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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL [2019] NZHRRT 33

	Reference No. HRRT 093/2016
UNDER	SECTION 50 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994
BETWEEN	DIRECTOR OF PROCEEDINGS
	PLAINTIFF
AND	WILLIAM ARTHUR BROOKS
	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 AH Waalkens QC and Ms K Wills for defendant

DATE OF HEARING: 26 and 27 November 2018

DATE OF DECISION: 17 June 2019

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

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[1] [This decision is to be cited as *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33.]

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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 Dr Brooks was an obstetrician and gynaecologist employed by the Taranaki District Health Board (Taranaki DHB). He also practised privately. These proceedings arise out of a complaint by the aggrieved person (Ms Cerise Lawn) and her husband about the care provided by Dr Brooks as her Lead Maternity Carer (LMC) during the labour and birth of her baby Ariana Lawn on 24 January 2012.

[3] Liability having been admitted and damages agreed, Dr Brooks has applied for a permanent order prohibiting publication of his name and of any details that might identify him 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 gave notice 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 25 September 2018 Dr Brooks 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 *Director of Proceedings v Brooks (Application for Non-Publication Orders)* [2018] NZHRRT 41. Those orders are in the following terms:

> **[26.1]** Publication of the name, address and of any other details which could lead to the identification of the defendant in these proceedings (William Arthur Brooks) is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[26.2]** 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 Dr Brooks 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] Dr Brooks admits to having breached this Right, as does the midwife in separate but related proceedings brought by the Director in HRRT092/2016.

[9] On 27 September 2018 the Director and Dr Brooks 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 Dr Brooks 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 Dr Brooks 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 is determined and an assessment made whether the summary of facts agreed to by the parties is in need of redaction or other amendment.

The agreed summary of facts

[12] The agreed summary of facts is 22 pages and 96 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 Dr Brooks for name suppression.

[13] It is sufficient to note that throughout her pregnancy, Ms Lawn's anti-natal care was shared between Dr Brooks and her general practitioner. Dr Brooks 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] The midwife (in HRRT092/2016) 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. Dr Brooks, who had not been notified by the admitting midwife that Ms Lawn had been admitted, was not called until late and did not arrive at the delivery suite until one hour prior to Ariana's delivery. 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 an independent expert has expressed significant concerns about the care given to Ms Lawn and her baby by Dr Brooks and by the midwife. The expert has advised there were a number of missed opportunities to identify and interrupt the progression of events:

[16.1] Failure to use CTG monitoring to assess fetal wellbeing in response to the presence of meconium and fetal tachycardia.

[16.2] Failure to identify and manage slow progress in labour.

[16.3] Failure to respond to abnormally elevated maternal heart rate and to closely monitor maternal temperature.

[16.4] Failure to expedite delivery in the second stage of labour.

[16.5] Use of syntocinon in the second stage without CTG monitoring despite marked fetal tachycardia.

[16.6] Delay in provision of effective resuscitation following delivery.

[17] While acknowledging that Dr Brooks was not called until late in the second stage of Ms Lawn's labour, the opinion of the expert is that given the dire circumstances only four things were required of Dr Brooks:

[17.1] To recognise that both Ms Lawn and the baby were likely to be infected.

[17.2] To recognise that the baby required immediate delivery.

[17.3] To recognise that the baby was likely to be compromised at birth and to ensure that neonatal staff were on hand to resuscitate the baby.

[17.4] To explain this to the aggrieved person quickly while making preparation to deliver the baby.

[18] The agreed summary records Dr Brooks accepts that his actions outlined in the agreed summary of facts breached Right 4(1) of the Code and further accepts he mismanaged the situation and did not follow protocols.

[19] The summary records Dr Brooks apologised in person during a meeting with Ms Lawn and in writing for the distress and grief she has had to endure since the birth of Ariana.

Dr Brooks has retired from medical practice

[20] Dr Brooks is presently 80 years of age. He retired from medical practice in July 2013 and since then has not worked in medical practice at all.

[21] No other adverse findings have been made against him by the Health and Disability Commissioner, the Medical Council, the Health Practitioners Disciplinary Tribunal or any other body. Nor is he aware of ever having been the subject of an investigation by the Health and Disability Commissioner. Throughout the years of his practice he has never had another case where an outcome or anything like the present has happened.

