(1) ORDER THAT PARAGRAPHS [27] AND [85] TO [87] NOT BE PUBLISHED TO ANY PERSONS OTHER THAN THE PARTIES

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 4**

	Reference No. HRRT 035/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DEBORAH WAXMAN**
	PLAINTIFF
AND	**JITENDRA PAL**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms LJ Alaeinia, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Dr D Waxman in person
Dr J Pal in person

DATE OF NAME SUPPRESSION HEARING: **Heard on the papers**

DATE OF DECISION ON APPLICATION FOR NAME SUPPRESSION: **25 January 2017**

DECISION OF TRIBUNAL ON APPLICATION BY PLAINTIFF FOR NAME SUPPRESSION[1]

Introduction

[1] In *Waxman v Pal* [2016] NZHRRT 28 (11 August 2016) the Tribunal found there had been no interference by Dr Pal with Dr Waxman's privacy. The claim by Dr Waxman under the Privacy Act 1993 was accordingly dismissed.

[2] Seven weeks after delivery of the Tribunal's decision Dr Waxman by email dated 30 September 2016 submitted an application for name suppression.

[1] [This decision is to be cited as: *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4.]

[3] In this decision the Tribunal:

> **[3.1]** Reviews the principles to be applied when suppression orders are sought by a party to proceedings before the Tribunal.
>
> **[3.2]** Declines the application by Dr Waxman for non-publication orders.

History of the application

[4] The Tribunal's substantive decision was given on 11 August 2016.

[5] When Dr Waxman on 30 September 2016 filed the request for name suppression the application was not served on Dr Pal because Dr Waxman believed the application contained sensitive information of a personal nature.

[6] Nevertheless, Dr Pal was entitled to be heard on the application. To reconcile the parties' competing interests the Chairperson by *Minute* dated 3 October 2016 directed that the original application filed by Dr Waxman be treated as a "closed" document to which Dr Pal would not have access. Dr Waxman was, however, directed to file an "open" version of the application omitting only that information which could justifiably be withheld from Dr Pal. In the same *Minute* the Chairperson invited the parties to consider the Tribunal's then recent decision on non-publication orders, being *Scarborough v Kelly Services (NZ) Ltd (Application for Non-Publication Orders)* [2015] NZHRRT 43. Reference was also made to more recent decisions of the High Court. Dr Waxman's submissions were due on 4 October 2016 and those by Dr Pal on 6 October 2016. Provision was also made for Dr Waxman to file reply submissions.

[7] An open version of Dr Waxman's application and supporting submissions were duly filed on 4 October 2016 together with closed counterparts.

[8] It so happened that on 4 October 2016 the Court of Appeal delivered judgment in *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 in which guidance was given in relation to the principles to be applied in civil cases when suppression orders are sought. The Chairperson accordingly issued a further *Minute* on 25 October 2016 inviting Dr Waxman and Dr Pal to consider the Court of Appeal decision and to make further submissions should they wish. The deadline for Dr Waxman to file her submissions was 1 November 2016. In the event of Dr Pal wishing to respond his application for leave to do so was required by 3 November 2016.

[9] The Tribunal then discovered that on 14 October 2016 the Supreme Court had delivered judgment in *Erceg v Erceg* [2016] NZSC 135, a decision which addresses in some detail the principles which apply when non-publication orders are sought in civil litigation.

[10] *Erceg v Erceg* makes no reference to the judgment given ten days earlier by the Court of Appeal in *Y v Attorney-General*.

[11] The Tribunal being bound by decisions of the Supreme Court it was necessary that Dr Waxman and Dr Pal be given opportunity to address *Erceg v Erceg*. A further *Minute* was accordingly issued by the Chairperson on 1 November 2016 setting out a timetable for the filing of submissions. Dr Waxman on 8 November 2016 filed further open and closed submissions. Dr Pal has not sought leave to file additional submissions.

[12] In summary the submissions filed by the parties are dated:

- 30 September 2016 – Dr Waxman
- 3 October 2016 – Dr Waxman
- 27 October 2016 – Dr Pal
- 1 November 2016 – Dr Waxman
- 8 November 2016 – Dr Waxman

[13] All the submissions filed by Dr Waxman (in both open and closed form) and the submissions filed by Dr Pal have been taken into account in the preparation of this decision.

Publicity

[14] The submissions by Dr Waxman make reference to publication of the Tribunal's 11 August 2016 decision on the Tribunal's website, to a note of the decision on the blog page of the Privacy Commissioner's website, and to an article published by *New Zealand Doctor*. It is therefore necessary that a brief description be provided of the publicity given to the decision.

[15] Following release of the Tribunal's decision on 11 August 2016 it was published on the Ministry of Justice website www.justice.govt.nz/tribunals/human-rights/ and on the website of the New Zealand Legal Information Institute www.nzlii.org/nz/cases/NZHRRT/2016/. Decisions of the Tribunal have been published on both websites for a number of years, as have decisions of other tribunals and, of course, decisions of the High Court, Court of Appeal and Supreme Court among others.

