(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 **[2013] NZHRRT 14**

	Reference No. HRRT 006/2013
UNDER	**THE PRIVACY ACT 1993**
IN THE MATTER OF	**AN INTERIM ORDER APPLICATION UNDER S 95 OF THE HUMAN RIGHTS ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**THE SENSIBLE SENTENCING GROUP TRUST**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson

REPRESENTATION:
Mr SRG Judd for plaintiff
Mr DA Garrett for defendant

DATE OF HEARING: 17 April 2013

DATE OF DECISION: 22 April 2013

DECISION OF CHAIRPERSON ON APPLICATION FOR INTERIM ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE AGGRIEVED PERSON AND HIS PARTNER

Introduction

[1] These proceedings have been brought by the Director of Human Rights Proceedings (the Director) under s 82 of the Privacy Act 1993. The aggrieved individual the subject of the proceedings was in 1995 convicted of historic indecent assaults and indecent acts upon two girls that 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 Sensible Sentencing Group Trust (SSGT) has published the aggrieved person's name on its website along with details of his convictions. 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.

[2] At a teleconference convened on 10 April 2013 the parties agreed to a timetable which, if adhered to, will ensure that the case will be ready to be set down some time after mid-July 2013. See the *Minute* issued on 10 April 2013.

The grounds of the application and the grounds of opposition

[3] Pending the substantive hearing the Director seeks an interim order prohibiting publication of the name and identifying details of the aggrieved person. The grounds of the application are that the order is necessary in the interests of justice to preserve the position of the parties pending final determination of the proceedings. The application is opposed by the SSGT on the grounds that:

> **[3.1]** There is no evidence establishing, on the balance of probabilities, that there is any court order prohibiting publication of the aggrieved person's name.
>
> **[3.2]** The aggrieved person's name and the details of his sexual and other offending are already in the public domain and have been in that domain since 2009.
>
> **[3.3]** There is no evidence that the victims of the aggrieved person's offending have any objection to the aggrieved person's name being published.
>
> **[3.4]** It is contrary to the interests of justice for the orders to be made unless a Court of competent jurisdiction has made an order to that effect.

Preservation of the immediate provision – the SSGT undertaking and the "interim" interim order

[4] As recorded in the *Minute* issued at the conclusion of the teleconference on 10 April 2013, during that teleconference Mr Garrett gave an undertaking to the effect that the SSGT would not, until further order of the Tribunal, disclose the name of the aggrieved person or any details which might lead to his identification. The terms of that undertaking, as communicated by Mr Garrett by email dated 10 April 2013 was as follows:

> The defendant hereby undertakes as follows:
>
> 1. To immediately remove all references to the **[aggrieved person]** from its website, and not to repost his name or any details leading to the discovery of his identity until the conclusion of the hearing of the interim application for name suppression to be held on 17 April 2013; and
>
> 2. That no person acting for or on behalf of the defendant Trust will disclose in any medium the name of the complainant or any details leading to his identity being discovered until the conclusion of the hearing on 17 April 2013 referred to above, or until further order of the Human Rights Review Tribunal.

[5] At the commencement of the hearing on 17 April 2013 it was noted that the public gallery was full, if not overflowing with representatives from the media. Mr Judd sought an interim non-publication order pending the delivery of a decision on the Director's interim order application under s 95, reasoning that if reportage of the s 95 application resulted in disclosure of the name of the aggrieved person, the Director's application would become pointless.

[6] Given this submission and further given the terms of the undertaking already given by the SSGT, at the commencement of the hearing the following non-publication orders were made under ss 95 and 107(3)(b) of the Human Rights Act 1993 and s 89 of the Privacy Act 1993:

> **[6.1]** Publication of the name or of any other details which might lead to the identification of the aggrieved person in these proceedings are prohibited pending further order of the Tribunal.
>
> **[6.2]** Publication of the name or of any other details which might lead to the identification of the partner of the aggrieved person in these proceedings are prohibited pending further order of the Tribunal.
>
> **[6.3]** Publication of the name or of any other details which might lead to the identification of the victim who has sworn an affidavit in these proceedings.

At the conclusion of the hearing a further order was made that there is to be no search of the Tribunal file without leave of the Chairperson.

[7] It goes without saying that the making of these "interim" interim orders at the commencement of the proceedings did not indicate any view as to the merits of the interim order application itself.