Extreme adverse outcomes for Ms Lawn and Ariana

[22] The actions of Dr Brooks and of the midwife 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:

> 79. 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);
d. Strabismus (eyes are not aligned);
e. Seizures;
f. Severe global developmental delays;
g. Constipation;
h. Poor growth;
i. Poor sleeping patterns.

....

81. 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, Dr Brooks admits that she (Ms Lawn) has lost:

[23.1] The benefit of receiving appropriate obstetric care and, in particular, the timely detection and/or appropriate response to maternal infection and/or fetal compromise.

[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 medical 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 Dr Brooks that the circumstances outlined have had a significant and negative impact on Ms Lawn, including 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 Dr Brooks and the midwife, 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.

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

[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 Dr Brooks and the midwife 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 Dr Brooks and the midwife. The amended statement of claim was subsequently filed on 27 July 2016. However, the foreshadowed proceedings by the Director against Dr Brooks and the midwife 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 DR BROOKS FOR PERMANENT NAME SUPPRESSION

Grounds

[30] By application dated 2 October 2018 Dr Brooks has asked for a permanent non-publication order. The grounds of the application are, in summary:

[30.1] The public interest in knowing Dr Brooks's identity is limited in that:

[30.1.1] He is no longer practising medicine in any capacity, having retired five years ago in July 2013.

[30.1.2] Publication of his 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 his identity is significantly reduced by this extensive delay.

[30.1.4] Suppression of his 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 Dr Brooks' name is published, there is the risk of irreparable harm to:

[30.2.1] The reputation of his wife (the wife) who is also a health practitioner. They live in a small community and she will be easily identified in connection with Dr Brooks. In turn, this creates the risk of harming her relationship with patients and causing her undue stress.

[30.2.2] The reputation and career of Dr Brooks' daughter (daughter 1), an academic holding a doctorate in Immunology.

[30.2.3] The ability of Dr Brooks' other daughter (daughter 2) to potentially obtain work as a medical radiation technologist in Taranaki.

[30.2.4] Dr Brooks' health given his age and the stress and upset associated with this matter.

[30.2.5] Dr Brooks' reputation and standing in the small community in which he lives (Taranaki).

The evidence in support of the application

[31] The essence of the application is that publication of Dr Brooks' name will adversely impact not only on himself but also on the three members of his family who are health practitioners, namely his wife and two daughters. Although Dr Brooks is the only member of his family who has provided an affidavit in support of the suppression application, the Tribunal has been provided with affidavits by third parties as well as letters of support. We reproduce here only the gist of the evidence.

[32] Dr Brooks' wife is a nuclear medicine technologist who has worked for the Taranaki DHB for the past 34 years. It is said she is highly regarded for her expertise and work in her field. She and Dr Brooks live in a small community and her name is clearly associated with his. She has not provided an affidavit. However, a former work colleague (now retired) also a nuclear medicine technologist has deposed that publication of Dr Brooks' name will make it very difficult for his wife to cope in the workplace. Such publication will create the risk of his wife being unable to undertake her work effectively. Were she to find it necessary to resign, the nuclear imaging service at the hospital will likely close given recruiting issues. Apparently there are less than 100 persons registered as nuclear medicine technologists in New Zealand.

[33] As mentioned, one of Dr Brooks' daughters is an academic holding a doctorate in Immunology. It is not suggested publication of her father's name will have the consequence of her being disadvantaged through formal recruitment and career progression at the University. Rather, in the opinion of the deputy head of her department, publication could impact adversely on her professional reputation among staff and students and the wider biomedical research community which overlaps significantly with the clinical medicine sector. The concern is about the potential for students to link Dr Brooks to his daughter with a view to undermining her academic integrity and moral authority by association. In addition any public linking could impact on the daughter's academic research work and undermine her confidence and reputation within New Zealand because it is widely known she is the daughter of Dr Brooks.

[34] The second daughter, a medical radiation technologist, does not presently work in Taranaki but may wish at some point in the future to return to New Plymouth to work. She is concerned publication of her father's name could prejudice her ability to obtain work.

[35] Finally, Dr Brooks seeks name suppression because he is concerned at the risk of harm to his own reputation and health. As to his reputation the Tribunal has received affidavits from two medical practitioners who are also obstetricians and gynaecologists who have worked with Dr Brooks at the Taranaki DHB. Both speak highly of him. Dr LG Fookes deposes:

> 7. Arthur Brooks was an excellent surgeon who served the local community very well until his retirement. He was always available 24/7. I know of no other case where Dr Brooks

encountered the problems that were experienced with this birth. I had and still have a high regard for him professionally.

