(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND ANY OTHER IDENTIFYING PARTICULARS OF THE DEFENDANT.

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL.

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2019] NZHRRT 32**

	Reference No. HRRT 092/2016
UNDER	**SECTION 50 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994**
BETWEEN	**DIRECTOR OF PROCEEDINGS**
	PLAINTIFF
AND	**MRS SMITH**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms K Anderson, Member
Ms W Gilchrist, Member

REPRESENTATION:
Ms V Casey QC and Ms J Herschell for plaintiff
Mr L Taylor QC and Ms R Scott for defendant

DATE OF HEARING: **26 and 27 November 2018**

DATE OF DECISION: **17 June 2019**

(REDACTED) DECISION OF TRIBUNAL ON APPLICATION BY DEFENDANT FOR FINAL NAME SUPPRESSION ORDERS[1]

INDEX

[1] [This decision is to be cited as *Director of Proceedings v Smith (Application for Final Non-Publication Orders)* [2019] NZHRRT 32.]

INTRODUCTION

[1] These proceedings under Part 4 of the Health and Disability Commissioner Act 1994 (HDC Act) have been brought by the Director of Proceedings (Director).

[2] At the relevant time Mrs Smith [this is the name given to the defendant to protect her identity in compliance with the suppression orders made in this decision at [141]] was a registered midwife employed by the Taranaki District Health Board (Taranaki DHB) as a hospital midwife at Taranaki Base Hospital. These proceedings arise out of a complaint by the aggrieved person (Ms Cerise Lawn) and her husband about the care provided by Mrs Smith and Ms Lawn's Lead Maternity Carer (LMC) obstetrician during the labour and birth of their baby Ariana Lawn on 24 January 2012.

[3] Liability having been admitted and damages agreed, Mrs Smith has applied for a permanent order prohibiting publication of her name and of any details that might identify her in conjunction with this matter, being the care provided to Ms Lawn in connection with the birth of her daughter.

[4] The application is opposed by the Director.

[5] By memorandum dated 24 September 2018 the Director has given notice that Ms Lawn and her husband do not seek an order prohibiting publication of their names or the name of their daughter.

Interim order in operation

[6] Since 26 September 2018 Mrs Smith has had the benefit of interim name suppression orders made by the Chairperson pursuant to ss 95 and 107 of the Human Rights Act 1993 (HRA). These provisions have application by virtue of the HDC Act, s 58. See [redacted]. Those orders are in the following terms:

> **[11.1]** Publication of the name, address and of any other details which could lead to the identification of the defendant in these proceedings [redacted] is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[11.2]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

Liability admitted and damages claim settled

[7] By second amended statement of claim dated 19 September 2017 the Director alleged Mrs Smith breached Right 4(1) of the Code of Health and Disability Services Consumers Rights (the Code) which provides:

> Every consumer has the right to have services provided with reasonable care and skill.

[8] Mrs Smith admits to having breached this Right, as does the LMC in separate but related proceedings brought by the Director in HRRT093/2016.

[9] On 25 September 2018 the Director and Mrs Smith filed a consent memorandum which recorded:

> **[9.1]** A settlement of the Part 4 proceedings had been reached as to both liability and damages.

[9.2] The parties had agreed upon a summary of facts, a signed copy of which was filed with the memorandum.

[9.3] The parties requested that the Tribunal make a declaration under the HDC Act, s 54(1)(a) that Mrs Smith had breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of Right 4(1) by failing to provide services to the aggrieved person (Mrs Cerise Lawn) with reasonable care and skill.

[10] The consent order has not yet been made because the consent memorandum requires the agreed summary to be published by the Tribunal as an addendum to the decision. It is accepted by the Director that should Mrs Smith be granted final name suppression orders the agreed summary will require appropriate redaction.

[11] By *Minute* dated 1 October 2018 the Chairperson directed that the consent declaration not be made until the application for final name suppression had been determined and an assessment made whether the summary of facts agreed to by the parties was in need of redaction or other amendment.

The agreed summary of facts

[12] The agreed summary of facts is 24 pages and 102 paragraphs in length. It is not practical to summarise the content in this decision. Nor is it necessary to do so given the purpose of this decision is not to establish liability but to address the application by Mrs Smith for name suppression.

[13] It is sufficient to note that throughout her pregnancy, Ms Lawn's anti-natal care was shared between her LMC and her general practitioner. The LMC obstetrician had overall responsibility for the care of Ms Lawn. The pregnancy was uncomplicated and the baby was carried to full term.

[14] At around midday on 23 January 2012 Ms Lawn was admitted to Taranaki Base Hospital to give birth.

[15] Mrs Smith took over midwifery care of Ms Lawn at 11pm that night after Ms Lawn had been in hospital for around 11 hours and in established labour for around 10 hours. Ariana was born at around 3:50am on 24 January 2012 covered in meconium (fetal stool), pale and floppy and in respiratory distress.

[16] The summary of facts records that in the opinion of a midwifery expert Mrs Smith provided attentive support to Ms Lawn but did not provide midwifery care to a reasonable standard overall in that despite undertaking a number of assessments she did not institute closer monitoring measures of both the mother and the baby or otherwise act upon assessment results when there were indications of emerging risk factors. The summary at para 99 states:

> In the presence of maternal tachycardia, at least one raised maternal temperature recording, meconium stained amniotic fluid, an increasing fetal heart baseline (no matter that it was apparently just at the upper limit of the normal range), and episodes of fetal tachycardia Mrs Smith did not institute closer monitoring of the baby nor did she inform the LMC obstetrician or the obstetrician on duty.

[17] The agreed summary records Mrs Smith accepts that her actions breached Right 4(1) of the Code in that she:

[17.1] Failed to take appropriate steps to monitor Ms Lawn in light of her presentation.

[17.2] Failed to contact the LMC obstetrician to notify him in a timely manner of Ms Lawn's presentation.

[17.3] Failed to call the neonatal unit after delivery when the LMC obstetrician did not.

[18] The summary records Mrs Smith has stated that she deeply and sincerely regrets her actions and inactions and has acknowledged her shortcomings. She has apologised in person and in writing to Ms Lawn for her actions.

Mrs Smith no longer in practice as a midwife

[19] Mrs Smith ceased practising as a midwife in September 2014 and has not renewed her New Zealand practising certificate which lapsed on 31 March 2015. She has no intention of ever renewing her certificate as she has resolved not to practise as a midwife again. She is prepared to sign a voluntary undertaking confirming her stated intention and understands that this undertaking can be annotated on her registration with the Midwifery Council of New Zealand.

[20] That Council, in turn, has confirmed in writing that following advice by the Health and Disability Commissioner that an investigation had been commenced into a complaint by Ms Lawn, the Council wrote to Mrs Smith seeking her response in relation to certain competency issues. The Council subsequently required Mrs Smith to take remedial steps. On those steps being taken a decision was made by the Council on 16 September 2013 to the effect that it was satisfied the competence issues had been satisfactorily addressed and that the Council would await the outcome of the investigation by the Health and Disability Commissioner. When the Commissioner's report was published in June 2014 the Council advised the Commissioner that the competence issues identified in the Commissioner's report had been identified by the Council in mid-2013 and that Mrs Smith had already undertaken remedial education.

[21] The Council confirms Mrs Smith has not renewed her annual practising certificate and further confirms there are no competence, health or conduct concerns, other than this matter, that have been brought to the attention of the Council in relation to Mrs Smith since September 2004 when the Council took over from the Nursing Council responsibility for regulating midwives.

Extreme adverse outcomes for Ms Lawn and Ariana

[22] The actions of Mrs Smith and of the LMC had extreme adverse outcomes for both Ms Lawn and Ariana. Those outcomes are detailed in the agreed summary. In the context of the present application we reproduce only the following:

> 87. As a result of the HIE [hypoxic ischaemic encephalopathy], Ariana has since experienced significant and complex health difficulties and developmental problems, including:
>
> a. Spastic/dystonic quadriplegic cerebral palsy;[2]
> b. Feeding difficulties requiring PEG (tube) feeding;
> c. Microcephaly (an abnormally small head, associated with incomplete brain development);

[2] Spastic means increased muscle tone; dystonic means abnormal movements; quadriplegic means all four limbs are involved.

d. Strabismus (eyes are not aligned);
e. Seizures;
f. Severe global developmental delays;
g. Constipation;
h. Poor growth;
i. Poor sleeping patterns.

....

