Medical Practitioners Disciplinary Tribunal

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DECISION NO: 1/97/1C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against E registered medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on the 30th day of April 1997

PRESENT: Ms W N Brandon - Deputy Chairperson
Professor B D Evans, Dr A M C McCoy, Mr G Searancke,
Dr D C Williams (members)

APPEARANCES: Ms R Hayward for Complaints Assessment Committee
Mr H Waalkens for respondent
Mr R Caudwell - Secretary
Mrs K G Davenport - Legal Assessor
(for first part of call only)

DECISION ON THE JOINT APPLICATION FOR PRIVATE HEARING

1.0 **THIS** is a joint application for a private hearing made on behalf of the complainant, Mrs xx, and Dr E the respondent doctor.

2.0 **THE** hearing of the application was by telephone conference commencing at 7.00 pm on Wednesday, 30 April 1997. Joint submissions in support of the application were filed by counsel and made available to the Deputy Chair and members of the Tribunal in advance of the hearing of the application.

Upon hearing from Ms Rachael Hayward, counsel for the Complaints Assessment Committee, and Mr Harry Waalkens, counsel for Dr E, the Tribunal with one member dissenting, makes the following **orders**:

ORDERS:

2.1 **THAT** the hearing by the Medical Practitioners Disciplinary Tribunal of a charge of professional misconduct dated 26 February 1997 against Dr E of xx be heard in public.

2.2 **THAT**, pending further order of the Tribunal, there is to be no publication whatsoever of the identity of the parties, or any other information which would lead to the parties being publicly identified.

2.3 **NO** written statements of evidence are to be circulated to any person except the Tribunal, the parties and their counsel, either prior to or in the course of the hearing.

3.0 REASONS FOR THE TRIBUNAL'S DECISION:

3.1 **HAVING** carefully considered the submissions advanced by counsel, both prior to and in the course of the hearing of the application, the Tribunal was not persuaded that the particular facts and circumstances presented in this application justified the Tribunal departing from the clear legislative directive contained in Section 106(1) of the Medical Practitioners Act 1995 that hearings of the Tribunal shall be held in public.

3.2 **PRIOR** to the enactment of the Medical Practitioners Act 1995, hearings of both the Medical Practitioners Disciplinary Committee and the Medical Council of New Zealand were held in private. The new statutory provisions, specifically Sections 106 and 107 of the Act, are of a mandatory nature (subject to the Tribunal's discretionary powers to order the whole or any part of a hearing be held in private) and are consistent with the principles of open justice; the public demand for accountability and transparency of the disciplinary process, and similar provisions in the legislation governing other professions, for example lawyers and dentists.

3.3 **THE** Tribunal, whilst aware of public criticism that private hearings shielded the medical profession from public scrutiny, also accepts that the doctor/patient relationship is a special relationship of confidence involving the disclosure of personal or intimate matters such that if all disciplinary proceedings are to be held in public in the future, complainants, or potential complainants, may be deterred not only from making complaints, but also from seeing the process through to a hearing, and beyond if appeals eventuate.

3.4 **NEVERTHELESS**, it is clear from the language of Sections 106 and 107 of the Act that the unequivocal intention of Parliament in enacting this legislation was that the Tribunal is to proceed from a presumption that all hearings will be held in public, subject to the Tribunal, either of its own volition or on application, exercising its discretion to order that the whole or any part of a hearing may be heard in private if the particular circumstances of the case, or the subject matter which will be canvassed at the hearing, warrants.

3.5 **THE** Tribunal is loathe to stipulate a threshold test which it would require parties to meet before exercising its discretionary powers to grant an application for a private hearing. Each case will fall to be decided on its particular facts, and the circumstances which present. However, given the protections for a complainant provided for in Section 107 where charges relate to or involve -

(a) "Any matter of a sexual nature; or

(b) Any matter that may require or result in the complainant giving evidence of matters of an intimate or distressing nature."

it seems clear that the legislature intended that only the most compelling reasons would suffice to displace the presumption contained in Section 106(1) of the Act.

3.6 **THIS** application was made in reliance on Section 106(2)(a) of the Act which provides:

"Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:

(a) An order that the whole or any part of a hearing shall be held in private."

3.7 **THE** application was advanced on the basis of submissions and affidavit evidence of Mrs xx. No other affidavit evidence was provided, and the reasons advanced on the part of the complainant in this instance appear to fall within the matters anticipated, and provided for, in Section 107(l)(b) of the Act. In support of Dr E's application for a hearing in private, counsel advanced three reasons:

(1) That Section 107 omits to consider that the whole case (and thus the complainant's medical history) will be reviewing the same material contained in the complainant's evidence, and will traverse the same points;

(2) That the hearing is to be held in xx described by Mr Waalkens as "a small town, not a metropolitan centre" and, as a result, that there is a significant risk of prejudicial publicity occurring for Dr E out of all proportion to the level of offending alleged;

(3) That counsel, and presumably Dr E is not confident that orders providing merely for name suppression will be sufficient to protect Dr E's privacy.

