IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2019] NZHRRT 5**

	Reference No. HRRT 030/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**JUDITH ANN TAPIKI**
	FIRST PLAINTIFF
AND	**JOSEPHINE ERU**
	SECOND PLAINTIFF
AND	**NEW ZEALAND PAROLE BOARD**
	DEFENDANT

AT NEW PLYMOUTH

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Ms JA Tapiki and Ms J Eru in person
Ms VJ Owen for defendant

DATE OF HEARING: **25 October 2018**

DATE OF DECISION: **22 January 2019**

DECISION OF TRIBUNAL[1]

INTRODUCTION

[1] A Parole Board (Board) decision given on 5 May 2014 required the offender to live at a particular address. It was the address at which his mother (Ms Tapiki) and Ms Eru live. The decision was sent to the victim of the offender. This led to a tragic chain of events including damage to the property by third parties, the removal of Ms Tapiki's son to a new town and his suicide.

[1] [This decision is to be cited as *Tapiki and Eru v New Zealand Parole Board* [2019] NZHRRT 5.]

[2] The case for Ms Tapiki and Ms Eru is that disclosure of their home address breached information privacy principles (IPP) 5 and 11. They rely on the fact that the Parole Act 2002, s 108(3) explicitly provides that the Board is subject to the Privacy Act 1993.

[3] The Parole Board relies on s 50(1) of the Parole Act which requires the Board to advise a victim of any release conditions applying to an offender. It submits it was under a statutory obligation to disclose the plaintiffs' address to the victim. Given this obligation the Board also relies on the Privacy Act, s 7(1) (and (4)) which provide, in effect, that neither IPP 5 nor IPP 11 derogate from the obligation under the Parole Act to notify a victim of any release conditions applying to an offender.

[4] The outcome of this case turns on the interpretation of s 50 of the Parole Act and on the application of that provision to the facts as found. We do not in this decision address IPP 5.

THE FACTS

[5] The central facts are not in dispute. The Parole Board did not challenge the evidence given by Ms Tapiki and Ms Eru and chose not to call witnesses. It did, however, rely on the documentary evidence in the common bundle of documents and on legal submissions. In these circumstances only an outline of the facts is necessary.

[6] Ms Tapiki is the mother of Jesse Christian Dolman (Jesse).

[7] In October 2007 Jesse was sentenced to 12 years imprisonment for serious violent offending (wounding with intent to cause bodily harm). The end date of his sentence was 28 November 2018.

[8] Jesse was first released from this sentence on 9 November 2012. He was recalled in April 2013 as there were issues relating to his compliance with the conditions of his parole and with his engagement with his probation officer.

[9] He was released again in June 2013 but recalled once more in October 2013 having received a warning from the Board at a progress hearing in September of that year. Again the concern related to his disengagement from parole.

[10] At a lengthy hearing before the Board on 16 January 2014 attended by family members (including Ms Tapiki) the Board decided to release Jesse on 29 January 2014 in large part because Ms Tapiki persuaded the Board she could be counted on to provide the basis for a fresh start for her son and to provide firm but understanding control.

[11] On 5 May 2014 the Board saw Jesse again for a progress hearing. Once more, he was supported by Ms Tapiki who attended the hearing. In its decision of that date the Board noted Jesse had settled in well with Ms Tapiki. To reflect the fact that Jesse was now living with his mother the Special Conditions stipulated that Jesse was to live at her home and not move without the prior written approval of a probation officer.

[12] Ms Tapiki explained to the Tribunal that in the lead up to the progress hearing much careful thought and preparation by her and Ms Eru had occurred because given Jesse's three prior releases and two recalls, they wanted to ensure that this time, with strong family support, he would have a real chance for reintegration into the community and the best possible opportunity for a positive future. She had also engaged the

services of a local social services agency which Jesse was seeing fortnightly for further support regarding community integration.

[13] The plan put in place included Ms Tapiki giving up her small flat and Ms Eru agreeing to share her home with Ms Tapiki and with Jesse. It is a home in which Ms Eru has lived for the past 48 years and holds special significance for her as it was built by her father. Ms Eru had known Ms Tapiki and Jesse for some years and was more than willing to have Ms Tapiki and Jesse stay. A probation officer visited the property to make an assessment and the address was approved by him. In preparation for Jesse's arrival Ms Eru took the precaution of taking out a confidential telephone number because ill-feeling in the community towards Jesse had been evident at the original court hearing.

[14] As mentioned, the Parole Board decision of 5 May 2014 expressly stipulated as a Special Condition that Jesse live at the parole address which we have redacted for the purpose of this decision:

> To reside at [address withheld by Tribunal], and not to move from that address without the prior written approval of a Probation Officer.

[15] The decision was on 15 May 2014 referred to the Operations Manager (an employee of the Department of Corrections (Corrections)) of the Board for editing. Under the Parole Act, s 110 administrative support for the Board is provided by the Department of Corrections. The Operations Manager noted there was a discrepancy in the decision relating to the month in which a further progress hearing was to be held and the decision was returned to Justice Fraser (the then Panel Convenor) for correction and re-signing. The corrected decision was received back by the Operations Manager later that same day for editing.

