MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 230/03/100D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of a charge laid by the Director of Proceedings against A medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING: The parties agreed that the Tribunal consider the application and determine it on the basis of the parties' written evidence and submissions

TRIBUNAL: Dr D B Collins QC - Chair
Ms S Cole, Dr G S Douglas, Dr C P Malpass, Dr J L Virtue (members)

COUNSEL: Ms T Baker for the Director of Proceedings

Ms J Gibson for respondent

The Application

1. Dr A is a xx practising with xx. On 31 March 2003 the Director of Proceedings charged Dr A with professional misconduct pursuant to s.109(1)(b) Medical Practitioners Act 1995 ("the Act"). The details of the charge are set out in the next paragraph. On 5 May 2003 Dr A applied for orders prohibiting publication of his name and any other matters that could lead to his identification until the "conclusion of evidence". Dr A's application is made pursuant to s.106(2)(d) of the Act.

The Charge

2. The allegations relate to Dr A's management of a patient during late March and early April 1999. The particulars of the charge allege:

   - Doctor A "failed to adequately investigate the cause or causes of the discharge of large volumes of fluid from [the patient's] perineum"; and/or
   - Doctor A "failed to adequately investigate the cause or causes of swinging pyrexia".

Summary of Grounds for Application

3. The application identifies the grounds for name suppression in the following way:

   "1. That A has suffered from considerable stress as a result of this process.

   2. A will be compromised in his ability to present his best defence if name suppression and suppression of identifying details are not granted.

   3. There is no justifiable element of public interest in the notification of A's name.

   4. The time period that forms … the basis of the charge is 26 March 1999 to 10 April 1999 – the Medical Council has not ordered a competence review in relation to A.

   5. A's family is under significant stress currently because of ….. (**Not for publication by order of the Tribunal**).

6. Publication of A's name prior to a finding by the Tribunal has … the … potential of seriously damaging his reputation: he has recently commenced work as a xx at xx.

7. There has been a significant delay in the investigation and prosecution of this matter which has led to severe stress being placed on A."

4. Dr A has filed an affidavit in support of his application. The key points in his affidavit are:

- There have been a number of delays incurred in bringing the charge against Dr A;
- This is the first complaint leveled against Dr A;
- (**Not for publication by order of the Tribunal**)
- In June 2002 Mrs A was diagnosed with .. (**Not for publication by order of the Tribunal**). So far Mrs A has recovered reasonably well but her circumstances are a source of natural and obvious concern.

The Director of Proceedings' Position

5. A directions conference was held on 6 May 2002. At that conference the Director of Proceedings indicated she neither consented to nor opposed Dr A's application.

Principles applicable to name suppression

6. The Tribunal has previously set out the principles applicable to applications by doctors seeking suppression of their name pending determination of charges by the Tribunal.[1] The Tribunal proposes to adopt the language used in its earlier decisions when referring to the principles applicable to Dr A's application.

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[1] See for example decision No. 216/02/95C, and decision No. 221/02/97C

7. Name suppression applications are notoriously difficult to determine. It is often said that deciding name suppression applications involves a balancing of competing factors. In many respects that is an over simplification of a task that requires careful analysis and evaluation of a matrix of competing considerations.

8. The starting point when considering the principles applicable to name suppression in the medical disciplinary arena is s.106 Medical Practitioners Act 1995. Subsections 106(1) and (2) provide:

> *"(1) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public.*
>
> *(2) Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including (again with out limitation) the privacy of the complainant (if any)) and to the public interest, it may make any one or more of the following orders: …*
>
> *(d) … an order prohibiting the publication of the name, or any particulars of the affairs, of any person."*

Public Hearing

9. Subsection 106(1) places emphasis on the Tribunal's hearings being held in public unless the Tribunal, in its discretion applies the powers conferred on the Tribunal by s.106(2). Another exception to the presumption that the Tribunal's hearings will be conducted in public can be found in s.107 which creates special protections for complainants where the charge involves a matter of a sexual nature, or where the complainant may give evidence of an intimate or distressing nature.