[16] On 20 September 2016 the website of the Privacy Commissioner (www.privacy.org.nz) published a blog entitled "Recording of phone calls at the doctor's". On 22 September 2016 an article entitled "Tribunal dismisses doctor's privacy concerns over phone call recordings" appeared on the website www.nzDoctor.co.nz. In addition to being published online Dr Waxman advises this magazine is also distributed in hard copy to health personnel.

[17] Both the blog published on the Privacy Commissioner's website and the item published by *New Zealand Doctor* drew (to a greater or lesser degree) on the Tribunal's description of the background to the dispute between Dr Pal and Dr Waxman. That description follows:

> **[4]** On 3 December 2013 Dr Waxman's employment was summarily terminated by Dr Jitendra Pal after he discovered in the Panmure computer system a download folder containing some 600 pages of files relating to persons who were not patients of the two practices. Rather they were clients of Best Doctors, a company which facilitates access to medical specialists who then provide a second opinion and medical advice. Dr Pal concluded that while in attendance at the Panmure and Howick surgeries Dr Waxman had been simultaneously working for Best Doctors. It was not work or research linked to any of the patients of the two surgeries nor was it voluntary work. It was commercial work done in time for which Dr Waxman was already been paid to be locum at the two surgeries.
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> **[5]** In the opinion of Dr Jitendra Pal the actions of Dr Waxman negatively impacted on the practices in terms of extra waiting time for patients, inattentiveness to their problems and failure to attend to paperwork such as lab results and ACC queries. He felt patient care had been compromised by Dr Waxman's actions. He was also concerned at the breach of the privacy of the clients of Best Doctors in that their private files were now located on the computer of a third party. The correctness of Dr Pal's conclusions are not an issue the Tribunal is required to determine.
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> **[6]** Dr Jitendra Pal sent an email to Dr Waxman asking that she immediately cease working. Dr Waxman emailed back asking for four weeks pay. Dr Pal contended he was entitled to terminate Dr Waxman's employment without notice and without pay.

> **[7]** Dr Waxman took her case to the Disputes Tribunal. In a decision given on 17 February 2014 Dr Jitendra Pal was ordered to pay Dr Waxman $7,084.00.
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> **[8]** Because Dr Jitendra Pal believed the tribunal hearing had taken place in his absence (the originally notified date of hearing was apparently changed) he appealed to the District Court. In support of that appeal he prepared a detailed defence referenced to the Best Doctor documents downloaded on the practice computer and to 22 transcripts of the 27 telephone calls made by Dr Waxman while at the Panmure surgery. By these means Dr Pal intended demonstrating the dismissal was justified and that no award in favour of Dr Waxman should be made. Unfortunately for Dr Pal the appeal was dismissed as the limited permitted grounds of appeal to the District Court from the Disputes Tribunal do not allow a re-litigation of the evidence.
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> **[9]** Be that as it may, the significant point for present purposes is that Dr Waxman was served with the appeal papers filed by Dr Jitendra Pal. This occurred on 29 March 2014. On sighting the transcripts she was shocked to discover that her private telephone calls made from the surgeries had been recorded and that transcripts of those private conversations were in existence. The subject matter of the telephone calls included a pending tax audit, accounting matters, personal financial affairs, her dealings with a motor vehicle dealership and complete details of her credit card. There were also recordings of her discussions with her three young children. Dr Waxman told the Tribunal that the very subject matter of the telephone discussions underlined she was ignorant of the fact that the calls were being recorded. She said the interception and recording of her private affairs had caused intense humiliation and embarrassment. She had to cancel her credit card.
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> **[10]** It must be emphasised that in the present proceedings under the Privacy Act the Tribunal is not called on to determine the rights and wrongs of the circumstances in which Dr Waxman's employment was terminated or to question the outcome of the proceedings before the Disputes Tribunal and the District Court.
>
> **[11]** In these present proceedings under the Privacy Act Dr Waxman alleges there was a breach of information privacy Principles 1 to 4 and 11. By way of remedy she seeks (inter alia) an apology from Dr Jitendra Pal as well as damages of $4,000 for humiliation, loss of dignity and injury to feelings.

[18] By drawing on these passages both the blog and the magazine article made reference to Dr Pal discovering on his surgery computer system a download folder containing some 600 pages of files relating to persons not patients of the two practices, that Dr Pal had reached the conclusion Dr Waxman had been working for Best Doctors in time for which Dr Waxman was being paid to be locum at the two surgeries and that Dr Pal believed the actions of Dr Waxman negatively impacted on his practice and that of his wife.

Dr Waxman's communications with the Privacy Commissioner

[19] On 28 September 2016 Dr Waxman made contact with the Office of the Privacy Commissioner complaining about "an apparent lack of ethical and moral regard" by that Office in publishing the blog commentary. She expressed concern at the "lack of regard" for her privacy by publication of the Tribunal findings in full "without any censorship on a blog page and then go further to increase publicity by the distribution of a newsletter to my colleagues with professional consequences". She asserted that:

> Aside from the proceedings being published on the MoJ website where one would have to know where to look and know what to look for, the actions of the Privacy Commissioner's office has been a much more blatant exposure with no input or attention to consequences or potential inappropriate content.

