a person of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence.

In the matter of the application of TSK (a pseudonym) [2023] NSWSC 494 (11 May 2023) (Campbell J)

18. Turning specifically to s 8(1)(c) , it is unnecessary for the plaintiff to prove that, absent an order, the relevant risk of harm would probably materialise. Rather, what is called for is a "calculus of risk" approach "requiring the Court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person": *AB (a pseudonym) v R (No 3)* (2019) 97 NSWLR 1046; [2019] NSWCCA 46 (at [56]–[58] , per the Court). Protection of the safety of a person extends to a person's psychological safety as well as physical safety: *AB v R (No 3)* at [59]. However, as Nettle J said in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 at [15] :

> "... it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm *of such gravity and likelihood* that, without the orders sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable". (My emphasis)

Application of Connelly; The Estate of Nancy Allwood Connelly [2023] NSWSC 467 (04 May 2023) (Hallen J)

78. In *AB v CD* (2019) 93 ALJR 321; [2019] HCA 6 at [15] , Nettle J wrote in relation to when assessing whether an order is necessary to protect a person's safety, the Court must be satisfied:

> "...of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

Chief Health Officer, NSW Health v FRC (application for continuation of public health order) [2023] NSWCATAD 76 (29 March 2023) (Cole DCJ, Deputy P, T Simon, Principal Member, Dr B McPhee, Senior Member)

11. Although the requirement for the Tribunal is less onerous than the requirement which applies in the Courts when considering an application for a non-publication order, the process for considering the application is similar. The process, in so far as the impact upon the party seeking the non-publication order is concerned, was described succinctly in *Council of the New South Wales Bar Association v EFA* [2021] NSWCA 339 at 228 :

> 228. ...The "calculus of risk" approach requires a more nuanced consideration, taking into account the nature, imminence and degree of likelihood of harm to occur to the relevant person. The "calculus of risk" approach appears, in the decided cases, to have gained ascendency as the preferred approach: see *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 ; *AB (No 3)* (NSWCCA); *Wilson v Basson* [2020] NSWSC 512 at [18] .

Kumar (formerly CWRG) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2022] FCA 1586 (22 December 2022) (Colvin J)

3. No party has sought to file submissions. I note that the applicant has filed an appeal in respect of my decision in which the applicant is named. Section 91X of the *Migration Act 1958* (Cth), which provides that the Court must not publish the name of a person in a proceeding which concerns protection visa claims, does not apply in the present case. There is no suggestion that the pseudonym is necessary to protect harm to any person: as to which, see the consideration of equivalent provisions by Nettle J in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 at [14][15].

DFT22 v Australian Taxation Office [2022] FedCFamC2G 883 (26 October 2022) (Laing J)

12. In considering whether a suppression order was *"necessary to protect the safety of any person"*, Nettle J stated in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 93 ALJR 321 at [15]:

> 15. The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Attorney-General v Khan (suppression order) [2022] VSC 627 (13 October 2022) (John Dixon J)

8. The third identified purpose is protecting the safety of any person. An order can be made if it is necessary to protect the safety of any person, which is a term that encompasses not just the safety of the particular person but those who are immediately associated with them; it is also a term that includes protection in the sense of psychological safety. [8] Nettle J described the test of necessity in the context of safety in *AB (a pseudonym) v CD (a pseudonym)* and said:

> It has been suggested that 'necessary' in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm. As it appears to me, the latter construction is to be preferred. [9]

*via*

[9] (2019) 364 ALR 202, 205 [14].

MJ v the Australian Criminal Intelligence Commission [2022] FedCFamC2G 671 (17 August 2022) (W J Neville J)

22. Secondly, in dealing with an Application for suppression Orders under the *Judiciary Act 1903* (Cth), in *AB (a pseudonym) v CD (a pseudonym)* ("AB"), Nettle J said, at [14] and [15] (internal citations omitted; emphasis added): [3]

> [14] This application is made on the basis that the orders sought are *necessary* to protect the safety of HI and JK. As this Court has observed, "necessary" is a word which denotes more than what is merely convenient, reasonable or sensible. As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. It has been suggested that "necessary" in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm. As it appears to me, the latter construction is to be preferred.
>
> [15] The criterion is *not one of necessity to prevent harm* to a person but of *necessity to protect the safety of a person*. And *safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence*. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, *because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of* ***the existence of a possibility*** *of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable*.