[16] The edits then made to the decision by the Operations Manager comprised the redaction of the name of Ms Tapiki wherever it appeared in the decision along with all references to her status vis-à-vis Jesse. However, the street address of Ms Tapiki's and of Ms Eru's home was not redacted in any way. It was common ground the redactions relating to Ms Tapiki's identity did not impede the ability of anyone aware of the facts of the case (such as the victim or members of the victim's family) from readily identifying that the residential address stipulated in the Special Conditions as the parole address was the home address of Ms Tapiki and of Ms Eru. The more so given the small size of the provincial town in question.

[17] A copy of the decision with certain names redacted but showing the parole address was then sent to the victim.

[18] On 22 May 2014 the Operations Manager realised he had failed to redact the parole address and concluded there had been a privacy breach by the sending of the Board's decision to the victim.

[19] A letter dated 23 May 2014 was sent by the Operations Manager to Jesse advising there had been an interference with his (Jesse's) privacy and apologising for the oversight.

[20] When on 28 May 2014 Corrections voluntarily notified the breach to the Privacy Commissioner the seriousness of the breach was expressly acknowledged. The Commissioner was told that because of strong local community feelings, Jesse was to be moved to a new town:

> The crime he committed (GBH) caused significant injuries (one victim is now wheelchair-bound) and there was strong local community feelings at the time (including funds raised for the victims). Consequently, we anticipate a strong reaction to people knowing he is again living in the local community. Local Probation will therefore propose he move out of [redacted], which we anticipate he will resist.

[21] Ms Tapiki confirmed the depth of ill-feeling in the community. In a letter dated 2 July 2014 sent by her to the Chairperson of the Parole Board she referred to the threats made to her and to Jesse during the court hearing and described the consequences of the release of the parole address to the victim. The plans she and Ms Eru had made to assist Jesse's reintegration into society had been destroyed. They now lived in fear for their safety:

> We live in a very small community and the victim lives in the same small town that we do. There is now a very real threat to myself and the family friend I live with, as well as her teenaged son. I have trouble sleeping at night, especially when no one else is home. We have very limited options for places to move, and it seems so unjust to have to do so because of a mistake that never should have happened. We specifically moved to this address, giving up the small flat we had made our home in order to have Jesse with us upon his release. We had changed our whole lives to make this happen because we believed so strongly in his ability to make a success of his life with the supports we had put in place for him. I live in fear now that the family of the victim in Jesse's case are going to turn up on our doorstep and want vengeance. Our privacy and human rights have been breached in the most grievous way — putting our very safety and peace of mind at risk.

[22] Ms Tapiki also told the Board that subsequent to the disclosure of the parole address their letterbox had been smashed. Ms Eru confirmed this incident and referred to the fact that a few days later a fence around the house had also been damaged.

[23] Ms Tapiki's letter to the Board confirms that on 30 May 2014 Jesse received a letter from Corrections telling him he could no longer live with his mother and Ms Eru due to the risk to his safety and that he would have to relocate to Masterton. Ms Tapiki pointed out Jesse had minimal or no support in that town and after Jesse's move she had had little contact with him. She concluded her letter with an eloquent summary of the consequences of the disclosure of the address:

> I am worried every day for the safety of our household and the wellbeing of my [son]. I have no control over this situation and no recognition of the gravity of what has happened. I have lost the opportunity to support my [son] and see him grow and thrive with all the supports he had put in place for him, and ultimately to stay out of prison and live a good life as a healthy, functioning member of society. The Parole Board released Jesse to my care because of the supports we had put in place for him. The Parole Board have now put that in jeopardy.

[24] In an email dated 12 September 2014 addressed to the Chairperson of the Parole Board Jesse set out in some detail the downward spiral of his life consequent on his being compelled to leave the supporting environment put in place by his mother. Having deteriorated both mentally and physically, Jesse later committed suicide at some undetermined time between 24 December 2014 and 16 January 2015.

[25] In describing the circumstances of Jesse's release on parole into her care, the disclosure of their address and the shattering of their plans followed by the final tragic outcome, Ms Tapiki spoke at the hearing with feeling but also with dignity. Appropriately in the circumstances she was not cross-examined. Nor was Ms Eru who was equally compelling in her narrative of events.

[26] Having confirmed the damage to the letterbox and fence Ms Eru described the impact of these events on her health and on her work. She felt in danger and wanted to know why, when her home was first inspected by a probation officer, she and Ms Tapiki

were not told their address would be given to the victim. This would have allowed an informed decision whether Ms Eru would go ahead with supporting Jesse's release on parole to her home:

> When I thought everything was going so well, I was very upset when Judi told me that our address was disclosed to the victim, and that Jesse has to move. This is my family home. I am the occupant along with Judi who live at this address. We maintain the property, and I am the ratepayer. This has been home to me for the last 48 years. A home my father built. Never in 48 years has this home and my personal safety been compromised.
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> After the address was disclosed, my letterbox was damaged. This was reported to the Police but because there were no witnesses; they could not proceed any further. A few days later my fence, which is close to the house was also damaged. This was not reported to the police because once again there were no witnesses. My property is located down a long driveway. Our closest neighbours are an elderly couple. I am a Fonterra shift worker. I have been at my job for 28 years. I take my responsibilities seriously: I work 12-hour shifts, two days and two nights. My work involves heavy machinery and my ability to concentrate became a health and safety issue and I quite often had to leave work. These matters concerned me. I was unable to focus on my everyday living. My home was in danger, my concerns for the elderly couple next door, and knowing Judi was at home by herself worried me, especially when I was on night shift. And the sadness I was feeling for Jesse when he was made to leave home.
>
> When the probation officer came to inspect the property; why was I not told then that the Parole Board could give out my address to the victim? Had I been made aware of this I could have made an informed decision.