[20] By email dated 29 September 2016 the Privacy Commissioner responded that he had directed that the blog post be amended by the removal of the names of both Dr Waxman and Dr Pal who would henceforth be referred to as "Dr W" and "Dr P". The link to the Tribunal's decision on the Ministry of Justice website would nevertheless remain.

[21] The Privacy Commissioner explained to Dr Waxman he had instructed his staff to publicise decisions of the Tribunal to as wide an audience as possible in order to improve public understanding of how the law works. Because the Tribunal's decision contained no restrictions on the publication of Dr Waxman's name, the blog post had been published with identifying details intact. While expressing the view that sole responsibility for the publicity attendant on Dr Waxman's dispute with her former employer (and its sequel in the Tribunal) fell on Dr Waxman, the Commissioner made the following observation, an observation on which Dr Waxman now places some reliance:

> When you decided to take your case to the Human Rights Review Tribunal the consequence was that the outcome would be a publicly available decision of the Tribunal. In my experience of the Tribunal the Chair, particularly in relation to lay, unrepresented parties is usually at pains to explain this, and very often goes so far as to almost elicit requests for suppression. I do not know whether he did so in your case but it seems that for some reason you have not elected to seek name suppression or any publication restrictions in relation to the decision. The decision has sat on the Ministry of Justice website, and from there uploaded to other legal data bases since mid-August.

[22] On 30 September 2016, apparently encouraged by the Privacy Commissioner's observation, Dr Waxman filed the present application for suppression orders.

The submissions by Dr Waxman – summary

[23] There being four sets of submissions by Dr Waxman there is an inevitable degree of overlap and repetition. In these circumstances we intend addressing only the central themes of which there are four in number.

[24] The first theme is that the Tribunal had a duty to draw the attention of both Dr Waxman and Dr Pal to the fact that s 107(3) of the Human Rights Act 1993 empowers the Tribunal, of its own motion or on the application of any party to the proceedings, to make an order prohibiting the publication of any report or account of the evidence in any proceedings before it either as to the whole or any portion thereof. As a lay litigant Dr Waxman could not be expected to ask for name suppression particularly when she did not realise the Tribunal would publish the decision on the Tribunal website. She relies on the observation by the Privacy Commissioner that the Tribunal "often goes so far as to almost elicit requests for suppression" and she criticises the Tribunal for failing to take steps to canvas with the parties the existence of any "safety orders" or to ascertain possible detriment to the parties before publication of the decision.

[25] The second theme is that publication of the Tribunal decision led in turn to the blog post and the *New Zealand Doctor* article. The consequence was loss of face, embarrassment and humiliation. The magazine in particular is widely distributed to doctors and surgeries throughout New Zealand, the very sources of locum work, referrals and business opportunities. Dr Waxman submits that the narrative in the Tribunal decision leads to the conclusion Dr Waxman had "performed negligently as a doctor in not attending to patients in a timely and appropriately clinical manner and the standard of care had fallen bringing harm on [Dr Pal's practice]". She submits that she may suffer irremediable damage to her practice with "consequent grave implications for her own well-being and that of her dependent family if there is no anonymisation". She emphasises that her professional practice is specialised and depends very much on trust. The allegations made by Dr Pal will be seen as "grave in reflecting on [Dr Waxman's] ability to practice as a trusted GP and medical adviser. This could lead to a "widespread withdrawal of instructions with loss of confidence and resultant harm". The reference made to a pending tax audit was hardly helpful. She had not had opportunity

to counter the allegations of unprofessional conduct nor had the Tribunal made findings as to their validity.

[26] The third theme is that the particular identity of Dr Waxman and of Dr Pal is of no public interest.

[27] The fourth and final theme is that [redacted].

The decision in *Waxman v Crouch*

[28] At the request of the Tribunal the submissions by Dr Waxman also addressed the decision in *Waxman v Crouch* [2016] NZHC 2004 (29 August 2016). The *Minute* of the Chairperson issued on 1 November 2016 was in the following terms:

> **[2]** At the same time Dr Waxman is to be offered opportunity to make submissions on the fact that the decision in *Waxman v Crouch* [2016] NZHC 2004 (29 August 2016, Palmer J) has been published on the Judicial Decisions Online website as well as on the NZLii database. The fact of publication and the information contained in that decision is of potential relevance to more than one of the submissions made by Dr Waxman in her closed submissions.

[29] The brief facts, as set out in paras [1], [2] and [3] of the High Court decision are that Dr Waxman and Mr Crouch are neighbours. Dr Waxman sought a restraining order in the District Court against Mr Crouch under the Harassment Act 1997. Not only did she fail in that application, Judge Sharp considered it was Dr Waxman who had been doing the harassing, had been vexatious and ordered indemnity costs against her. Dr Waxman appealed. Although self-represented in the District Court, Dr Waxman was represented in the High Court by experienced counsel.

[30] Palmer J upheld Judge Sharp's judgment declining the application for a restraining order as the degree of harassment did not meet the required level. However the finding that Dr Waxman had acted vexatiously to the degree justifying indemnity costs was set aside.

