(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 25**

	Reference No. HRRT 006/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**THE SENSIBLE SENTENCING GROUP TRUST**
	FIRST DEFENDANT
AND	**THE SENSIBLE SENTENCING TRUST**
	SECOND 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 first and second defendants
Victim A and Victim B in person

DATE OF SUBMISSIONS: 26 May 2014, 28 May 2014

DATE OF DECISION: 13 June 2014

DECISION OF TRIBUNAL ON APPLICATION BY DEFENDANT FOR CHANGE OF VENUE AND OTHER MATTERS

Background

[1] By memorandum dated 26 May 2014 Ms Pender has made three applications:

> **[1.1]** That the Sensible Sentencing Group Trust (SSGT) be removed as a defendant and replaced by the Sensible Sentencing Trust (SST).
>
> **[1.2]** That the venue for the hearing of these proceedings be transferred from Auckland to Wellington.
>
> **[1.3]** That the length of the time allocated for the hearing be shortened from ten days to five days.

[2] By memorandum dated 28 May 2014 Mr Judd submits on behalf of the Director that:

> **[2.1]** Both the SSGT and the SST should be defendants in these proceedings.
>
> **[2.2]** That the venue remain Auckland.
>
> **[2.3]** That ten days continue to be set aside for the hearing.

Whether SSGT correct defendant

[3] Ms Pender advises that there are two relevant incorporated societies: The SSGT and the SST. Both organisations are not-for-profit, depending almost entirely on volunteers and are funded by donations. The SSGT undertakes purely charitable work. It was the only entity at the time these proceedings were filed. The SST, on the other hand, undertakes both charitable and advocacy work, including the administration of the offender databases. The SST does not take any technical point over this issue but to avoid confusion asks that it be substituted as the defendant.

[4] Mr Judd draws attention to the fact that at the hearing of the interim order application on 17 April 2013 then counsel for the SSGT, Mr D Garrett advised that both organisations would regard themselves bound by the decisions of the Tribunal. Furthermore, if it is the case that the entity which published the information in question in 2009 was the SSGT but that the SST is now responsible for managing the relevant databases, then it is appropriate that both entities be defendants. Particularly, the SSGT needs to remain a defendant because the causes of action relate to things done in 2009. If the SST has now taken over managing the databases, then any remedy of an injunctive nature would need to apply to the SST. However, provided counsel for the SSGT is still willing to undertake that both the SSGT and the SST will be bound by whatever orders are made, the Director does not take a strong position on the name of the defendant used in the intituling.

Correct defendant – discussion

[5] The Chairperson can confirm that at the hearing of the interim order application on 17 April 2013 Mr Garrett was asked whether it was accepted that the SSGT was the correct defendant. The Chairperson understood that Mr Garrett responded that while there were two incorporated societies, being the SSGT and the SST, both were content to have the "current intitulement" and that the undertakings given applied to both.

[6] In our view the determinative point is that if the SSGT published the information in question but the SST is now responsible for managing the relevant databases, then it is appropriate that both entities be cited as defendants, particularly given that from the outset the case has been conducted by both entities on the basis that their separate

identities are not material to the issues to be determined by the Tribunal. While the Director has suggested that the matter be resolved by way of an undertaking by counsel (that both the SSGT and the SST will be bound by whatever orders are made), it is inherently unsatisfactory that the case be determined on that basis. It is better that both entities be formal parties to the proceedings. Offered an opportunity to make submissions on the joinder of SST Ms Pender has not responded. This is not surprising given the terms of her memorandum dated 26 May 2014 at [1].

[7] In these circumstances we direct that the Sensible Sentencing Trust be added to the proceedings as the second defendant.

The application for change of venue

[8] Ms Pender submits that while it has been directed that these proceedings be heard at Auckland, that direction must be seen in light of the fact that previous counsel, Mr D Garrett, is Auckland-based but Ms Pender, who has taken over conduct of the case, is Wellington-based.

[9] Reference is made to "the usual rule", namely that a plaintiff is normally required to file proceedings in the court nearest to the residence or principal place of business of the defendant. Here, the defendants' offices are in Napier but they would prefer that the venue be closer to Ms Pender to conserve costs bearing in mind their not-for-profit status and limited funds. On the other hand, the plaintiff is said to be "a Crown agent".

[10] It is further submitted that the balance of convenience favours Wellington as the appropriate venue in that while the Director and his counsel are based in Auckland, the Privacy Commissioner is based in Wellington. The complainant is based in Taupo. The Director's witnesses are based in Wellington, Taupo and Western Australia, so there is no advantage for them in an Auckland hearing. The witnesses for the SSGT are based in Napier, Wellington and Christchurch and only one resides in Auckland. Again, there is no advantage for the defendant's witnesses in having the matter heard at Auckland.

[11] Ms Pender further advises that it is understood that the Victims, who are based in Christchurch, consent to a hearing being held in Wellington instead of Auckland.