[27] Although no evidence was called by the Board the Tribunal was asked to take into account a letter dated 19 October 2015 sent by the Chairperson to the Privacy Commissioner. The essential point made was that both the acknowledgement by Corrections that there had been an interference with Jesse's privacy and the apology had been wrongly made. The Chairperson contended there had been no breach of privacy because the Parole Act, s 50(1) requires release conditions applying to an offender to be notified to the victim.

[28] The letter did not address the point whether, in the present case, the Parole Board had addressed its mind to s 50(2) and in particular to whether the parole address should be withheld from the victim on the grounds disclosure of the information would unduly interfere with the privacy of Ms Tapiki and of Ms Eru. This is an issue to which we return.

LIABILITY – THE LEGAL ISSUES

[29] In determining whether the Parole Board interfered with the privacy of Ms Tapiki and of Ms Eru the primary issues appear to be:

> **[29.1]** The degree to which s 50 of the Parole Act displaces the Board's obligations under the Privacy Act.
>
> **[29.2]** Whether the discretion in s 50(2) of the Parole Act was exercised by the Board at all.
>
> **[29.3]** Whether a person's residential address is personal information about that individual.

[30] The second of these issues arises because it is clear from the 22 May 2014 report from the Board's Operational Manager that all editing decisions in respect of the Board's decision of 5 May 2014 were made not by the Board, but by Corrections staff providing administrative assistance to the Board. If the Board did not address the

question whether disclosure of the parole address would unduly interfere with the privacy of those (Ms Tapiki and Ms Eru) living at the address there is a real issue whether s 50 can be deployed at all as an answer to the claim there has been an interference with privacy.

THE RELATIONSHIP BETWEEN THE PAROLE ACT AND THE PRIVACY ACT

Application of the Privacy Act to the Parole Act

[31] Although the Privacy Act 1993 predates the Parole Act 2002, the Parole Act explicitly provides that the Parole Board is subject to the Privacy Act. Section 108(3) of the Parole Act provides:

> **108 New Zealand Parole Board established**
>
> (1) The New Zealand Parole Board is established as an independent statutory body.
> (2) The Department of Corrections provides administrative and training support to the Board.
> (3) The Board is subject to the Official Information Act 1982 and to the Privacy Act 1993.

[32] The Parole Board is accordingly governed by the information privacy principles, including IPPs 5 and 11 relied on by Ms Tapiki and Ms Eru. Because their case stands or falls on IPP 11, we do not intend addressing IPP 5 in this decision. Information privacy principle 11 prohibits the disclosure of personal information unless one of the exceptions permitted by IPP 11 is shown by the agency to have application:

> Principle 11
> *Limits on disclosure of personal information*
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> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
> (b) that the source of the information is a publicly available publication and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information; or
> (c) that the disclosure is to the individual concerned; or
> (d) that the disclosure is authorised by the individual concerned; or
> (e) that non-compliance is necessary—
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
> (ii) for the enforcement of a law imposing a pecuniary penalty; or
> (iii) for the protection of the public revenue; or
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
> (f) that the disclosure of the information is necessary to prevent or lessen a serious threat (as defined in section 2(1)) to—
> (i) public health or public safety; or
> (ii) the life or health of the individual concerned or another individual; or
> (fa) that the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions; or
> (g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
> (h) that the information—
> (i) is to be used in a form in which the individual concerned is not identified; or
> (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
> (i) that the disclosure of the information is in accordance with an authority granted under section 54.

[33] On the other hand the Parole Act, s 50(1) explicitly requires that every victim of the offender be advised of any release conditions applying to the offender. Because this requirement will often have privacy consequences, those consequences are required by s 50(2) to be addressed by the Board and it may withhold advice of a particular condition if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender):

> **50 Decisions must be notified**
>
> (1) After a hearing, every person who was notified under section 43(2) must be advised of—
> (a) whether, and, if so, when, the offender is to be released from detention; and
> (b) any release conditions applying to the offender; and
> (c) if the Board has declined to direct the release of the offender on parole,—
> (i) the date by which the offender must be further considered for parole; and
> (ii) the relevant activities (if any) specified under section 21A(b); and
> (iii) notice that the hearing may be brought forward if all of the relevant activities have been completed earlier than expected; and
> (d) if the Board has made a postponement order,—
> (i) the date by which the offender must further be considered for parole; and
> (ii) the relevant activities (if any) specified under section 27(4); and
> (iii) notice that the hearing may be brought forward if all of the relevant activities have been completed earlier than expected.
> (2) When advising a victim under this section of any release conditions applying to an offender, the Board may withhold advice of a particular condition if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender).

[34] While the phrase "unduly interfere" is defined neither by the Parole Act nor by the Privacy Act it carries its ordinary meaning of inappropriate or unjustifiable. See *OED Online* (Oxford University Press, June 2014). What is undue is clearly dependent on context. See *R v B* [1996] 1 NZLR 385 (CA) at 387. That context will include the nature of the privacy interest of the "other person" as well as the nature and degree of the potential harm to which that person will be exposed by the privacy interference.