89. Ariana is significantly cognitively impaired and her physical and intellectual disabilities are life-long. She will always require full care, 24 hours a day, seven days a week. Due to her cerebral palsy, Ariana requires support for all aspects of her personal daily cares, including dressing and undressing, all her grooming and hygiene needs mobilisation, positioning, transfers, toileting, feeding. She will be unable to care for herself and be safe in any situation without supervision.

[23] As to Ms Lawn, Mrs Smith admits that she (Ms Lawn) has lost:

[23.1] The benefit of receiving appropriate midwifery care and, in particular, the timely detection and/or appropriate treatment of maternal infection and/or fetal compromise and/or the benefit of earlier specialist intervention.

[23.2] The benefit of making informed decisions about her delivery.

[23.3] The benefit of receiving timely and/or appropriate resuscitation of Ariana.

[23.4] The benefit of the ability to place trust in the midwifery profession.

[23.5] The benefit of positive interractions with a healthy child and/or the benefits/joys/pleasures of parental enjoyment and/or satisfaction involved in having a child with a healthy life.

[23.6] The benefit of career development.

[23.7] The ability to pursue and/or develop her life in the way she would otherwise have chosen and/or to lose future life enjoyment by restriction of her future life choices.

[24] It is further accepted by Mrs Smith that in the circumstances outlined, Ms Lawn has suffered significant and enduring emotional distress, grief and trauma and injury to her feelings.

The Taranaki District Health Board

[25] It is relevant to note the Health and Disciplinary Commissioner's report 12HDC00481 (11 June 2014) made adverse findings not only in relation to Mrs Smith and the LMC, but also in relation to the Taranaki DHB. The overall conclusion recorded at para 195 was that the DHB had not provided services to Ms Lawn and Ariana with reasonable care and skill, and did not ensure quality and continuity of services.

[26] On 12 November 2015 Ms Lawn commenced her own proceedings (HRRT069/2015) against the Taranaki DHB seeking damages and a declaration the DHB had breached the Code.

[27] By email dated 11 December 2015 the Director gave notice to the Tribunal and to the parties to those proceedings ie HRRT069/2015 that she (the Director) had decided to take proceedings before the Tribunal against both Mrs Smith and the LMC with the

consequence Ms Lawn's statement of claim against the Taranaki DHB would have to be amended to exclude any claim in relation to the actions of Mrs Smith and the LMC. The amended statement of claim was subsequently filed on 27 July 2016. However, the foreshadowed proceedings by the Director against Mrs Smith and the LMC were not filed until 22 December 2016.

[28] By subsequent email dated 18 December 2015 the Director gave notice pursuant to s 55 of the HDCA that she intended appearing and being heard in the proceedings brought by Mrs Lawn against the Taranaki DHB.

[29] The proceedings were eventually settled and a notice of discontinuance filed on 21 August 2018.

THE APPLICATION BY MRS SMITH FOR PERMANENT NAME SUPPRESSION

Grounds

[30] By application dated 5 October 2018 Mrs Smith has asked for a permanent non-publication order. The grounds of the application are, in summary:

[30.1] The public interest in knowing Mrs Smith's identity is limited in that:

[30.1.1] She is no longer practising midwifery in any capacity, having retired from midwifery practice in New Zealand in 2014 and her practising certificate having lapsed in March 2015. She is prepared to give a voluntary undertaking that she will not practise again. That undertaking can be permanently annotated on the Register of Midwives by the Midwifery Council of New Zealand.

[30.1.2] Publication of her name is not necessary to enable patients to make future decisions as to their medical care.

[30.1.3] The matters to which this claim relates occurred in January 2012, more than six years ago. Any public interest in her identity is significantly reduced by this extensive delay.

[30.1.4] Suppression of her name and identifying details will not materially limit the public's ability to learn of the facts of the matter and the standards expected by the profession. This is where the public interest lies, not in knowing the defendant's identity.

[30.2] If Mrs Smith's name is published, there is the risk of irreparable harm to:

[30.2.1] Mrs Smith's ability to continue to undertake [redacted].

[30.2.2] Her ability to gain approval from [redacted] immigration authorities for entry visas into [redacted]. Such visas are currently required on an ongoing six monthly basis.

[30.2.3] Her husband's ability to undertake [redacted] should Mrs Smith be denied an immigration visa or if her involvement in the work [redacted].

[30.2.4] Her reputation and standing with the organisations which [redacted].

[30.2.5] Her prospects of being successful in applying for a position as a [redacted] based at a health clinic [redacted].

[30.2.6] To her reputation and standing in Taranaki where she and her husband maintain close contact with friends, family and the [redacted] who [redacted].

[30.2.7] Her health as well as the health of her mother-in-law who is 90 years of age.

[31] Orders are also sought preventing the disclosure of the affidavit evidence filed in support of the application, particularly those details which relate to the involvement of Mrs Smith and of her husband in overseas [redacted].

The evidence in support of the application

[32] The essence of the application is that since January 2012 Mrs Smith and her husband have dedicated their lives to working for [redacted] in remote areas of [redacted]. Publication of Mrs Smith's name in connection with these present proceedings will place at real risk the continuation of their work and the viability of the projects in which they have been active.

[33] The two affidavits sworn by Mrs Smith and the single affidavit sworn by her husband are long and detailed. Only a brief overview follows.

[34] Mrs Smith obtained her nursing qualification between 1975 and 1979. A six-month term as a nurse in [redacted] followed in 1981. That sparked an interest [redacted], an interest shared by Mr Smith who has a qualification in engineering, a Bachelor of Business and a [redacted]. Shortly after their marriage they visited the Philippines [redacted]. However, further study and family commitments took over for a number of years but in 2008 they were [redacted]. During 2011 their circumstances changed in that their sons left home for study and work leaving Mr and Mrs Smith free to pursue [redacted].

[35] In 2012 Mr Smith commenced study for his [redacted] while Mrs Smith worked in Sydney as a midwife to help pay for the cost of study and accommodation.

[36] During 2012 Mr and Mrs Smith were invited [redacted] called [redacted] and to join a team in [redacted]. The invitation was accepted. A visit to the team in [redacted] followed in 2013.

[37] In October 2013 Mr and Mrs Smith returned to New Zealand to prepare for a move to [redacted] while continuing to work. [Redacted] projects require those [redacted] their work through their [redacted]. Mr and Mrs Smith have [redacted] their [redacted] from [redacted]. They have also sold their family home [redacted].

[38] By October 2014 they had [redacted] and returned [redacted]. All of 2015 and most of 2016 were spent at a language school there doing formal language and cultural training.

[39] In about March 2017 they moved to one of the poorest and most remote of the [redacted] and had to learn the local dialect to be able to function and deal with local ways of doing things. They assisted by capacity building and by mentoring the leadership of staff of local foundations, including a health clinic. Mr Smith's affidavit also makes reference to helping with the engineering aspects of a water project to harness a spring

and to reticulate the water throughout a particular village. The scheme was the first step in a programme to improve water, sanitation and hygiene. He is also investigating how to introduce more appropriate low tillage agricultural techniques to increase yields and soil conservation.

[40] Overseas funding has enabled the equipping of a birthing centre established to address the chronic high infant and maternal mortality rate in the area which is twice that of the [redacted] average. The role of Mr and Mrs Smith is to bring long term vision and assistance to the administration board and staff and to see through improvements. Mrs Smith does not work at the clinic as a midwife.

[41] In her second affidavit Mrs Smith confirms that all of the [redacted] with which she and her husband work have been told the full nature of the proceedings before the Tribunal. The lead doctor and the board at the health clinic in [redacted] have also been told Mrs Smith is facing the current proceedings, their nature and her role and that she and her husband would be required to be absent from the project for four months attending to this case.

[42] Through his extensive management and marketing experience Mr Smith has been able to improve the systems at the health clinic and to promote it in the community. An increase in the number of registered patients is needed to secure its future because government funding is tied to the number of registered patients. He has assisted the management team to formulate a strategic plan and works to encourage its implementation.

[43] [redacted] has been facilitating ophthalmological interns to visit the clinic to do cataract operations, another area of huge need in the region. To expand this programme would require the clinic to upgrade its registration to hospital status. To achieve that goal significant management, strategic and staffing issues need to be addressed.