Identifying the issues

[8] In support of his application the Director has filed affidavits by the aggrieved person sworn on 18 April 2011 and 15 April 2013 and two affidavits sworn by the aggrieved person's partner. The Director has also sworn an affidavit dated 16 April 2013 attaching a number of exhibits. The SSGT has filed an affidavit sworn on 9 April 2013 by Mr GN McVicar, National Chairperson of the SSGT, an affidavit sworn on 15 April 2013 by Mr PE Jenkins, Webmaster and Offender Database Administrator for the SSGT and an affidavit sworn on 15 April 2013 by one of the victims of the offending by the aggrieved person.

[9] It is not practical to provide a detailed account of each affidavit. To a large degree the chronology is not in dispute. The subject of the contest between the parties is twofold:

> **[9.1]** Whether there is an order of the District Court having the effect that in relation to the matters for which he has been convicted, the aggrieved person's name and identifying details cannot be published. If there is such an order it is conceded by the SSGT that the name of the aggrieved person (and his identifying details) cannot be published on the SSGT website.
>
> **[9.2]** If the answer to the first issue is "No", whether in all the circumstances an interim order should be made directing non-publication of the aggrieved person's name and identifying details including that of his present partner pending the Tribunal's formal determination of the substantive proceedings.

[10] As will be seen, there is a further issue as to the consequences of s 139 of the Criminal Justice Act 1985.

The convictions

[11] According to the affidavit of the aggrieved person, he was first married in March 1973. In 1990 the marriage relationship deteriorated when his wife moved in with a man with whom she was having an affair. Three years later he filed for divorce and during that process the two victims made complaints to the Police alleging that the aggrieved person had indecently assaulted them in 1975 and 1978. Upon separation the children of the marriage had remained with the aggrieved person. However, once the complaints were made to the Police by the victims, the wife sought custody. The eventual outcome was that the children remained in the custody of the aggrieved person.

[12] Details of the charges and of the outcome of the prosecution are helpfully set out in a *Minute* issued by MA Crosbie DJ on 30 November 2009. The *Minute* records:

> **[12.1]** On 20 March 1995 the aggrieved person faced trial by jury on 11 counts but was found not guilty or discharged on six of those counts.
>
> **[12.2]** The counts on which he was found guilty on 23 March 1995 were as follows:
>
> > **[12.2.1]** Count 5 – on or about 1 June 1975 at Westport indecently assaulted a girl "A" then aged 14 years by touching her naked body with his hands.
> >
> > **[12.2.2]** Count 7 – on or about 1 July 1975 at Lyttelton being a male did an indecent act upon a girl "B" then aged 10 years.
> >
> > **[12.2.3]** Count 8 – on or about 1 September 1975 at Christchurch being a male did an indecent act upon a girl "B" then aged 10 years.
> >
> > **[12.2.4]** Count 9 – on or about 1 October 1975 at Christchurch being a male did an indecent act upon a girl "B" then aged 10 years.
> >
> > **[12.2.5]** Count 11 – on or about 1 December 1978 at Christchurch being a male did an indecent act upon a girl "B" then aged 14 years.
>
> **[12.3]** The sentencing date was 10 April 1995. The sentences imposed were as follows:
>
> > **[12.3.1]** Count 5 – 3 months imprisonment.
> >
> > **[12.3.2]** Counts 7, 8, 9 and 11 – 12 months imprisonment.

Whether non-publication order made in the District Court

[13] The *Minute* issued by Crosbie DJ states that:

> **[13.1]** While an order for interim name suppression was made on 31 May 1994 by RM Elliot DJ, there is no record of a continuation of that order past the next appearance on 10 June 1994. There is no record of a final suppression order being made.
>
> **[13.2]** Section 139 of the Criminal Justice Act 1985 applies. The *Minute* states:

> 8 As the Registrar has already pointed out, s 139 of the Criminal Justice Act 1985 applies. In this case there is a prohibition against publishing the names of the two victims. Further, there is a prohibition of publishing the relationship of the above-named and the victims on the basis that it may lead to their identity.

[14] As mentioned the significance of s 139 of the Criminal Justice Act appears to have been overlooked by the parties. It is an issue addressed shortly.