MJ v the Australian Criminal Intelligence Commission [2022] FedCFamC2G 671 (17 August 2022) (W J Neville J)

29. In particular, I recall that in *AB*, Nettle J referred to the "possibility" of relevant risk. He did not (nor has any other Court) refer to issues of "efficacy", or perhaps that some of the information, and or the identity of certain employees, may be partially "in the market place", so to speak. It is the *possibility of risk*, and conformity with the relevant statutory provisions, which gives rise to the satisfaction here.

MJ v the Australian Criminal Intelligence Commission [2022] FedCFamC2G 671 (17 August 2022) (W J Neville J)

22. Secondly, in dealing with an Application for suppression Orders under the *Judiciary Act 1903* (Cth), in *AB (a pseudonym) v CD (a pseudonym)* ("AB"), Nettle J said, at [14] and [15] (internal citations omitted; emphasis added): [3]

> [14] This application is made on the basis that the orders sought are *necessary* to protect the safety of HI and JK. As this Court has observed, "necessary" is a word which denotes more than what is merely convenient, reasonable or sensible. As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. It has been suggested that "necessary" in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being

a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm. As it appears to me, the latter construction is to be preferred.

[15] The criterion is *not one of necessity to prevent harm* to a person but of *necessity to protect the safety of a person*. And *safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence*. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, *be cause the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of* ***the existence of a possibility*** *of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable*.

*via*

[3] *AB (a pseudonym) v CD (a pseudonym)* (2019) 93 ALJR 321; (2019) 364 ALR 202 .

SZTKE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 585 (22 July 2022) (Taglieri J)

29. I was referred to *AWU15 v Minister for Immigration and Border Protection (No.2)* [2019] FCA 2132. Kerr J referred to a number of statements of judges of the Federal Court, the High Court and New South Wales Supreme Court on legal principles that apply when suppression and non-publication orders are sought. Drawing on the authorities cited, I consider the following summary of principles apply in determining whether suppression or non-publication orders should be made under the FCFCOA Act :

> (a) There are two alternate constructions to the relevant statutory provisions. To obtain an order it is necessary to show that, absent an order being made, it would be probable that the person in question will suffer harm, or whether all that is required is satisfaction that that on the balance of probabilities the order sought is necessary to protect the person's safety. [5]
>
> (b) The preferred resolution of the alternative constructions referred to at a) is the latter and proof of the probability of harm as a precondition to making an order is not required. Instead, **necessity** for such an order will be informed by the nature, imminence and degree of the likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk is a possibility as opposed to a probability. [6]
>
> (c) A party seeking a suppression or non-publication order needs to show more than embarrassment, inconvenience, annoyance or unreasonable or groundless fears. [7]
>
> (d) "Necessary" is a word which denotes more than what is merely convenient, reasonable, desirable or sensible. [8]

(e) As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities. [9]

(f) Such orders should only be made in exceptional circumstances; [10]

(g) The onus borne by an applicant seeking such an order is a heavy one. [11]

*via*

[8] *AB v CD* [2019] HCA 6 at [14] citing *Hogan v Australian Crime Commission* [2010] HCA 21.

SZTKE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 585 (22 July 2022) (Taglieri J)

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(f) Such orders should only be made in exceptional circumstances; [10]

(g) The onus borne by an applicant seeking such an order is a heavy one. [11]

*via*

[6] *Roberts-Smith v Fairfax Media Publications Pty Limited* [2019] FCA 36 at [17] and [18] ; per Nettle J in *AB v CD* [2019] HCA 6 at [15] .

