IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 10**

	Reference No. HRRT 025/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**ARTHUR WILLIAM TAYLOR**
	PLAINTIFF
AND	**CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr AW Taylor in person
Ms V Casey for defendant

DATE OF ADMISSIBILITY HEARING: **9 March 2016**

DATE OF DECISION: **11 March 2016**

DECISION OF TRIBUNAL ON THE ADMISSIBILITY OF THE PROPOSED EVIDENCE OF BRIAN HUNTER[1]

Introduction

[1] At the conclusion of the oral admissibility hearing held on Wednesday 9 March 2016 in advance of the substantive hearing to commence on Monday 14 March 2016, the Tribunal upheld the submission by the Chief Executive, Department of Corrections (Corrections) that the proposed evidence of Mr Brian Hunter should not be admitted. See the *Minute* of the Tribunal issued on the afternoon of 9 March 2016. Our reasons for that decision now follow. Excluded from this ruling are those paragraphs to which

[1] [This decision is to be cited as: *Taylor v Corrections (Admissibility of Evidence)* [2016] NZHRRT 10]

objection is not taken by Corrections, being paras 14, 15, 42 and 43 (and the exhibits referred to, but not the text that appears in between the two paragraphs) and para 45. It is implicit paras 1, 2 and 3 are excepted as well.

Background – the pleadings

[2] Because issues of admissibility are determined by the pleadings it is necessary at the outset to briefly record the parties' respective cases as set out in their statement of claim and statement of reply.

[3] Mr Taylor's case is that on 5 September 2014 he made a request that Corrections provide access to certain personal information held by Corrections about him. He alleges that when the information was so provided it was deficient in two broad respects:

> **[3.1]** Email correspondence to and from Corrections staff about Mr Taylor had been redacted by removing the name, position description and contact details of those staff members.
>
> **[3.2]** Some information had been obscured by the addition of a watermark which read "Released Under the Privacy Act 1993".

[4] In its statement of reply Corrections has responded:

> **[4.1]** The withheld information is not personal information about Mr Taylor and is therefore not disclosable under information privacy principle 6.
>
> **[4.2]** In the alternative, the information has been properly withheld under s 29(1)(a) of the Act (unwarranted disclosure of the affairs of another), s 29(1)(e) (likely to prejudice the safe custody or rehabilitation of the individual) and s 29(1)(j) (request frivolous or vexatious or the information requested is trivial).
>
> **[4.3]** The obscuring of information by the watermark was inadvertent. The obscured information was re-provided to Mr Taylor on 9 March 2015 with an apology.

Case management steps regarding the filing of evidence

[5] Following a teleconference held on 19 August 2015, the Chairperson issued a *Minute* of that date requiring (inter alia) Mr Taylor to file his statements of evidence by 2 October 2015. A single statement (for Mr Taylor himself) was not filed until 15 October 2015, some two weeks out of time. The timetable provided for Corrections to file its evidence by 13 November 2015 but owing to the late filing by Mr Taylor of his statement, the statement by Mr VP Arbuckle (presently the only witness for Corrections) was not filed until 27 November 2015, similarly two weeks beyond the scheduled date. A further copy of Mr Arbuckle's statement was filed on 10 December 2015. It is identical in every respect to the original 27 November 2015 version except that cross-references have been given to the Common Bundle of Documents. Mr Taylor's reply evidence was due on 27 November 2015. Allowing for a commensurate two week expansion of the timetable, the filing date was 11 December 2015.

[6] On 16 February 2016 Ms Casey expressed concern no witness statement by Mr Brian Hunter had been filed even though such filing had earlier been foreshadowed by Mr Taylor.

[7] On 19 February 2016 Mr Taylor filed a witness statement by Mr Brian Hunter.

The procedure for dealing with the admissibility challenge

[8] At a teleconference convened by the Chairperson on 26 February 2016 Ms Casey made three points:

> **[8.1]** The statement was filed out of time.
>
> **[8.2]** Much of Mr Hunter's evidence is not relevant or admissible even allowing for the relaxed evidentiary standards which apply in proceedings before the Tribunal. It is accepted there are some paragraphs in the statement which are properly in reply, being paras 14, 15, 42, 43 (not including the underneath starred and unnumbered paragraph) and para 45. Admitting the balance of the evidence would (inter alia) needlessly prolong the hearing.
>
> **[8.3]** If Mr Hunter's statement were to be admitted Corrections would require time to answer the broad, wide-ranging and largely unparticularised allegations made by him. The 14 March 2016 fixture would have to be vacated.

[9] Following discussion it was agreed Corrections would file written submissions setting out in succinct terms the case in support of the admissibility challenge. This was to be followed by submissions by Mr Taylor. A teleconference was scheduled for 9am on 9 March 2016 for the hearing of argument. The accelerated timetable was made necessary by the fact that the fixture date for 14 and 15 March 2016 was imminent and the parties needed to know whether the evidence was to be admitted.