The case for the Director

[15] As to whether an order was made in the District Court directing non-publication of his name, the Director concedes that at present it is not possible to produce a formal court record showing that such order was made. Because the judge's sentencing notes are missing and because the audio record has been destroyed, it is necessary to resort to secondary evidence. That evidence shows:

[15.1] The aggrieved person believes a permanent order suppressing his name and identifying details was made at the sentencing on 10 April 1995:

> Naturally I was present during the full criminal trial process. Suppression orders were a feature of the case and a final suppression order was made suppressing the details of the victims and also my details on the basis that these were convictions **[*redacted*]**. My lawyers were Gerald Nation and Stephanie Dryhberg. I remember that after I was sentenced the two lawyers came to me and commiserated with me at the result and pointed out that at least no details would be aired in public as there was a final suppression order applying to the identity of **[the victims]** and me.

[15.2] Immediately after sentencing Mr Nation told the aggrieved person's current partner that suppression of the aggrieved person's name had been continued.

[15.3] Two contemporaneous reports of the case published in *The Press* on 22 March 1995 and on 23 March 1995 specifically record that interim suppression of name had been granted. In addition the report of the sentencing published in the same newspaper on 11 April 1995 does not identify the aggrieved person by name whereas in other reports from the criminal courts appearing on the same page the names of the particular individuals are published.

[15.4] While the *Minute* issued by Crosbie DJ on 30 November 2009 states that there is no record of a final suppression order being made, the sentencing notes of Hattaway DJ are missing from the Court file and the audio tape of the proceedings were kept for ten years only and have been destroyed. The statement that there is "no record" of a final suppression order is therefore not inconsistent with the aggrieved person's belief that a final suppression order was in fact made. The incomplete nature of the court record is underlined by the fact that the two *Press* articles published on 22 and 23 March 1995 respectively refer to interim suppression. This contradicts the statement by Crosbie DJ that:

> 5 While there was an Order for interim name suppression made on 31 May 1994 by his Honour Judge RM Elliot, there is no record of a continuation of that Order past the next appearance on 10 June 1994. There is no record of a final suppression Order being made.

[15.5] It is intended to obtain an affidavit from an associate of the aggrieved person who was present at sentencing on 10 April 1995. It is believed this witness recalls the matter and that he will say that name suppression was "to remain in place". An email received by the Director from this intended witness reports:

> That I can confirm that I was in attendance at the court case for [the aggrieved person]. At the time it was confirmed that name suppression was to remain in place. Immediately after I was allowed a brief time with [the aggrieved person] prior to his transfer. This enabled me to assure him that name suppression was in place and that the suppression order was to remain so.

[15.6] Between *The Press* article on 11 April 1995 and publication by the SSGT in October 2009 no further publication took place regarding the offending. This is consistent with an order having been made.

[16] The narrative which is part of the Director's case shows that in 2009 the aggrieved person was employed as a CEO of an organisation. In September or October 2009 an anonymous person provided to his employer a three page print out of information about the aggrieved person held by the New Zealand Police on their national intelligence database, including his convictions. This document had been unlawfully taken from the Police. The disclosure of this information led in December 2009 to the termination of the aggrieved person's position. Substantial financial loss and stress followed both to the aggrieved person and to the woman who has been his partner for the past 22 years.

[17] In October 2009 the SSGT received a copy of the unlawfully obtained Police document and on 20 October 2009 posted on its website details of the aggrieved person, his convictions and sentence. On the same day a solicitor acting for the aggrieved person wrote to the SSGT asking that the aggrieved person's details be removed from the website. On 22 October 2009 the SSGT responded that the details would be removed subject to verification of the claimed non-publication order. No such verification having been received, the SSGT put the details of the aggrieved person back on its website on 1 November 2009. A letter sent by the solicitor for the aggrieved person on 5 November 2009 requesting immediate removal of the details was not complied with. Of significance to the substantive proceedings, the same letter made a request for personal information:

> We note that your Trust's website states that your Trust obtained information regarding our client's offending from "Court documents supplied and made available at the Christchurch Court. In light of the above, please urgently provide us with copies of these Court documents. Please also urgently advise us who furnished your Trust with copies of our client's Court documents.

[18] The aggrieved person's details nevertheless remained on the SSGT website until 20 May 2010. They were not removed until receipt of a letter from the Privacy Commissioner advising that an investigation had been commenced following the lodging of a complaint by the aggrieved person. But the SSGT again published details of the aggrieved person on its website in early April 2013 and the present proceedings before the Tribunal along with the interim order application were filed.