SZTKE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 585 (22 July 2022) (Taglieri J)

29. I was referred to *AWU15 v Minister for Immigration and Border Protection (No.2)* [2019] FCA 2132. Kerr J referred to a number of statements of judges of the Federal Court, the High Court and New South Wales Supreme Court on legal principles that apply when suppression and non-publication orders are sought. Drawing on the authorities cited, I consider the following summary of principles apply in determining whether suppression or non-publication orders should be made under the FCFCOA Act :

(a) There are two alternate constructions to the relevant statutory provisions. To obtain an order it is necessary to show that, absent an order being made, it would be probable that the person in question will suffer harm, or whether all that is required is satisfaction that that on the balance of probabilities the order sought is necessary to protect the person's safety. [5]

(b) The preferred resolution of the alternative constructions referred to at a) is the latter and proof of the probability of harm as a precondition to making an order is not required. Instead, **necessity** for such an order will be informed by the nature, imminence and degree of the likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk is a possibility as opposed to a probability. [6]

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(f) Such orders should only be made in exceptional circumstances; [10]

(g) The onus borne by an applicant seeking such an order is a heavy one. [11]

*via*

[9] *AB v CD* [2019] HCA 6 at [14] citing *Hogan v Australian Crime Commission* [2010] HCA 21 and *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228.

Kaplan v State of Victoria [2022] FCA 590 (20 May 2022) (Mortimer J)

22. The authorities where such orders have been made, such as *AA v BB* [2013] VSC 120; 296 ALR 353 and *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 , involved specific and acute circumstances. In the former, orders were made suppressing the identities of a person convicted of contraventions of the *Family Violence Protection Act 2008* (Vic) , his former spouse, and their child. The Court also held that unrestricted publication in the proceeding before the Supreme Court would lead to identification of the parents and the child, contrary to the provisions and policy of the *Family Law Act 1975* (Cth) . In the latter, Nettle J found such orders were necessary to protect the safety of the two children of a person who had a previous role as a police informant, on the basis of evidence his Honour described in the following way (at [17]):

> I agree with respect with the Court of Appeal that any assessment of the risk to HI and JK involves a degree of conjecture. In this case, however, it is a degree of conjecture that is informed by the unchallenged opinion evidence of very senior and appropriately experienced police officers that the current level of risk to the safety of HI and JK is "acute" and will further increase with publication of EF's name and image upon expiration of current non-publication orders on 1 March 2019.

Kaplan v State of Victoria [2022] FCA 590 (20 May 2022) (Mortimer J)
*AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202
*AX v Stern*

Council of the New South Wales Bar Association v EFA (a pseudonym) [2021] NSWCA 339 (21 December 2021) (Bathurst CJ, Leeming JA and Simpson AJA)

228. Put briefly, the "probable harm" approach requires proof of the probability of harm in the absence of an order. The "calculus of risk" approach requires a more nuanced consideration, taking into account the nature, imminence and degree of likelihood of harm to occur to the relevant person. The "calculus of risk" approach appears, in the decided cases, to have gained ascendency as the preferred approach: see *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 ; *AB (No 3)* (NSWCCA); *Wilson v Basson* [2020] NSWSC 512 at [18] .

Ece21 v Minister for Home Affairs [2021] FCA 1447 (22 November 2021) (Jackson J)

9. I make no comment on the last of these submissions, but I accept that the other matters raised by the Minister justify a suppression order in this case. In order to be satisfied as to the ground of necessity to protect the safety of a person, the court need not find on the balance of probabilities that harm will occur if the suppression order is not made: see *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 at [14][15] . In the circumstances of the present case, it is enough that there is a real risk of serious harm to the applicant and that the risk will be appreciably increased if the order is not made. So I was satisfied that the orders proposed by the Minister were necessary to protect the safety of the applicant (which meant it was unnecessary to consider whether they were necessary to prevent prejudice to the proper administration of justice). I made orders suppressing the applicant's name and he has been assigned a pseudonym on the court file and in the publication of these reasons.

Huikeshoven v Secretary, Department of Education, Skills and Employment [2021] FCA 1359 (05 November 2021) (Jackson J)

54. Of course, the evidence which justified the orders in *AB v CD* , being the evidence of senior police officers that the risk to the safety of the children was acute, does not state any minimum standard which every applicant must satisfy. But the generality with which the present applicant expresses her concern means that the evidence here does not establish that suppression or other non-publication orders are necessary to protect the safety of any person, in the sense which Nettle J explained. No orders will be made on the ground in s 37A G(1)(c) .