8. Dr Brooks, over the years that he worked as an O&G in the Taranaki region did help thousands of women and babies. I am aware he is not going to be working again.

[36] Dr JH Smith has stated:

12. I am aware that Arthur Brooks delivered thousands of babies over the years. He had an excellent reputation as a doctor who was utterly committed to the welfare and benefit of the community. He was always available at any time of the day or night. I consider he left a positive imprint on the service that he provided for the community.

[37] A third obstetrician and gynaecologist (Dr WE Viner) has deposed that he regarded Dr Brooks to be a competent obstetrician and gynaecologist.

[38] In a letter to the Tribunal Dr Brooks' general practitioner of 30 years states that while Dr Brooks suffers from no known significant health ailments, he is 80 years of age and in jeopardy of health issues developing secondary to the stress name publication will inevitably cause. There is a risk Dr Brooks' health may be significantly harmed were he to sustain stress and upset as a consequence of publication of his name. Being 80 years of age Dr Brooks would be more susceptible to adverse medical consequences secondary to stress and upset.

[39] The medical practitioner goes on to say that he can confirm Dr Brooks has enjoyed an excellent reputation as an obstetrician and gynaecologist of the highest standards. He is unaware of any other adverse comment about him. The medical profession in Taranaki held in him high esteem. Publicity of his name or identity would run the risk of causing irreparable harm to his standing and reputation in the Taranaki community.

[40] As to the risk that an order of name suppression in Dr Brooks' favour might in some way tarnish the reputation of the other obstetricians working at the Taranaki DHB at the time, Dr Smith has deposed that such fears are not well placed. One of the doctors now lives in New York and neither Dr Smith nor Dr Viner have concerns about Dr Brooks receiving name suppression.

[41] Other evidence relied on by Dr Brooks 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 Dr Brooks or the midwife 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 the midwife. There was only one reference to Dr Brooks.

APPLICATION OPPOSED BY DIRECTOR

Grounds

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

[42.1] The order sought is not desirable in the interests of justice.

[42.2] Dr Brooks' identity in connection with this matter is already in the public domain.

[42.3] Dr Brooks has admitted serious breaches of the Health and Disability (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

[42.4] The nature of the breaches admitted by Dr Brooks (such as failure to discharge his responsibilities as Lead Maternity Carer to prepare a care plan, failure to record matters in the clinical notes, and failure to obtain informed consent) are such that it is unlikely these failures were limited to his care of Ms Lawn, and Dr Brooks does not suggest otherwise. Other women who have been under his care have an interest in knowing of these events and of the Tribunal's orders.

[42.5] The public interest in open justice supports the presumption that this information will not be suppressed. The fact that Dr Brooks is no longer in practice does not reduce public interest in open justice.

[42.6] There is a public interest in members of the medical 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.

[42.7] 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.

[42.8] 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

[43] Five 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. The fourth is by Ms BA Kelly, a recently retired Charge medical radiation technologist and the fifth is by Professor MJ Wilson, Victoria University of Wellington.

[44] 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 the midwife and by Dr Brooks, 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.

[45] Ms Lawn is opposed to the midwife and Dr Brooks 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 the midwife.

[46] 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.

[47] The evidence of Ms Aldridge is that after Ariana's birth she (Ms Aldridge) shared the names of the midwife and Dr Brooks (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 Dr Brooks and "quite a few people" would know the identity of the midwife. She accepts that knowledge of the midwife's involvement is not as common as Dr Brooks' because she (the midwife) 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.

[48] The evidence of Dr Butler is that the identities of the midwife and of Dr Brooks 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 Dr Brooks and the midwife, or say anything that might identify who they were.