[10] As earlier noted the hearing took place as scheduled on 9 March 2016. All three members of the Tribunal participated in the hearing. Later in the day a *Minute* was issued to the effect that, for reasons to be given at a later date, Mr Hunter's intended evidence would not be admitted except for those specific paragraphs to which Corrections had not taken objection.

[11] In now explaining our reasons for the decision it is first necessary to set out the Tribunal's approach to evidence in proceedings before it.

EVIDENCE IN PROCEEDINGS BEFORE THE TRIBUNAL

[12] The Privacy Act does not itself address the reception of evidence in proceedings before the Tribunal. This is because s 89 of the Privacy Act stipulates that Part 4 of the Human Rights Act 1993 applies with such modifications as may be necessary. It is Part 4 which regulates the procedure of the Tribunal and the admission of evidence by it.

[13] By virtue of s 106 of the Human Rights Act the Tribunal has a broad discretion to receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law. Subject to this discretion the Evidence Act 2006 applies to the Tribunal "in the same manner as if the Tribunal were a court within the meaning of that Act":

> **106 Evidence in proceedings before Tribunal**
>
> (1) The Tribunal may—
> (a) call for evidence and information from the parties or any other person:
> (b) request or require the parties or any other person to attend the proceedings to give evidence:
> (c) fully examine any witness:

(d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.

(2) The Tribunal may take evidence on oath, and for that purpose any member or officer of the Tribunal may administer an oath.

(3) The Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Tribunal thinks fit, verifying it by oath.

(4) Subject to subsections (1) to (3), the Evidence Act 2006 shall apply to the Tribunal in the same manner as if the Tribunal were a court within the meaning of that Act.

[14] In the case of inconsistency between the provisions of the Evidence Act and the Human Rights Act, the provisions of the Human Rights Act prevail. See the Evidence Act, s 5(1):

5 Application

(1) If there is an inconsistency between the provisions of this Act and any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise.

[15] In *DML v Montgomery* [2014] NZHRRT 6 (12 February 2014) two important statements were made by the Tribunal regarding these provisions:

[15.1] The Tribunal's discretion under s 106(1)(d) of the Human Rights Act to receive otherwise inadmissible evidence is a wide one and it is not appropriate to lay down any prescriptive rule for the exercise of that discretion. This much is clear from the language of the provision which emphasises the case-specific context in which the exercise of the power arises:

> **[50]** The Tribunal's discretion under s 106(1)(d) of the HRA to receive otherwise inadmissible evidence is a wide one and it is not appropriate to lay down any prescriptive rule for the exercise of that discretion. This much is clear from the language of the provision which emphasises the case-specific context in which the exercise of the power arises. The issue is whether the challenged evidence will assist the Tribunal to deal effectively with the matter before it. It must also be borne in mind that the stated purpose of the HRA, as found in the Long Title, is to provide better protection of human rights in New Zealand. That purpose must not be overlooked when assessing whether the evidence will assist the Tribunal to deal effectively with the matter before it. As both this provision and the judgment in *Carlyon Holdings Ltd v Proceedings Commissioner* at 533 recognise, a technical approach by the Tribunal to evidentiary matters is inappropriate.

[15.2] Section 106(1)(d) of the Human Rights Act is not a secondary or fall-back provision which comes into play only if the challenged evidence is inadmissible under the Evidence Act. Rather it is the primary provision under which admissibility decisions are made:

> **[51]** The Family Court cases provide no assistance as the statutory language in s 106 of the HRA is different, as is the statutory context. Section 106(1)(d) of the HRA is not a secondary or fall-back provision which comes into play only if the challenged evidence is inadmissible under the Evidence Act 2006. Rather it is the primary provision under which admissibility decisions are made. This is clear from s 106(4) which stipulates that the Evidence Act applies to the Tribunal "subject to" s 106(1) of the HRA. In turn s 5(1) of the Evidence Act states that if there is any inconsistency between the provisions of that Act and any other enactment the provisions of that other enactment, prevail unless the Evidence Act provides otherwise.

[16] These statements of principle are consistent with the Tribunal's duty under s 105 of the Human Rights Act to (inter alia) act according to the substantial merits of the case, without regard to technicalities:

105 Substantial merits

(1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
(2) In exercising its powers and functions, the Tribunal must act—
  (a) in accordance with the principles of natural justice; and
  (b) in a manner that is fair and reasonable; and
  (c) according to equity and good conscience.