Huikeshoven v Secretary, Department of Education, Skills and Employment [2021] FCA 1359 (05 November 2021) (Jackson J)

51. I do not accept that the applicant has established that the orders she seeks are necessary to protect the safety of any person. Proceeding on the construction of the legislation adopted by Nettle J in *AB v CD* , it is still necessary for the court to be 'satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable': *AB v CD* at [15] .

Huikeshoven v Secretary, Department of Education, Skills and Employment [2021] FCA 1359 (05 November 2021) (Jackson J)

55. As I have said, the applicant went on to rely on the further passage from *AB v CD* at [20] , which is quoted at [30] above, concerning the effect on the administration of justice of nonpublication of the names and images of children. However I do not consider that the passage supports the orders sought here. The suppression orders which Nettle J made were based on the equivalent to s 37AG(1)(c) concerning the safety of persons, and not on prejudice to the administration of justice. While, as the applicant submitted, Nettle J earlier in the decision referred to the administration of justice ground as relevant, his Honour did not rest his orders on the equivalent to s 37AG(1)(a) or make any assessment of whether that ground was satisfied. As the Secretary submitted, his Honour's comments at [20] are part of his assessment of the safety ground. And in saying that the interests of the administration of justice will not be compromised by non-publication of their names and images, his Honour was not indicating that the obverse had been established before him, that non-publication *was* necessary to prevent prejudice to the proper administration of justice.

Huikeshoven v Secretary, Department of Education, Skills and Employment [2021] FCA 1359 (05 November 2021) (Jackson J)

27. The parties differed as to the relevance and applicability of other authorities, so it is necessary to go to them in some detail. One was *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 ( ***AB v CD*** ). There Nettle J held (at [14] ) that the ground of necessity to protect the safety of any person (in equivalent legislation, namely s 77RF(1)(c) of the *Judiciary Act 1903* (Cth) ) did not require that it be established on the balance of probabilities that, absent the order, the person would suffer harm. Rather, it required 'satisfaction on the balance of probabilities that the order is necessary to protect the person's safety ... being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm'. At [15] his Honour went on to explain:

> The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment

> of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Huikeshoven v Secretary, Department of Education, Skills and Employment [2021] FCA 1359 (05 November 2021) (Jackson J)

29. In *AB v CD* Nettle J decided that suppression orders were necessary in order to protect the safety of the applicant and her children. His Honour did so (at [17] ) on the basis of:

> unchallenged opinion evidence of very senior and appropriately experienced police officers that the current level of risk to the safety of HI and JK [the children] is 'acute' and will further increase with publication of EF's name and image upon expiration of current non-publication orders on 1 March 2019.

Huikeshoven v Secretary, Department of Education, Skills and Employment [2021] FCA 1359 (05 November 2021) (Jackson J)

51. I do not accept that the applicant has established that the orders she seeks are necessary to protect the safety of any person. Proceeding on the construction of the legislation adopted by Nettle J in *AB v CD* , it is still necessary for the court to be 'satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable': *AB v CD* at [15] .

Jenkings v Northern Territory of Australia (No 4) [2021] FCA 839 (26 July 2021) (Mortimer J)

24. To this can be added the observation of Nettle J in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 at [21] that

> a primary objective of the administration of justice is to safeguard the public interest in open justice.

Fletcher v Brown (No 2) [2021] FCA 725 (25 June 2021) (Jackson J)

37. In relation to the specific ground of suppression in relation to the safety of a person, in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 at [15] , Nettle J said of an equivalent provision (s 77RF(1)(c) of the *Judiciary Act 1903* (Cth) ):

> The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

State of New South Wales v Avakian (No 2) [2021] NSWSC 677 (17 June 2021) (Davies J)