[19] The documents exhibited to the affidavit by the Director establishes, in his submission, that a lengthy investigation was conducted by the Privacy Commissioner. On 30 March 2011 the Assistant [Privacy] Commissioner (Investigations) advised the aggrieved person that he had concluded that the SSGT had interfered with the privacy of the aggrieved person by breaching information privacy Principles 6, 8 and 11. The letter further advised that a decision had been made to refer the case to the Director of Human Rights Proceedings. By subsequent letter dated 9 May 2011 the Assistant Commissioner (Legal and Policy) wrote to the then Director referring the matter pursuant to s 77(2) of the Privacy Act 1993 so that the Director could decide whether to institute proceedings against the SSGT under s 82 of the Act.

[20] In the meantime, on 9 May 2011 a confidential settlement was reached with the Commissioner of Police in relation to the Privacy Act complaint made against the Commissioner.

[21] Mr Judd submits that the conclusions reached by the Privacy Commissioner after a detailed investigation of the facts and after hearing the SSGT represent a careful and responsible analysis of the facts and that for the purpose of the interim order application those conclusions establish, at the very least, a strong arguable case that there has been a breach of Principles 6, 8 and 11 as alleged. The Director's case cannot be dismissed as trivial or lacking in substance. The breach of the information privacy principles referred to is of a serious kind. The allegations are that the SSGT interfered with the aggrieved person's privacy by:

> **[21.1]** Refusing to make information available on request in breach of Principle 6.
>
> **[21.2]** Failing to take reasonable steps to ensure that the information was accurate, up to date, complete and not misleading prior to publishing the information in breach of Principle 8. In particular the SSGT failed to take sufficient steps to check whether publication of the aggrieved person's name was prohibited.
>
> **[21.3]** Publishing the information without having reasonable grounds for believing that any of the exceptions in Principle 11 would apply to disclosure.

[22] In developing his submissions Mr Judd drew attention to the fact that should the Director establish an interference with privacy as defined in s 66 of the Act, the Tribunal would have power under s 85(1) to order a range of remedies including a declaration of interference with privacy, a cease and desist order and damages:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
>
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
>
> (c) damages in accordance with section 88:
>
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
>
> (e) such other relief as the Tribunal thinks fit.

[23] The Tribunal will also have power under s 107(3)(b) to make a permanent order prohibiting the publication of the aggrieved person's name and identifying details.

[24] It was also submitted that this being a case which has at its core legally binding non-publication orders flowing from the 1994-1995 court processes, the Tribunal cannot allow these present proceedings under the Privacy Act to undermine the effectiveness of those obligations. In particular the Tribunal must preserve the ability of the Director to seek as a remedy non-publication orders. It can only do this by making an interim non-publication order binding on the SSGT and others. Put another way, unless an interim non-publication order is made, the Tribunal may well be disabling itself from being able to make a proper determination as to the appropriate remedy to be granted in the event of the Director being successful in these proceedings.

[25] In summary the interim order application is based on the following:

> **[25.1]** Because the name of the aggrieved person has been suppressed in the past by way of an order of the District Court, the Tribunal, in turn, must ensure that in the present proceedings the order of the District Court not be undermined or imperilled. The only way this can be done is for the Tribunal to similarly order non-publication.
>
> **[25.2]** Even assuming that there is no non-publication order in the District Court, the Tribunal itself should, on the evidence presently before it, issue a non-publication order.

The case for the SSGT

[26] In opening the case for the SSGT Mr Garrett asked that it be noted that in the event of the Director's claim failing, the SSGT will be seeking indemnity costs. In opposing the interim order application four points were made. First, there is no evidence that name suppression was granted in 1995. Second, the name of the aggrieved person is already in the public domain. Third, the purpose of name suppression in sexual abuse cases is to protect the victim, not the perpetrator. Finally, it is not in the interests of justice for the interim orders to be made.

[27] As to the first point, the position of the SSGT is that were a final non-publication order in existence, it would comply with such order. However, no such order has been shown to exist notwithstanding ample opportunity for the aggrieved person to produce such evidence. The SSGT therefore intends re-publishing the aggrieved person's information on its website unless prohibited from doing so by way of an interim order under s 95 of the Human Rights Act.

[28] It is submitted that the assertion by the aggrieved person that a non-publication order was made is self-serving and that in the absence of the court order itself, a belief in the existence of such order cannot provide a proper basis for an interim order being made by this Tribunal under s 95 of the Human Rights Act. It is further submitted that while ss 105 and 106(1)(d) of the Act confer a broad discretion to receive any evidence, no weight should be given to the newspaper clippings or to the intended evidence offered by the author of the email.

