(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE AGGRIEVED PERSON AND OF HIS PARTNER

(2) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE VICTIMS

(3) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 21**

	Reference No. HRRT 006/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**THE SENSIBLE SENTENCING GROUP TRUST**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Ms K Anderson, Member

REPRESENTATION:
Mr SRG Judd for plaintiff
Ms NM Pender for defendant
Victim A and Victim B in person

DATE OF SUBMISSIONS: **28 March 2014, 11 April 2014, 22 April 2014 and 23 April 2014**

DATE OF DECISION: 23 May 2014

DECISION OF TRIBUNAL ON APPLICATION BY DEFENDANT FOR SEPARATE DETERMINATION OF ISSUES

Background

[1] By *Minute* dated 11 December 2013 these proceedings were set down for hearing at Auckland on Monday 18 August 2014. Two consecutive weeks have been set aside. The final timetable steps were scheduled to be completed by 28 March 2014 with the filing of the common bundle of documents. This has now been done and the case is ready for hearing.

[2] It is recorded in the *Minute* that the Director of Human Rights Proceedings (the Director) has challenged the admissibility of a large amount of the evidence tendered by the Victims. In the Director's view that evidence raises issues not relevant to the alleged breaches of the information privacy principles pleaded in the statement of claim. As can be seen from the *Minute* at [9] to [12], the foreshadowed objection has not yet been addressed. The matter was left on the basis that the Director would, by 20 December 2013, advise whether application was to be made for a pre-trial ruling on the admissibility of the challenged evidence. On 19 December 2013 the Director gave notice that he would not make application for a pre-trial ruling on admissibility. Rather, he will make objections to the evidence at the substantive hearing itself.

[3] By notice dated 23 December 2013 the Tribunal was advised that the Sensible Sentencing Group Trust (SSGT) would henceforth be represented by Ms Pender, who previously represented Victim A and Victim B.

[4] The two Victims are now self-represented. The terms on which they have been permitted to appear before the Tribunal are set out at [50.1] of the decision given on 19 August 2013 and reported as *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application by Victims to be Heard)* [2013] NZHRRT 26 (19 August 2013):

> **[50.1]** Pursuant to s 108 of the Human Rights Act 1993 the victims are allowed to appear before the Tribunal and to make submissions and to call evidence on any matter that should be taken into account in determining the present proceedings. The victims may appear in person or be represented by counsel.

Overview of Director's case

[5] These proceedings have been brought by the Director under s 82 of the Privacy Act 1993. The aggrieved individual was in 1995 convicted of historic indecent assaults and indecent acts upon two girls (Victim A and Victim B) which occurred in 1975 and 1978. He maintains that he was awarded permanent name suppression in respect of these offences. On various occasions beginning in 2009 the SSGT published the aggrieved person's name on its website along with details of his convictions. The SSGT did not source this information from a publicly available publication. In these proceedings brought by the Director it is alleged that the SSGT thereby interfered with the privacy of the aggrieved person by breaching information privacy Principles 6, 8 and 11. The claim is that:

> **[5.1]** Prior to publishing the information about the aggrieved person's convictions on its website, the SSGT did not take reasonable steps to ascertain whether the aggrieved person had name suppression. Nor did the information make any reference to the possibility that there was name suppression. (Principle 8).
>
> **[5.2]** In disclosing the aggrieved person's name and information about his convictions for sexual offending the SSGT had no reasonable grounds for believing that any of the exceptions in Principle 11 applied to the disclosure.

[5.3] On 5 November 2009 the aggrieved person, by his legal adviser, requested personal information from the SSGT being the court documents held by the SSGT and the identity of the person who provided the documents to the SSGT (Principle 6). A decision on that request was not made within 20 working days after the day on which the SSGT received the request. By virtue of s 66(3) of the Act the request was deemed to have been refused.

[6] The SSGT and the victims contend (inter alia) that while the aggrieved person may have had the benefit of a name suppression order in the period prior to his trial, that order was not continued beyond sentence. The Director contends otherwise and much effort has been expended with a view to bringing clarity to the situation. Whether those efforts have been successful is an issue yet to be determined. The issue was canvassed, but not resolved, by the Chairperson when making interim non-publication orders on 22 April 2013. See *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application for Interim Non-Publication Orders)* [2013] NZHRRT 14 (22 April 2013).

[7] The Director contends that while the existence (or otherwise) of name suppression for the aggrieved person is part of the factual background to the case and relevant to remedies, the ultimate "truth" as to the making of a final order is not determinative of liability ie the question whether the SSGT is in breach of Principles 6, 8 and 11.