[49] The evidence of Ms Kelly relates to the possibility of daughter 2 being disadvantaged in the development of her career. Ms Kelly states that in her experience any interview or subsequent employment of a health practitioner is based on their qualifications, experience and reputation in their own right and is not influenced by any factors associated with other family members. In her opinion any bias on the part of any prospective employer is very unlikely and she does not believe there would be any impact on the daughter's reputation or ability to retain or obtain employment in her field of practice as a result of Dr Brooks' conduct. Any risk would be very remote. Ms Kelly goes on to depose that with respect to Dr Brooks' wife, the community in which these events occurred would likely already have knowledge of the events and of the practitioner involved. That notwithstanding, Dr Brooks' wife has continued working since 2012 (when these events occurred). If there was going to be an impact on her work, which Ms Kelly considers unlikely, this would surely have occurred already. In addition, given that Dr Brooks' wife has been working in her position at the Taranaki DHB for 34 years and is clearly well respected for her expertise, it seems highly unlikely the actions of her husband would cause her own well-earned reputation to be put at risk.

[50] The evidence of Professor Wilson relates to daughter 1 and the fear that her professional reputation would be damaged by association with her father's published name. In Professor Wilson's opinion the risk would be negligible. Nor would she be professionally disadvantaged by association with her father. University processes for appointment and career progression are rigorous and fair. In his experience academic

merit is judged on the performance and reputation of the person themselves and the unrelated conduct or misconduct of other members of their family over whom they have no control would not be relevant.

No cross-examination

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

Admissibility of Ms Lawn's evidence

[52] 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 Dr Brooks' 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.

[53] 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.

[54] 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 Dr Brooks' application for permanent name suppression. That decision cannot be surrendered to Ms Lawn and we did not understand the Director to contend otherwise.

[55] 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

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

> **[56.1]** Claims under either Part 1A or Part 2 of the Human Rights Act that there has been discrimination on a prohibited ground.
>
> **[56.2]** Claims under Part 8 of the Privacy Act 1993 that there has been an interference with privacy.
>
> **[56.3]** 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.

[57] 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

[58] 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).

[59] 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.

[60] 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 Dr Brooks 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. His 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.

[61] We now:

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

[61.2] 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.

[61.3] 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*

[62] 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].

[63] 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.

[64] 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.

[65] *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.

[66] Although not directly submitting *Waxman* was wrongly decided, Dr Brooks 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]

[67] 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)

[68] 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]

[69] 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).

[70] 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.

[71] 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:

[71.1] 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.

[71.2] 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.

[71.3] 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].

[71.4] 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.

[72] 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.

[73] 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

[74] 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.

[75] 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.

[76] 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

[77] 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.

[78] Dr Brooks 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.

[79] 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.

[80] 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.

[81] 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.

[82] 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.

[83] 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

[84] 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.

[85] 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.

[86] 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

[87] 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.

[88] 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).

[89] 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

[90] 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.

[91] 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.

[92] 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.

[93] We return to the facts.

APPLICATION OF THE LAW TO THE FACTS

Introduction

[94] The actions of the midwife and of Dr Brooks 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.

[95] It is also understandable she wants the midwife and Dr Brooks to be held accountable for the breach of her rights and that she is opposed to the application for name suppression.

[96] 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

[97] 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:

> **[97.1]** 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.
>
> **[97.2]** In July 2014 Dr Brooks sent a letter of apology to Ms Lawn and in August 2014 met with Ms Lawn and again apologised.
>
> **[97.3]** 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.

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

[99] We do not see any basis for attributing any part of this delay to Dr Brooks.

[100] However, delay does not in itself justify the making of a permanent suppression order. There must be some material before the Tribunal to show specific adverse consequences which, combined with all the other circumstances of the case, justify an exception to the fundamental rule of open justice.

[101] Just as delay might strengthen a case for suppression, it can also undermine the case. As in the case of Dr Brooks' wife. As pointed out by Ms Kelly, some of the communities in Taranaki have knowledge of the events and that Dr Brooks was the obstetrician and gynaecologist. Certainly it is common knowledge at the hospital. If there was going to be an impact on Dr Brooks' wife's work, it could have been expected this would have already occurred or that some evidence of the potential harm would have emerged. But there is no such evidence.

[102] Similarly the prospect of harm to daughter 2 who may (possibly) in the future move to Taranaki remains highly speculative. She has not moved to her home town in the seven years since these events and the evidence that she may so move at some point in the future is scant. She herself has not filed an affidavit regarding her intentions and the possible timeframe for the possible relocation.

[103] In the circumstances we can attach little weight to the claimed adverse consequences anticipated by Dr Brooks' wife and by daughter 2. The interests of daughter 1 are addressed in the context of reputation and standing.