19. The joint judgment of the Court (Hoeben CJ at CL, Price & Adamson JJ) said:

> [56] The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).
>
> [57] The differences between the two approaches can be illustrated by the following example. The probable harm approach would require an applicant to prove that death threats made to him or her would be likely to be carried out. Under the calculus of risk approach the nature of the harm (death) would carry weight in the calculus of risk which would have the effect that it would not be necessary for the court to be satisfied that it was probable that the threats would be carried out. The fact that the possible harm was so serious would lead to the court's being satisfied under s 8(1)(c) that an order was necessary in circumstances where it could not be said to be probable that the threats would be carried out.
>
> [58] We regard the statement extracted from *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* at [46] as consistent with the calculus of risk approach. We do not consider the second approach to be consistent with the words of s 8(1)(c) . The evident purpose of s 8(1)(c) is to provide a mechanism to protect the safety of persons who would otherwise be endangered by publication of proceedings in accordance with the principles of open justice. This purpose is more effectively advanced by the calculus of risk approach which is, therefore, to be preferred: s 33 of the *Interpretation Act 1987* (NSW) . As Nettle J said in *AB (A Pseudonym) v CD (A Pseudonym)* at [15]:
>
> > "The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."

Roberts-Smith v Fairfax Media Publications Pty Limited (No 14) [2021] FCA 552 (24 May 2021) (Abraham J)

42. The IGADF submitted as to the safety of witnesses, a calculus of risk approach is to be applied, citing *R v Khayat (No 2)* [2019] NSWSC 1315. Adamson J at [20] observed:

The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person or persons. If the prospective harm is very severe, as in the present case, it may more readily be concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The calculus of risk approach has been endorsed in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46 at [56]- [58] (Hoeben CJ at CL, Price and Adamson JJ); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]- [17] (Besanko J).

Council of the Law Society of New South Wales v XX (No 4) [2021] NSWSC 192 (08 March 2021) (Davies J)

14. The joint judgment of the Court (Hoeben CJ at CL; Price & Adamson JJ) said:

> [56] The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).
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> [57] The differences between the two approaches can be illustrated by the following example. The probable harm approach would require an applicant to prove that death threats made to him or her would be likely to be carried out. Under the calculus of risk approach the nature of the harm (death) would carry weight in the calculus of risk which would have the effect that it would not be necessary for the court to be satisfied that it was probable that the threats would be carried out. The fact that the possible harm was so serious would lead to the court's being satisfied under s 8(1)(c) that an order was necessary in circumstances where it could not be said to be probable that the threats would be carried out.
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> is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable."
>
> ...
>
> [60] In the present case the risk to the applicant's psychological safety had a real potential to affect his physical safety. The evidence that the publicity had given rise to suicidal ideation and caused the applicant to make plans for his own death was sufficient to require the Court below to consider whether the ground under s 8(1)(c) was made out. His Honour failed to do so. This matter alone is sufficient to warrant a grant of leave and oblige this Court to embark on a rehearing of the application to determine for itself whether a non-publication order ought be made.

Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants and Attorney-General for the State of Victoria [2020] VSCA 214 (26 August 2020) (Beach, McLeish and Weinberg JJA)

46. In oral argument, and in support of his arguments referred to above, the Chief Commissioner placed particular emphasis on a passage in the judgment of Nettle J in *AB v CD; EF v CD*. [13] Specifically, his Honour said:

> I agree with respect with the Court of Appeal that any assessment of the risk to HI and JK involves a degree of conjecture. In this case, however, it is a degree of conjecture that is informed by the unchallenged opinion evidence of very senior and appropriately experienced police officers that the current level of risk to the safety of HI and JK is 'acute' and will further increase with publication of EF's name and image upon expiration of current non-publication orders on 1 March 2019. It was contended on behalf of The Age Company Ltd that the police evidence was 'undermined' by evidence that, so far, there has been relatively limited interest shown in the matter abroad as measured by reference to the number of overseas computer searches of and in relation to the matter conducted since the revocation of special leave in November 2018. I note, however, that The Age Company Ltd eschewed an opportunity to cross-examine the police deponents and, in any event, as is explained in the police evidence, public interest in the matter is predicted to surge once the identity of EF is publicly disclosed. [14]

*via*

[13] (2019) 364 ALR 202 .

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*via*

[14] Ibid 206 [17].

Secretary of the Department of Communities and Justice and X and Ors (No. 2) [2020] FamCA 534 (08 July 2020) (Aldridge J)

*AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202

*Brown v Tasmania*

Secretary of the Department of Communities and Justice and X and Ors (No. 2) [2020] FamCA 534 (08 July 2020) (Aldridge J)

44. I consider that this reasoning is consistent with *AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202. In that case, in proceedings which did not concern the applicant's children in any way, the parties' names were suppressed so as to avoid harm being done to the applicant's children as a means of retribution against the applicant.