[17] It would be a mistake to assume, however, that there will seldom be occasion for the Tribunal to apply the provisions of the Evidence Act. Everything depends on the context of the particular case and it is necessary for an "any evidence" tribunal such as this Tribunal to keep in mind the two fundamental principles which, in general terms, govern the admissibility of evidence in civil and criminal proceedings:

[17.1] Subject to exceptions which are not presently relevant, all relevant evidence is admissible. Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding. Conversely, evidence that is not relevant is not admissible in a proceeding. See s 7:

7 Fundamental principle that relevant evidence admissible

(1) All relevant evidence is admissible in a proceeding except evidence that is—
  (a) inadmissible under this Act or any other Act; or
  (b) excluded under this Act or any other Act.
(2) Evidence that is not relevant is not admissible in a proceeding.
(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[17.2] Evidence must be excluded if its probative value is outweighed by the risk that the evidence will either have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. See s 8:

8 General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
  (a) have an unfairly prejudicial effect on the proceeding; or
  (b) needlessly prolong the proceeding.
(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[18] Against this background we turn to those parts of Mr Hunter's intended evidence to which objection is made. Given the time constraints in delivering this decision we do not intend addressing each and every paragraph in detail.

THE INTENDED EVIDENCE OF BRIAN HUNTER

Overview of the admissibility challenge by Corrections

[19] The essence of the objection by Corrections is that Mr Hunter's evidence is not relevant to the matters at issue in the proceeding and is therefore inadmissible in terms of s 7(2) of the Evidence Act. Apart from the few paragraphs which are not challenged, the proposed statement of evidence comprises a mix of argument and legal submission, and both general and very specific complaints and allegations of serious misconduct by Corrections staff and management covering a wide range of subject matter and context. None of these complaints and allegations relate to the alleged contravention of the Privacy Act by Corrections in response to Mr Taylor's request of 5 September 2014, which is the subject of this proceeding. Similarly, with the exception of the mentioned

paragraphs, none of them are directly responsive to Mr Arbuckle's evidence. The evidence is put forward in support of an allegation that Mr Arbuckle's evidence is deliberately untruthful, by showing that all (or perhaps a majority) of Corrections' staff and management lack integrity and are dishonest. These allegations are scandalous and without foundation.

[20] Our findings follow.

Paras 1 to 3

[21] Mr Hunter says he is an Information Technology Consultant working throughout New Zealand. For the past 15 years he has been involved with support and advocacy for inmates, mental health patients and WINZ clients. The purpose of his statement is to set out his response to various matters addressed by Mr V Arbuckle, Deputy Chief Executive, Corporate Services, Department of Corrections.

[22] We observe Mr Hunter does not seek to qualify himself as an expert on the subject matter of his statement.

Para 4

[23] Mr Hunter regularly makes requests under both the Official Information Act 1982 and the Privacy Act to the Department of Corrections either personally or on behalf of inmates. He alleges Corrections redact anything which might identify staff and further alleges that when challenged over the redactions, Corrections provides "no legitimate response". In addition Corrections allegedly fails to comply with the time limits for responding to requests for access to personal information. It plays the system by unjustifiably extending the 20 working day provision.

[24] In our view little assistance is to be gained from the unparticularised assertions made by Mr Hunter. Whether redactions were properly made in the unspecified cases to which he refers will not assist in determining whether the redactions made in the present case were properly made. In relation to those redactions, the Tribunal has the documents in both open and closed form and can make its own assessment.

Paras 5 to 10

[25] It is alleged the person in Corrections with whom Mr Hunter deals over requests for access to personal information provides responses that "bear no resemblance to the truth and contain blatant lies" it is said all letters received by Mr Hunter from this person have "an element of prevarication".

[26] Corrections responds the allegations are serious in nature and if the evidence is admitted there will need to be an investigation of the claims and evidence in reply filed. This will involve real delay and expense. The hearing itself would be prolonged by an inquiry into the competing accounts.

[27] We are of the view ss 7 and 8 of the Evidence Act assist. First, in terms of s 7, the evidence does not tend to prove or disprove anything of consequence to the determination whether the information withheld from Mr Taylor was personal information and if it was, whether Corrections can rely on one or other of the relevant withholding grounds. Mr Hunter's evidence has no relevance to the issues identified in the pleadings. The evidence not being relevant it is not admissible. Similarly, s 8 is a reminder of the principle that even if, contrary to our view, there is some probative value to the evidence, admission will have an unfairly prejudicial effect on the proceeding and

will needlessly prolong the proceeding. In short, we do not accept the evidence will assist us to deal effectively with the matter before us.

Para 11

[28] Reference is made in this paragraph to personal information requested by Mr Hunter in the context of civil litigation which at an (unspecified) time he had in contemplation against Corrections. That litigation is apparently still ongoing. Mr Hunter alleges Corrections staff were shown in those proceedings to have provided "knowingly dishonest" information to the Courts.

[29] Unsurprisingly, Corrections disputes this allegation and again says that if the evidence is admitted it will need to prepare evidence in response.