[31] The factual narrative in the High Court judgment is flattering of neither Dr Waxman nor Mr Crouch. Yet (apparently) no suppression orders were sought by Dr Waxman through her counsel notwithstanding the embarrassment and humiliation which would ordinarily follow from the almost inevitable publication of the decision on the Judicial Decisions Online website. On one view there is a disconnect between Dr Waxman's application for name suppression in the one case but not in the other.

[32] As to the High Court decision Dr Waxman has submitted:

> **[32.1]** She was "again a lay litigant" and unaware of the fact she could seek name suppression. However, as mentioned, Dr Waxman was represented in the High Court by an experienced barrister.
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> **[32.2]** She accepts "albeit ignorantly" publication of the High Court decision on the Ministry of Justice website was to occur but as such publication requires specific searching the resultant effect of publicity was limited.
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> **[32.3]** None of the findings in the decision appeared on a blog website or were disseminated to businesses and her medical peers.
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> **[32.4]** The Tribunal had a duty to protect Dr Waxman from further harm and by drawing Dr Pal's attention to the High Court decision this had caused Dr Waxman further distress and was both "unwarranted and unreasonable".

The submissions by Dr Pal

[33] In brief submissions dated 27 October 2016 Dr Pal makes three points:

> **[33.1]** Dr Waxman initiated the proceedings before the Tribunal and it was reasonable to assume she accepted the normal incidence of the public nature of court proceedings.
>
> **[33.2]** Having initiated the proceedings against Dr Pal in the Disputes Tribunal, with the Police and in the Human Rights Review Tribunal, Dr Waxman had to accept embarrassment and damage to reputation was an inherent risk.
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> **[33.3]** In the proceedings before the Tribunal there were no elements of physical or sexual abuse.

NON-PUBLICATION ORDERS – PRINCIPLES TO BE APPLIED BY THE TRIBUNAL

The statutory jurisdiction to make non-publication orders

[34] The Tribunal, then known as the Complaints Review Tribunal, was constituted by the Human Rights Commission Act 1977, s 45 and was subsequently continued in being (as the Human Rights Review Tribunal) on and after 1 January 2002 as a consequence of the Human Rights Amendment Act 2001. See the Human Rights Act, s 93.

[35] The Tribunal has jurisdiction in respect of three distinct categories of claims:

> **[35.1]** Claims under either Part 1A or Part 2 of the Human Rights Act that there has been discrimination on a prohibited ground.
>
> **[35.2]** Claims under Part 8 of the Privacy Act 1993 that there has been an interference with privacy.
>
> **[35.3]** 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.

[36] The constitution of the Tribunal, its functions, powers and procedure are identical across all three 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.

[37] In the result the single statutory provision which confers on the Tribunal jurisdiction to make non-publication orders is s 107 in Part 4 of the Human Rights Act. Neither the Privacy Act nor the Health and Disability Commissioner Act make separate provision for suppression orders by the Tribunal. Section 107 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).

[38] 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.

[39] It is to be noted there is no express reference to the Tribunal having power to order the non-publication of the names or identifying details of any person. However, such power can be inferred from the generality of the terms in which the jurisdiction to prohibit publication is conferred, namely the power to order non-publication of "any report or account of the evidence or other proceedings … either as to the whole or any portion thereof".

[40] Jurisdiction to order name suppression under s 107(3)(b) was not questioned in the High Court decisions of *Commissioner of Police v Director of Human Rights Proceedings* (2007) 8 HRNZ 364, *B v Director of Proceedings* HC Wellington CIV-2008-485-1021, 11 July 2008, *Haydock v Gilligan Sheppard* HC Auckland CIV-2007-404-2929, 11 September 2008 and *C v Director of Human Rights Proceedings* HC Auckland CIV-2010-404-001662, 6 September 2010. Nor was it challenged in *Sensible Sentencing Group Trust v Human Rights Review Tribunal* [2014] NZCA 264 (25 June 2014).

"special circumstances" and "desirable"

[41] The heading to s 107 is potentially misleading in that it suggests the Tribunal must sit in public unless there are "special circumstances". The heading reads: "Sittings [of the Tribunal are] to be held in public except in special circumstances". However, the actual text of s 107(3) makes no reference to special circumstances. Rather, it stipulates the Tribunal may make a suppression order if it is "satisfied that it is desirable to do so". The phrase "special circumstances" does not appear anywhere in s 107 apart from in the heading.