10. The requirement in s.106(1) that the Tribunal's hearings be held in public mirrors the principle that, except in unusual and rare circumstances, regular Court proceedings are conducted in public. An effect of that principle in our regular Courts is that defendants will rarely receive name suppression. Four cases can be cited to illustrate this point:

- In *M v Police*[2] Fisher J said:

> *"In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offend".*

- In *R v Liddel* [3] the Court of Appeal said:

> *"… the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'…. The basic value of freedom to receive and impart information has been re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990 …*
>
> *The room that the legislature has left for judicial discretion in this field means that it would be inappropriate for this Court to lay down any fettering code. What has to be stressed is the prima facie presumption as to reporting is always in favour of openness. Name restrictions as to the victims of sexual crimes are automatic (subject to the possibility in a range of cases of orders to the contrary), and they are permissible for accused or convicted persons. But they are never to be imposed lightly, and in cases of conviction for serious crime the jurisdiction has to be exercised with the utmost caution".*

- In *Lewis v Wilson & Horton Ltd* [4] the Court of Appeal re-affirmed what had been said in *R v Liddell*. The Court noted:

> *"… the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings".*

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2 (1991) 8 CRNZ 14
3 [1995] 1 NZLR 538
4 [2000] 3 NZLR 546

- Recently, in *Re X* [5] the High Court distilled the relevant principles relating to name suppression applications to a number of propositions including:

> *"The principle of open justice dictates that there should be no restriction on publication except in very special circumstances."*

11. The cases referred to in the preceding paragraphs all involved criminal prosecutions. Apart from *Re X,* the cases cited examine the broad discretion conferred on Courts in criminal cases by s.140 Criminal Justice Act 1985 to suppress the name of an accused or convicted person.[6] It is axiomatic that medical disciplinary hearings are not criminal prosecutions.[7] Nevertheless, guidance can be derived from the criminal law jurisdiction when applying the requirement of public hearings contained in s.106(1) Medical Practitioners Act 1995 to an application for name suppression by a doctor charged with serious offending.

12. A number of decisions of the Tribunal, and appellate Courts have recognised the importance of the requirement set out in s.106(1) of the Act that hearings of the Tribunal shall be heard in public when the Tribunal considers name suppression applications filed by a doctor. For example: in *Harman v Medical Practitioners Disciplinary Tribunal* [8] the District Court held:

> *"The Tribunal referred in its judgment to the well known statement of principle [in] R v Liddell … That decision is to the effect that the prima facie presumption as to reporting is always in favour of openness and that in considering whether a power to prohibit publication should be exercised the starting point is the importance in the democracy of freedom of speech, open judicial proceedings and the right of the media to report the matter fairly and accurately as 'surrogates of the public'. These freedoms are re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990. In this case that presumption is reinforced by the statutory injunction to the Tribunal that it should hear proceedings in public".*

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5 (unreported), HC Wellington M 109/02, 26 July 2002 Hammond J

6 Section 140 Criminal Justice Act provides: Court may prohibit publication of names – (1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

7 *Re A Medical Practitioner* [1959] NZLR 782, *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, *Guy v Medical Council of New Zealand* [1995] NZAR 67

8 DC Auckland NP 4275/00, 3 May 2002, J Doogue DCJ

13. In *F v Medical Practitioners Disciplinary Tribunal* [9] one of the many questions the Court was asked to focus upon concerned the appellant's contention that the Tribunal had mis-directed itself when deciding not to continue an interim name suppression order. It was said the Tribunal had wrongly applied the criminal law presumption of public hearings to the doctor's application to continue suppression of his name. In that case the doctor submitted that the higher public interest of "openness" in criminal hearings should not be automatically transposed to medical disciplinary proceedings. The High Court held there was a fundamental distinction between name suppression in criminal cases and those which arose in a professional disciplinary forum. The Court noted:

> *"… there is … a fundamental distinction, but on closer examination the impact of this is likely to be more apparent rather than real".*

14. The Court proceeded to say s.106(2) Medical Practitioners Act 1995 required the Tribunal to take into account the interests of the practitioner. The Court said in the context of that case (the practitioner had been found guilty of conduct unbecoming a medical practitioner) the Tribunal should have regard to the possibility:

> *"… that the charges brought against the practitioner might be found to be unfounded or so trivial that a finding of misconduct is not warranted. In such a case the practitioner will continue to practice. Therefore it is reasonable that the right to practice should not be prejudiced by the practitioner being identified in relation to allegations which do not, at the end of the day, have any bearing on his ability to do so.*
>
> *… therefore pending determination of the charges it will usually be quite reasonable in most cases to make interim orders for non-publication of name"* (emphasis added).

The Court proceeded to observe that if a doctor is found liable following a disciplinary hearing then there is a strong expectation the doctor's name will be published.