3.8 **IN** submissions, Mr Waalkens suggested that the "public interest" referred to in Section 106(2) is in the proper functioning of the Tribunal, not in the content of the hearing. The Tribunal considers that that is only a part of the totality of the "public interest" with which Section 106(2) is concerned. Many other factors will be significant, to a lesser and greater degree, depending upon the particular facts and circumstances which present in any given case. For example, it seems to the Tribunal that the notion of "public interest" contained in Section 106(2) also encompasses such factors as public confidence in the medical profession; the concept of accountability of the professionals responsible for the health and safety of the citizens of New Zealand; and the public interest in the open administration of justice generally.

3.9 **IN** submissions, counsel referred to *Broadcasting Corporation of New Zealand v Attorney General [1982] 1NZLR 120,* specifically, to the statement by Richardson J at pages 132-134:

"One of the essential qualities of a Court of justice is that it conducts its proceedings in public. There are evidentiary advantages in that course for access of the public and the news media to the Courts tends to enhance the quality of testimony, and at times too, to secure the testimony of those who realise from what they learn of the particular case, usually through news media reporting of proceedings, that they have a contribution to make. However, the constitutional reasons go far deeper. Their concern is with the administration of justice both in the particular case and in the generality of cases, and the associated basic need to preserve confidence in the judicial system. Open justice imposes a certain self discipline on all who are engaged in the adjudicatory process - parties, witnesses, counsel, court officers and Judges .... the regular conduct of trials in open Court also provides an assurance to the wider public that justice is being administered openly and under public scrutiny."

3.10 **THE** Tribunal accepts that statement unreservedly, notwithstanding Mr Waalkens' submissions that the level of alleged offending on the part of Dr E is "at the lower end of the scale". Whether or not that subsequently proves to be the case is a matter for determination by the Tribunal after the hearing of the charges is concluded.

3.11 **COUNSEL** also referred to the statement of Thomas J in *Police v O'Connor [1992] 1NZLR87, at 96:*

"... I have already indicated that the general principle [of the open administration of justice] cannot be framed in absolute terms. Its content is neither inflexible nor immutable. It has already been observed by Cooke J (as he then was) that the two most famous cases decided in England on the fundamental importance of public hearings, *Scott v Scott* and *McPherson v McPherson,* are examples of the very type of case for which the legislature, reflecting contemporary opinion, now enjoins privacy (see *Broadcasting Corporation v Attorney General* at pages 131-132). Yet, notwithstanding the furore of opposition at the time, no-one would today seriously contend that the abridgement of publicity in family law and divorce proceedings has undermined the public's confidence in the administration of justice".

In the Tribunal's view, it is noteworthy that in that statement, and in the context of family law and divorce proceedings, that His Honour referred to "the abridgement of publicity" impliedly acknowledging that private hearings and the complete prohibition of publicity, could not be justified in any area of the law, except in the most extreme circumstances. An abridgement of publicity, similar to what is provided for in the family jurisdiction, (a jurisdiction which also involves matters of a personal, intimate or distressing nature), is contemplated, and provided for, in both Sections 106(2) and 107(1) of the Act.

3.12 **WEIGHING** all of the factors falling for consideration in this application, it is the Tribunal's decision to decline to exercise its discretion provided for in Section 106, beyond making the orders set out at the commencement of this decision. The Tribunal is of the view that the case for the complainant falls within Section 107 of the Act and that at the hearing the complainant, may as of right, choose to give her oral evidence in private. Beyond that, the Tribunal considers that the privacy of the parties, and in particular any prejudice which may result to the respondent doctor if he is publicly identified prior to, or in the course of, the hearing of the charges, can be protected and provided for by non-publication orders.

3.13 **IN** conclusion, the Tribunal notes that, as a matter of fact, this is the first such application which the Tribunal has considered. However the Tribunal has taken the approach that it would be unfair for the burden of precedent to fall upon these particular parties simply because they are the first parties to make such an application. Whilst the precedent effect of this decision has not been ignored by the Tribunal, it has not been a determinative factor. The Tribunal has endeavoured to consider this application on its own merits, and on the basis of the particular facts and circumstances which have been ably and comprehensively presented to the Tribunal by the parties' representatives.

Dated at Auckland this 7th day of May 1997.

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W N Brandon

DEPUTY CHAIRPERSON