Secretary of the Department of Communities and Justice and X and Ors (No. 2) [2020] FamCA 534 (08 July 2020) (Aldridge J)

69. In the 2019 reasons for judgment, I said:

> 73. I do not propose to recite all the evidence. Some examples shall suffice. The page references are to the tender bundles referred to in Ms [P's] affidavit filed 1 July 2019:
>
> · [Redacted]
>
> 74. [Redacted]
>
> 75. [Redacted]
>
> 76. In assessing the need to protect the safety of a person, one must take account of the risks involved. A particular risk, such as those just discussed, may not be likely or imminent, nevertheless, a real risk of harm. That harm could well include violence or death. A risk of very severe harm which, however, may not be likely, but nonetheless, falls within the need for protection described in s 102PF(1)(c) of the Act.
>
> 77. The analogy of the seatbelt described by Nettle J in *AB v CD* at [15] aptly applies.

78. A more likely risk of harm, and one that is likely to be psychological rather than physical, is the intrusion of the public into the children's lives. That intrusion could take many forms but could well include name-calling, baiting and verbal abuse. None of that would assist any children, let alone children now trying to adjust to a new life after particularly trying circumstances.

79. I am, however, of the view that publicity of itself is not helpful for these children. That, indeed, is one of the premises upon which s 121 of the Act is based – the need for privacy in the interests of the parties to proceedings and, in particular, their children. Of course, there is little public interest in most Family Court cases but, in those in which public interest is taken, the actual identity of the parties is not relevant.

80. [Redacted]

ELA18 v Minister for Home Affairs (No 2) [2020] FCA 782 (05 June 2020) (Abraham J)

17. The relevant principles in relation to the making of suppression or non-publication orders under s 37AF of the Federal Court Act are well settled. While the appellant has not identified which limb of s 37AG is relied on in support of his application, it is presumed it is s 37AG(1)(c) . The question therefore in this instance is whether the making of a suppression or non-publication order is "necessary to protect the safety of any person": s 37AG(1)(c) . The word "necessary" in that context is a "strong word": *Hogan v Australian Crime* Commission [2010] HCA 21; (2010) 240 CLR 651 ( *Hogan* ) at [30] , although it is not to be given an unduly narrow construction: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; (2012) 83 NSWLR 52; (2012) 293 ALR 384 at [8] , citing Hodgson JA in *R v Kwok* [2005] NSWCCA 245; (2005) 64 NSWLR 335 at [13] . The threshold which an appellant must satisfy is high. Mere embarrassment, inconvenience, annoyance or unreasonable or groundless fears will not suffice to found a suppression or non-publication order: *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd (No 1)* [2015] FCA 607; (2015) 331 ALR 68 at [30] ; *Chen v Migration Agents Registration Authority (No 1)* [2016] FCA 649 at [11] . Although an appellant is not required to prove that the harm which he or she fears would be an inevitable consequence in the absence of such an order: *AWU15* at [32] citing *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; (2019) 364 ALR 202 at [15] per Nettle J . Once the court is satisfied that an order is necessary, it would be an error not to make it: *Hogan* at [33] . There is no exercise of discretion or balancing exercise involved: *Australian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430 at [21] . The onus is on the appellant to persuade the Court to make the order has been described as "a very heavy one": *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 at [8] .

Wilson v Basson [2020] NSWSC 512 (08 May 2020) (Ward CJ in Eq)

18. In assessing whether the condition in sub-s 8(1)(c) of the *Court Suppression and Non-publication Orders Act* has been satisfied in any particular case, the weight of authority is that the "calculus of risk" approach is to be used (as opposed to the "probable harm" approach). Nettle J in *AB v CD* (2019) 93 ALJR 321; [2019] HCA 6 ( *AB v CD 2019 Judgment*) made it clear that when assessing whether an order is necessary to protect the person's safety, the Court must be (at [15]):

> ... satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

AWU15 v Minister for Immigration and Border Protection (No 2) [2019] FCA 2132 (19 December 2019) (Kerr J)

