Medical Practitioners Disciplinary Tribunal

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DECISION NO: 2/97/3C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against S registered medical practitioner of xx respondent

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on the 7th day of May 1997

PRESENT: Mr P J Cartwright - Chairperson
Dr J M McKenzie, Dr M J P Reid, Dr A F N Sutherland,
Mrs H White (members)

APPEARANCES: Mr M McClelland for Complaints Assessment Committee
Mr N Beadle for respondent
Ms G J Fraser - Secretary
Mr J D Howman - Legal Assessor
(for first part of call only)

1.0 APPLICATION FOR PRIVATE HEARING

1.1 **A** Complaints Assessment Committee ("the CAC") established under Section 88 of the Medical Practitioners Act 1995 ("the Act") has determined in accordance with Section 92(1)(d) of the Act that a complaint against the respondent shall be considered by the Medical Practitioners Disciplinary Tribunal ("the Tribunal"). The charge against the respondent has been set down for hearing in xx.

1.2 **THIS** is an application made on behalf of the respondent for the following orders:

1. **THAT** the publication of the name of the respondent, directly or indirectly, in connection with the treatment or death of C be prohibited until further order;
2. **THAT** the hearing of the charges be held in private;
3. **THAT** any report or account of any part of any hearing by the Tribunal, whether held in public or in private, be prohibited until further order.

1.3 **AN** ancillary order sought is that in each case no such further orders be made without the Tribunal first having permitted the respondent to make submissions as to why such orders should be extended.

1.4 **THE** hearing of the application was by telephone conference commencing at 6.30 pm on Wednesday 7 May 1997. In advance of the hearing submissions in support of the application were filed by Mr M Parker, for the respondent and by Mr McClelland on behalf of the CAC in opposition to the application.

2.0 ORDERS:

Upon hearing from Mr Beadle, counsel for the respondent at the telephone conference, and Mr McClelland, counsel for the CAC, the Tribunal makes the following orders:

2.1 **THAT** the hearing by the Tribunal of a charge of professional misconduct, or in the alternative a charge of conduct unbecoming a medical practitioner and that conduct reflects adversely on the practitioner's fitness to practise medicine, dated 20 March 1997 against the respondent, be heard in public.

2.2 **THAT** publication of the name of the respondent, directly or indirectly, in connection

with the treatment or death of C**,** be prohibited until further order.

2.3 **THAT** 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 PRE-HEARING PUBLICITY:

3.1 **A** solicitor acting for the complainants (not Mr McClelland for the CAC) contacted the Tribunal Secretariat after the complainants had received the CAC's letter advising that a charge had been laid before the Tribunal. The solicitor indicated to the Secretariat that the complainants intended to advise the media of the charge and inquired if there was any provision in the legislation that prevented them from taking that action. The solicitor was advised that the Secretariat was not aware of any provision in the Act which prevented the complainants from disclosing to others that a charge was being laid.

3.2 **MUCH** to the distress of the respondent media reports about the reference of the complaint to the Tribunal followed in the Evening Standard of xx (29 March 1997), NZ Herald (31 March 1997) and the Dominion (1 April 1997).

3.3 **ON** the application of Mr Parker and following directions from Mr Howman, the Chairperson directed on 17 April 1997 that the complainants were not to publish either the particulars of this application, the fact that it had been made, or their (or other parties) submissions.

4.0 **RESPONDENT'S CASE:**

4.1 **ESSENTIALLY** it is a formal application pursuant to Section 106 of the Act the relevant parts of which, for the purpose of this application, provide:

"106. Hearings of Tribunal to be in public:

(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 (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:

(b) An order prohibiting the publication of any report or account of any part of any hearing by the Tribunal, whether held in public or in private:

(c) An order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

(d) Subject to subsection (7) of this section, an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

(3) Every application to the Tribunal for any order under this section shall be heard in private, but the other parties to the proceedings and the complainant (if any) shall be entitled to be present and to make submissions with regard to the application.

(4) .....

(5) .....

(6) .....

(7) .....

(a) .....

(b) .....

(c) ....."

4.2 **MR** Parker has advanced a number of reasons in support of his principal submission that the hearing should be held in private. The Tribunal will refer here only to those submissions which it considers are relevant to the consideration of making one or more of the orders sought under Section 106 of the Act.

4.3 **THE** respondent is a Paediatric Registrar at xx Hospital. No internal disciplinary steps have been taken against him and he is considered to be a competent Registrar. There have been no other investigations in relation to the respondent's treatment of patients.

4.4 **ON** 24 September 1996 an inquest into the death of C was held in xx . The complainants were represented by counsel and the respondent was cross-examined.

Reports of the Coroner's Inquest were published in the news media. The Coroner made no adverse comment in relation to the respondent's conduct in treating C let alone, any recommendations as to his future conduct.

4.5 **WHILST** the rights of the complainants to pursue their complaint is respected, that right must be balanced with the respondent's right to privacy until any charges are proven against him. Even if all the charges are discharged without penalty, damage has already been done to the respondent's reputation. Also a large number of people may have read the newspaper reports already published. Further dissemination of the identity of the respondent and the evidence to be led at the hearing of the charges is inappropriate pending the findings of the Tribunal (at which time these issues can be revisited).