[12] For the Director the following submissions are made:

> **[12.1]** From the outset the SSGT has consented to Auckland as the venue. All that has changed is that the defendant now has Wellington instead of Auckland counsel. That choice was made by the SSGT knowing the venue is Auckland. Ms Pender accepted the brief in full knowledge that the hearing was to be in Auckland.
>
> **[12.2]** Although the Director is a statutory officer, he has limited resources and is based in Auckland. The Privacy Commissioner has offices in both Wellington and Auckland but more importantly, he has no role in the proceedings.
>
> **[12.3]** The location of the witnesses for the parties is neutral.
>
> **[12.4]** A change of venue will jeopardise the fixture. Such de facto adjournment cannot be justified simply because the defendants have elected to change to Wellington counsel.

Change of venue – discussion

[13] The Secretariat of the Tribunal is provided by the Tribunals Division of the Ministry of Justice. Regulations 5 and 15 of the Human Rights Review Tribunal Regulations 2002 require all proceedings and subsequent documents to be filed with the Tribunals Division, Ministry of Justice, Wellington. The Tribunal, however, does not sit in Wellington as a matter of course. Its practice is to allocate a venue agreed on by the parties or if there is no agreement, at a venue determined by the interests of justice and by the Tribunal's responsibilities under ss 104(1) and 105(2) of the Human Rights Act 1993.

[14] In the present case, from the outset the SSGT, through Mr Garrett, consented to the proceedings being heard in Auckland. The first *Minute* issued on 10 April 2013 following a teleconference convened on that date recorded at [16.8] that the proceedings were to be heard at Auckland. That direction was repeated in the *Minutes* issued on 10 May 2013 and on 12 July 2013. Furthermore, the decision of the Tribunal given on 19 August 2013 (in which it made an order pursuant to s 108 of the Act allowing the two Victims to appear before the Tribunal and to make submissions and to call evidence) specifically stipulated that the proceedings be heard at Auckland. The Victims were joined on that basis. The *Minute* issued on 11 December 2013 again stipulated Auckland as the venue.

[15] By the time the Tribunal was given notice on 23 December 2013 that counsel would change from Mr Garrett to Ms Pender, the Tribunal had made it clear over a period of nine months that Auckland was the agreed venue. The change of venue application now comes five months later.

[16] In our view the SSGT has for too long both consented to and acquiesced in Auckland as the venue. It is now too late to make the submission that because it has chosen to instruct Wellington counsel, the venue should be moved to that city. Just as there is no advantage to the witnesses for the SSGT in having the matter heard in Auckland, no advantage has been identified in having the hearing in Wellington apart from counsel's convenience and an unspecified saving in cost. In this regard the Director also has limited funds and must be frugal in the deployment of moneys provided by the taxpayer. As far as the Victims are concerned, they are both based in Christchurch and the Tribunal's attention has not been drawn to any good reason why it would be more of a dislocation for them to travel to Auckland for the hearing than Wellington.

[17] The three members of the Tribunal who will hear this case are all Auckland-based and have already engaged in one or more of the interlocutory decisions delivered since the Chairperson's interim order decision. The prospect of having to appoint a new Wellington-based panel is not one the Tribunal would welcome. More particularly, however, the Tribunal wishes to avoid the risk of the fixture being lost because of a change of venue.

[18] In these circumstances the application that the venue be changed to Wellington is declined.

Reduction of the time allocated for the hearing

[19] Ms Pender asks that "the length of the hearing be confirmed as five days, rather than ten days". It would appear that the argument is that if ten days are allocated rather than five, the hearing will run for ten days instead of five.

[20] For the Director it is submitted that the parties should not take the risk of running out of time and should welcome the fact that the time allocated by the Tribunal will ensure that this end is achieved.

[21] In our view account must be taken of the fact that four parties will take part in the hearing, two of those parties being litigants in person. It was apparent at the hearing of the interim order application that these proceedings will be strongly contested. This impression is confirmed by the witness statements which have been filed by the parties. There is good reason for allocating sufficient time to ensure that whatever contingencies arise during the trial, the hearing will be completed in one sitting. As far as the parties are concerned this will ensure the efficient allocation of resources and avoid the unfairness and cost which inevitably accompany a part-heard hearing, particularly one in which credibility will be an issue and potentially difficult issues of law argued. If there is a perceived danger of the hearing expanding into the time allocated, the remedy lies in the hands of the parties and their witnesses.

[22] It is difficult to see why time allocation has again been raised after the Tribunal in its very recent decision given on 23 April 2014 in *Director of Proceedings v Sensible Sentencing Group Trust (Application for Split Hearing)* [2014] NZHRRT 21 (23 May 2014) at [29] to [35] gave the reasons for the conservative time allocation. The needless reopening of the issue thereby causing the Director to file submissions and the Tribunal to issue a further decision is an unwelcome diversion of time.

Conclusion

[23] For the foregoing reasons the Tribunal:

> **[23.1]** Orders that the Sensible Sentencing Trust be joined as a second defendant.
>
> **[23.2]** Dismisses the application for change of venue from Auckland to Wellington.
>
> **[23.3]** Dismisses the application that the ten days allocated for the hearing of these proceedings be shortened to five days.

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