[44] That [redacted] to address maternal mortality, infant mortality, malnutrition and stunting in the district. A two-year role for a health management worker has been created. However, it has not been possible to identify anyone locally who can fill the role or who would live in the area for extended periods. Mrs Smith has been asked to apply for the position as it is believed she has significant skillsets that are very limited in the area. In his lengthy letter the director of the agency has confirmed the offer has been made notwithstanding that Mrs Smith has been found in breach of standards of professional care in relation to her role as a midwife in the present case. In the offered role she would not be practising as a midwife but developing the clinic's health management systems. However, in his experience there is a significant risk the offer will be withdrawn should there be adverse publicity connected with the present proceedings because:

> **[44.1]** Publication of Mrs Smith's name in relation to a human rights proceeding and involving professional negligence in the health field is likely to cause significant impediments to her and her husband successfully receiving approval for entry visas.
>
> **[44.2]** The community in which Mr and Mrs Smith work is very small. Notification that Mrs Smith was involved in a case that involved human rights proceedings is likely to be misunderstood and perceived as human rights abuses or criminal conduct. Likewise, publicity that failure to provide appropriate health services caused significant harm to the patient will result in the loss of the trust and confidence of the community necessary for the work to be successful.

[44.3] Any damage to Mrs Smith's reputation and credibility will damage also the reputation and credibility of her husband and cause flow on damage by association to the credibility and reputation of the [redacted] working in that area.

[45] Both Mr Smith and his wife depose they anticipate that in the event of Mrs Smith's name being published in connection with these proceedings the reputation of [redacted] could be adversely affected and the [redacted] the various [redacted], including that of Mr and Mrs Smith, would be undermined. In this connection Mr Smith cross-references to the fact that all those involved in [redacted] projects are required to promote their work in order to raise awareness and [redacted]. This is an essential, ongoing component of the work and [redacted] has a strict policy that unless all [redacted] is obtained, their workers cannot return to their [redacted]. If Mrs Smith's professional reputation and credibility is publicly brought into question, it is highly likely that opportunities for them to promote their projects would be very limited and [redacted] would, as a result, be very difficult to obtain.

[46] Mr Smith has deposed that it would be "beyond devastating" for him and his wife to prematurely end their [redacted] work in [redacted]. It is work to which both he and his wife have dedicated the last six years of their life and they had intended to continue [redacted] until their retirement.

[47] In her second affidavit Mrs Smith observes that since their return to [redacted] after an absence of four months she and her husband have been greatly saddened to see that much of what they had been working on has gone backwards, emphasising the value of their dedication and work.

[48] She refers in particular to the project which aimed to improve water, sanitation and hygiene in the village earlier referred to. In the absence of Mr and Mrs Smith the project has stalled and is in danger of failing:

> 20. During our absence an [redacted] consultancy firm undertook an independent review of the project to harness and distribute spring water to an incredibly poor village of about 170 families approximately 20 minutes out of town who do not have access to fresh water. Aspects of the project that were completed, while [Mr Smith] was not there to provide oversight, have been done at a very low and non-sustainable standard. The project has stalled and is incomplete and is now in danger of failing. This is on the eve of planting season which is then followed by the rainy season. The timing now means that it will be very difficult to get this started again until well into next year. The village has been waiting for over three years for this project.

[49] As to her own role of developing the health clinic's management systems, Mrs Smith reports that many of the positive results achieved prior to her and her husband returning to New Zealand have been neglected and there has been a noticeable regression in the quality of care to patients and in the maintenance of the facility.

[50] Mrs Smith goes on to say that she can say with certainty, having seen the effect of her and her husband being away for four months, that their presence is essential at this stage to encourage and guide the major projects on which they are presently working. Their brief absence had demonstrated that they are making a significant and positive change to the lives of the village population and in the area. They are very concerned that if they are not able to continue this work the communities and families they have been assisting will be detrimentally affected.

[51] The Tribunal has also received a medical certificate from Mrs Smith's general practitioner which confirms Mrs Smith's evidence that the circumstances in which Ariana was born have caused Mrs Smith immense distress. The length of time taken to resolve

these proceedings has compounded this personal toll. Mrs Smith's distress and anxiety have been exacerbated by the potential adverse consequences publication could have on both her and her husband. In the opinion of the general practitioner the consequences of publication of Mrs Smith's name in connection with this matter may, in her view, cause a significant and disproportionate risk of harm to Mrs Smith's mental health.

[52] For his part Mr Smith has detailed the impact on his personal health of the protracted process which followed from the lodging of Ms Lawn's complaint and reference is also made to the health status of his 90-year-old mother. Produced to the Tribunal is a medical certificate from the mother's general practitioner advising she (the mother) has a [redacted]. In the doctor's opinion there is a considerable risk publication of Mrs Smith's name will cause significant harm to the mother's [redacted] and would likely cause a recurrence of her [redacted]. She (Mr Smith's mother) would also almost certainly be at significant risk of physical deterioration as a secondary consequence of the mental shock and distress. Given her advanced years such mental or physical deterioration could result in irreparable harm.

[53] Other evidence adduced by Mrs Smith includes an affidavit from a legal secretary which establishes that an internet search for articles or publications that mention the name "Ariana Lawn" do not refer to either Mrs Smith or the LMC by name. An examination of the Facebook pages for Ms Lawn and for Ariana from the date those pages were created up to mid-September 2018 similarly make no reference to Mrs Smith. There was only one reference to the LMC.

APPLICATION OPPOSED BY DIRECTOR

Grounds

[54] By notice of opposition dated 12 October 2018 the Director opposes the application for name suppression on the following grounds:

> **[54.1]** The order sought is not desirable in the interests of justice.
>
> **[54.2]** Mrs Smith's identity in connection with this matter is already in the public domain.
>
> **[54.3]** Mrs Smith has admitted serious breaches of the Health and Disability (Code of Health and Disability Services Consumers' Rights) Regulations 1996.
>
> **[54.4]** The public interest in open justice supports the presumption that this information not be suppressed. The fact that Mrs Smith is no longer in practice in New Zealand does not reduce public interest in open justice.
>
> **[54.5]** There is a public interest in members of the midwifery profession being seen to be accountable for their actions. The public interest is not served by professionals maintaining their reputation and public standing by suppressing accurate information.
>
> **[54.6]** It would not be appropriate for the Tribunal to exercise its powers under HRA, s 107 to facilitate non-disclosure of its decision by the defendant to foreign governmental and other agencies that may have a legitimate interest in this information.

[54.7] The orders sought would interfere with the right of freedom of expression of the aggrieved person and of her family and community, contrary to s 14 of the New Zealand Bill of Rights Act 1990.

[54.8] The grounds and evidence put forward by the defendant do not meet the high threshold of showing specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice, and/or to override the right to freedom of expression belonging to the aggrieved person and her family and community.

The evidence in opposition

[55] Three affidavits have been filed by the Director. The first is by Ms Lawn, the second by Ms Bianca Aldridge, who is a friend of Ms Lawn and her husband and who was a support person for Ms Lawn's labour. The third affidavit is by Dr Stephen Butler, a Consultant Paediatrician at Taranaki Base Hospital.

[56] The primary affidavit is by Ms Lawn. It is a substantial document which originally comprised 26 pages and 89 paragraphs. Following objection by the defendants, the Director filed a replacement affidavit affirmed on 7 November 2018 in which the majority of paras 7 to 44 had been redacted in whole or in part. In the unredacted balance of the affidavit Ms Lawn addresses (inter alia) the care provided by Mrs Smith and the LMC, the extreme adverse outcomes, Ariana's care needs, the toll taken on Ms Lawn and the sacrifices made by her and her husband. There is a substantial overlap between the affidavit and the agreed summary of facts.

[57] Ms Lawn is opposed to Mrs Smith and the LMC being granted name suppression. Her primary reasons are that each must be held accountable for what they have done, that name suppression will prevent her and others talking about the events freely, that her and her husband's lives having been changed forever, it is important for them to be able to tell Ariana's story in full and completely. She also deposes that in any event her and her husband's families, friends and local communities generally know the identity of Mrs Smith as the midwife.

[58] In justifying the admission of this evidence the Director submitted:

> Mrs Lawn is the party most directly affected by the suppression orders sought by the defendants, as she is the victim of the breaches of the Code by the defendants, and she and her family have suffered serious harm as a result. She is also the person whose rights to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 will be most directly affected. Mrs Lawn's evidence is directed to explaining the impact the orders will have on her, and why she is opposed to them. Her narrative of events, and her own experience of what happened, is highly pertinent to her position. It would be a breach of natural justice for the Tribunal not to hear from Mrs Lawn given that she wishes to be heard. It is also important for the victim to be heard to ensure that the real nature of what happened is not lost.