[29] It is also pointed out that in the affidavit sworn by the victim on 15 April 2013 the victim deposes that at the time of the trial she was strongly opposed to the aggrieved person having name suppression. She was also present for the delivery of the verdict by the jury and for the sentencing. Because of her strong feelings about the issue she has a clear recall that the name of the aggrieved person was suppressed at first, but at later hearings there was no mention of name suppression. She remembers being surprised that he did not apply for name suppression after the first hearing. She says that she is "quite clear" in her recollection that there was no mention of name suppression at sentencing and recalls being "a bit surprised by that, given that he had had name suppression in the beginning". The SSGT submits that it is established on the balance of probabilities, if not beyond reasonable doubt, that there was no final suppression order.

[30] As to the second point, it is submitted that the name of the aggrieved person has been widely disseminated among social media sites since 10 April 2013 and *Truth* published an article on 11 April 2013. Reference was made to *Mayer v R* [2011] NZCA 36 in which Mr Mayer gave an interview to a newspaper confessing to his offending; *Narayan v New Zealand Police* [2012] NZHC 81 where Heath J at [17] declined an

interim suppression order as the accused person's name could be "readily obtained from media sources that published legally at the time". Finally reference was made to *Wesley v R* [2012] NZCA 323 where publication of the convicted person's name was permitted notwithstanding s 139 of the Criminal Justice Act.

[31] As to the fourth point, *R v Liddell* [1995] 1 NZLR 538 establishes the proposition that when considering the powers given by s 140 of the Criminal Justice Act, the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings and the right of the media to report the latter fairly and accurately as surrogates of the public. The prima facie presumption as to reporting is always in favour of openness.

THE INTERIM ORDER APPLICATION - DISCUSSION

Preliminary observation

[32] If a final non-publication order by the District Court is in existence there would be no issue between the parties. The aggrieved person's details would not be published by the SSGT.

[33] If it transpires that the official Court record of such suppression order has been lost, the aggrieved person has suffered a substantial injustice by the publication of his name by the SSGT and others on the assumed premise that the order does not exist. After all, it is the responsibility of the Court to retain a proper record of orders made by it, not for those before the Court to be required to establish independently and perhaps many years later, what actually transpired on a particular day. The automatic destruction after ten years of the audio record of the sentencing is regrettable. Both the parties and the Tribunal are left in the highly unsatisfactory position of having to rely on secondary evidence.

The grounds for making an interim order

[34] Section 95(1) of the Human Rights Act confers on the Chairperson of the Tribunal discretionary power to make an interim order if he or she is "satisfied" that it is "necessary" in the "interests of justice" to preserve the position of the parties:

> **95 Power to make interim order**
>
> (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[35] This provision is similar to, but not the same as, s 8 of the Judicature Amendment Act 1972. The two provisions were recently examined in *Deliu v New Zealand Law Society (Decision on Interim Order Application)* [2012] NZHRRT 1 (8 February 2012) at [29] – [52]. It is not necessary to repeat that discussion here.

[36] For present purposes it is intended to adopt and apply the test applied in applications under s 8 of the Judicature Amendment Act 1972 and as set out in *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA). In that case Cooke J at 430 said that the s 8 power should not be restricted by any formulation such as that found in the cases on interim injunctions, for example *American Cyanamid*. Specifically there is no general rule that a prima facie case must be established by the applicant for the order. The Court has a wide discretion to consider all the circumstances of the case:

> Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[37] The broad language of this section was also emphasised by Richardson J at 430-431 and by Somers J at 433. The *Carlton & United Breweries* approach was recently described by the Supreme Court in *Easton v Wellington City Council* [2010] NZSC 10 at [5] as settled principle.

"Necessary"

[38] In interpreting the term "necessary" in s 95 there is no reason to depart from the analogous determination in *Carlton & United Breweries* that "necessary" means reasonably necessary.

"Interests of justice"

[39] In *X v Police* (High Court Auckland, AP253/91, 9 October 1991, Barker J) it was said that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.

The discretion

[40] As held in *Deliu* at [53], in exercising the discretion under s 95 it is permissible to have regard to all the circumstances of the case including the apparent strength or weaknesses of the complaint and all the repercussions, public or private of granting interim relief.