[42] Nevertheless the heading is an "indication" that may be considered in ascertaining the meaning of s 107. See the Interpretation Act 1999 s 5(2) and (3):

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[43] While s 5 of the Interpretation Act permits the phrase "special circumstances" to be considered when ascertaining the meaning of s 107(3), it is made clear recourse to such "indication" is permissive, not mandatory. The heading can be overridden by (inter alia) the language of s 107. See *R v Panine* [2003] 2 NZLR 63 (CA) at [38]. The point is accurately captured in the following passage from RI Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 256:

> … It must be remembered that these headings are only "indications" – they mainly repeat (not vary, or complete incomplete) meaning in the rest of the section: because of their brevity they mostly cannot even be regarded as summaries. Thus, even though s 5(2) and (3) do not

> expressly say so, it must be the case that more detailed substantive provisions of the section prevail if there is inconsistency. Indeed, on a few (thankfully rare) occasions, section headings have been actively misleading, sometimes because a section has been hurriedly amended on its way through Parliament. So section heading "indications" are to be used to ascertain meaning in line with, not contrary to, s 5(1). [Footnote citations omitted]

[44] As more recently summarised by RI Carter and J McHerron in "Statutory Interpretation Update" (New Zealand Law Society seminar, June 2016) 105, a section heading is only an "indication" and is not necessarily a summary of the text of the section itself. If there is conflict, the text of the body of the section will usually prevail.

[45] We turn then to the task of interpreting s 107(3) and in particular the key term "desirable".

[46] As to text, the following points are to be noted:

> **[46.1]** The word used in the text of s 107(3) is "desirable", not the section heading phrase "special circumstances". We do not accept "desirable" is to be read as meaning "special circumstances". This is because the terms are not synonyms and because the phrase used in the section heading is an "indication" only. It must yield to the text in the body of s 107(3). Had Parliament intended to restrict the making of suppression orders to special circumstances it would have been simple enough for s 107(3) to so provide. Instead the term used in the text of the subsection is "desirable" as in "[w]here the Tribunal is satisfied it is desirable to do so".
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> **[46.2]** This point appears to have been overlooked when s 107(3) was considered in *Haydock v Gilligan Sheppard*. In that case the High Court at [23] emphasised the need for an applicant to establish "very special circumstances" or a "compelling reason" before a suppression order can be made. Significantly the judgment makes no reference to the actual text of s 107(3):
>
> > Arguably the Tribunal adopted a test which was unduly favourable to Ms Haydock when referring simply to factors which might dictate a result contrary to publication. The requirement is more rigorous. There must be a compelling reason or very special circumstances if a suppression order is to be made … The applicant must satisfy a high threshold.

[47] Generally, in its reading and application of s 107(3)(b) the Tribunal has not substituted "special circumstances" for "desirable". In *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 5 at [89] the Tribunal explained its approach as being one which starts with the principles of open justice, freedom of speech and the right of the media to report judicial proceedings. But where the interests of a particular litigant outweighs those considerations, the Tribunal has been willing to make orders. That approach was not challenged on appeal in *Commissioner of Police v Director of Human Rights Proceedings* (2007) 8 HRNZ 364 at [68] to [78].

[48] In the subsequent 2010 decision of *C v Director of Human Rights Proceedings* the High Court confirmed the general approach identified by the Tribunal in *Director of Human Rights Proceedings v Commissioner of Police* and made explicit reference to the "desirable" criterion in s 107(3). The test was framed in the following terms at [70]:

> [70] We confirm that the general approach identified by the Tribunal in *Director of Human Rights Proceedings v Commissioner of Police* is correct, namely that the starting point is publication is permitted. The question is whether in the circumstances of the particular case and on the evidence before the Tribunal, it is desirable that publication should be prohibited, in the sense that the considerations of openness in the proceedings before the Tribunal, the right

> of the media to report the result, freedom of speech and the impact of s 14 of the New Zealand Bill of Rights Act 1990 are outweighed in the particular case. [Footnote citation omitted]

No reference was made to the phrase "special circumstances" or to *Haydock v Gilligan Sheppard.*

[49] In *Director of Proceedings v Emms* [2013] NZHRRT 5 (25 February 2013) at [117] the Tribunal's approach to name suppression was expressed in the following terms:

> **[117]** The granting of name suppression is a discretionary matter for the court or tribunal: *R v Liddell* [1995] 1 NZLR 538 (CA). The starting point when considering suppression orders is the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. However, in *Liddell* it was recognised at 547 that the jurisdiction to suppress identity can properly be exercised where the damage caused by publicity would plainly outweigh any genuine public interest. The decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) underlines that in determining whether non-publication orders should be granted, the court or tribunal must identify and weigh the interests of both the public and the individual seeking publication.

[50] More recently, in *Scarborough v Kelly Services (New Zealand) Ltd (Interim Order Application)* [2015] NZHRRT 43 at [19] to [24] the Tribunal noted the competing lines of authority in both the High Court and Court of Appeal as to whether, in civil cases, special circumstances must be shown before a non-publication order can be made. The Tribunal concluded at [24] that it did not then have to determine which line to follow.

Present interpretation of s 107 of the Human Rights Act

[51] In general terms, it can be said the Tribunal has not interpreted "desirable" as meaning "special circumstances". Rather, as stated in *C v Director of Human Rights Proceedings* at [70], the question has been whether in the circumstances of the particular case and on the evidence before the Tribunal, it is desirable that publication should be prohibited in the sense that considerations of openness in the proceedings before the Tribunal, the right of the media to report the result, freedom of speech and s 14 of the New Zealand Bill of Rights Act are outweighed in the particular case.