Resolving the Board's conflicting statutory obligations

[35] The apparent conflict between s 50 of the Parole Act and IPP 11 is resolved by s 7 of the Privacy Act. The effect of subs (1) of this provision is that nothing in IPP 11 derogates from any provision in the Parole Act that authorises or requires personal information to be made available:

> **7 Savings**
>
> (1) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.
> (2) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that—
> (a) imposes a prohibition or restriction in relation to the availability of personal information; or
> (b) regulates the manner in which personal information may be obtained or made available.
> (3) Nothing in principle 6 or principle 11 derogates from any provision—
> (a) that is contained in any legislative instrument within the meaning of the Legislation Act 2012 made by Order in Council and in force—
> (i) in so far as those principles apply to a department, a Minister, an organisation, or a public sector agency (as defined in paragraph (b) of the definition of that term in section 2(1)) that is established for the purposes of assisting or advising, or performing functions connected with, a department, a Minister, or an organisation, immediately before 1 July 1983; and

(ii) in so far as those principles apply to a local authority or a public sector agency (as so defined) that is established for the purposes of assisting or advising, or performing functions connected with, a local authority, immediately before 1 March 1988; and

(iii) in so far as those principles apply to any other agency, immediately before 1 July 1993; and

(b) that—

(i) imposes a prohibition or restriction in relation to the availability of personal information; or

(ii) regulates the manner in which personal information may be obtained or made available.

(4) An action is not a breach of any of principles 1 to 5, 7 to 10, and 12 if that action is authorised or required by or under law.

(5) Nothing in principle 7 applies in respect of any information held by the Department of Statistics, where that information was obtained pursuant to the Statistics Act 1975.

(6) Subject to the provisions of Part 7, nothing in any of the information privacy principles shall apply in respect of a public register.

[36] It is necessary to emphasise that subs (1) does not say that IPP 11 has no application to the other enactment. On the contrary, it does apply albeit only up to the point there is derogation from the other provision. Once the derogation point is arrived at the other enactment prevails. In this context "derogates" means to repeal or abrogate in part or to lessen or impair the other enactment. See *OED Online*.

[37] The effect in the present case is that if the assessment of privacy interests required by s 50(2) of the Parole Act is not made, the prohibition in IPP 11 on the disclosure of personal information continues to apply, as required by s 108(3) of the Parole Act.

[38] Such interpretation will not, in terms of s 7(1) of the Privacy Act, "derogate from" s 50 of the Parole Act. Section 50 is intended to ensure the privacy interests of persons other than the offender are taken into account (and if necessary, protected) in the context of the disclosure of release conditions to a victim. But as we will shortly explain the provision will only work as intended if both subsections are properly applied in full, that is with subs (1) and (2) being read together and an assessment being made by the Board as to whether disclosure of a parole condition would in fact unduly interfere with the privacy of a person other than the offender. Until s 50 is so applied to the particular case IPP 11 governs disclosure of the personal information.

[39] This is the significance of the point that s 7(1) of the Privacy Act does not exclude IPP 11 from operating in the context of s 50 of the Parole Act. Rather, IPP 11 applies up to the point its application to a specific set of facts derogates from s 50. If the Board fails to address its mind to subs (2) the continued application of IPP 11 to the personal information in the Board's decision cannot be said to derogate from s 50 as the Board's default would otherwise leave a vacuum. That vacuum must necessarily be filled by the Board's obligations under IPP 11, as intended by the statutory application of the Privacy Act to the Parole Board.

APPLYING THE PAROLE ACT, S 50

[40] In the factual setting of the present case s 50 of the Parole Act, reduced to its essentials, provides:

50 Decisions must be notified

(1) After a hearing, every person who was notified under section 43(2) must be advised of—

…

(b) any release conditions applying to the offender; and

…

(2) When advising a victim under this section of any release conditions applying to an offender, the Board may withhold advice of a particular condition if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender).

[41] On accepted principles of statutory interpretation, the two subsections must be read together. See Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 257-262.

[42] That is, the mandatory duty in subs (1) to notify every victim of the offender of any release conditions applying to the offender is subject to the decision of the Board under subs (2), when "advising a victim under this section of any release conditions applying to an offender", to withhold advice of a particular condition "if disclosing the condition would unduly interfere with the privacy of any other person other than the offender".

[43] The subsections cannot be read disjunctively so that s 50(1) is taken to impose in all cases a duty to advise victims of all release conditions without redaction. The opening words in subs (2) "[w]hen advising a victim under this section" explicitly requires the two subsections to operate together, imposing a duty to advise except where disclosing the condition would unduly interfere with the privacy of any other person (other than the offender).

[44] Any other interpretation would leave unaddressed the privacy interests of third parties which s 50(2) so clearly intends to be a mandatory relevant consideration and in appropriate cases, a fetter on the obligation to disclose.

[45] The evidence received by the Tribunal establishes that no decision at all was made by the Board as to what redactions (if any) were to be made to its decision pursuant to s 50(2). The privacy interests of Ms Tapiki and of Ms Eru in relation to their residential address were simply not thought of, taken into consideration or addressed. Further, such redactions as were made in respect of Ms Tapiki's name and of her relationship to Jesse were made not by the Board but by administrative support staff provided by Corrections. The relevant officer also failed to address the privacy interests of Ms Tapiki and of Ms Eru regarding disclosure of their residential address.