[30] We do not see how an investigation by the Tribunal into an allegation made in other (unspecified) proceedings will shed any light on the issues in Mr Taylor's case. For reasons similar to those given above, ss 7 and 8 of the Evidence Act require the tendered evidence to be excluded.

Paras 12, 13, 16 and 17

[31] In these paragraphs Mr Hunter repeats his belief that in his dealings with Corrections over disclosure issues the identity of Corrections staff has been improperly withheld.

[32] We cannot see how Mr Hunter's opinion in relation to documents the Tribunal has not seen and in relation to circumstances not before the Tribunal can assist determination of the question whether, in the circumstances of Mr Taylor's specific case, breaches of the Privacy Act have been established.

Paras 18 to 22

[33] Mr Hunter refers to Canadian and New Zealand case law which he believes supports the argument that the identity of Corrections staff should be disclosed where a request is made by a prisoner for access to personal information held by Corrections.

[34] Not being a lawyer or expert, Mr Hunter's evidence is inadmissible. Mr Taylor is not thereby prejudiced. The cases referred to by Mr Hunter can be cited by him (Mr Taylor) by way of submission.

Paras 23 to 24

[35] Mr Hunter alleges Corrections has a propensity to "cover up".

[36] This is an allegation so vague it is impossible for Corrections to sensibly respond. Corrections strongly denies the allegation and again submits that if the evidence is admitted, it will need time to file evidence in reply.

[37] We struggle to see how investigation of the allegation by Mr Hunter will be of assistance when we come to address the issues in the present case. This is another example of the need to exclude evidence that is not relevant to the proceeding (s 7 of the Evidence Act) and the need to exclude evidence where, even if the evidence can be shown to have some probative value, that value will be outweighed by its unfairly prejudicial effect on the proceedings and in addition, will needlessly prolong the proceeding.

Paras 25 to 37

[38] In these paragraphs Mr Hunter alleges improper conduct on the part of unnamed probation officers. The allegations are contested by Corrections.

[39] We do not see how, in the context of the present proceedings, we have jurisdiction to investigate the allegations. Furthermore, the outcome of any inquiry will hardly be helpful to the determination of the specific issues raised by the pleadings in this case. This is another circumstance in which ss 7 and 8 of the Evidence Act require the exclusion of the evidence.

Paras 38 to 41 and 44 to 54

[40] In these paragraphs Mr Hunter comments on the veracity of the evidence to be given by Mr Arbuckle and the weight to be given to Mr Arbuckle's evidence. Indeed it could be said that the entire brief of evidence by Mr Hunter has this purpose.

[41] For good reason s 37 of the Evidence Act stipulates that a party cannot offer evidence about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity:

> **37 Veracity rules**
>
> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
> (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
> (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
> (c) any previous inconsistent statements made by the person:
> (d) bias on the part of the person:
> (e) a motive on the part of the person to be untruthful.
> (4) A party who calls a witness—
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
> (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

[42] As to whether the proffered veracity evidence is "substantially helpful" we find that it is not:

[42.1] Apart from the few paragraphs to which Corrections does not take objection, the entire content of Mr Hunter's statement is based on his opinion concerning facts and circumstances which, with few exceptions, are described in the most general of terms, making investigation and challenge difficult.

[42.2] The statement contains frequent references to Mr Hunter's belief that Corrections is a corrupt organisation guilty of serious breaches of the law, if not criminality. Few, if any, of the opinions offered by Mr Hunter are expressed in objective terms.

[43] In these circumstances we find his evidence will not be substantially helpful. To the contrary, we believe that admission of his evidence will be substantially unhelpful in our determination of the pleaded issues.

Paras 55 to 60

[44] In these paragraphs there is a further allegation that an employee of Corrections acted unprofessionally.

[45] Again, whether the accusation has any truth to it is not an issue capable of exploration in the context of the present proceedings. The evidence will not assist us to deal effectively with Mr Taylor's case and ss 7 and 8 of the Evidence Act require the evidence to be excluded.

[46] As to those paragraphs in which Mr Hunter offers his opinions on Corrections and Mr Arbuckle, for the reasons given earlier, we do not find them of any help at all.

The remedy point

[47] An alternative argument advanced by Mr Taylor is that Mr Hunter's evidence goes primarily to remedy.

[48] Even were that to be the case, the same objections to admissibility apply.

The delay point raised by Corrections

[49] Given our findings there is no need to address the second objection raised by Corrections, namely that Mr Hunter's evidence was filed out of time.

DECISION

[50] The proposed evidence of Mr Brian Hunter is excluded. Not included in this ruling are those paragraphs to which objection is not taken by Corrections, being paras 14, 15, 42 and 43 (and the exhibits referred to, but not the text that appears in between the two paragraphs) and para 45. Also not included in this ruling are paras 1, 2 and 3.

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Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**