[59] The evidence of Ms Aldridge is that after Ariana's birth she (Ms Aldridge) shared the names of Mrs Smith and the LMC (and their involvement in Ariana's birth) not only with members of Ms Lawn's community, but also with Ms Aldridge's community, school and day care staff, friends and family. As Taranaki is a small region and because Ariana's case has been very public (including increased publicity when money was being raised for Ariana's surgery in the United States), Ms Aldridge believes that most people in the local community who know of Ariana's circumstances would also know the identity of the LMC and "quite a few people" would know Mrs Smith was the midwife involved. She accepts that knowledge of Mrs Smith's involvement is not as common as the LMC because she was not as established in the community and moved away after Ariana's

birth. But certainly her involvement is well known in the networks of Ms Aldridge and of Ms Lawn.

[60] The evidence of Dr Butler is that the identities of Mrs Smith and of the LMC are well known in the paediatric department where he works. In addition, after noting that Ariana's disabilities have had a huge and ongoing impact on her family, as a paediatrician who sees Ariana and her family regularly, Dr Butler is concerned about the additional effect name suppression would have on the family if they were unable to talk about their experiences freely due to concern that they were not allowed to name the LMC and Mrs Smith, or say anything that might identify who they were.

No cross-examination

[61] Neither party to these proceedings required the attendance of the opposing parties' witnesses for cross-examination.

Admissibility of Ms Lawn's evidence

[62] The admissibility of Ms Lawn's evidence was challenged on the grounds that she is not a party to the proceedings and her experience of what happened and her views as to the merits of Mrs Smith's application for name suppression are of no relevance. The Tribunal was told Ms Lawn was fully involved in the process of confirming the wording of the agreed summary of facts and its finalisation was conditional upon her consent.

[63] However, for the reasons advanced by the Director, we are of the view the evidence is properly admissible. Ms Lawn is the person whose right to freedom of expression under the Bill of Rights Act, s 14 will most directly be affected and the impact the orders will have on her are relevant in the overall assessment of what is necessary to secure the proper administration of justice. It is not without significance that the Criminal Procedure Act 2011, s 200(6) provides that when determining whether a suppression order of permanent effect is to be made in the criminal context, any views of a victim of the offence must be taken into account. While the present proceedings are not criminal in substance or in form, s 200(6) underlines that in principle there can be no objection to the Tribunal taking into account the evidence of the aggrieved person if such evidence is tendered.

[64] There are the additional points that the agreed summary of facts already contains much of Ms Lawn's evidence and the Tribunal is well aware that issues relating to liability and damages have been settled with the result the task at hand is not to determine "punishment" or liability but to make a decision on Mrs Smith's application for permanent name suppression. That decision cannot be surrendered to Ms Lawn and we did not understand the Director to contend otherwise.

[65] Given these factors the probative value of the evidence is not outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding (Evidence Act 2006, ss 7 and 8). Alternatively, expressed in terms of HRA, s 106, it is our opinion the evidence will assist the Tribunal to deal effectively with the application, irrespective whether the evidence would be admissible in a court of law.

NON-PUBLICATION ORDERS – SECTION 107 OF THE HUMAN RIGHTS ACT 1993

[66] The Tribunal has jurisdiction over three categories of claims, being:

> **[66.1]** Claims under either Part 1A or Part 2 of the Human Rights Act that there has been discrimination on a prohibited ground.

[66.2] Claims under Part 8 of the Privacy Act 1993 that there has been an interference with privacy.

[66.3] Claims under Part 4 of the Health and Disability Commissioner Act 1994 that the Code of Health and Disability Services Consumers' Rights has been breached.

[67] The constitution of the Tribunal, its functions, powers and procedures are identical across all three of its jurisdictions because Part 4 of the Human Rights Act applies in common to all proceedings under all three Acts. See the Privacy Act, s 89 and the Health and Disability Commissioner Act, s 58.

Section 107

[68] The Tribunal's jurisdiction to make non-publication orders is conferred by HRA, s 107 which provides:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
> (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
> (4) Every person commits an offence and is liable on conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

[69] The effect of s 107(1) and (3) is that the Tribunal is under a mandatory duty to hold every hearing in public unless the Tribunal is satisfied it is "desirable" to make an order prohibiting publication of any report or account of the evidence.

[70] In the present case identifying the point at which the Tribunal can be "satisfied" that it is "desirable" to make a non-publication order is the essential issue for determination. The submission for Mrs Smith is that the statutory phrase "Where the Tribunal is satisfied that it is desirable to do so" sets a threshold considerably lower than that which is generally applicable in the civil context. Her submission draws primarily on a line of cases decided under the Health Practitioners Competence Assurance Act 2003 (HPCA Act), s 95(2). The Director, on the other hand, relies on the Tribunal's decision in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 (*Waxman*) at [63]. In that case the Tribunal held that on an application for a permanent suppression order the applicant must show specific adverse consequences which are sufficient, in the interests of justice, to justify an exception to the fundamental rule of an open system of justice. The standard is necessarily a high one.

[71] We now:

[71.1] Summarise what was decided in *Waxman*.

[71.2] Examine whether the HRA and HPCA Act are sufficiently analogous to allow the interpretation of the one to be relevant to the interpretation of the other.

[71.3] Determine the meaning of "desirable" in HRA, s 107(3).

After addressing the relevance of the New Zealand Bill of Rights Act we summarise our conclusions before returning to the facts of the case.

The decision in *Waxman*

[72] The significance of *Waxman* lies in its interpretation of HRA, s 107 in the light of the decision of the Court of Appeal in *Y v Attorney-General* [2016] NZCA 474 (4 October 2016) and the subsequent (and superseding) decision of the Supreme Court in *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310. Both senior court decisions addressed the test to be applied when suppression orders are sought in civil cases. The principal point of divergence between the two decisions lies in the degree of emphasis to be given to the fundamental rule of open justice. The balancing exercise at the centre of the Court of Appeal analysis has been displaced by the Supreme Court's requirement that there be an inquiry into what will serve the ends of justice. A non-publication order is only valid if it is really necessary to secure the proper administration of justice in the particular proceedings. The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one. See *Erceg* at [2], [3], [13] and [18].

[73] Proceedings before the Tribunal are explicitly described as civil proceedings in all three of its jurisdictions. See HRA, s 92B, the Privacy Act, s 82(2) and the HDC Act, s 50(2). While the discretion to make suppression orders under Part 4 of the Human Rights Act will always be governed by the text of s 107(1) and (3) read in the context of the purpose of the relevant statute (being the HRA, Privacy Act or HDC Act), the exercise of that discretion must be guided by principle. The significance of *Erceg* lies in its exposition of those principles. As the Tribunal noted in *Waxman* at [63] there is a striking degree of congruence between those principles and s 107:

> **[63.1]** The requirement in s 107(1) that every hearing of the Tribunal be held in public is but statutory recognition of the principle of open justice so forcefully stressed by the Supreme Court at [2] of its decision. Everything said by the Supreme Court regarding this principle applies with equal force to the Tribunal and to the interpretation of s 107. It is not a principle to which lip service can be given preparatory to addressing the merits of the particular application in some sort of balancing exercise. It is the principle which drives the interpretation and application of s 107. It imposes what has been described as self-discipline on all engaged in the adjudicatory process and means that media representatives should be free to provide fair and accurate reports of what occurs in tribunal hearings.
>
> **[63.2]** The opening phrase in s 107(1), "[e]xcept as provided", is likewise statutory recognition of the fact that as in the civil context, there are circumstances in which the general principle of open justice can be departed from.
>
> **[63.3]** The Supreme Court at [13] rejected a requirement that the party seeking a suppression order must show "exceptional circumstances". This accords with our view that while the phrase "special circumstances" is used in the heading to s 107 no special circumstances test is in fact prescribed in the text. The question is whether the Tribunal is "satisfied it is desirable" to make the non-publication order. In civil cases the test is that the applicant must show specific adverse consequences sufficient to justify an exception to the fundamental rule of an open system of justice. Nowhere in *Erceg v Erceg* is this approach described as a balancing exercise. In our view the same applies to s 107 because it too emphasises the public interest in adhering to an open system of justice (s 107(1)) while allowing exceptions when the Tribunal is satisfied it is desirable to make a suppression order. It is implicit from the context of s 107 that the applicant for the suppression order must show (to use the language of the Supreme Court) specific adverse consequences sufficient to justify an exception to the fundamental rule. The standard is necessarily a high one.

[74] The Tribunal concluded at [63.4] that understood in this light, the phrase in s 107(3) "satisfied that it is desirable to do so" means desirable not from the point of view of the party seeking the suppression order, but desirable from the point of view of the administration of justice, a phrase which must (as emphasised by the Supreme Court) be construed broadly to accommodate the particular circumstances of individual cases as well as considerations going to the broader public interest. Fundamentally it is an inquiry as to what will serve the ends of justice, not a balancing exercise.