4.6 **IT** is not in the public interest to disclose the identity of the respondent, as he must inevitably continue with his duties at xx hospital, has been subject to no internal disciplinary action and will continue to treat members of the public in the normal way. Publication of the respondent's name will only lead to unnecessary and unfounded public alarm as to the appropriateness (or otherwise) of patient care at xx Hospital. There are no positive reasons of public interest which point to disclosure of the respondent's name.

5.0 **CAC's POSITION:**

5.1 **IN** essence Mr McClelland explained the complainants do not seek suppression orders and wish the hearing to be conducted in public. In support of his principal submission that the hearing should be held in public, Mr McClelland cited a number of authorities which will be discussed briefly in the reasons section of the decision which follows.

5.2 **IN** summary it was submitted by Mr McClelland on behalf of the CAC that:

(a) Orders under Section 106 of the Act should only be made in exceptional or special circumstances;

(b) The circumstances of C's death and the respondent's involvement in her management are very much in the public arena. It must follow that any suppression order in the terms sought would be moot or of limited effect because the details sought to be suppressed have already been well publicised;

(c) Impact of publication will be apparent in every case where a medical practitioner is charged with misconduct under the Act. This in itself should not be sufficient to warrant an order being made pursuant to Section 106(2) of the Act.

6.0 **REASONS FOR DECISION:**

6.1 **AS** observed by Mr McClelland, Section 106 of the Act reflects a very significant change in direction in the conduct of medical disciplinary cases. Under the Medical Practitioners Act 1968 charges framed under that Act were inquired into by the Medical Council in private. Now under the 1995 Act there is a specific direction that such proceedings should be held in public. It is necessary to make formal application to the Tribunal for suppression or similar orders, as has happened in this case.

6.2 **IN** his submissions Mr McClelland referred to the discussion pertaining to the exercise of a discretion to grant name suppression by the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538, 546-547:

"..... 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". These principles have been stressed by this Court in a line of cases extending from *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 to *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 where a number of the intermediate decisions are cited. 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. And the principles just mentioned may be seen in vigorous - and, to some, even startling -operation in the Supreme Court of Canada in ..... 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 that the prima facie presumption as to reporting is always in favour of openness."

6.3 **IT** should be expressly acknowledged that the Tribunal's discretion to make one or more of the orders contained in Section 106(2) is predicated by "having regard to the interests of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest". Given the wish of the complainants to have the hearing conducted in public, the "interests of any person" in terms of making this application are restricted to those of the respondent. In consequence it is the interest of the respondent only which, in this application, needs to be balanced against "the public interest". Under Section 106 of the Act the Tribunal is expressly directed to consider public interest. In discussing the role of public interest in name suppression applications before disciplinary tribunals, Tomkins J in delivering the decision of the full Court in *S v Wellington District Law Society* AP319-95 High Court Wellington 11 October 1996, emphasised the presumption in favour of openness and the purpose of disciplinary tribunal proceedings in protecting the public. His Honour was dealing with a statute with a presumption in favour of public hearings, like the

Medical Practitioners Act 1995. At page 5 His Honour noted "The public interest referred to is the interest the public, including members of the legal profession, has resulting from its right to know about proceedings affecting a practitioner. The interests of any person includes the interests of the practitioner as well as others."

6.4 **AND** further at page 6 His Honour concluded "..... 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 would 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 the practitioner, when exercising the discretion whether or not to prohibit publication".

6.5 **IT** must be acknowledged that the proceedings in *R v Liddell* were of a criminal nature. And in referring to the proceedings in *R v Liddell* the court in *S v Wellington District Law Society* noted that proceedings before a Disciplinary Tribunal are not criminal proceedings. Nevertheless the Tribunal gains considerable assistance from the statements of general principle which are articulated in the passages quoted from the above two cases.

6.6 **THIS** is the second application to be considered by the Tribunal under Section 106 of the Act. The judgement of the Tribunal in this application accords entirely with the conclusion reached by the Tribunal in the first of such applications (Decision No. 97/lC Application 1). Having considered carefully the submissions made by counsel, both prior to and in the course of hearing the application, the Tribunal was not

persuaded that the particular facts and circumstances presented in this application justified any departure from the clear legislative intent contained in Section 106(1) of the Medical Practitioners Act 1995, that hearings of the Tribunal shall be held in public.

6.7 **THE** presumption that hearings of the Tribunal be held in public is subject to the exercise of a discretion, in this case a balancing of the privacy of a medical practitioner against the public interest. It is important to ensure that both interests have been considered carefully.