[41] As earlier mentioned, if it is established that as a matter of law the aggrieved person's name and identifying details cannot be published, it is axiomatic that that legal protection must not be put at risk by these proceedings before the Tribunal and a non-publication order should be made. The first question, therefore, is whether there is an arguable case that the secondary evidence establishes a pre-existing legal protection. The term "arguable case" is used to signal that on an interim order application the decision-maker should not ordinarily enter upon a detailed consideration of the merits of the substantive application. It is not his or her function, nor is it possible to do so at this time. See in this regard *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230 (Gendall J) at 236:

> Turning to matters which I have to consider where interim relief is sought under s 8(1) of the Judicature Amendment Act 1972, the Court cannot and does not enter upon a detailed consideration of the merits of the substantive application. It is not its function, nor is it possible to do so at this time. The discretion vested in the Court to make an interim order exists:
>
> > … if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant …
>
> Generally speaking, except for the purposes of passing the threshold test for the granting of interim relief, it is not appropriate to go into a detailed consideration of the exercise of the statutory power that is under review when dealing with interim applications such as these. *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368.

Two paths to non-publication of identity

[42] As the law stood in April 1995, there were two paths to name suppression for a person accused of or convicted of the crimes faced by the aggrieved person, being offences under ss 128, 133, 134 and 135 of the Crimes Act 1961.

[43] First, by way of a specific (and personal) order made by a court under s 140 of the Criminal Justice Act 1985. It provided:

> **140. Court may prohibit publication of names —**
>
> (1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.
> (2) Any such order may be made to have effect only for a limited period, whether fixed in the order or to terminate in accordance with the order; or if it is not so made, it shall have effect permanently.
> (3) If any such order is expressed to have effect until the determination of an intended appeal, and no notice of appeal or of application for leave to appeal is filed or given within the time limited or allowed by or under the relevant enactment, the order shall cease to have effect on the expiry of that time; but if such a notice is given within that time, the order shall cease to have effect on the determination of the appeal or on the occurrence or non-occurrence of any event as a result of which the proceedings or prospective proceedings are brought to an end.
> (4) The making under this section of an order having effect only for a limited period shall not prevent any court from making under this section any further order having effect either for a limited period or permanently.
> (5) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who commits a breach of any order made under this section or evades or attempts to evade any such order.

[44] Second, by way of the automatic operation of s 139 of the Criminal Justice Act. The terms of s 139 of the Criminal Justice Act 1985 as it stood on the sentencing date of 10 April 1995 are conveniently set out in *R v Liddell* [1995] 1 NZLR 538 (CA) at 542-543:

> **139. Prohibition against publication of names in specified sexual cases —**
>
> (1) No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of an offence against any of sections 128 to 142A of the Crimes Act 1961, the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, unless —
>
> (a) That person is of or over the age of 16 years; and
> (b) The court, by order, permits such publication.
>
> (2) No person shall publish, in any report or account relating to proceedings in respect of an offence against section 130 or section 131 of the Crimes Act 1961, the name of the person accused or convicted of the offence or any name or particulars likely to lead to the person's identification.
>
> (3) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who publishes any name or particular in contravention of subsection (1) or subsection (2) of this section.

[45] It is intended to address s 139 of the Criminal Justice Act first.

Section 139 Criminal Justice Act 1985

[46] In the present case s 139(1) had application by reason of the fact that the offences with which the aggrieved person were charged came within "sections 128 to 142A of the Crimes Act 1961". There is no basis for believing that any application was made for a

permission order under subs (1)(b), least of all the granting of such permission. It follows that in the present case there is no need to consider any issue concerning permission.

[47] So, by force of statute, there must be no reporting of the name of any of the victims or of any name or particulars likely to lead to the identification of the victims. As stated in *Liddell* at 543:

> … by the automatic operation of the ban enacted by Parliament, and not by any order of the Court, the media are not free to report the appellant's name or any other particulars if the report would be likely to lead to the identification of a victim.

[48] This prohibition has applied throughout the relevant years. The contemporary analogue is s 203 of the Criminal Procedure Act 2011.

[49] The significance of s 139 of the Criminal Justice Act appears to have been overlooked by the parties and indeed both Mr Judd and Mr Garrett conceded as much during the course of the hearing when asked to make submissions on the provision. Nevertheless, s 139 is specifically referred to in the *Minute* made by Crosbie DJ that:

> As the Registrar has already pointed out, s.139 of the Criminal Justice Act 1985 applies. In this case there is a prohibition against publishing the names of the two victims. Further, there is a prohibition of publishing the relationship of the above-named and the victims on the basis that it may lead to their identity.

