Medical Practitioners Disciplinary Tribunal

P0 Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary

DECISION NO: 6/97/5C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on 13 June 1997

PRESENT: Mr P J Cartwright - Chairperson
Dr F E Bennett, Dr B J Trenwith, Dr L F Wilson,
Mr P Budden (members)

APPEARANCES: Mr M McClelland for Complaints Assessment Committee
Ms J Gibson for respondent
Ms G J Fraser - Secretary
Mrs K G Davenport - Legal Assessor
(for first part of call only)

DECISION ON THE JOINT APPLICATION FOR PRIVACY

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 **SEPARATE** applications have been made on behalf of the respondent and the CAC for an order that the whole of the hearing by the Tribunal of a charge of professional misconduct dated 24 April 1997 against the respondent be heard in private.

1.3 **THE** hearing of thc applications was by telephone conference commencing at 9.30 am on Friday 13 June 1997. In advance of the hearing submissions in support of the applications were filed by counsel.

2.0 **ORDERS**

2.1 **THAT** the hearing by the Tribunal of a charge of professional misconduct dated 24 April 1997 against the respondent be heard in private.

2.2 **UNTIL** further order this decision is not to be published beyond the Tribunal, the complainant, CAC counsel and the respondent and his counsel in a form which contains any reference to the names of any party, the nature of the complainant's condition, or to the centre of population where both the complainant and the respondent reside and where the Tribunal will sit to hear the charges.

3.0 GROUNDS OF APPLICATION

3.1 **FOR** the CAC Mr McClelland explained that it is desirable that the hearing be in private and furthermore that there is no over-riding public interest in having the hearing held in public. Mr McClelland's application was made in reliance on Section 106(2)(a) of the Act, *S v Wellington District Law Society* (High Court, Auckland, 22 October 1996 AP319/95), and a decision of Judge Roderick Joyce QC (District Court, Auckland, 20 May 1997 AP2154/97).

3.2 **FOR** the respondent Ms Gibson advanced the following grounds:

3.2.1 **THAT** the charge of "conduct unbecoming in a professional respect" must equate to the least serious of all the charges and to a charge at the lowest end of the scale.

3.2.2 **PUBLICATION** of the proceedings, given the nature of the complaint, would disproportionately punish the medical practitioner.

3.2.3 **THE** public interest in such a proceeding, if indeed there is any, can be adequately satisfied by the release of the decision of the Tribunal with deletion of the names, location and any details that the Tribunal thinks fit.

3.2.4 **PUBLICATION** of the proceedings, given the small centre that the practitioner lives and works in, would have an adverse and disproportionate effect on the practitioner's private medical practice and employment elsewhere.

3.2.5 **SUPPRESSION** of names pursuant to Section 106(2)(d) would be insufficient to protect the medical practitioner's general reputation.

3.2.6 **THE** Tribunal's role pursuant to the Act is to protect the public and medical profession, and not primarily for the purposes of exercising a punitive function.

3.3 **IN** support of the application, Ms Gibson filed an affidavit sworn by the respondent in which he substantiated the grounds of his application.

3.4 **IN** an affidavit filed by Mr McClelland on behalf of the complainant it was explained, inter alia, "..... my evidence ..... will involve a discussion of some very intimate matters I do not want to discuss in public".

4.0 REASONS FOR DECISION

4.1 **UNDER** the 1968 Medical Practitioners Act hearings before the Medical Council and the Medical Practitioners Disciplinary Committee were always held in private. Under the new legislation, that presumption has been reversed. However, the Tribunal has been given a discretionary power under Section 106 of the Act to order that the whole or part of a hearing be held in private. In exercising this discretion, the Tribunal is required to weigh up the interests of any person, including the privacy of the complainant, against the public interest. The discretion is a wide one. The Tribunal need only be "satisfied that it is desirable" to do so.

4.2 **THE** Tribunal agrees with counsel that the case against the respondent is one in which it would be desirable for the Tribunal to exercise its discretion and order that the hearing be held in private. Evidence given by witnesses will necessarily involve a detailed discussion of the medical history of the complainant. On his behalf Mr McClelland explained, without going into any details, that certain matters of a quite intimate nature will be discussed at the hearing. The Tribunal is satisfied that Mr McClelland's assurance in this respect can be relied upon. In this context, the privacy of the complainant is a very real issue to be taken into account by the Tribunal.

4.3 **IT** was submitted by Ms Gibson that suppression of names pursuant to Section 106(2)(d) of the Act would be insufficient to protect the respondent's general reputation. A similar submission has been made by counsel to the Tribunal in other applications for hearings to be held in private. The Tribunal would be interested to learn why it is that the efficacy of orders made pursuant to Section 106(2)(d) is considered to be suspect.