[75] *Waxman* at [66] summarised the principal points to be kept in mind (the list is not exhaustive) when determining whether the Tribunal is satisfied it is "desirable" to make a suppression order:

> **[66.1]** The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.
>
> **[66.2]** There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.
>
> **[66.3]** The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.
>
> **[66.4]** In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
>
> > **[66.4.1]** whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
> >
> > **[66.4.2]** whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.
> >
> > **[66.4.3]** whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

[76] Although not directly submitting *Waxman* was wrongly decided, Mrs Smith contended that the term "desirable" in HRA, s 107(3) sets a threshold considerably lower than that generally applicable in the civil context. Cited in support was a line of cases decided under the Health Practitioners Competence Assurance Act, s 95(2) which also uses the term "desirable". The decision in *Johns v Director of Proceedings* [2017] NZHC 2843 at [162] to [166] illustrates the submission:

> [162] Comparisons with s 200 of the Criminal Justice Act 2011 and the criminal jurisdiction are inapt. There notions of "extreme hardship" are engaged.
>
> [163] Plainly the s 95(2) requirement of desirability is significantly lower. On this issue, Fogarty J in *ANG v A Professional Conduct Committee* said:
>
> > "As this judgment will endeavour to demonstrate, there has not been consistent interpretation and application of s 95. Second, in this judgment under appeal and other judgments, the policy disposition of the Tribunal has been consistent with the policy disposition of s 200(1), (2), essentially reflecting a presumption that there will be publication unless there is extreme hardship to the person convicted. I consider this approach to be an error of law. There is no way that s 95 of the Act can be interpreted in setting the same policy of suppression as in s 200 of the CPA."

> [164] I accept Ms Stuart's submission that the threshold under s 95 is also considerably lower than that which is generally applicable in the civil context. On this topic Chisholm J made similar comments in *ABC v CAC*:
>
> > "Not surprisingly it is common ground that the 'desirable' test in s 106 involves a lower threshold than the 'exceptional' test commonly used by the Courts."
>
> [165] On the same topic Frater J observed in *Director of Proceedings v I* that disciplinary proceedings are neither criminal nor punitive. They have a specific purpose which is to protect the health and safety of members of the public by ensuring that medical practitioners are competent to practice medicine. As her Honour observed, the dictionary definition of "desirable" is something worth seeking or doing as advantageous, beneficial or wise. In that sense it is a wholly different concept to exceptional.
>
> [166] For the same reasons as those adopted by other Judges of this Court I am satisfied that the test under s 95 invokes a considerably lower threshold than the usual civil test. It does not require exceptionality nor even something out of the ordinary. And while it is a concept not readily amenable to precise definition it does require evaluating the competing considerations of the interests of any person and the public interest. Attempts to refine the definition further are fraught because the analysis will always be case dependent. [Footnote citations omitted]

[77] As the point was not considered in *Waxman*, it must now be addressed.

Whether the interpretation of "desirable" in HPCA Act s 95(2) is relevant to the interpretation of HRA s 107(3)

[78] We do not accept that the interpretation of the term "desirable" in the context of the HPCA Act, s 95(2) is relevant to the interpretation of that term when used in the context of HRA, s 107(3) because the two statutes are neither the same nor analogous. As observed by Ross Carter in *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 269-270, it is always dangerous to assume that words bear the same meaning in different Acts: the contexts and purposes may be different enough to make such analogies inapplicable. Reference is then made to the following passage in *Barrie v R* [2012] NZCA 485, [2013] 1 NZLR 55 at [36]:

> **[36]** The enactment of a statutory definition of "lawyer" in the Lawyers and Conveyancers Act does not have any bearing on the meaning of "lawyer" in the Bill of Rights. Unless expressly adopted, the meaning given to a word in one piece of legislation is not affected by the meaning given to that same word in a different enactment. The courts have warned against the dangers of reasoning by analogy in statutory interpretation, especially between statutes dealing with different subject-matter. The definition in the Lawyers and Conveyancers Act defines the scope of the Act's regulatory regime. There is no indication that it was intended to have wider application.
>
> [Footnote citations omitted]

[79] The HPCA Act, s 95 requires the Health Practitioners Disciplinary Tribunal (HPDT) to hold its hearings in public unless it is satisfied that it is desirable to make certain orders in derogation of that obligation. Section 95 provides:

> **95 Hearings to be public unless Tribunal orders otherwise**
>
> (1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.
> (2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:
> (a) an order that the whole or any part of a hearing must be held in private:
> (b) an order prohibiting the publication of any report or account of any part of a hearing, whether held in public or in private:
> (c) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at a hearing:

(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

(3) An application to the Tribunal for an order under subsection (2) must be heard in private, but the other parties to the proceedings and any complainant are entitled to be present and to make written or oral submissions on the application.

(4) If the Tribunal proposes on its own initiative to make an order under subsection (2), it must give the parties to the proceedings and any complainant an opportunity to make written or oral submissions on the proposal; all parties and complainants (if any) are entitled to be present when any oral submissions are heard.

(5) Even if a hearing of the Tribunal is otherwise held in private, the Tribunal may allow any particular person to attend it if satisfied that he or she has a particular interest in the matter to be heard.

(6) An order made under this section continues in force—
(a) until a time specified in it; or
(b) if no time is specified, until it is revoked under section 99.

(7) Every person commits an offence and is liable on conviction to a fine not exceeding $10,000 who, without reasonable excuse, contravenes an order made under subsection (2).

[80] This provision is far more explicit than the general terms of HRA, s 107. Express jurisdiction is conferred to make non-publication orders of a specific kind. The procedure for the hearing and determination of the application is also addressed whereas HRA, s 107 makes no such provision.

[81] While there is the superficial similarity of a "desirability" threshold, there are substantive differences between the two Acts and they have little in common. In particular:

[81.1] The objectives of each Act are different. The purpose of the HPCA Act, as articulated in s 3(1), has as its focus the protection of the health and safety of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions:

3 Purpose of Act

(1) The principal purpose of this Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.

(2) This Act seeks to attain its principal purpose by providing, among other things,—
(a) for a consistent accountability regime for all health professions; and
(b) for the determination for each health practitioner of the scope of practice within which he or she is competent to practise; and
(c) for systems to ensure that no health practitioner practises in that capacity outside his or her scope of practice; and
(d) for power to restrict specified activities to particular classes of health practitioner to protect members of the public from the risk of serious or permanent harm; and
(e) for certain protections for health practitioners who take part in protected quality assurance activities; and
(f) for additional health professions to become subject to this Act.

[81.2] Proceedings before the HPDT are disciplinary proceedings instituted by the laying of a charge (HPCA Act, s 91, 92 and 100). The HPDT can make (inter alia) findings of professional misconduct and can cancel the registration of the health practitioner, suspend, censure and fine.

[81.3] Claims before the Human Rights Review Tribunal under the HDC Act, on the other hand, are of a different kind and different objectives and considerations apply. It is a rights-based jurisdiction. Section 6 of the HDC Act states that the purpose of that Act is "to promote and protect the **rights** of health consumers … and … to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those **rights**" [emphasis added]. The focus of the HDC Act is on the vindication of the rights of the consumer and public accountability has

a high value in that context. See *Director of Proceedings v Candish* [2013] NZHRRT 40 at [10].

[81.4] Proceedings before the Human Rights Review Tribunal in each of its three jurisdictions are explicitly civil proceedings, as are the remedies which can be granted. See HRA, s 92B and 92I, Privacy Act, ss 82 and 85 and the HDC Act, ss 50 and 54.

[82] In these circumstances we doubt whether the many decisions under the HPCA Act cited in argument provide assistance to the understanding and application of what is "desirable" under the HRA, the Privacy Act and the HDC Act.

[83] Our concern is increased by the fact that most of the High Court decisions cited in argument predate the *Erceg* judgment given on 14 October 2016. Of those which post-date the decision only *ANG v Professional Conduct Committee* [2016] NZHC 2949 refers to *Erceg* at any length but there is nothing in *ANG* which is of assistance regarding the interpretation and application of HRA, s 107. The subsequent decision in *Johns v Director of Proceedings* [2017] NZHC 2843 makes passing reference to *Erceg* at fn 35 but the balance of the decision has as its focus previous case law interpreting the requirement of "desirability" in HPCA Act, s 95(2).