[52] The question is whether the Tribunal's approach is in need of revision in light of the decision of the Court of Appeal in *Y v Attorney-General* and of the Supreme Court in *Erceg v Erceg*. Put another way, is the "desirable" test in s 107(3) to be interpreted and applied in a manner consistent and harmonious with the civil law position as now explained by the Supreme Court? Is there a balancing exercise?

The decision of the Court of Appeal in *Y v Attorney-General*

[53] The decision of the Court of Appeal in *Y v Attorney-General* [2016] NZCA 474 (4 October 2016) was intended to provide guidance in relation to the principles to be applied in civil cases where non-publication orders are sought. The Court noted at [22] that (as at 4 October 2016) limited guidance had been given by the Supreme Court. Ironically, ten days later the Supreme Court delivered a detailed decision on the very issue with the result the decision of the Court of Appeal must be regarded as superseded. For this reason it is not intended to examine the decision in any depth.

[54] It is sufficient for present purposes to note the Court took the following approach:

> **[54.1]** The jurisdiction is discretionary. See [24].
>
> **[54.2]** The starting point is the principle of open justice and the related freedom of expression guaranteed by the Bill of Rights, s 14. Together, these two tenets

create a presumption of disclosure of all aspects of civil court proceedings. See [25] and [26].

[54.3] As the media are the conduit through which most members of the public receive information about court proceedings, the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings. Given that importance, a court will need to have sound reasons for finding that the presumption favouring publication is displaced. See para [29].

[54.4] There is no onus or burden on an applicant for suppression in the sense an onus rests on a plaintiff in a civil claim. The question is simply whether the circumstances justify an exception to the fundamental principle. See [29].

[54.5] It would be incorrect for any particular threshold to be set for name suppression. Previous decisions of the Court of Appeal stating the threshold is "exceptional circumstances" or "extraordinary circumstances" have incorrectly stated the law, or no longer correctly state the law. Extraordinary circumstances are not required to justify suppression in a civil case. Nevertheless the threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression. See [30].

[54.6] The correct approach requires the court to strike a balance between open justice considerations and the interests of the party who seeks suppression. The open justice principle is not an article of faith, never to be departed from. See [31].

[54.7] Given the almost limitless variety of civil cases and the fact that every case is different, the balancing exercise must necessarily be case dependent. See [32]. It is neither possible nor desirable to attempt a definitive list of possible reasons for granting suppression. [See [34].]

[55] In large measure the decision of the Court of Appeal is in accord with the later decision of the Supreme Court in *Erceg v Erceg* in that both decisions emphasise the principle of open justice, accept there is no onus on an applicant, emphasise there is no "exceptional circumstance" threshold and acknowledge the standard to be met by an applicant is high. The decisions diverge over the degree of emphasis to be given to the principle of open justice. The balancing exercise at the centre of the Court of Appeal approach is replaced in the Supreme Court decision by an inquiry as to what will serve the ends of justice.

The decision of the Supreme Court in *Erceg v Erceg*

[56] The decision of the Supreme Court in *Erceg v Erceg* [2016] NZSC 135 opens with a strong statement regarding the centrality of the principle of open justice in both civil and criminal contexts. This principle together with the need to secure the proper administration of justice governs the exercise of the discretion to make non-publication orders:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media

> representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language. [Footnote citations omitted]

[57] While there are circumstances in which the interests of justice require that the general rule of open justice be departed from, such departure is restricted to the extent necessary to serve the ends of justice. See [3].

[58] The party seeking the non-publication order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one. See [13]:

> However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one. [Footnote citations omitted]

[59] The reasons for this "stringent" approach are those explained by Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142-143. See [14]:

> 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.

[60] At [17] and [18] the Supreme Court stated that, subject to one qualification, the approach taken by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (NSWCA) at 476-477 is to be applied in the New Zealand context. In that case McHugh JA stated:

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.

[61] The qualification added by the Supreme Court at [18] is that when McHugh JA said that a non-publication order by a court was only valid "if it is really 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:

We consider that the approach encapsulated in the extract is also applicable in the New Zealand context, subject to clarification of one point. McHugh JA said that a non-publication order by a court was only valid "if it is really necessary to secure the proper administration of justice in proceedings before it". It is important to emphasise that the phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of particular cases. In *John Fairfax Group v Local Court of New South Wales*, Kirby P identified some of the exceptions to the principle of open justice at common law and then said:

> The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.

The administration of justice standard is capable of accommodating the particular circumstances of individual cases as well as considerations going to the broader public interest.

[Footnote citations omitted]

Revisiting the interpretation of s 107 of the Human Rights Act

[62] There is a possible argument that *Erceg v Erceg* has no application to suppression applications under s 107 of the Human Rights Act because there is no civil law analogue to s 107(1) and (3).

[63] Such argument would, however, take too narrow a view. 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, the exercise of that discretion must be guided by principle. The significance of *Erceg v Erceg* lies in its exposition of those principles. Because they are congruent with s 107, they will not displace or supplant the statutory language in s 107. The degree of congruence is striking:

[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.

[63.4] 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.