[46] While the Parole Act, s 110 requires the chief executive of the Department of Corrections to ensure the Board is provided with the administrative and training support necessary to enable them to perform their functions efficiently and effectively, neither that provision nor any other provision of the Parole Act allows those providing administrative support (and who are legally separate from the Board) to make decisions which the Parole Act requires to be made by the Board. Section 110 follows:

110 Department of Corrections to provide administrative and training support to Board

(1) The chief executive must ensure that the Board and the chairperson are provided with the administrative and training support necessary to enable them to perform their functions efficiently and effectively.

(2) The support must, without limitation, include the following:

(a) support on a regional basis for parole panels operating in each region:

(b) co-ordination of the timetable for, and membership of, parole panels:

(c) support for the Board in performing its functions under section 109(2):

(d) support for the chairperson in performing his or her functions under section 112:

(e) support for panel convenors in performing their functions under section 114(3):

(f) making available appropriate induction and training for Board members.

[47] Under s 50(2) of the Parole Act the designated decision-maker is the Parole Board. There is no statutory power to delegate that function to a person providing administrative support. To underline the strictly limited degree of delegation permitted by the Act the powers of the Chairperson can only be delegated to a panel convenor and any such delegation may not be further delegated. See the Parole Act, s 113.

[48] Not only does s 50(2) explicitly require the Board itself to make the decision whether advice of a particular release condition is to be withheld from a victim on privacy grounds, the general rule is that there can be no delegation of "judicial" powers. The principle is that special tribunals and public bodies exercising functions broadly analogous to the judicial are precluded from delegating their powers of decision unless there is express authority to that effect. See Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review* (8th ed, Thomson Reuters, London, 2018) at [5-161]. The following passage from Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 75 makes specific reference to the dangers inherent in relying on staff to make decisions:

> A court cannot delegate its responsibility to take judicial decisions. If a tribunal considers that a certain order should be made, and has jurisdiction to make the order, it should not delegate the making of it. This prohibition on delegation operates to preclude a tribunal from excessive reliance on counsel or members of its staff in the making of its decisions. A breach of this prohibition may cause the decision of the tribunal to be quashed for want of procedural fairness. The critical question is whether the tribunal has brought independent judgment to bear on the decisive issues before it. [Footnote citations omitted]

[49] Even were the delegation point to be put to one side, it is in any event clear from the account provided by the Operations Manager that as a matter of fact he did not address the question whether Ms Tapiki's and Ms Eru's residential address should be withheld under s 50(2) of the Parole Act. That is why he made the subsequent apology.

[50] In the result, publication of the address to the victim took place without any assessment having been made by the Board (or by its administrative staff) whether such disclosure would unduly interfere with the privacy of Ms Tapiki or of Ms Eru.

[51] In these circumstances it is not possible for the Board to benefit from the protection of s 7 of the Privacy Act. Parliament clearly intended third party interests be taken into account and that they be protected in appropriate cases. Were a Board not to apply s 50(2) and were IPP 11 not to have application, the protection of privacy interests so clearly intended by s 50(2) specifically and by s 108(3) generally would be stripped away.

[52] For the reasons earlier explained this vacuum can be avoided by recognising that the intended effect of s 108(3) of the Parole Act and of s 7(1) of the Privacy Act is to ensure IPP 11 applies in all circumstances and is displaced only to the extent that any specific provision of the Parole Act which authorises or requires personal information to be made available is actually applied by the Parole Board. Failure to apply leaves in place the obligations under IPP 11.

Whether an exception to IPP 11 had application

[53] Anticipating such ruling the Board submitted in the alternative it was entitled to disclose its redacted decision to the victim under exception (e)(i) to IPP 11 on the basis that non-compliance was necessary to avoid prejudice to the maintenance of the law by the Board under both the Parole Act and the Victims' Rights Act 2002. As developed, the submission was:

[53.1] Offenders who are on parole are still serving their sentences for the offences of which they were convicted and are liable to be recalled to prison by the Board under the Parole Act. In addition the Board is required to carry out its victim notification functions to registered victims of offenders under both the Victims' Rights Act and the Parole Act, including under s 50 of the latter Act.

[53.2] There are strong public policy reasons why victims should be permitted to know the whereabouts of their offenders while they are on parole. The case of a child sex offender being released to live near their victim or a school is an example.

[54] As the Board is relying on an exception to IPP 11, a reverse onus of proof applies. Section 87 of the Privacy Act provides:

> **87 Proof of exceptions**
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> Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

[55] The application of Principle 11 was summarised in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [190] as follows:

> **[190]** Applying this provision to Principle 11, it was established in *L v L* HC Auckland AP95-SW01, 31 May 2002, Harrison J at [20] (and see the Tribunal decisions collected in *Harris v Department of Corrections* [2013] NZHRRT 15 (24 April 2013) at [43]) that the sequential steps to be followed are:
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> > **[190.1]** Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.
> >
> > **[190.2]** If the Tribunal is satisfied that personal information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Principle 11.
> >
> > **[190.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Principle 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by s 66(1)(b). The burden of proof reverts to the plaintiff at this stage.
> >
> > **[190.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.
>
> **[191]** It is not a defence that the interference was unintentional or without negligence on the part of the defendant. See s 85(4) and *L v L* at [13] and [99].

[56] The short answer to the Board's alternative defence is that before any of the exceptions in IPP 11 apply, the agency (here, the Board) must believe at the time, on reasonable grounds, that the relevant exception applies. In the present case there is no evidence such reasonable belief was held and the fact that no consideration at all was given by the Board to the disclosure of the address precludes reliance on IPP 11(e)(i).