The application for determination of preliminary issues and for order that Registrar file affidavit

[8] On 28 March 2014 the SSGT applied for the following orders:

[8.1] First, that the following issues be determined before, and separately from, the other issues in the proceeding:

[8.1.1] whether any order exists which would prevent publication of the aggrieved person's conviction history on the offender database operated by the SSGT.

[8.1.2] if the answer is "yes", whether a primary purpose of the order was to protect the aggrieved person's privacy.

[8.2] Second, that the Registrar of the District Court at Christchurch (or his nominee) file an affidavit. As to the content of the affidavit, the parties are to agree on the areas to be covered. All parties are to have the right to cross examine.

[9] The grounds of the application are:

[9.1] The preliminary issues are severable and capable of being heard apart from the remainder of the proceeding.

[9.2] A hearing of the preliminary issues would take approximately one fifth of the time allocated for the substantive hearing. Determination of the issues could substantially reduce the time required to dispose of any remaining issues.

[9.3] The Tribunal would be assisted by independent evidence from the Registrar as to the court records and record-keeping practices at the time of the criminal trial.

[9.4] The orders would enable the proceedings to be heard, determined, or otherwise dealt with fairly, efficiently, simply, and speedily.

[10] In a supporting memorandum it is submitted for the SSGT that:

[10.1] The preliminary questions go "directly to the heart of this proceeding". A finding of "no" for either issue would dispose of the causes of action based on information privacy Principles 8 and 11 in that there can be no interference of privacy under s 66(1)(b) unless it is established that "but for" the alleged breaches, the aggrieved person would not have suffered adverse consequences. It is asserted that in the context of the case, the requisite nexus requires the Tribunal to be satisfied that publication of the aggrieved person's criminal history was in breach of a suppression order intended to preserve his privacy.

[10.2] The hearing of the preliminary issues will take approximately two days including the hearing of evidence relevant to the preliminary points. There is the potential for significant efficiency gains.

[10.3] The issues of loss and of damages should be left until last. An early determination of the preliminary issues could obviate consideration of heads of damage.

[11] As to the request for "independent" evidence from the Registrar, it is submitted that while the Tribunal will be presented by the parties with copies of records kept by the Christchurch District Court at the time of the aggrieved person's trial in 1995, no party has yet put forward a witness capable of explaining the significance of those records. The Tribunal would therefore likely benefit from hearing from someone with knowledge of the practice of the District Court in Christchurch at the time, including how relevant records were kept.

[12] Victim A and Victim B say that they support the application made by the SSGT and wish to give evidence and to make submissions at the hearing of the preliminary issues.

Submissions for the Director

[13] The Director opposes the making of the proposed orders. Specifically, he submits determination of the preliminary issues will not determine liability and will not lead to any or any significant shortening of the balance of the hearing. The primary relevance of the identified issues is in relation to remedies, not liability.

[14] The Director submits that the proposed issues are not "preliminary" and will not be determinative of liability:

[14.1] As to Principle 11, the factual basis for the claim is that the SSGT published personal information in circumstances where it had no reasonable grounds for believing that it was sourced from a publicly available publication. In fact the personal information had been unlawfully obtained from the police computer in a form that was not publicly available. Whether or not there was a relevant suppression order in place at the time of publication is immaterial to the question of liability.

[14.2] As to Principle 8, the existence or otherwise of a relevant suppression order is similarly immaterial to the question of liability. Under Principle 8 the

issue is whether adequate steps were taken to ensure the information was accurate and complete (including adequately checking whether name suppression applied to the aggrieved individual). If the Tribunal decides that there was an interference with privacy it will need to consider whether, as one of the remedies to be granted, there should be an order prohibiting the SSGT from publishing the information in question. At that point the question whether there is an existing suppression order in place would need to be considered. The Tribunal's decision on these matters will be relevant to remedies, rather than liability.

[14.3] Accordingly the issues proposed as "preliminary issues" are not in fact preliminary but are issues subsequent to the question of liability.

[15] As to the claim that determination of the preliminary issues would save time, the Director submits:

[15.1] There would be no saving because all four of the Director's witnesses will be giving evidence in any event and the two Victims will also be giving evidence.

[15.2] The non-publication issue is connected to remedies. It would be inefficient to require witnesses to attend to deal with the non-publication issues and then attend again at another hearing.

[15.3] The two weeks allocated for the hearing is a conservative time estimate and the Director is of the view that the case may well be completed within five days.