[64] Interpreting "desirable" in this manner will not involve radical departure from the interpretation that has been applied by the Tribunal for a number of years. That interpretation, as confirmed by the High Court in *C v Director of Human Rights Proceedings* at [70] has been framed in the following terms:

> [70] We confirm that the general approach identified by the Tribunal in *Director of Human Rights Proceedings v Commissioner of Police* is correct, namely that the starting point is publication is permitted. The question is whether in the circumstances of the particular case and on the evidence before the Tribunal, it is desirable that publication should be prohibited, in the sense that the considerations of openness in the proceedings before the Tribunal, the right of the media to report the result, freedom of speech and the impact of s 14 of the New Zealand Bill of Rights Act 1990 are outweighed in the particular case. [Footnote citation omitted]

[65] The importance of *Erceg v Erceg* lies in its articulation of the constitutional importance of the open justice principle and the manner in which that principle informs the exercise of the discretion to make suppression orders. It is an inquiry as to what will serve the ends of justice, not a balancing exercise. To the degree this is not made clear by the Tribunal's hitherto interpretation of s 107, that interpretation must be adjusted to accord with the principles as now explained by the Supreme Court.

Summary of correct approach when applying s 107 of the Human Rights Act

[66] In summary (and at the risk of some repetition) the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that 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.

[67] This approach must now be applied to the particular circumstances of the application by Dr Waxman.

ASSESSMENT OF THE APPLICATION FOR SUPPRESSION ORDERS

[68] The four central themes advanced by Dr Waxman in support of her application for name suppression are now addressed.

Theme 1 – Tribunal had a duty to notify Dr Waxman it has power to order name suppression

[69] At the present time, in approximately 75% of the cases filed with the Tribunal, one or more of the litigants are self-represented either by choice or of necessity. The Tribunal is consequently well aware of the need for its practice and procedure to be adapted to ensure all litigants, both represented and unrepresented, have access to justice understood as access to a court (or tribunal) and the right to effective justice. But in the context of an adversarial process in which there is both a plaintiff and a defendant, there are necessary limits to what the Tribunal can do by way of giving legal advice or assistance to one or both parties. The rule against bias is but one such limitation as is the need to treat all parties fairly. It is not the Tribunal's function to serve as a legal nursemaid to one or both of the parties.

[70] In 2016 the Chairperson convened 64 teleconferences and issued 150 Minutes. Given this workload there are practical limits to the assistance which can be given to the parties especially given the exponential growth in the Tribunal's caseload. In the past two years new filings have increased by over 110%. Prudence would suggest that the Tribunal not add to its already substantial workload by unnecessarily providing parties with a tailor-made exposition of all aspects of the Tribunal's jurisdiction and powers of potential relevance to the particular case. All parties have free internet access to the statutes on which the Tribunal's jurisdiction is founded and they cannot transfer to the Tribunal their responsibility to read those statutes. The Tribunal must also avoid appearing to solicit time-wasting or hopeless applications which are then declined after needless expenditure of much effort by all concerned.

[71] It does happen that particularly vulnerable parties appear before the Tribunal such as children, victims of sexual harassment or assault and those with physical, intellectual, psychiatric or psychological illness, disability or impairment. In such cases fairness requires that the Tribunal draw attention to issues which are potentially relevant and significant but not readily identifiable or discoverable by the vulnerable party. It is in these circumstances the Tribunal's power to make suppression orders is often raised by the Tribunal of its own motion.

[72] However, in the present case both parties are medical practitioners. Given their education, qualifications and life experience it was assumed the absence of legal representation was by choice, not financial necessity and that in electing to represent themselves they had at least familiarised themselves with the legislation, being the Privacy Act and Part 4 of the Human Rights Act or had assumed the risks inherent in not doing so.

[73] At the lengthy case management teleconference convened on 6 November 2015 (one hour 15 minutes in duration) the Chairperson explained in some detail the procedure to be followed at the hearing and the pre-hearing steps to be taken by the parties. The agreed timetable for the filing and exchange of witness statements was recorded in the *Minute* issued by the Chairperson immediately after the teleconference. As a consequence Dr Waxman knew in advance of the hearing what Dr Jitendra Pal and his witnesses would say in evidence about their dealings with Dr Waxman. She knew Dr Pal would say he believed Dr Waxman had acted unprofessionally by leaving the downloaded files on his practice computer and by possibly neglecting patients of the practice. Yet she did not ask for the suppression of this evidence or ask that the evidence be received in a closed hearing. Dr Waxman had ample opportunity to take legal advice prior to the hearing on these points and to apply for an interim suppression order in relation to that evidence. No such application was made.

[74] The two day hearing (30 and 31 May 2016) was held at the Auckland District Court in a courtroom open to the public. The hearing was conducted on conventional adversarial lines being an opening by the plaintiff followed by the plaintiff's evidence plus cross-examination; opening by defendant followed by the calling of the defence witnesses plus cross-examination. Closing submissions followed. There was an order excluding witnesses. Throughout the process there was full opportunity for suppression orders to be sought. No application was made by either party.