15. The suggestion in *F* that it would be quite reasonable in most cases to make interim orders for name suppression pending determination of disciplinary charges against a doctor is a clear indication from the High Court that the Tribunal should give favourable consideration to

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[9] Unreported HC Auckland AP 21-SW01, 5 December 2001, Laurenson J

applications to name suppression pending determination of disciplinary charges against the doctor. The observations of the High Court must carry considerable weight.

16. It must be said however that the comments of the learned Judge in *F* were *obiter dicta.* With the greatest of respect and deference to the High Court Judge, the Tribunal believes it must assess each application for name suppression on its merits and faithfully apply the legislative criteria set out in s.106(2) Medical Practitioners Act 1995 when considering name suppression applications.

17. It would be unfortunate if the idea were to gain currency that there is a presumption in favour of name suppression whenever a doctor applies to the Tribunal under s.106(2)(d) to have their name suppressed pending determination of disciplinary charges. Such a presumption could not be reconciled with the Tribunal's duty to carefully exercise the discretion conferred upon the Tribunal by s.106(2) after applying the criteria specified by Parliament.

S.106(2) Considerations

Interests of any Person

18. In considering whether or not it is desirable to grant an order suppressing publication of a practitioner's name the Tribunal is required to have regard "to the interests of any person" the "interests of any person" include the unfettered interests of a complainant to privacy.

19. Undoubtedly the interests of any person include the interests of Dr A. The Tribunal may also have regard to persons other than the practitioner as well as the complainant. In this case the interests of the practitioner's family have been brought to the Tribunal's attention as factors the Tribunal should take into account in assessing Dr A's name suppression application.

Interests of the Practitioner

Damage to Reputation

20. In his application Dr A suggests publication of his name prior to a finding by the Tribunal has the "… potential of seriously damaging his reputation".

In his affidavit Dr A elaborates on this concern and states:

> *"…I have recently commenced work with xx. Initially this was for a short contractual time period as a locum; I have recently been asked to extend my contract and have agreed to do so until August. I am very concerned about the impact that this charge would have on my practice at xx which is relatively new and the trust of the patient base in xx."*

21. The Tribunal is not convinced that Dr A's reputation would be seriously damaged if his name were published at this juncture. The allegations focus on the way Dr A is said to have managed one patient four years ago. The allegations are undoubtedly a source of concern and distress for Dr A. However, the charge must be viewed in perspective. It is not uncommon for very serious allegations to be heard by the Tribunal which undoubtedly impact upon the standing and the reputation of the doctors concerned. Allegations of sexual and drug abuse are examples of charges in this category. The allegations leveled against Dr A do not reflect upon his integrity and are unlikely to affect his standing in the community. Having made these observations the Tribunal accepts that it would be unfortunate if Dr A's reputation were damaged by reason of his name being associated with allegations which at this juncture have not been proven. If Dr A's reputation were damaged there is little solace to be gained by suggesting his reputation would be salvaged if the charges are not proven. This concern was acknowledged in the following way by Fisher J in *M v Police*:

> *"… the stigma associated with a serious allegation will rarely be erased by a subsequent acquittal. Consequently when a Court allows publicity which will have serious adverse consequences for an unconvicted defendant, it must do so in the knowledge that it is punishing a potentially innocent person."*

Stress suffered by Dr A

22. It is not unusual for doctors to suffer stress as a result of being charged with a disciplinary offence. Normally when stress is relied upon as a ground for seeking name suppression the Tribunal would receive medical evidence explaining the effects of the stress upon the doctor's health.

23. The fact the Tribunal has not received any medical reports in this case should not be construed as a criticism. The Tribunal is confident that if medical evidence existed which supported Dr A's application it would have been brought to the attention of the Tribunal.

24. The Tribunal concludes Dr A is suffering stress albeit not of a nature that has impacted upon his health. The Tribunal believes Dr A's stress is generated by three factors, namely:

- the effects of the complaint, investigation and laying of the charge;
- the unique events that have unfolded xx. Dr A explains his concerns in the following way in his affidavit:

- Mrs A's very unfortunate circumstances, referred to in the following way in Dr A's affidavit:

> *"In June last year my wife, xx, was diagnosed ….(**Not for publication by order of the Tribunal**). This has been a very sad and stressful occasion for me and my family which has not been assisted by the length of time that it has taken for this matter to reach a charge."*

25. The Tribunal accepts Dr A's stress is likely to be exacerbated if his name is published prior to the Tribunal reaching any conclusions about the charge he is facing. The Tribunal also accepts that the effects of further stress may impede Dr A to function as a xx to the best of his abilities. Furthermore adverse publicity may compromise Dr A's ability to defend the charge he is facing.