Health issues

[104] Dr Brooks' long term general practitioner has provided a statement that Dr Brooks suffers from no known significant health ailments but there is a risk of health issues developing secondary to the stress publication of his name will inevitably cause. Being 80 years of age Dr Brooks would be more susceptible to adverse medical consequences secondary to stress and upset.

[105] It would also be the case that Dr Brooks' wife (and indeed all members of his family) have had to live with the stress of these proceedings for some years and that name

publication at this stage will only increase that stress. However, the possibility of publication of Dr Brooks' 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. In these circumstances health issues have little or no bearing on our decision.

Reputation and standing

[106] Reference has been made by Dr Brooks to potential loss of reputation and standing. It is correct the evidence establishes Dr Brooks enjoyed an excellent reputation as a doctor committed to the welfare and benefit of his patients and the community.

[107] The Tribunal accepts that publication of Dr Brooks' name, even at a distance of seven years from the events, may well result in a diminution or loss of his reputation and standing. However, such will not impact on his ability to practise or on his income. At 80 years of age he has retired. Wounded though he may feel, the loss of his reputation and standing is not a factor to which any substantial weight can be attached.

[108] Addressing this issue, 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.

[109] 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 whether a suppression order is necessary to secure the proper administration of justice in the particular proceedings. In that overall assessment the interests of family members (if relevant) are to be taken into account.

[110] Dr Brooks relied on the decision in *B v R* [2011] NZCA 331 as authority for the proposition that name suppression can be appropriate where publication would compromise the ability of a family member to do his or her job. In the present case the family members said to fall into this category are Dr Brooks' wife and daughter 1.

[111] In *B v R* Mr B had pleaded guilty in the District Court to 21 charges of being in possession of an objectionable publication. The publications showed or depicted the exploitation of children and young persons for sexual purposes. The plea for name suppression was advanced on the basis publication of B's name would impact adversely on family members, including B's former wife (who held senior positions in two District Courts in the area), his elder daughter who also worked for the courts and a younger daughter employed by the Investigation Section of the Inland Revenue Department. That position was said to carry with it an expectation of integrity and honesty which was likely to be adversely affected were the father's name to be published.

[112] The judgment of the Court of Appeal records the former wife as having deposed that in her capacity as a court official she had frequent dealings with members of the public who relied on her integrity and honesty. She was concerned about the way in which she would be perceived and the effect on her ability to discharge her responsibilities if B's name was published. The elder daughter was also required to deal with members of the public and with members of the legal profession. She shared her mother's concern about the effect name publication would have on her ability to discharge her responsibilities as a court official.

[113] The suppression order was granted on the basis that publication of B's name would compromise the ability of Mrs B and of her two daughters to do their jobs:

> [24] Publication of Mr B's name would plainly cause incalculable hurt to individual family members and the extended family as a group. Apart from the acute embarrassment it would cause on a personal level, it would undoubtedly compromise the ability of Mrs B and her two daughters to do their jobs. It will inevitably cause distress to the children involved and has the potential to seriously disrupt their development.

[114] For Dr Brooks it is submitted that as this decision comes from the criminal jurisdiction it is particularly strong authority.

[115] However, the decision is largely focused on the fact that it involved sexual offending and on the question whether there was a heightened case for publicly identifying the offender. Little is said about the principle of open justice and the need to secure the proper administration of justice. In that respect the decision shows its age (2011) when compared with the more recent decision of the Supreme Court in *Erceg* (2016). Nor is there any reference to or discussion of Bill of Rights issues. In addition there is little indication of the degree to which the former wife and the daughters elaborated on the factual foundation for their concerns that their ability to do their jobs would be compromised beyond their being understandably embarrassed.

[116] In the present case neither Dr Brooks' wife nor daughter 1 have provided the Tribunal with an affidavit or letter. Their case has been presented by others. As to the claim Dr Brooks' wife would find it difficult to cope in the workplace, the risk has existed since January 2012 or, June 2014 at the latest, being the date when the Commissioner's report was first published. The findings in that report would be well known in the hospital community. Yet she has continued to work for the Taranaki DHB, apparently without her ability to do her job being compromised.