Conclusion regarding the HPCA Act

[84] The two Acts diverge substantially as to their objectives, the form and nature of the proceedings and the "remedies" which can follow. In short, disciplinary proceedings are different in kind to civil proceedings brought to enforce statutory rights. Whereas the suppression powers of the HPDT in disciplinary proceedings are tightly prescribed by the HPCA Act, s 95, the Human Rights Review Tribunal has a unique trilogy of jurisdictions which provide for the vindication of certain human rights by way of civil proceedings. Reflecting the flexibility required across the broad range of circumstances in which suppression applications will be made in the context of the three separate jurisdictions, s 107 is worded in general terms. Desirability must be assessed in the context of the objects and purpose of the specific Act comprising the jurisdiction trilogy.

[85] It is not necessary for the purposes of the present proceeding to determine what approach the Health Practitioners Disciplinary Tribunal does or should take to suppression orders under HPCA Act, s 95. Nor is it appropriate for the Human Rights Review Tribunal to attempt to assess what impact *Erceg* will have in the disciplinary context. As we have explained, claims before the Human Rights Review Tribunal under the HDC Act are of a different nature and type compared with disciplinary action under the HPCA Act with the consequence different objectives and considerations will apply. As the Supreme Court recognised when refusing leave in *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 376 at [2], the situations warranting confidentiality are likely to differ between criminal and civil matters and "within them", as legislation often indicates.

[86] For these reasons we have not found much assistance in the decisions under the HPCA Act and we prefer to be guided by the terms of *Erceg* itself and by our previous decision in *Waxman*.

The term "desirable" in section 107 of the Human Rights Act

[87] The decision in *Waxman* had no need to and did not specifically analyse the threshold set by "desirable" other than to observe the word does not mean "special circumstances" and that the principle of open justice means that the standard of

satisfaction must be high. That was said in the context of an application for the permanent suppression of the plaintiff's name.

[88] Mrs Smith has submitted the threshold set by s 107(3) for permanent name suppression is lower than that which is generally applicable in the civil context. The submission is based on the interpretation and application of the relevant provision in the HPCA Act. For the reasons already given, we do not accept the cited jurisprudence is relevant or helpful.

[89] Nevertheless there remains for consideration the question of how the "desirable" standard is to be applied in practice across the broad spectrum of the circumstances covered by HRA, s 107, not just applications for final, permanent suppression of information.

[90] In our view not all of the many circumstances which might conceivably fit the exceptions permitted by HRA, s 107(3) will have the same significance to the general rule of open justice. Some circumstances will impact on open justice to a greater degree than others. As a consequence the degree of persuasion to satisfy the desirability threshold will vary according to the nature of the order sought, the degree of derogation from the general rule of open justice and the New Zealand Bill of Rights Act and whether the interests of justice require the general rule to be departed from in the particular circumstances of the case. Illustrations follow.

[91] Prohibiting the reporting of details of the salaries earned by third parties was accepted in *Waters v Alpine Energy Ltd (Discovery No. 3)* [2015] NZHRRT 13 at [21] as properly falling within s 107(3). The protection of third party privacy interests of that kind did not require a high threshold of desirability to be achieved. Similarly, the refusal of media access to the Tribunal file until a statement of reply is filed (as happened in *IHC New Zealand v Ministry of Education (Non-Party Access No. 2)* [2014] NZHRRT 20 at [16] to [19]) and the release to the media of a redacted version of the pleadings as in *A v Van Wijk (Access to File)* [2019] NZHRRT 12 has a low impact on the open justice rule compared with the hearing of proceedings in camera or the suppression of the identity of one of the parties (as in *Waxman*). In the latter two categories the impact on open justice will be substantial, as will be the degree of derogation from the right to freedom of expression. Consequently a more persuasive case will have to be made before the Tribunal can be satisfied it is "desirable" that the relevant s 107(3) exception be made.

[92] In some circumstances the interests of justice themselves may require the general rule of open justice be departed from, as in the case of parties and witnesses who have been subjected to sexual harassment (*DML v Montgomery and MT Enterprises Ltd* [2014] NZHRRT 6), children and young persons (*Edwards v Capital and Coast DHB (Application for Non-Publication Orders)* [2016] NZHRRT 19 and *WXY v Attorney-General (Non-Publication Order)* [2014] NZHRRT 43) and where the photographing or filming of witnesses while giving evidence is likely to affect the quality of their evidence. See for example *Director of Proceedings v Nelson (Application for In-Court Media Coverage)* [2013] NZHRRT 13 where the Tribunal prohibited the photographing of the defendant while she was giving evidence but permitted the taking of photographs during the balance of the hearing. A similar ruling was made in *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland (Camera In-Court Application by TVNZ)* [2013] NZHRRT 16. The decision in *Hammond v Credit Union Baywide (In-court media application to obtain photograph of exhibit)* [2014] NZHRRT 56 is another illustration of the variable nature of the s 107 circumstances. In that case the media had requested permission to photograph a cake which had some significance to the case. The media had already been able to report the appearance of the cake and the words which had been iced on it. The

application was declined given the potential long-term consequences to the plaintiff's future employment and career prospects.

[93] There will be occasion when satisfaction as to the desirability of a suppression order will be provided by statute alone. In *MacGregor v Craig (Second Interim Non-Publication Order)* [2015] NZHRRT 40 an interim suppression order was made to preserve the statutory confidentiality which HRA, s 85 attaches to the HRA dispute resolution process. The suppression provisions of ss 11B to 11D of the Family Courts Act 1980 provide a further example, as illustrated by *Re Apostolakis No. 3 (Refusal of Name Suppression)* [2018] NZHRRT 4.

"desirable" – summary

[94] The term "desirable" in s 107 does not reflect a lower test for permanent name suppression orders than the common law or other equivalent statutory regime. Rather the provision confers a broad discretion necessary for the Tribunal to deal with the wide range of cases that may come before it, not just applications for name suppression. In some circumstances "desirability" may require little justification or derogate only slightly from the general rule and the New Zealand Bill of Rights. In other circumstances the threshold will be higher given the importance of the open justice principle in the context of the facts of the case, the interests protected under the New Zealand Bill of Rights Act and the degree of derogation.

[95] It is necessary to mention again that the determination of what is "desirable" in the context of any particular case will depend, in part, on the stated purpose of the Act under which the proceedings have been brought. The Long Title to the HRA refers to "better protection of human rights in New Zealand" as one of the purposes of the Act while the Long Title to the Privacy Act refers to the object of that Act as being (inter alia) the promotion and protection of individual privacy. In the case of the HDC Act the explicitly stated purpose of the Act is the promotion and protection of the rights of health consumers:

> **6 Purpose**
>
> The purpose of this Act is to promote and protect the rights of health consumers and disability services consumers, and, to that end, to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights.

[96] We do not intend addressing interim non-publication orders made under HRA, ss 95 and 107 as the statutory criteria for the making of such orders are different. Section 95 requires the Tribunal (or Chairperson) to be satisfied the order is necessary in the interests of justice to preserve the position of the parties pending a final determination of the proceedings. In addition it is recognised that interim, rather than permanent, suppression is more likely to be granted at an interlocutory stage of a proceeding because at trial the court or tribunal will be better placed to assess any need for permanent suppression. See *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 at [34].

The New Zealand Bill of Rights Act

[97] The Director did not contend a full *Hansen* [*R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1] analysis is required on an application for name suppression under HRA, s 107 but there was no dispute that in both criminal and civil jurisdictions the making of a suppression order requires consideration of the New Zealand Bill of Rights Act. For an example taken from the criminal context see Elias CJ in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [43]:

> **[43]** The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield. And since the Judge is required by s 3 to apply the New Zealand Bill of Rights Act 1990, it will be necessary for the Judge to consider whether in the circumstances the order prohibiting publication under s 140 is a reasonable limitation upon the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5). Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome.

[98] Since the Tribunal is required by s 3 to apply the New Zealand Bill of Rights Act it will be necessary for the Tribunal to consider whether in the circumstances of the particular case the suppression order sought is a reasonable limitation on the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5).

[99] As stated by McGrath, William Young and Glazebrook JJ in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [157], whether or not a suppression order is a limitation on freedom of expression that complies with s 5 will depend on the circumstances of the particular case.

Conclusion

[100] In our view a final suppression order can be made consistently with the New Zealand Bill of Rights Act where the interests of justice require that the general rule of open justice be departed from and the order is a reasonable limit in terms of the New Zealand Bill of Rights Act. Such departure is permissible only to the extent necessary to serve the ends of justice.

[101] Given this stringent approach the standard, as recognised in *Erceg* at [13], is a high one. The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice.