Interests of the Complainant

26. No submissions have been received which specifically relate to the complainant's personal interest. The Director of Proceedings has adopted a neutral stance in relation to Dr A's application.

Public Interest

27. S.106(2) requires the Tribunal to have regard to the "public interest" when determining whether or not to suppress publication of the name of an applicant.

28. In *S v Wellington District Law Society*[10] the High Court examined the concept of "public interest" in relation to an application to suppress the name of a lawyer subject to disciplinary proceedings. In considering a provision in the Law Practitioners Act 1982 similar to s.106(2) Medical Practitioner's Act 1995, a full bench of the High Court said:

> *"… the public interest to be considered, when determining whether the Tribunal, or on appeal this Court, should make an order prohibiting the publication of the report of the proceedings, requires consideration of the extent to which publication of the proceedings were to provide some degree of protection to the public, the profession or the Court. It is the public interest in that sense that must be weighed against the interests of other persons, including a practitioner, when exercising a discretion whether or not to prohibit publication".*

29. More specifically, in *Re X* Hammond J reiterated the "public interest" considerations stated in a number of criminal cases. His Honour said the following about "public interest":

> *"… public interest in knowing the name of an offender is a very powerful one. In the case of an offender, the absence of publicity may cause suspicion to fall on other members of the public. The publicity may lead to the discovery of additional evidence of offences, and the absence of publicity may allow an offender to re-offend."*

30. The following "public interest" considerations have been evaluated by the Tribunal when considering Dr A' application:

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[10] [2001] NZAR 465

- The public's interest in knowing the name of a doctor accused of a disciplinary offence;
- Accountability and transparency of the disciplinary process;
- The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990 [11];
- The extent to which other doctors may be unfairly implicated if Dr A is not named;
- The possibility that publicity might lead to discovery of additional evidence;
- The extent to which the absence of publicity may allow an opportunity for further alleged offending.

31. Each of these considerations will now be examined by reference to Dr A's application.

Public interest in knowing the name of a doctor accused of a disciplinary offence

32. Prior to the Medical Practitioners Act 1995 coming into force, medical disciplinary proceedings were heard in private. The Medical Practitioners Act 1968 conferred upon the Medical Council and the Medical Practitioners Disciplinary Committee the power to direct that the effects of any orders made by those bodies be published in the New Zealand Medical Journal [12]. That power effectively enabled the Medical Council and Medical Practitioners Disciplinary Committee to publish the name of a doctor after they had determined disciplinary proceedings against the doctor.

33. Section 106 and 107 of the Medical Practitioners Act 1995 reflect Parliament's wish that the Medical Practitioners Disciplinary Tribunal conduct its hearings in public. Furthermore, Parliament determined that unless the grounds for suppression set out in s.106(2) and 107 are established the names of those who appear before the Tribunal are able to be published.

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[11] "Freedom of expression – Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

[12] S.65 Medical Practitioners Act 1968

When the Medical Practitioners Bill was introduced into Parliament in 1994 the then Minister of Health, the Hon J Shipley said:

> *" A major criticism of the existing disciplinary procedure is that hearings are held in private. In order that justice is seen to be done the Bill provides for hearings to be held in public, except that, after having regard to the interests of any person and to the public interest, the Tribunal may order that part or all of a hearing should be heard in a private session, or indeed, prohibit the publication of any report or account of any part of the hearing or any materials produced at the hearing …. The Tribunal will be able to make an order prohibiting the publication of the name or any particulars of the affairs of any person".*[13] (emphasis added)

These intentions were achieved when sections 106 and 107 were enacted.

34. It is important to note that those who promoted the new legislation were concerned that the public desire to know what was happening in medical disciplinary cases was frustrated by the provisions of the 1968 Act which required disciplinary hearings to be heard in private. Parliament responded to those concerns by enacting sections 106 and 107 Medical Practitioners Act 1995 so as to fulfil the public's wish to know, inter alia, the identity of doctors who appear before the Medical Practitioners Disciplinary Tribunal. Doctors wishing to apply for suppression of their name when they appear before the Tribunal need to appreciate that Parliament clearly expected that the identity of doctors charged with a disciplinary offence before the Tribunal would, generally, be able to be published.