[16] As to the request for an order that the Registrar of the District Court file an affidavit, the Director submits:

[16.1] There is no need for such order. If the SSGT has a different view then it is entitled to call the Registrar to give evidence in the usual way and may seek leave to serve a subpoena if necessary.

[16.2] The documentary records on the District Court file now included in the common bundle of documents speak for themselves and do not need a witness to explain them. There is no dispute that interim orders for name suppression were made and that they continued at least until the aggrieved individual was sentenced.

[16.3] The only factual matter not known (because the sentencing judgment has been lost) is whether an express final order for suppression was made. The Registrar cannot give evidence as to whether or not such final order was made. Neither can the Registrar speculate. The best anyone can do is to draw inferences from the court file, the contemporaneous newspaper articles and the oral evidence of the witnesses who were in court on the day of the sentencing as to their recollection of what occurred.

[16.4] It follows that the Registrar cannot add any admissible evidence to assist the Tribunal.

The reply submissions by SSGT

[17] The reply submissions for the SSGT challenge the Director's position that the existence of a suppression order is immaterial to the question of liability. It is submitted

for the SSGT that the Director "appears to ignore" the statutory test for establishing whether an action amounts to an interference with privacy under s 66(1) of the Act. It is further submitted that while the original information supplied to the SSGT was from a confidential source, the information itself was a matter of public record so that whatever steps the Director claims the SSGT ought to have taken before publishing the aggrieved person's criminal history, those steps would have led to the same outcome in the absence of a relevant suppression order. The SSGT therefore presses the submission that the issue of name suppression is wholly determinative of liability for the alleged breaches of Principles 8 and 11. That is, if there was nothing prohibiting publication of the criminal history, the aggrieved person's position is the same with or without the alleged breaches. Consequently, there could have been no interference with his privacy under s 66(1). As to Principle 6, causation would still be relevant to the nature of any relief sought.

[18] In respect of the order sought against the Registrar of the Christchurch District Court, it is said that evidence from the Registrar would "usefully cast light" on the recording practices of the Court at the relevant time and help establish the purpose and significance of the records to be produced before the Tribunal. This, in turn, would assist the Tribunal to draw appropriate inferences from all the evidence. However, if the Tribunal does not make the order sought, the SSGT will itself call an appropriate official.

DISCUSSION – WHETHER SPLIT TRIALS

Jurisdiction to make the orders sought

[19] There has been no challenge to the jurisdiction of the Tribunal to make the orders sought by SSGT.

[20] This was appropriate. Jurisdiction exists by reason of the following:

> **[20.1]** While the Privacy Act does not confer power to make interlocutory orders of the kind sought, Part 4 of the Human Rights Act 1993 (HRA) applies (with such modifications as are necessary) by virtue of s 89 of the Privacy Act.
>
> **[20.2]** Section 105 of the HRA requires the Tribunal (inter alia) to act according to the substantial merits of the case, without regard to technicalities and to exercise its powers and functions in a manner that is fair and reasonable. Section 104(5) allows the Tribunal to regulate its procedure as it thinks fit.
>
> **[20.3]** Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 empowers the Chairperson, subject to decisions of the Tribunal, to give directions necessary for the proceedings to be dealt with fairly, efficiently, simply, and speedily as is consistent with justice:
>
> > **16 Conduct of proceedings: power to give directions, etc**
> >
> > (1) Subject to decisions of the Tribunal, the Chairperson may give any directions and do any other things—
> > (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
> > (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 1993 or the Health and Disability Commissioner Act 1994, or with these regulations.

[21] Reading these provisions together we are of the view that the Tribunal can order split hearings that is, questions can be determined separately if the circumstances of the particular case so require.

[22] As to the criteria to be applied, we propose being guided by the High Court Rules, r 10.15. Indeed, both SSGT and the Director relied on case law under r 10.15 (or its predecessor). Such guidance, however, must be consistent with the performance by the Tribunal of its duties under s 105 of the HRA.

High Court Rules, r 10.15 – guidance

[23] High Court Rules, r 10.15 provides:

> **10.15 Orders for decision**
>
> The court may, whether or not the decision will dispose of the proceeding, make orders for—
> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[24] For the purpose of determining the present application we have drawn on the following principles established under r 10.15 as set out and discussed in *McGechan on Procedure* at [HC10.15.01] to [HC10.15.07] and [HR10.15.01] to [HR10.15.09].