[57] As explained in *Geary v Accident Compensation Corporation* at [201] to [203], the subjective component (the belief) as well as the objective component (the reasonable grounds) in Principle 11 must exist at the date of disclosure. There must be an actual

belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice:

> **[201]** Returning to Principle 11, it is to be noted that to escape the statutory prohibition on disclosure of personal information, an agency must establish that at the time of disclosure, it possessed the requisite belief on reasonable grounds:
>
> > An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds, ….
>
> **[202]** There is a subjective component (the belief) and an objective component (the reasonable grounds). It must be established that both elements existed as at the date of disclosure.
>
> **[203]** The need for reasonable grounds for belief requires the agency to address its mind to the relevant paragraph of Principle 11 on which it intends to rely. See by analogy *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [63]:
>
> > We consider that the need for reasonable grounds for belief in the necessity of disclosure requires the agency concerned to first inspect and assess the material being disclosed. The exception is not engaged where there is a failure to check the contents of the disclosure material before transmission.
> >
> > There must be an **actual** belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice.

[58] Our finding of fact is that at the time the 5 May 2014 decision was made and at the time the partly redacted version was sent to the victim, neither the Board nor any member of its support staff had considered the application of IPP 11(e)(i) and there was no actual belief based on a proper consideration of the relevant circumstances that disclosure of the plaintiffs' residential address was necessary to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences.

[59] In conclusion, prior to the release to the victim of the plaintiffs' home address, no assessment had been made under s 50(2) of the Parole Act and none of the exceptions in IPP 11 justified the release of the information.

[60] We now address the question whether the home address was personal information about Ms Tapiki and Ms Eru.

WHETHER A RESIDENTIAL ADDRESS IS "PERSONAL INFORMATION"

[61] It was not disputed by the Board that the address at which Ms Tapiki and Ms Eru live is personal information about them. The concession was properly made:

> **[61.1]** As recently held by the Tribunal in *Taylor v Corrections* [2018] NZHRRT 35 at [78] the definition of "personal information" is central to the scope of the information privacy principles and to the Privacy Act as a whole since all of the privacy principles and all of the withholding provisions apply only to information that is "personal information". "Personal information" is defined in PA, s 2(1):
>
> > ***personal information*** means information about an identifiable individual; and includes information relating to a death that is maintained by the Registrar-General pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995, or any former Act (as defined by the Births, Deaths, Marriages, and Relationships Registration Act 1995)
>
> **[61.2]** This definition of personal information does not require that the information itself identify the individual. It is only required that the individual be "identifiable".

Information can be personal information even if the individual is identifiable only with the use of extrinsic information or knowledge. In *Sievwrights v Apostolakis* HC Wellington CIV-2005-485-527 at [17] and [18] the High Court explicitly rejected the proposition that the individual concerned must be able to be identified in the information without the use of any extrinsic information or knowledge. Use of the word "identifiable" allows linked data to establish identity.

[61.3] If any person can link the information with other information to identify the individual or individuals to which it relates then the information will be "personal information". Identifiability is not limited to identification by strangers, but can be made on the basis of a link identifying the individual, whether that link is obtained from the recipient's own knowledge or by other means. See *Proceedings Commissioner v Commissioner of Police* [2000] NZAR 277 (CRT) at 285.

[61.4] This interpretation is consistent with the broad definition of "personal data" in the European Union General Data Protection Regulation (GDPR) which came into force on 25 May 2018. Article 4(1) provides:

> 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

For the reasons given in *Naidu v Royal Australasian College of Surgeons* [2018] NZHRRT 23 at [41] – [43], it is appropriate that wherever reasonably possible, consistency be achieved between privacy legislation in New Zealand and the GDPR.

[62] In these circumstances Ms Owen for the Board properly accepted the residential address in question was personal information about Ms Tapiki and Ms Eru and that they were identifiable from the content of the redacted version of the Board's decision of 5 May 2014 sent to the victim.

Overview of conclusions

[63] In summary our primary conclusions are:

[63.1] Prior to the release by the Board of the partly redacted decision dated 5 May 2014 to the victim no assessment had been made by the Board as to whether disclosure of the residential address of Ms Tapiki and Ms Eru would unduly interfere with their privacy.

[63.2] No such assessment was made by any of the Board's administrative support officers provided by Corrections. Such assessment could not in any event have been lawfully made by such officer.

[63.3] In these circumtsances IPP 11 continued to have application and prohibited disclosure of the address unless one of the exceptions in IPP 11 had application. On the facts, none of the IPP 11 exceptions have been shown by the Board to have had application.

[63.4] The residential address was personal information about both Ms Tapiki and Ms Eru.

[63.5] By publishing to the victim the residential address of Ms Tapiki and of Ms Eru the Board breached the IPP 11 prohibition on the disclosure of personal information.

[64] It is now necessary to determine whether, in light of this breach, there has been an interference with the privacy of Ms Tapiki and of Ms Eru.