32. While unreasonable or groundless fears will not suffice to justify the making of a suppression order I accept, as Nettle J observed in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 at [15] when referring to an analogous provision of the Judiciary Act , that an applicant is not required to prove that the harm which he or she fears would be the inevitable consequence in the absence of such an order:

> ... [I]t should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Secretary of the Department of Communities and Justice and X & Ors [2019] FamCA 521 (08 August 2019) (Aldridge J)

*AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202
*AB (A Pseudonym) v The Queen (No 3)*

Secretary of the Department of Communities and Justice and X & Ors [2019] FamCA 521 (08 August 2019) (Aldridge J)

65. The word “necessary” must be given its appropriate weight. It is insufficient that the proposed order be seen as “convenient, reasonable or sensible” ( *Hogan v Australian Crime Commission* (2010) 240 CLR 651 per French CJ, Gummow, Hayne, Heydon & Kiefel JJ at [31] –[32]. This led Nettle J to observe that the relevant sections are not concerned with trivialities ( *AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202 (“ *AB v CD* ”) at [14] ).

Secretary of the Department of Communities and Justice and X & Ors [2019] FamCA 521 (08 August 2019) (Aldridge J)

67. Nettle J in *AB v CD* , preferred the latter construction saying:

> 15. The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

Secretary of the Department of Communities and Justice and X & Ors [2019] FamCA 521 (08 August 2019) (Aldridge J)

77. The analogy of the seatbelt described by Nettle J in *AB v CD* at [15] aptly applies.

Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police [2019] VSCA 154 (27 June 2019) (Whelan, Beach and Weinberg JJA)

84. In relation to physical safety the Chief Commissioner submitted that the analysis of Nettle J in *AB v CD* ; *EF v CD [7]* was the correct approach. He particularly emphasised in that connection the danger to family members of the relevant persons. The Chief Commissioner relied upon the traditional protection afforded to informers and submitted that in this case the risk of retribution against the relevant persons was very real. In relation to the suggestion that the work of the Commission would be 'thwarted' it was submitted that that was something of an overstatement and that, in any event, that had to be weighed against the 'extreme' risk to the physical safety of the relevant persons and their family members, and the general importance to the administration of justice of maintaining confidence in the system's willingness and capacity to protect informers. It was submitted that the Commission would not be hamstrung because hearings had to be held in private.

Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police [2019] VSCA 154 (27 June 2019) (Whelan, Beach and Weinberg JJA)

CRIMINAL LAW – Suppression orders – Application by chairperson of the Royal Commission into Management of Police Informants to vacate or vary suppression orders – Whether continuation of orders necessary – Whether without order risk to safety unacceptable – Revocation of suppression orders would increase risk – Suppression orders varied to permit disclosure to and by the Royal Commission in accordance with *Inquiries Act 2014* and the *Witness Protection Act 1991* – *AB v CD* [2019] VSCA 28, *AB v CD; EF v CD* [2019] HCA 6 applied – *Open Courts Act 2013* (Vic) ss 15, 18 – *Witness Protection Act 1991* (Vic) ss 10(5), 10(7), 10A – *Inquiries Act 2014* (Vic) ss 12, 17, 18, 21, 24, 26, 34 .

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*via*

[7] [2019] HCA 6 ('*AB v CD* — HC 2019').

State of New South Wales v Wilmot [2019] NSWSC 1002 (21 June 2019) (Lonergan J)

11. AB (A Pseudonym) v CD (A Pseudonym) [2019] HCA 6 at [15] .

AB (a pseudonym) v CD (a pseudonym) and EF (a pseudonym) [No 2] [2019] VSCA 95 (01 May 2019) (Ferguson CJ, Beach and McLeish JJA)

5. In support of their applications, AB and EF rely upon the fact that on 8 March 2019, Nettle J made orders, that correspond with the orders they now seek, in respect of all of the documents filed in AB and EF's applications for non-publication orders in the High Court. [3] Indeed, AB submits that this Court should make the orders he seeks because:

> The High Court having determined the point of principle relied upon by AB, and having ruled accordingly, this Court is bound to apply that principle in relation to the Application Documents.

*via*

[3] See *AB v CD; EF v CD* [2019] HCA 6 .