7.0 **PRIVACY OF THE RESPONDENT:**

7.1 **MR** McClelland has readily conceded that publication of the respondent's name in this case has had some impact on his reputation. This cannot be denied. Equally it will have caused some distress. However, Mr McClelland is correct in saying such impact will be apparent in every case where a medical practitioner is charged with misconduct under the Act. But this factor, in itself, should not be sufficient to warrant an order that the hearing be held in private, either in whole or in part. On this aspect helpful comment was made by the Australian Court of Appeal in *Independent Commission Against Corruption v Chaffey and others* [1993] 30 NZWLR 21. Principally the case focused on the exercise of an open discretion contained in Section 31(1) of the Independent Commission Against Corruption Act 1988. In part 31(1) provides that a hearing may be held in public or in private ".... subject to the requirement in Section 31(3) of the obligation .... to have regard to any matters which it considers to be related to the public interest." The Court commented (at 60):

"Where a proceeding is heard in public, a party to it may well suffer harm from the publicity of it. That harm may range from mere embarrassment to grave damage to reputation. However, the fact that will result if the discretion be exercised in favour of a public hearing does not mean that the party has not been dealt with with procedural fairness. In some cases, the public interest or other ends to be served by the discretion may outweigh the right of the individual not to be harmed by the proceeding. In so far as legitimate expectation or the like is relevant, parties involved in such proceedings may not expect that in no circumstances may their reputation suffer from their involvement, or generally ...."

8.0 PUBLIC INTEREST:

8.1 **A** number of factors have been raised in this application in the respondent's defence. This is not the time to deal with them. No doubt these and other factors will be raised in the course of the substantive hearing. Many of these may have been canvassed at the inquest. The Tribunal considers that the public has the right to know all of the factors relevant to C's death, including the respondent's account of events. This is because the Tribunal considers that there is an over-riding public interest in issues surrounding this case. The charge faced by the respondent follows the death of a 16 month old baby from meningitis in June last year. The onset of winter is near, a time of the year when it is believed these types of illnesses are more likely to occur. Mr Parker explained that difficult diagnostic issues arise in relation to meningitis. If this is the case the Tribunal is reinforced in its view that it is more appropriate to have the hearing in public than in private.

8.2 **THERE** is merit in Mr McClelland's submission that an order under Section 106 to hold a hearing in private will only be made in exceptional or special circumstances. This accords with the view expressed by the Tribunal in Decision No. 97/1C Application 1 that:

"..... 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"

8.3 **IN** support of the application counsel for the respondent argued, in considering what is the "public interest", that one may be tempted to assume that it is in the interests of the public to have full disclosure. In respondent counsel's submission that that is not so, he referred to the English Court of Appeal decision of *Lion Laboratories v Evans* [1984] 2 ALL ER 417. At 435 Griffiths L J, when dealing with a case involving disclosure of confidential information to which public interest was pleaded as a defence, stated:

"There is a world of difference between what is in the public interest and what is of interest to the public."

8.4 **THE** Tribunal does not agree with respondent counsel that this case is helpful in assisting to determine what issues are relevant in deciding how to consider the public interest factor under Section 106. First this case does not deal specifically with suppression orders in the context of disciplinary proceedings. Secondly, the Tribunal considers that the focus should be as explained by Tompkins J in *S v Wellington District Law Society,* "..... the interest of the public, including members of the legal profession, resulting from its right to know about proceedings affecting a practitioner."

8.5 **THE** circumstances surrounding C's death and the respondent's involvement in the case have already received significant media attention. The Tribunal rejects respondent counsel's submission, now these details have already been published, that they satisfy the public interest in knowing about these proceedings. It is not

surprising that there has been significant media attention. The death of a young child from meningitis and the involvement of the public health system are, in the Tribunal's judgement, matters of considerable public interest.

8.6 **THE** Tribunal also considers that the circumstances of C's death and the respondent's involvement in his management are very much in the public arena. It must follow that any suppression order in the terms sought would be moot or of limited effect. Although from the respondent's perspective this is most certainly not the case, the Tribunal considers that an order for the proceedings to be held in private would give rise to considerable public suspicion and concern, given Parliament's express direction that such hearings should be heard in public. The details of C's death have not only been closely scrutinised at a public inquest (at which the respondent gave evidence), but also have been published extensively and are readily available to the public.

8.7 **ON** behalf of the respondent it was submitted that publication of his name will only lead to unnecessary and unfounded public alarm as to the appropriateness (or otherwise) of patient care at xx Hospital. The Tribunal is minded to comment that no evidence has been adduced to support this claim.

8.8 **ONE** final aspect which warrants brief attention is a comment made by Mr Beadle during the teleconference. It was to the effect that public interest would be unlikely because, given the requirement that this application be heard in private (Section 106(3)), the public would be unaware if the orders sought had been made. Mr McClelland's response was predictably appropriate.

9.0 CONCLUSION:

9.1 **SUFFICIENT** has been said to explain why the Tribunal has made the order that the charge against the respondent be heard in public.

9.2 **AS** to the second order, the Tribunal considers that it will provide the respondent with the necessary degree of privacy pending the outcome of the hearing of the charge against him.

9.3 **THE** third order has been made in the interests of ensuring that the Tribunal's ability to protect the privacy of parties under Section 106 of the Act is not rendered otiose.

Dated at Auckland this 16th day of May 1997.

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P J Cartwright

CHAIRPERSON