[50] The protection given to the aggrieved person is derivative of the protection given to the victims. The SSGT and media are not free to report his name or any other particulars if the report would be likely to lead to the identification of the victims. Given that the prosecution **[redacted]**. The purpose of s 139 and its successor provision in s 203 of the Criminal Procedure Act is to protect the victim. The shield can only be discarded if a permission order is granted in terms of (here) s 139(1)(a) and (b) of the Criminal Justice Act. The protection given to the victim should not be read down by a narrow reading of "likely to lead to [the victim's] identification".

[51] The automatic operation of the ban enacted by s 139 and not by any order of a court largely renders academic any debate as to whether an individuated non-publication order was made by the District Court under s 140 of the Criminal Justice Act. Indeed it is possible that because of s 139 no individuated order under s 140 was thought necessary. This may (and it is to be stressed "may") explain the silence of the court record as well as the reports in the media to the effect that the aggrieved person's name was suppressed.

Assessment in relation to s 139 Criminal Justice Act

[52] Be that as it may, on this interim order application it is clear that s 139 of the Criminal Justice Act automatically operated as a ban and the SSGT was not free to report the aggrieved person's name or any other particulars likely to lead to the identification of one or other of the victims. Given that the offending **[redacted]** the Director has more than satisfied me that he has an apparently strong case and that to refuse the interim order application creates a real risk of endangering the statutory protection given to the victims under s 139 and in a derivative way, to the aggrieved person himself. Because the ban enacted by Parliament has automatic operation, the fact that the name of the aggrieved person has already been published is of no real significance. The possible commission of offences by the SSGT and others can be no reason for the Tribunal allowing its own processes to undermine the protection given to victims by force of statute.

[53] I have in these circumstances determined that an interim order is to be made, prohibiting, pending further order of the Tribunal or of the Chairperson, publication of the name and occupation or of any other details which might lead to the identification of the aggrieved person.

Section 140 Criminal Justice Act 1985

[54] It is now intended to address the question whether an individuated non-publication order was made under s 140 of the Criminal Justice Act.

[55] As previously mentioned, it is not disputed that if there is an order of the District Court prohibiting publication of the aggrieved person's name and other identifying details, then in these proceedings under the Privacy Act an order should be made in similar terms to ensure that the Tribunal's processes do not inadvertently lead to the court order being undermined.

[56] The issue is whether a non-publication order was made in the District Court.

[57] As the Court record is incomplete it is necessary to look at such evidence as is before the Tribunal. For the SSGT it is pointed out that not only has the aggrieved person been unable to produce a formal court order, one of the victims believes that no suppression order was made at sentencing. As against this, however, the aggrieved person remembers events differently and points by way of support to the three items published in *The Press*. Two of those items record that he had name suppression and the final item does not name him when naming could have been expected. There is the hearsay evidence (admissible under ss 105 and 106 of the Human Rights Act) that immediately after the sentencing the aggrieved person's lawyer told the aggrieved person that there was a final suppression order applying to the identity of the victims and of him. The defendant says that at the substantive hearing there will also be evidence from an associate of the aggrieved person who was also present at the sentencing and recalls that name suppression was to remain in place.

[58] Within the limited confines of an interim order application brought on at short notice and without the benefit of cross-examination it is not possible to resolve the dispute over the facts.

Assessment in relation to s 140 Criminal Justice Act

[59] What is clear is that:

> **[59.1]** The Director has good grounds for instituting the present proceedings.
>
> **[59.2]** There is an arguable case that a non-publication order was made under s 140 of the Act.
>
> **[59.3]** The Director should be given the opportunity, in the context of a substantive hearing, to establish that such order was made.
>
> **[59.4]** Unless an interim non-publication order is made at this stage of the proceedings, the Director will be precluded from advancing this limb of his case and the Tribunal from granting any relevant remedy.
>
> **[59.5]** If it is established that a non-publication order was in fact made by the District Court, the aggrieved person will suffer a real injustice and real harm by being deprived of the protection of that order.

[59.6] Neither the SSGT nor any other person will suffer any real prejudice by the prohibition on publication pending the outcome of the substantive hearing.