WHETHER THERE HAS BEEN AN INTERFERENCE WITH PRIVACY

[65] The effect of s 85(1) of the Privacy Act is that before the Tribunal has jurisdiction to grant a remedy under that Act, the Tribunal must be satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of the plaintiff(s). The definition of what is an interference with the privacy of an individual is set out in s 66. Only subs (1) is relevant to the present case:

> **66 Interference with privacy**
>
> (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
>
> (a) in relation to that individual,—
>
> (i) the action breaches an information privacy principle; or
>
> (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
>
> (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
>
> (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
>
> (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
>
> (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
>
> (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
>
> (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
>
> (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[66] Applied to the facts of the case, the definition requires Ms Tapiki and Ms Eru to establish, on the balance of probabilities:

[66.1] An action of the Parole Board has breached an information privacy principle; and

[66.2] In the opinion of the Tribunal, this action

[66.2.1] has caused, or may cause, loss, detriment, damage, or injury to Ms Tapiki and to Ms Eru; or

[66.2.2] has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of Ms Tapiki and of Ms Eru; or

[66.2.3] has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of Ms Tapiki and of Ms Eru.

[67] The case for Ms Tapiki and for Ms Eru is that disclosure of the address breached IPP 11 and as a consequence they experienced significant injury to feelings. The relevant statutory terms were explained by the Tribunal in *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170] and the Board did not dispute that if an interference with privacy was established, the plaintiffs would have, in the circumstances, experienced significant injury to feelings of the kind stipulated by s 66(1)(b)(iii) of the Privacy Act.

[68] Addressing the first requirement of s 66(1), it would be plain from our earlier findings that we have concluded there was a breach of IPP 11 by disclosure of the residential address at which Ms Tapiki and Ms Eru live and none of the exceptions permitted by IPP 11 have been established by the Board.

[69] As to the second requirement, we have been satisfied by the unchallenged evidence given by Ms Tapiki and by Ms Eru that disclosure of their address to the victim resulted in significant injury to their feelings:

> **[69.1]** Their letterbox and fence were damaged. This resulted in considerable anxiety and fear for their safety given the history of ill-feeling evident from the time of the original court hearing.
>
> **[69.2]** On 30 May 2014 Jesse was instructed by Corrections to leave their home and move to Masterton for his own safety. Not only was this a significant blow in itself, it underlines the genuineness of the fears held by Ms Tapiki and Ms Eru.
>
> **[69.3]** The support for Jesse which had been so carefully put in place by Ms Tapiki and by Ms Eru was negated in its entirety and no similar support was available to him in Masterton. This caused justifiable anxiety by Ms Tapiki and by Ms Eru regarding his wellbeing and his possibilities for the future.

[70] As the section requires the plaintiffs to establish "significant" injury to feelings it is necessary to expand on the last factor, albeit at some risk of repeating the earlier narrative of evidence. The overarching point is that after all her efforts to save her son Ms Tapiki found herself powerless to stop the unravelling of what turned out to have been her last chance to help him turn his life around. Although he had been released three times and recalled twice it was not any relapse on his part which had brought on the new crisis. Rather it was the disclosure of their address without account first being taken of their privacy interests and as a consequence Jesse had been summarily ordered from their home and town.

[71] The Tribunal cannot improve on the significant injury to feeling described by Ms Tapiki in her letter to the Board:

> We had changed our whole lives to make this happen because we believed so strongly in his ability to make a success of his life with the supports we had put in place for him. I live in fear now that the family of the victim in Jesse's case are going to turn up on our doorstep and want vengeance. Our privacy and human rights have been breached in the most grievous way — putting our very safety and peace of mind at risk.
>
> …
>
> I am worried every day for the safety of our household and the wellbeing of my [son]. I have no control over this situation and no recognition of the gravity of what has happened. I have lost the opportunity to support my [son] and see him grow and thrive with all the supports he had put in place for him, and ultimately to stay out of prison and live a good life as a healthy, functioning

> member of society. The Parole Board released Jesse to my care because of the supports we had put in place for him. The Parole Board have now put that in jeopardy.

[72] On this evidence we are satisfied not only that there was significant injury to the feelings of Ms Tapiki but also that there is a clear and direct causal connection between that injury and the breach of IPP 11. This was not a case where the address was of little moment. Rather it was the focal point of the plan (approved by the Board itself) for Jesse's reintegration after years in prison and in circumstances where members of his family could be at risk of direct harm themselves should the address be disclosed.

[73] Addressing now the injury to feelings experienced by Ms Eru, it is she who owns the house in question, had to take time off work because of the anxiety caused by the damage to her property and her awareness that Ms Tapiki was at home by herself. As a member of Jesse's immediate support group she too experienced significant injury to feelings as in the case of Ms Tapiki. To repeat her evidence:

> My work involves heavy machinery and my ability to concentrate became a health and safety issue and I quite often had to leave work. These matters concerned me. I was unable to focus on my everyday living. My home was in danger, my concerns for the elderly couple next door, and knowing Judi was at home by herself worried me, especially when I was on night shift. And the sadness I was feeling for Jesse when he was made to leave home.

[74] We find in her case too there has been established a causal connection between the breach of IPP 11 and the significant injury to feelings.

[75] The causation standard applied is that explained in *Taylor v Orcon Ltd* [2015] NZHRRT 15, (2015) 10 HRNZ 458 at [59] to [61].

[76] We accordingly conclude that in terms of s 66(1) of the Privacy Act there has been an action of the Parole Board which was an interference with the privacy of Ms Tapiki and of Ms Eru which resulted in significant injury to their feelings.