Darren Brown (a pseudonym) v The Queen (No 2) [2019] NSWCCA 69 (05 April 2019) (Payne JA, Johnson and N Adams JJ)

37. There had been a debate in the cases about whether the probability of harm is a precondition to making an order. That debate has now been concluded by a recent decision of this Court in *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46. The correct approach is a "calculus of risk" approach which the Court described in the following way:

> "[56] The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).
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> [57] The differences between the two approaches can be illustrated by the following example. The probable harm approach would require an applicant to prove that death threats made to him or her would be likely to be carried out. Under the calculus of risk approach the nature of the harm (death) would carry weight in the calculus of risk which would have the effect that it would not be necessary for the court to be satisfied that it was probable that the threats would be carried out. The fact that the possible harm was so serious would lead to the court's being satisfied under s 8(1)(c) that an order was necessary in circumstances where it could not be said to be probable that the threats would be carried out.
>
> [58] We regard the statement extracted from *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* at [46] as consistent with the calculus of risk approach. We do not consider the second approach to be consistent with the words of s 8(1)(c) . The evident purpose of s 8(1)(c) is to provide a mechanism to protect the safety of persons who would otherwise be endangered by publication of proceedings in accordance with the principles of open justice. This purpose is more effectively advanced by the calculus of risk approach which is, therefore, to be preferred: s 33 of the *Interpretation Act 1987* (NSW) . As Nettle J said in *AB (A Pseudonym) v CD (A Pseudonym)* at [15]:
>
> > 'The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not

> the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.'

> [59] In the present case, the Court below purported to adopt the probable harm approach and required the applicant to prove that the social media posts would probably cause a real risk to safety as the highlighted passage in [32] of its reasons set out above indicates. It is implicit in his Honour's reasons that he focussed on physical safety. At [30], the Court below characterised the evidence adduced by the applicant from Ms Howell as focussing on "distress and psychological condition", which his Honour found was not the subject of an application under s 8(1)(c) . It is plain from this paragraph of the reasons that his Honour failed to take account of the largely uncontroverted evidence adduced as to the risks of physical and mental injury including the possibility of the applicant's death (through suicide) or catastrophic harm (by attempted suicide) from aggravation of the applicant's mental condition. His Honour also discounted the evidence that not making the order would seriously affect the applicant's wife's mental condition. The Court below was in error in not taking this evidence into account under s 8(1)(c) . There is nothing in the statutory wording of the section to indicate that it is intended to be limited to physical safety. The wording is apt to include psychological safety, including aggravation of a pre-existing mental condition as well as the risk of physical harm, by suicide or other self-harm, consequent on the worsening of a psychiatric condition.

> [60] In the present case the risk to the applicant's psychological safety had a real potential to affect his physical safety. The evidence that the publicity had given rise to suicidal ideation and caused the applicant to make plans for his own death was sufficient to require the Court below to consider whether the ground under s 8(1)(c) was made out. His Honour failed to do so. This matter alone is sufficient to warrant a grant of leave and oblige this Court to embark on a rehearing of the application to determine for itself whether a non-publication order ought be made."

R v Khayat (No 2) [2019] NSWSC 1315 (11 March 2019) (Adamson J)

20. On the basis of Mr McCartney's and Ms Cook's evidence, I am also satisfied that, if the sensitive information were available to potential terrorists, there is a risk that it will be used to endanger the safety of, and potentially kill, members of the public. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person or persons. If the prospective harm is very severe, as in the present case, it may more readily be concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The calculus of risk approach has been endorsed in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J ) ; *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46 at [56]-[58] (Hoeben CJ at CL, Price and Adamson JJ); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J).

AB (A Pseudonym) v R (No 3) [2019] NSWCCA 46 (08 March 2019) (Hoeben CJ, Cl, Price and Adamson JJ)

56. The authorities have considered two possible approaches to the interpretation of s 8(1)(c) , the so-called "calculus of risk" approach and the "probable harm" approach. The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood

of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The second postulated interpretation, the probable harm approach, requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm. The calculus of risk approach has been specifically adopted in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]-[17] (Besanko J). The question of which approach was the correct one did not need to be decided in *D1 v P1* at [55] (Bathurst CJ, McColl JA and McClellan CJ at CL agreeing).