[59.7] As to the submission that the identity of the aggrieved person is already in the public domain, via news media and the social media, there is no evidence before the Tribunal as to what has been published in "social media". As to prior publication by the SSGT on its website, such publication from October 2009 to May 2010 may have been in breach of s 139 of the Criminal Justice Act and the SSGT cannot rely on its own apparently unlawful acts to defeat the present application. To permit otherwise would also be in disregard of the Tribunal's duty under s 105(2) of the Human Rights Act to act according to equity and good conscience. For similar reason the publications by *Truth* on three occasions between 27 November 2009 and 11 April 2009 cannot defeat the application. The decisions cited by SSGT in opposition to the application are drawn from the criminal law and are plainly distinguishable from the present statutory setting. In *Mayer* the applicant could not escape the consequences set in motion by his own "confession" to a newspaper. In *Narayan* it was held that publication which occurs **legally** may militate against a suppression order. Here there is a strong case that publication was in breach of s 139 of the Criminal Justice Act. In *Wesley* it was held that publication of the convicted person's name was not inconsistent with the protection afforded to the victim by s 139 of the Criminal Justice Act. But in that case **[redacted]**.

[59.8] Publication of the name of the aggrieved person and potentially that of his partner at a distance of eighteen years from the date of sentence has the ability to cause fresh harm as the aggrieved person and his partner endeavour to find a source of income. The scope for damage to the partner and her business is substantial.

[59.9] Non-publication orders as to the name, occupation and identifying details of the aggrieved person will not inhibit the public reporting of the claim brought by the Director. In that respect the principle of open judicial proceedings and freedom of speech will remain respected. But at the present time it is difficult to see what public interest there is in identifying the particular aggrieved person. On the contrary, there is the practical consideration that publication of personal details is bound to be a deterrent to the bringing of proceedings by or on behalf of persons who might otherwise have a justifiable grievance. The aggrieved person did not, on conviction, forfeit all rights. The unlawful taking of his personal information from the Police database has led to his dismissal from employment and the publication of some of that information by the SSGT on its website. If any of the information privacy principles have been breached and if a non-publication order was made in the District Court or if the derivative protection provided by s 139 of the Criminal Justice Act applies, the Tribunal cannot allow its processes to be used to circumvent that protection.

[60] While the foregoing is not intended as an exhaustive summary of the relevant factors, it is largely for these reasons that I am of the view that the non-publication order sought by the Director must be made in relation to the argument under s 140 of the Criminal Justice Act.

[61] It is now necessary to examine whether non-publication orders are required for any other person.

WHETHER NON-PUBLICATION ORDERS REQUIRED FOR THIRD PARTIES

[62] One of the victims has filed an affidavit in these proceedings. She does not thereby waive the statutory protection she and the other victim enjoy from disclosure of their identity. However, it is possible that the proceedings before the Tribunal may lead to their identity being disclosed inadvertently. To protect the victims against this contingency a permanent order is made prohibiting disclosure of their identity along with any other details which might lead to their identification.

[63] The other innocent party is the aggrieved person's partner of 22 years. Quite apart from the fact that identification of her could lead to the identification of the aggrieved person, as an innocent member of his family there is no reason why she should not receive protection. See by analogy *R v Liddell* at 546. She is now running a business which is the couple's source of income, the aggrieved person having found it almost impossible to find employment since the 2009 leaking of the Police information. Not only does the partner depend on the business, so do nine staff. An order is accordingly made prohibiting publication of the name, address, occupation or any other identifying particulars which may lead to the identity of the partner, including the name of her business.

FORMAL ORDERS

[64] Pursuant to ss 95 and 107(3)(b) of the Human Rights Act 1993 and s 89 of the Privacy Act 1993 the following orders are made:

> **[64.1]** Publication of the name and occupation or of any other details which might lead to the identification of the aggrieved person in these proceedings is prohibited pending further order of the Tribunal or of the Chairperson.
>
> **[64.2]** Publication of the name, address, occupation or of any other details which might lead to the identification of the partner of the aggrieved person in these proceedings, including the name of her business, is prohibited pending further order of the Tribunal or of the Chairperson.
>
> **[64.3]** Publication of the name and occupation or of any other details which might lead to the identification of the victims of the aggrieved person is prohibited pending further order of the Tribunal or of the Chairperson.
>
> **[64.4]** There is to be no search of the Tribunal file without leave of the Chairperson.

"Rodger Haines"

.....

Mr RPG Haines QC
Chairperson