[102] It is not intended to attempt a restatement of what was said in *Waxman* at [66] where the Tribunal summarised the principal points to be kept in mind when interpreting and applying HRA, s 107(1) and (3). It is necessary, however, to emphasise that the greater the degree of derogation from open justice and the New Zealand Bill of Rights the greater the degree of persuasion required to satisfy the desirability threshold. The content of what is "desirable" in each case must be calibrated to reflect the significance and nature of the confidentiality issues under consideration. Not all of the exceptions permitted by HRA, s 107(3) will have the same significance or impact on the general rule of open justice.

[103] We return to the facts.

APPLICATION OF THE LAW TO THE FACTS

Introduction

[104] The actions of Mrs Smith and of the LMC had extreme adverse outcomes for Ms Lawn, her husband and Ariana. They will be living with the consequences of those actions for the rest of their lives. Caring for Ariana has taken a great toll on Ms Lawn. The amount of stress during and after this traumatic event has sometimes been unbearable. Her quality of life has been changed drastically. It is understandable she wants to be able to tell Ariana's story in full.

[105] It is also understandable she wants Mrs Smith and the LMC to be held accountable for the breach of her rights and that she is opposed to the application for name suppression.

[106] But while Ms Lawn's views are relevant to the Tribunal's decision, they are not determinative. The task of the Tribunal is to assess the application objectively and to apply the relevant law.

Delay

[107] One of the conspicuous features of this case is the long delay between the events on 24 January 2012 and the hearing of the name suppression application on 26 and 27 November 2018, a period of 6 years and 10 months:

> **[107.1]** Ms Lawn lodged her complaint with the Health and Disability Commissioner on 17 April 2012 but the Report by the Commissioner was not published until 11 June 2014, a delay of just over two years.
>
> **[107.2]** On 19 June 2014 Mrs Smith sent a letter of apology to Ms Lawn and on 1 August 2014 there was a meeting between Taranaki DHB staff, Mrs Smith, Ms Lawn and her family.
>
> **[107.3]** The present proceedings were not filed until 22 December 2016, a delay of five years. The final amended statement of claim was not filed until after a further nine months on 19 September 2017.

[108] In the result the making of consent orders regarding liability and the application for a suppression order fall for determination only two months short of seven years after the events.

[109] We do not see any basis for attributing any part of this delay to Mrs Smith and in any event little point is served by apportioning blame. The simple fact of the matter is that it was within the five years which elapsed between January 2012 and the filing of proceedings in December 2016 that Mrs Smith and her husband abandoned their careers in favour of undertaking, on a fulltime basis, [redacted]. The decision was not the result of a whim. [redacted] has long been their ambition and their preparation for working in [redacted] has been intensive, including spending almost two years [redacted] at a language school doing formal language and cultural training. Prior to that Mr Smith had spent a further year in preparation by studying for a [redacted].

[110] Publication of Mrs Smith's name has real potential to cause significant harm not just to her, but also to her husband who has sacrificed much by giving up his professional career and investing the past seven years [redacted] to use his skills for the benefit of the poor.

[111] Mr and Mrs Smith [redacted] from their work. They are required to do all [redacted] and have sold their home [redacted].

[112] The projects on which Mrs Smith and her husband are engaged [redacted] aimed at improving the quality of the lives of those living in a remote part of [redacted]. The fact that at least two of these projects went into sharp decline during the Smiths' recent absence in New Zealand underlines not only the worth of their work, but also the value of their personal contribution. It is not surprising Mrs Smith has been approached to undertake a two-year health management position.

[113] Given the time, energy and dedication invested by Mr and Mrs Smith [redacted] Mr Smith has understandably deposed that it would be "beyond devastating" for him and his wife to prematurely end [redacted].

[114] Mr and Mrs Smith would not be facing this prospect had it not taken five years for these proceedings to be instituted. It was in these five years that they abandoned their careers, sold their home, engaged in substantial preparation and then embarked on [redacted] work in a substantive way.

[115] The long delay and its consequences are highly relevant to the issue whether the suppression orders are necessary to secure the proper administration of justice notwithstanding the principle of open justice. In our view the substantial delay is a factor of considerable significance given the Smiths changed their position during the period of the delay. In this respect it must be made clear the interests to be taken into account are not just those of Mrs Smith. There are also those of third parties, particularly Mr Smith, the [redacted] and the communities [redacted]. The long-term prejudice to them is likely to be severe. This will not serve the ends of justice.

[116] We address next the main points which remain for consideration.

The alleged cover-up

[117] The Director submits Mrs Smith is seeking suppression orders:

> To facilitate her withholding the Tribunal's decision from [redacted] immigration officials and other agencies of the [redacted] and Australian governments, and from other public and private agencies that may have a legitimate interest in knowing of the decision.

[118] As to this Mrs Smith has deposed in both of her affidavits that the relevant [redacted] have been fully informed of the matter as have the lead doctor and the board at the health clinic. Her evidence goes to some lengths to address the allegation the application is a "cover up".

[119] We have no reason to doubt the sincerity and veracity of Mrs Smith or of the authors of the letters annexed to her first affidavit, both of whom support the application for name suppression. There is no contradictory evidence and there has been no cross-examination.

[120] It must also be pointed out that name suppression by a New Zealand court or tribunal does not excuse or inhibit the duty to disclose relevant information to an immigration department during visa processing. The principle is the same in the criminal context. See the Criminal Records (Clean Slate) Act 2004, s 14(3).

Prior publication

[121] Mrs Smith is not named in the Commissioner's report. The practice of the Commissioner is to publish on his website only a redacted version of a report. Such publication is stated at para 220 to be for educational purposes. As in the case of *Director of Proceedings v Candish* [2013] NZHRRT 40 at [10.10] we are not required to determine whether we agree with this approach or with the Commissioner's policy document *Naming Providers in Public HDC Reports*. The powers and functions of the Commissioner and of the Tribunal are distinctly different and in addition it is not uncommon for confidentiality to be available in one forum but not in another. See *Clark v Attorney-General (No. 1)* [2005] NZAR 481 (CA) at [48] and *Musuku v Commissioner of Inland Revenue* [2015] NZHC 1584 at [20]. In these circumstances the fact that neither Mrs Smith nor the LMC have

been named in the website version of the Commissioner's report does not mean the Tribunal should for that reason take a favourable view of the suppression application.

[122] The evidence shows that while details of the Commissioner's report have been extensively covered in media, this has been done without naming Mrs Smith. The Director submits this is beside the point because Mrs Smith's name is well known in the community and is in the public domain. It is submitted the suppression orders would for this reason be futile. Reliance is placed on the evidence that Ms Lawn, her (and her husband's) family, friends and local communities generally know Mrs Smith was involved. Ms Lawn says that anyone who does not already know that the LMC and Mrs Smith were involved would probably have been able to identify the LMC at least from the description that the LMC had since retired and the midwife had been employed at the hospital. On visits to local and hospital communities Ms Lawn has on numerous occasions been approached by other health practitioners asking what happened to the LMC and to Mrs Smith.

[123] Ms Aldridge says in her affidavit that the names of the LMC and Mrs Smith are known in her community, day care, school, and by friends and family. They are also known by health practitioners at the Taranaki DHB. However, knowledge of Mrs Smith's involvement is not as common as that of the LMC:

> [The LMC's] involvement is common knowledge because he was so well known in the community. Knowledge of [Mrs Smith's] involvement is not as common as [the LMC's] because she was not as established and she moved away after Ariana's birth, but certainly her involvement is well known in my and [Ms Lawn's] networks.

[124] The fact remains, however, that Mrs Smith has never been named in mainstream media and the events are now seven years in the past.