[25] Those principles, in summary are:

[25.1] The underlying purpose of the rule is to expedite proceedings by limiting or defining the scope of the trial in advance or obviating the need for a trial altogether. See *Innes v Ewing* (1986) 4 PRNZ 10 at 18. Under High Court Rules, r 10.15 it is not necessary that the decision on the separate question will dispose of the proceeding.

[25.2] The jurisdiction is discretionary. The cases are replete with warnings about a "short-cut" often turning into a longer route: *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd (No. 2)* HC Auckland CL 5/94, 18 July 1995 at 7 (Barker J). In *Tilling v Whiteman* [1980] AC 1 at 25 Lord Scarman said:

> Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety, and expense.

[25.3] The starting point is the assumption that all matters in issue are to be determined in one trial because that would normally be the most expeditious and efficient manner for dealing with a proceeding: *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1998) 12 PRNZ 333 at 334-335 and *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [9]-[10]. The importance of finality in litigation was also emphasised in *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568 (CA) at 581.

[25.4] Consequently the burden of displacing the presumption rests on the party seeking split trials. This burden has been described as "heavy" or "not insignificant". See *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* at 335, *KPMG New Zealand v Gemmell* HC Auckland CIV-2008-404-4288, 27 March 2009 at [20] and *Turners & Growers Ltd v Zespri Group Ltd* at [10]. In *Karam v Fairfax NZ Ltd* [2012] NZHC 887 at [58] Associate Judge Osborne observed that an appropriate approach is to consider whether the

applicant has established good, preponderant reasons in favour of a separate question determination.

[25.5] The procedure is not appropriate where the questions concerned are required to be considered in the context of all the evidence: *Innes v Ewing* at 20-22 and *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 15 PRNZ 361 (CA) at [26]-[27]. Nor is it appropriate where it would effectively require a "mini-trial" before the main trial: *Talyancich v Cole* (1999) 14 PRNZ 195 at [22]-[23].

[25.6] Because the consequences of deciding a question separately are not always predictable, it is important to be able to show clear benefits when persuading a court or tribunal to follow this course. The prevailing assumption tends to be in favour of resolving everything together: Beck *Principles of Civil Procedure* (3rd ed, Thomson Reuters, 2012) at [11.5.1].

[25.7] Considerations relevant to the exercise of the discretion will vary with the facts of each case.

[26] In *McGechan on Procedure* at [HR10.15.06] the following are suggested to be the main criteria that have been taken into account in deciding whether to exercise the discretion to order a split trial:

[26.1] The likelihood of delay in finally resolving the proceeding.

[26.2] The probable length of the hearings if there is a split trial.

[26.3] Whether a decision one way or the other on the separate question(s) would end the litigation.

[26.4] The impact on the length of any subsequent hearing.

[26.5] A balancing of the advantages to the parties and the public interest in shortening litigation against any disadvantages asserted by parties opposing a split trial.

[26.6] Demarcation difficulties in defining issues to be addressed at the first trial, and those left for the second.

[26.7] Resulting difficulties of issue estoppel.

[26.8] Inadvertent disqualification of a Judge who has expressed views at the first trial on matters for decision at the second trial.

[26.9] Inadvertent findings at the first trial upon matters that are for full evidence and argument at the second hearing.

[26.10] The need to recall some witnesses at the second hearing.

[26.11] The duplication of time involved in the Court and counsel "coming up to speed" again for the second hearing.

[26.12] The prospect of multiple appeals.

[26.13] The need for a second round of discovery or other interlocutories and amended pleadings following the first trial.

[26.14] Rostering difficulties in ensuring that the same Judge is available for the second hearing.

[27] Not all of these criteria have application to the present case.

Application of relevant principles to the particular circumstances of the present case

[28] In our view the two issues of central importance are:

[28.1] Whether a split hearing will expedite the proceedings and significantly reduce the stress, time and cost for all parties.

[28.2] Whether a decision one way or the other on the proposed separate questions will, as submitted by SSGT, "finally resolve" the proceeding or "crystalise" the remaining issues.

Whether saving of time

[29] The parties are at polar opposites as to both the facts and the law. Whether the person aggrieved received name suppression in one form or another will be a strongly contested issue whether in the context of a split hearing or in the context of a single hearing. The Director will be calling the same four witnesses to give evidence irrespective of any ruling on the present application. In addition there will be the evidence of the Registrar of the District Court at Christchurch (SSGT will call the Registrar if the Tribunal declines to direct the Registrar to file an affidavit). The two Victims have stated that they wish to give (unspecified) evidence at any preliminary hearing.