[117] In the case of daughter 1, the evidence does not establish that her ability to do her job would be compromised. The evidence has been set out earlier in this decision and will not be repeated here. We make the observation that her case is ephemeral in nature and focused more on her perception of her reputation, the possible impact on her professional relationships and the effects such perceptions may have on her engagement with the scientific community. This falls well short of the "undoubtedly compromise" standard applied by the Court of Appeal in *B v R*. The fear that students might undermine her academic integrity and moral authority by association is equally ephemeral and speculative.

Prior publication

[118] Dr Brooks 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 the midwife nor Dr Brooks 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.

[119] The evidence shows that while details of the Commissioner's report have been extensively covered in media, this has been done without naming Dr Brooks. The Director submits this is beside the point because Dr Brooks' 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 Dr Brooks was involved. Ms Lawn says that anyone who does not already know that Dr Brooks and the midwife were involved would probably have been able to identify Dr Brooks at least from the description that he 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 Dr Brooks and the midwife.

[120] Ms Aldridge says in her affidavit that the names of Dr Brooks and the midwife 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 the midwife's involvement is not as common as that of Dr Brooks:

> [Dr Brooks] involvement is common knowledge because he was so well known in the community. Knowledge of [the midwife's] involvement is not as common as [Dr Brooks'] 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.

[121] The fact remains, however, that Dr Brooks has not been named in mainstream media and the events are now seven years in the past.

[122] 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:

> **[122.1]** 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".
>
> **[122.2]** 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]

[123] Nevertheless, the relevance of prior publication is only enlivened where the grounds for a suppression order are established and there remains the question whether the making of the order would be a futile act given the possibility the applicant's name might already be in the public domain.

The allegation that the breaches were not one-off events

[124] The Director and Ms Lawn assert that this case was not the first time Dr Brooks had breached the Code. The Director's notice of opposition alleged the nature of some of the breaches in the present case made it "inherently unlikely" that they were "one-off" (for example, the failure to prepare a birth plan, failure to make any records at all of the care provided, or the repeated failures to obtain informed consent from Ms Lawn during the delivery). Ms Lawn's evidence was that in her view also it was unlikely that many of these breaches were one-off events.

[125] The Director submitted that these inferences are "reasonable and obvious, given the nature of the breaches at issue". The submission concludes with an assertion that the onus is on Dr Brooks to establish the events were indeed a serious of "one-off" events:

> 22. If Dr Brooks wishes to support his application for name suppression with the unlikely claim that these breaches of the Code, which by their very nature appear to be routine, were indeed a series of "one-off" events in this delivery that have never happened before or since, then the onus is on him to adduce sufficient evidence to establish that as a matter of fact.

[126] To this Dr Brooks responded by affidavit to the effect that through his lawyer he had asked the Director to provide the evidence relied on to support the allegation that this case was not the first in which Dr Brooks had breached the Code. Even though the request was made on two occasions the Director, through her counsel, declined to provide any evidence. Dr Brooks says the suggestions made by Ms Lawn in her affidavit have no basis in fact.

[127] In our view it was neither fair nor appropriate for the Director to assert, without particularisation or evidence, that as a matter of inference, this case was not the first, leaving it to Dr Brooks to establish, affirmatively, that it was the first. The Director is making a serious allegation, an allegation which, in the absence of the particularisation sought by Dr Brooks, is impossible to answer. Dr Brooks has stated on oath that the suggestions have no basis in fact. The Director did not seek to cross-examine him on this point (or any other). That should be the end of the matter.

[128] In any event, if there is any onus on Dr Brooks to rebut affirmatively what is no more than a mere assertion by Ms Lawn and the Director, we are of the view his onus has been discharged. His two affidavits sworn on 9 and 22 November 2018 directly address the point. He has stated on oath that the suggestions have no basis in fact. In addition,

Dr Fookes, an obstetrician and gynaecologist who worked with Dr Brooks at the Taranaki DHB has deposed she knows of no other case where Dr Brooks encountered the problems that were experienced with Ariana's birth. She described Dr Brooks as an excellent surgeon and has a high regard for him professionally. Dr Viner, also an obstetrician who worked with Dr Brooks at the Taranaki DHB, has described Dr Brooks as a competent obstetrician and gynaecologist. Dr Smith, a third obstetrician and gynaecologist who worked with Dr Brooks at the Taranaki DHB refers to Dr Brooks delivering thousands of babies over the years and as having an excellent reputation as a doctor who was utterly committed to the welfare and benefit of the community. Dr Brooks' general practitioner (Dr Whitwell) has also stated in his letter that he is able to confirm Dr Brooks has enjoyed an excellent reputation as an obstetrician and gynaecologist of the highest standards. Dr Whitwell is unaware of any other adverse comment about him. To his knowledge the medical profession in Taranaki has held him high esteem.