[75] Dr Waxman presented her case with skill and confidence which accorded with her statement to the Tribunal that she has worked as a Police Medical Officer for some 15 years and given expert witness testimony to the standard required in the High Court. She is clearly an articulate individual at ease in court surroundings. It is hard to accept she was not aware name suppression can be applied for in a court or tribunal setting or that she could at least make inquiry of the Tribunal at the teleconference, at the commencement of the hearing or during the course of the two day hearing.

[76] Consequently there was nothing to put the Tribunal on notice it would be appropriate to draw the attention of the parties to the Tribunal's power to make suppression orders. There was no analogy with those cases involving victims of alleged sexual harassment, children or other litigants under a disability.

[77] In its decision given on 11 August 2016 at [5] and [10] the Tribunal was careful to record that the correctness of Dr Pal's conclusions was not an issue the Tribunal was required to determine nor was it called on to determine the rights and wrongs of the circumstances in which Dr Waxman's employment was terminated or to question the

outcome of the proceedings before the Disputes Tribunal and the District Court. Dr Pal's concerns were nevertheless a necessary part of the background narrative.

[78] In the foregoing circumstances the Tribunal does not accept that in the particular circumstances of the case it had a duty to alert Dr Waxman to the provisions in the legislation which confer jurisdiction to order name suppression.

Theme 2 – loss of face, embarrassment and humiliation

[79] It is submitted by Dr Waxman that publication of the Tribunal decision has led to loss of face, embarrassment and humiliation. She submits she may suffer irremediable damage to her practice with consequent grave implications for her own well-being and that of her dependent family. The allegations made by Dr Pal will be seen as reflecting on her ability to practise as a trusted GP and medical advisor. This could lead to a widespread withdrawal of instructions with loss of confidence and resultant harm.

[80] The fundamental difficulty with this submission is that there is a conspicuous absence of evidence that any of the feared consequences have occurred or could reasonably be expected to occur. The application for name suppression was made seven weeks after delivery of the Tribunal's decision consequent on Dr Waxman becoming aware of the publicity given to the case. The last set of submissions by Dr Waxman were filed on 8 November 2016, some three months after publication of the decision. Yet at no time has the Tribunal been provided with evidence that any of the feared consequences have come to pass or are at real risk of coming to pass. While Dr Waxman believes the order is necessary, there is in fact no evidence before the Tribunal upon which it can reasonably conclude it is necessary for a suppression order to be made. As the Supreme Court pointed out in *Erceg v Erceg* at [13], the courts have declined to make non-publication orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing or unwelcome.

[81] As stated by McHugh JA in the passage from *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* approved by the Supreme Court in *Erceg v Erceg*, there must be some material upon which the court (or tribunal) can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient. The Supreme Court at [13] spoke of the obligation on the party applying to show "specific adverse consequences" sufficient to justify an exception to the fundamental rule.

[82] As no such evidence has been received the suppression application fails for want of evidence.

Theme 3 – the particular identity of Dr Waxman is of no public interest

[83] It is correct that in *Y v Attorney-General* at [32] the Court of Appeal said that sometimes the legitimate public interest in knowing the names of those involved in the case (either as parties or as witness or both), or in knowing the detail of the case, will be high. But in other cases there may be little or no legitimate public interest in knowing the name or identifying particulars of the parties, or those of a witness, or in knowing particular details of the case.

[84] There is no suggestion, however, that name suppression turns on whether there is a legitimate public interest in knowing the names or details of the parties. Rather, the principle emphasised by the Supreme Court in *Erceg v Erceg* is that the administration

of justice must take place in open court accessible to the public and media representatives must be free to provide fair and accurate reports of what occurs in court. This rule can only be departed from where its observance would frustrate the administration of justice. It is within the administration of justice standard that the particular circumstances of individual cases are accommodated.

Theme 4 – [redacted]

[85] [redacted].

[86] [redacted].

[87] [redacted].

The High Court decision in *Waxman v Crouch*

[88] It could be said our conclusions are reinforced by the fact that in *Waxman v Crouch*, heard only two weeks after the Tribunal hearing, no suppression order was apparently sought or made notwithstanding the potentially damaging findings made in the District Court. However, we have decided it is unnecessary for the High Court decision to be taken into account in determining Dr Waxman's suppression application given our findings in respect of the four themes which have just been addressed. Consequently the decision in *Waxman v Crouch* has been excluded from our consideration of the case.

CONCLUSION

[89] Section 107(1) of the Human Rights Act requires every hearing of the Tribunal to be held in public. Exceptions to this requirement are provided for in s 107(2) and (3). Subsection (3) permits the making of a suppression order "[w]here the Tribunal is satisfied that it is desirable to do so".

[90] For the reasons given we have not, by a substantial margin, been satisfied that it is desirable for suppression orders to be made in this case.

Orders

[91] For the foregoing reasons the following orders are made:

> **[91.1]** The application by Dr Waxman for non-publication orders is dismissed.
>
> **[91.2]** As some of the evidence and submissions relating to the protection order may be sensitive, paras [27] and [85] to [87] of this decision are not to be published other than to the parties and are to be redacted from the version of the decision released for publication to persons other than them.

.....	.....	.....
Mr RPG Haines QC	**Ms LJ Alaeinia**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**