[125] There is no objection in principle to the making of a suppression order in the criminal or civil contexts when some in the community already know the identity of the person either through direct knowledge or as a result of publicity already given to a case. There will always be individuals, whether it be the parties, their families and communities, work associates and the like who know the suppressed information but this has never been a reason on its own to deny a suppression order in the criminal and civil contexts:

> **[125.1]** Extensive publicity is not of itself a bar to the making of a suppression order, particularly where there has been long delay. In *Ellis v Auckland District Law Society* [1998] 1 NZLR 750 there had been a delay of nearly five years between the dates of the offences and the hearing. The Full Court at 760 explicitly stated that they did not accept "that earlier extensive publicity is … a reason for declining to make suppression orders". In *S v Wellington District Law Society* [2001] NZAR 465 a differently constituted Full Court was willing to order suppression primarily because eight and a half years had elapsed since the law practitioner's convictions and notwithstanding that, at the time of his sentence "there was publication in the local news media of the conviction and sentence, and that the appellant was a qualified lawyer".
>
> **[125.2]** The Supreme Court has recently accepted that a suppression order does not preclude dissemination of the suppressed information to persons with a genuine need to know. See *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 at [79] where the context was the Criminal Procedure Act 2011, s 200 but the principle must necessarily be of application in the civil context as well:
>
> > [79] Drawing these threads together, the focus in s 200 is, generally, on publication beyond the courtroom to the public or a section of the public at large. We say "generally" because it is necessary to ensure the passing on to one other person or to a small

> number of persons (including dissemination by word of mouth), in the situation where that will undermine the very purpose of the suppression order, is captured by the section. The section does not encompass the dissemination of information to persons with a genuine need to know or, as the Court of Appeal put it, "a genuine interest in knowing", where the genuineness of the need or interest is objectively established. [Footnote citation omitted]

[126] Had the present proceedings been brought without long delay Mrs Smith would not now be facing the prospect of being named in the context of a repetition of the earlier publicity which followed publication of the Health and Disability Commissioner's report in June 2014. This inherent unfairness must be taken into account when assessing what is necessary to secure the proper administration of justice. At the same time the decision in *ASG v Hayne* will permit disclosure of Mrs Smith's name to those involved in the care of Ariana who have a genuine need to know.

[127] The Director criticised Mrs Smith for what was said to be the "delay" in making the suppression application. But as to this, it is the Tribunal's experience that parties with even the strongest of cases for name suppression often delay making application. For this there may be any number of reasons and in the absence of the Director seeking cross-examination of Mrs Smith there has been no clear opportunity for the criticism to be answered. It is to be noted, however, that for almost all of the period which post-dates the filing of these proceedings Mrs Smith has been living overseas in sometimes remote areas and in an email dated as early as 10 April 2017 Ms Scott referred to the consequential difficulty in obtaining instructions. It is unsurprising that once the parties reached settlement in late September 2018 Mrs Smith would wish to bring all aspects of the case to a close. Above all the fact remains that there has been no publication of her name outside various communities in Taranaki. That the application could have been brought at an earlier point has no substantive bearing on the merits of the issues to be determined. The relevant delay in this case lies in the five-year delay in the filing of the proceedings. There is no evidence to suggest Mrs Smith contributed to that delay.

Reputation and standing

[128] Reference has been made by Mrs Smith to the potential loss of reputation, credibility and standing. As to this it is correct the Midwifery Council has by letter dated 4 October 2018 confirmed no competence, health or conduct concerns, other than this matter, have been brought to the attention of the Council.

[129] But as to this, the Supreme Court in *Erceg* at [14] cited with apparent approval the following passage taken from the judgment of Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142-143:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: … A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[130] Embarrassment, invasions of privacy or damage by publicity to proceedings (which would include damage to reputation, standing and credibility) are not sufficient to justify name suppression. Such interests are sacrificed to the greater public interest in adhering to an open system of justice. These factors are, however, of potential relevance to the overall assessment of whether a suppression order is necessary to secure the proper administration of justice in the particular proceedings.

[131] In the present case the reputation, standing and credibility of relevance is not that of Mrs Smith, but of her husband, [redacted] and that of the local community organisations with which they work in [redacted]. It is they who are at risk of being jeopardised by their association with Mrs Smith, an association built up during the long delay in the bringing and resolution of these proceedings. It is an association of historical permanence and cannot now be changed. The evidence shows [redacted] could be at real risk and if that happens, the consequences could include termination of the projects. This will not serve the ends of justice.

Health issues

[132] Mrs Smith's long term general practitioner has provided a statement in which she expresses the view that publication of Mrs Smith's name may cause a significant and disproportionate risk of harm to her mental health.

[133] There is also a report from the general practitioner responsible for the care of Mr Smith's mother who is 90 years of age. It is reported she (the mother) is deeply distressed about the possibility of publication of Mrs Smith's name in relation to these proceedings. The mother [redacted] and there is a considerable risk publication will cause significant harm to her [redacted]. This in turn, would almost certainly put her at significant risk of physical deterioration as a secondary consequence of the [redacted] she might experience. Reference is made to the possibility of irreparable harm to her health from which she might never recover.

[134] The difficulty, however, in relation to both Mrs Smith and her mother-in-law is that the possibility of publication of Mrs Smith's name has existed for the past six years and the evidence does not point to any specific and serious health impact caused by publication beyond what would be expected to arise naturally from these events.

[135] However, although the weight to be given to the medical evidence cannot be described as substantial it is to be taken into account when addressing the administration of justice standard. As noted in *Erceg* at [18], the phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.

Overall conclusion

[136] Attempting to bring these various threads together the starting point is that the principle of open justice is fundamental to the common law system. The primary issue to be addressed is whether the interests of justice require that the general rule of open justice be departed from and if so, the extent to which such departure is necessary to serve the ends of justice. The suppression order must be a reasonable limit to the right to freedom of expression and Mrs Smith must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice. The extent of the order is limited to what is necessary to serve the ends of justice.

[137] Because permanent name suppression for Mrs Smith would be a substantial derogation from open justice we have required a high degree of persuasion to satisfy the desirability threshold. We have also, in applying ss 3 and 5 of the New Zealand Bill of Rights Act considered whether in the circumstances the suppression order is a reasonable limitation on the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society.

[138] Applying the law as earlier stated, our overall conclusion is that in terms of s 107(3) of the Human Rights Act 1993 we have been satisfied that it is desirable to make a permanent non-publication order, the terms of which follow below. Our primary conclusions are:

> **[138.1]** The delay factor is of determinative significance. Not only Mrs Smith, but also her husband and a number of third parties are at risk of severe detriment should publication of her name now occur some seven years after the events. This will not serve the interests of justice. Mr and Mrs Smith would not be facing this prospect had it not taken five years for these proceedings to be instituted. It was in these five years that they abandoned their careers, sold their home, engaged in substantial preparation and then embarked [redacted] in a substantive way.
>
> **[138.2]** The reputation, standing and credibility of Mr Smith, the [redacted] and that of the [redacted] with which Mr and Mrs Smith work in [redacted] are at risk of being jeopardised by their association with Mrs Smith. It is an association built up during the long delay in the bringing and resolution of these proceedings. It is an association of historical permanence and cannot now be changed. The evidence shows [redacted] could be at real risk and if that happens, the consequences could include termination of the projects. This will not serve the ends of justice.
>
> **[138.3]** There has been no prior publication of Mrs Smith's name in mainstream media and the fact that her name may be known in the communities associated with Ms Lawn, Ms Aldridge and the Taranaki hospital are not a bar to the making of a suppression order particularly given the long delay.
>
> **[138.4]** While we have not attached much weight to the medical evidence relied on by Mrs Smith it has nevertheless been taken into account.
>
> **[138.5]** We have also taken into account the fact that the order will not prevent disclosure of Mrs Smith's name to those involved in the care of Ariana who have a genuine need to know. In the totality of the circumstances the permanent suppression order will be a reasonable limitation in terms of the Bill of Rights Act, s 5.
>
> **[138.6]** It needs to be emphasised Mrs Smith has not and will not be practising as a midwife in [redacted]. The need to know of events in New Zealand seven years in the past in relation to matters not relevant to the projects on which Mrs Smith and her husband are working is either absent or at best minimal. Yet the permanent damage which could be done to those projects and the agencies associated with them (as well as Mr Smith) will be severe, as explained in the letters from [redacted] annexed to Mrs Smith's first affidavit.

Ancillary matters

[139] As a consequence of the non-publication orders made in this decision it will be necessary for the parties to confer regarding the redactions now required to the agreed summary of facts. Counsel are to file a joint memorandum (or if agreement is not possible, separate memoranda) following the expiry of 22 working days after the date of delivery of this decision.

COSTS

[140] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[140.1] Mrs Smith is to file her submissions within 14 days after the date of this decision. The submissions for the Director are to be filed within a further 14 days with a right of reply by Mrs Smith within 7 days after that.

[140.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[140.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

ORDERS

[141] The following orders are made pursuant to s 107 of the Human Rights Act 1993:

[141.1] Publication of the name, address, occupation and of any other details which could lead to the identification of the defendant in these proceedings [redacted] is prohibited.

[141.2] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

[141.3] The decision of the Tribunal, once redacted to comply with the above suppression orders, is to be released for reporting as *Director of Proceedings v Smith (Application for Final Non-Publication Orders)* [2019] NZHRRT 32.

[141.4] Leave is reserved to both parties to make further application should the need arise.

.....	.....	.....
Mr RPG Haines ONZM QC	**Ms K Anderson**	**Ms W Gilchrist**
Chairperson	**Member**	**Member**