[129] None of these doctors were required for cross-examination. As against their evidence there is the lay assertion by Ms Lawn that she "expects that other women are likely to have gone through something similar with Dr Brooks". In the face of the evidence given by Dr Brooks and his witnesses it is untenable for the Director to submit that it is unlikely that Dr Brooks' admitted failures were limited to his care of Ms Lawn. The more so given the Director has had ample time within which to investigate whether there is evidence to support the submission.

[130] We accordingly approach our decision on the basis that the breaches admitted by Dr Brooks were one-off events.

Overall conclusion

[131] 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 on the right to freedom of expression and Dr Brooks 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.

[132] Because permanent name suppression for Dr Brooks would be a substantial derogation from open justice we have required a high degree of persuasion to satisfy the desirability threshold.

[133] 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 not been satisfied that it is desirable to make a permanent non-publication order. As will have been seen, our primary conclusions are:

> **[133.1]** The long delay has not been shown to have caused specific, substantial prejudice to Dr Brooks or to any member of his family.
>
> **[133.2]** The evidence produced by Dr Brooks does not establish any specific, serious risk to his health (or that of any member of his family) should his name be published.
>
> **[133.3]** Publication of Dr Brooks' name may well result in diminution or loss of his reputation and standing. However, given that he retired in July 2013 such consequence will not impact on his ability to practise medicine or on his income. Any embarrassment or feeling that his privacy has been invaded is not sufficient.

[133.4] Neither the fact that Dr Brooks' name was not revealed in the Commissioner's report nor the fact that his name has not been published in mainstream media amount to reasons justifying a suppression order. The relevance of these factors is only enlivened where grounds for a suppression order are established and there remains the question whether the making of the order would be a futile act given the possibility the applicant's name might already be in the public domain.

[133.5] Dr Brooks has not established there is a real risk that publication of his name will compromise the ability of his wife or of daughter 1 to do their respective jobs.

[133.6] No adverse consequences of any moment will affect daughter 2.

[134] Given these findings little weight can be attached to the submissions made on behalf of Dr Brooks that:

[134.1] There is minimal public interest in now publishing his name or identifying him.

[134.2] The public interest in openness will not be jeopardised in a material manner by the making of a suppression order.

[135] These submissions fail to take into account that it is not a question of whether there is a public interest in naming Dr Brooks or whether the public interest will be jeopardised by the making of the order. Rather the question is whether the interests of justice require that a suppression order be made in derogation of the principle of open justice. The decision in *C v Director of Human Rights Proceedings* Civ-2010-404-001662, 6 September 2010 cited in support of the submissions is not on point. That case was decided under the Privacy Act, not the HDC Act and in addition the facts were very different. Public interest factors involving (as here) patient rights are of a different order to late compliance with a request for access to personal information under IPP 6.

[136] Consequently, applying to the facts the law as earlier explained, we have concluded the application by Dr Brooks for name suppression must be dismissed.

Protection of the privacy interests of family members

[137] It will have been noticed that to protect the privacy interests of Dr Brooks' wife and daughters this decision omits personal details not relevant to an understanding of our determination. To further protect their personal information now on the Tribunal's file a permanent order is made that there is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. In addition, both Dr Brooks and the Director are to be notified of any request to search the file and given opportunity to be heard on that application.

Interim non-publication order pending possible appeal

[138] To ensure any appeal right is not rendered nugatory, an interim non-publication order is made for the period between the delivery of this decision and expiry of the appeal period. If an appeal is filed application can be made either to the Tribunal or to the High Court for continuation of the interim order.

[139] If no appeal is filed the Tribunal will make the consent orders agreed to by the parties in their joint memorandum filed on 27 September 2018. The unredacted version of the agreed summary of facts will be attached to the Tribunal's decision, as requested.

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]** The Director is to file her submissions within 14 days after the date of this decision. The submissions for Dr Brooks are to be filed within a further 14 days with a right of reply by the Director 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:

> **[141.1]** The application dated 2 October 2018 by Dr Brooks for permanent name suppression is dismissed.
>
> **[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]** 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**