Accountability and Transparency of the Disciplinary Process

35. It is in the public interest, and the interests of the medical profession for the medical disciplinary process to be transparent. Associated with transparency is the desirability of ensuring the profession and public have confidence in knowing those who appear before the Tribunal will be held accountable if their conduct justifies a disciplinary finding against them. The requirements of transparency and accountability are factors which tend to counteract suppression of the name of a practitioner who appears before the Tribunal.

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[13] New Zealand Parliamentary Debates vol 544 p 5065

Importance of Freedom of Speech and Section 14 New Zealand Bill of Rights Act 1990

36. The public interest in preserving freedom of speech and the ability of the media 'as surrogates of the public' to report Tribunal proceedings have been stressed on numerous occasions by the Tribunal and appellate courts. The Court of Appeal in *R v Liddell* and *Lewis v Wilson & Horton Limited* stressed:

> *"… the importance in a democracy of freedom of speech, open judicial proceedings and the right of the media to report [proceedings] fairly and accurately as 'surrogates of the public' "*

is an important factor which weighs against suppressing the name of an accused. The same considerations apply to doctors charged with an offence before the Medical Practitioners Disciplinary Tribunal.

Other Doctors May Be Unfairly Impugned

37. A further factor, in the public interest, which doctors seeking name suppression must overcome is the concern that by suppressing the name of a practitioner charged with a disciplinary offence, other doctors may be unfairly suspected of being the doctor charged. This point has been emphasised on a number of occasions in criminal courts where Judges have declined name suppression to avoid suspicion falling on other members of the public.

38. Doctor A is one of many medical practitioners in xx. The size of the xx medical community is such that it is unlikely any particular doctor will be linked with the charge before the Tribunal if Dr A's name is suppressed. If there is any possibility other members of the xx medical community will be unfairly suspected of being the doctor charged in this case, then the Tribunal can address that concern by suppressing details of the fact Dr A practices in xx.

Possibility of Disclosure of Additional Evidence

39. A reason sometimes advanced in criminal cases for declining name suppression is that by publishing the name of an accused further evidence may come to hand. The possibility that such further evidence will be disclosed if a doctor's name is published is a further factor in the public interest against suppressing the identity of a doctor charged before the Tribunal.

40. In the case before the Tribunal the allegations relate to events said to have occurred in 1999. No other charges have been brought against Dr A. In his affidavit Dr A stresses that aside from this charge he has not been subject to any disciplinary charges or complaints. The Director of Proceedings has not challenged this evidence.

41. The fact there is one charge against Dr A stemming from one complainant and relating to events that are said to have occurred four years ago are factors the Tribunal bears in mind when assessing the public interest in relation to Dr A's application.

The Extent to Which the Absence of Publicity May Allow an Opportunity for Further Alleged Offending

42. Name suppression applications are sometimes declined in criminal cases in order to minimise the opportunity for an alleged offender to embark on further alleged offending. This consideration is mentioned by the Tribunal for the sake of completeness. Nothing has been put before the Tribunal to suggest this is a legitimate concern in this case.

Tribunal's Decision

43. The Tribunal has not found it easy to determine Dr A's application. In the final analysis the Tribunal has decided to grant Dr A interim suppression of name pending determination of the charge.

Reasons for the Tribunal's Decision

44. The Tribunal believes Dr A's unique circumstances are exceptional factors which justify the granting of the application pending determination of the charge by the Tribunal. The Tribunal accepts that the combination of factors which have caused stress to Dr A are highly unusual and when viewed holistically justify the Tribunal granting Dr A's application. If it were not for the combined effects of Dr A's wife's health and their concerns about the traumatic events that have recently unfolded xx the Tribunal would have declined Dr A's application. Dr A's circumstances and those of his wife justify the Tribunal granting his application. However, in reaching this conclusion the Tribunal records that it explicitly rejects the

suggestion that there is "no justifiable element of public interest" in allowing Dr A's name to be published at this juncture.

Conclusion

45. After weighing all of the interests identified in Dr A's application, the neutral stance taken by the Director of Proceedings, and the public interest considerations identified in this decision, the Tribunal believes that in this instance an interim order should be made to suppress Dr A's name pending determination of the charge. The Tribunal also orders that nothing be published at this stage which identifies Dr A as being a xx who works in xx.

DATED at Wellington this 28th day of May 2003

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D B Collins QC
Chair
Medical Practitioners Disciplinary Tribunal