REMEDY

[77] Where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual it may grant one or more of the remedies allowed by s 85 of the Act:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
> (c) damages in accordance with section 88:
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
> (e) such other relief as the Tribunal thinks fit.
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

(3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
(4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[78] Section 88(1) relevantly provides that damages may be awarded in relation to three specific heads of damage:

88 Damages

(1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
(a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
(b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
(c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

The conduct of the Parole Board

[79] Addressing first s 85(4), it is no defence that the interference was unintentional or without negligence, but the Tribunal must nevertheless take the conduct of the Parole Board into account in deciding what, if any, remedy to grant.

[80] Disclosure of the residential address of Ms Tapiki and of Ms Eru by the Board was inadvertent and appears to have occurred through a combination of circumstances:

[80.1] The Board overlooked giving consideration to s 50(2) of the Parole Act which requires a decision by it to withhold advice of a particular condition if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender). As the release condition in question gave the address at which Ms Tapiki and Ms Eru live, there was a clear obligation on the Board to make a determination under subs (2).

[80.2] This oversight was compounded by an apparent practice that redactions are decided by staff seconded by Corrections to provide administrative support to the Board. Whatever the merits of such practice, in those instances where s 50 applies, only the Board can make a determination whether the information is to be withheld on the grounds of undue interference with the privacy of a third party.

[81] The Board's inadvertent failure to apply s 50(2) in this case is neither an aggravating factor nor a mitigating factor. It is a neutral in our assessment of the appropriate remedies to be granted. The Board may nevertheless wish to reconsider its interpretation and application of s 50 of the Parole Act.

Declaration

[82] While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108].

[83] On the facts we see nothing to justify the withholding from Ms Tapiki and Ms Eru of a formal declaration that the Parole Board interfered with their privacy and such declaration is accordingly made.

Damages for pecuniary loss and for loss of benefit

[84] No claim for damages for pecuniary loss or for loss of benefit has been made under s 88(1)(a) or s 88(1)(b) of the Privacy Act.

Damages for injury to feelings

[85] Ms Tapiki and Ms Eru ask for an award of damages under s 88(1)(c) of the Privacy Act for injury to feelings.

[86] The general principles applied by the Tribunal are set out in *Hammond v Credit Union Baywide* at [170] and there is no need for them to be repeated here. It is sufficient to note that where, as here, it has been found for the purpose of liability under s 66(1)(b)(iii) there was significant injury to the feelings of the plaintiffs, it follows injury to feelings (without the adjectival qualifier) has been established for the purpose of s 88(1)(c) as this provision does not require that any of the statutory forms of emotional harm be "significant".

[87] As in the context of liability, before damages can be awarded for an interference with the privacy of an individual there must be a causal connection between that interference and one of the forms of loss or harm listed in the Privacy Act, s 88(1)(a), (b) or (c). The plaintiff must show the defendant's act or omission was a contributing cause to the loss or harm in the sense that it constituted a material cause. See *Taylor v Orcon Ltd* at [59] to [61].

[88] On the facts, causation cannot be in dispute. Disclosure of the plaintiffs' address to the victim had immediate and unfortunate repercussions for Ms Tapiki and Ms Eru. The evidence has already been detailed and there is a clear causal relationship between that disclosure and the injury to feelings experienced by Ms Tapiki and by Ms Eru. However, it must be made clear the later tragic death of Jesse was an event too remote from the wrongful disclosure of the parole address to the victim.

[89] Having regard to our finding that both Ms Tapiki and Ms Eru experienced significant injury to their feelings the circumstances of the case justify an award of damages towards the lower end of the middle band identified in *Hammond* at [176].

[90] However, we do see a distinction between Ms Tapiki on the one hand and Ms Eru on the other. That distinction is based on the fact that Ms Tapiki, as the mother of Jesse, experienced injury to feelings to a greater degree and to a greater intensity than Ms Eru. This is not to discount Ms Eru's injured feelings but it is necessary that the natural love, affection and feelings of responsibility on the part of Ms Tapiki for her son be specifically recognised. It was her unwavering support for Jesse and her diligent advocacy of the support plan put in place by her which led to his renewed release on parole. The destruction of her plans was felt to a different degree of intensity.

[91] In the circumstances we believe an appropriate response in the case of Ms Tapiki is an award of damages of $16,000 and in the case of Ms Eru, an award of $12,000. In fixing these amounts we have taken care to exclude any injury to feelings arising from Jesse's death.

FORMAL ORDERS

[92] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of the New Zealand Parole Board was an interference with the privacy of Ms Tapiki and of Ms Eru and:

> **[92.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the New Zealand Parole Board interfered with the privacy of Ms Tapiki and of Ms Eru by disclosing personal information about them in breach of information privacy principle 11.
>
> **[92.2]** Damages of $16,000 are awarded against the New Zealand Parole Board under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for the injury to feelings experienced by Ms Tapiki.
>
> **[92.3]** Damages of $12,000 are awarded against the New Zealand Parole Board under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for the injury to feelings experienced by Ms Eru.

COSTS

[93] Costs are reserved. Because Ms Tapiki and Ms Eru represented themselves the only costs recoverable by them are such disbursements as may have been incurred in preparing and presenting their case. Unless the parties come to an arrangement on costs the following timetable is to apply:

> **[93.1]** Ms Tapiki and Ms Eru are to file their submissions within 14 days after the date of this decision. The submissions for the Parole Board are to be filed within the 14 days which follow. Ms Tapiki and Ms Eru are to have a right of reply within seven days after that.
>
> **[93.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[93.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines ONZM QC **Chairperson**	**Ms GJ Goodwin** **Member**	**Mr BK Neeson JP** **Member**