[30] In our view it is clear that there will be little or no saving of time as far as the taking of evidence is concerned. The two day estimate given by the SSGT is, in the circumstances, unrealistic. As best we can estimate, the evidence to be received at the proposed split hearing is likely to occupy between one and 1.5 days. In this time the Tribunal will have to determine the admissibility objections previously signalled by the Director.

[31] The hearing of the legal submissions is similarly likely to be a lengthy exercise. At the proposed split hearing the SSGT will submit, inter alia, that:

[31.1] The Director has misunderstood the statutory test for establishing whether an action amounts to an interference with privacy under s 66(1) of the Act.

[31.2] While the original information supplied to SSGT was from a confidential source, the information itself was a matter of public record so that whatever steps the Director claims the SSGT ought to have taken before publishing the criminal history of the aggrieved person, those steps would have led to the same outcome in the absence of a relevant suppression order.

[32] Neither proposition is self-evidently correct. In our view neither can be satisfactorily addressed without hearing all the evidence the parties and the Victims wish to place before the Tribunal. In addition the argument is likely to be detailed. For these additional reasons the two day time estimate is unrealistic.

[33] In our view a split hearing would require between three to four days. As against this the Director estimates a single hearing will require approximately five days, observing that the two week fixture is a conservative time estimate.

[34] We would agree with the Director's description of the time estimate. Two weeks have been allocated to ensure that once the hearing commences, it reaches a finite conclusion. This will spare the parties the inconvenience and potential unfairness of a part heard hearing.

[35] Overall, we see no appreciable saving in time by acceding to the SSGT request.

Whether liability will be determined

[36] We are conscious that on this application it is neither possible nor appropriate for us to determine the correctness of the submissions intended to be advanced by the SSGT as to the requirements of s 66(1) of the Privacy Act and as to whether the issue of name suppression will wholly determine liability.

[37] What we can say is that there is merit in the Director's submission that the way he will present his case on Principles 6, 8 and 11 will make immaterial to liability the question whether a relevant suppression order was in place. In his submission, the suppression order is relevant primarily, if not exclusively, to the issue of remedies.

[38] Returning to principle, the starting point is that all matters in issue should be determined in a single substantive trial as this is normally the most expeditious and efficient manner for dealing with the proceeding. The SSGT has not established good, preponderant reasons for a split hearing. This is not a case where taking a shortcut can be risked. Indeed, if the Director turns out to be correct, the Tribunal may well end up determining remedy issues before determining liability.

[39] Because the consequences of deciding the proposed questions separately cannot be predicted with any safety and because no clear benefits can be demonstrated, the SSGT has fallen well short of discharging its burden.

[40] In these circumstances the application for split hearings is dismissed.

DISCUSSION – WHETHER REGISTRAR TO BE ORDERED TO FILE AN AFFIDAVIT

[41] It would be inappropriate in principle for the Tribunal to make an order requiring the Registrar to file an affidavit. While s 106 of the HRA gives the Tribunal power to call for evidence from the parties or from "any other person" and to require a person to attend the proceedings to give evidence (a witness summons can be issued under s 109), the application by the SSGT would require the Tribunal itself to interview the witness, to draft the affidavit and to secure the attendance of the witness at the hearing. This would go well beyond the Tribunal's function and imperil its necessary neutrality and independence. The Tribunal's powers could not have been intended to be exercised in such circumstances.

[42] Beyond this lies the fact that it would be unusual, to say the least, for the Tribunal to order that a witness file an affidavit on the terms sought by the SSGT (that the parties agree the areas to be covered and all parties to have the right to cross-examine). The drafting process itself would be surrounded by uncertainty as to how the parties are to agree on the areas to be covered, what is to happen in the event of disagreement, how the Tribunal is to draft the document and the consequences of the witness being seen as the Tribunal's witness.

[43] Beyond these objections there is considerable force to the Director's submission that the Registrar cannot give evidence as to whether or not an express final order for suppression was made. Neither can the Registrar speculate on whether such an order may or may not have been made based on what appears from the file. It is for the Tribunal to draw inferences from the court file, the contemporaneous newspaper articles and the oral evidence of the witnesses as to what occurred.

[44] It has not been shown that the Registrar can add any admissible evidence to assist the Tribunal.

[45] The application for an order directing the Registrar to file an affidavit is accordingly dismissed.

CONCLUSION

[46] For the foregoing reasons the Tribunal declines to make the orders sought by the SSGT in the application dated 28 March 2014. The application is dismissed.

.....	.....	.....
Mr RPG Haines QC	**Ms GJ Goodwin**	**Ms K Anderson**
Chairperson	**Member**	**Member**