4.4 **IN** the application filed by Mr McClelland on behalf of the complainant reliance was stated to be placed on a recent judgement of Judge Roderick Joyce QC in *E v The Medical Practitioners Disciplinary Tribunal* (Auckland District Court, AP No: 2154/97). That judgement related to the hearing of a privacy issue. In the Tribunal's view that judgement has considerable relevance in the determination of the two separate applications before the Tribunal. There are a number of similarities between the two cases. In both the applications came from the complainant and the respondent. In *E* the Judge accepted counsel's advice that "such a combination of doctor and patient ..... would be most unusual".

4.5 **LIKEWISE** in this case, as in *E*, a submission was made and accepted by the Court, that the complainant's effective concern that intimate details relating to her could be published was "one not readily to be dismissed". The Tribunal considers there is no compelling public interest which outweighs the interests of the complainant in this regard.

4.6 **ANOTHER** similarity between the two cases is the level at which the charging was pitched. Although in *E* the appellant was facing charges of professional misconduct, by reference to the public interest factor, the Court noted that the charges preferred "do not seem to be of the most serious". By comparison in this case the charge is one of "conduct unbecoming in a professional respect". The Tribunal agrees with Ms Gibson that this level of charging must equate to the least serious of all the charges and to a charge at the lowest end of the scale. Consequently the public interest factor in terms of having the hearing in public cannot be said to be compelling.

4.7 **THE** Tribunal is comfortable in concluding, as was concluded by the Court in *E*, that the public has nothing of substance to lose if the hearing is to be held in private. If at the end of the hearing an adverse finding is made against the respondent, or there is some matter of general medical interest which will provide a degree of protection to the public or the profession, that is a matter which can be addressed by the Tribunal in making its decision as to whether or not to order publication of the outcome of the proceedings.

4.8 **FOR** the reasons given an order has been made that the whole of the hearing will be held in private.

4.9 **SECTION** 106(3) of the Act is to the effect that every application under the Section shall be held in private. It is for this reason that the second order has been made by the Tribunal.

Dated at Auckland this 11th day of July 1997.

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P J Cartwright

CHAIRPERSON

Medical Practitioners Disciplinary Tribunal

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Mr P Budden (members)

APPEARANCES: Mr M McClelland for Complaints Assessment Committee
Ms J Gibson for respondent
Ms G J Fraser - Secretary
Mrs K G Davenport - Legal Assessor
(for first part of call only)

1.0 RULING ON THE PAPERS:

1.1 **THE** respondent is applying to strike out either all of the charge or Particular 3 of the charge which reads:

"**SUBSEQUENTLY** in a letter dated 22 November 1996 addressed to the Chair of the Complaints Assessment Committee made a comment of a disparaging and inflammatory nature about the state of health of xx in that he stated the said xx has *"been observed hosing down the family cowshed without any signs of discomfort"* by which comment **DR R** represented xx as being a man fit for his previous work and implied that xx was malingering when **DR R** had no first hand knowledge of the state of health of xx."

1.2 **THE** hearing by telephone conference on 13 June 1997 was adjourned with leave reserved for Mr McClelland to file an affidavit by the Legal Assessor appointed by the Complaints Assessment Committee ("the CAC"). Leave was also reserved for counsel to make further submissions. The additional documents were duly forthcoming but unfortunately it was not possible to arrange a further telephone conference because of the surgical and other commitments of Tribunal members and counsel. Accordingly it was agreed that the matter would be dealt with on the papers. On receipt of Directions from the Legal Assessor the Tribunal resolved to make the determination which follows. Counsel was advised by facsimile on 30 June 1997:

"The Tribunal has ruled:

1. Particular 3 of the charge be struck out.

2. That the charge be amended by re-numbering Particular 4 as 3 and making it read as follows:

"The above Particulars 1 and 2 of the charge when considered singularly and cumulatively amount to conduct unbecoming a medical practitioner and that conduct reflects adversely on Dr R's fitness to practice medicine."

The Tribunal's ruling, in writing with reasons, will follow."

2.0 REASONS FOR RULING:

2.1 THE grounds on which the respondent advances this application are that Section 90(a)(i) of the Act makes it compulsory that the doctor be advised in writing of the particulars of the complaint and of the membership of the CAC. The respondent complains that he was not notified in writing of a further complaint laid by Mr xx or of the make up of the CAC who were to determine the complaint arising out of a letter of 22 November 1996.

2.2 THE respondent says also that the charge is not valid because the CAC have failed to give him the opportunity to respond in writing to the subsequent complaints. In addition, the charge was drafted by the CAC as a charge of "conduct unbecoming in a professional respect" which does not follow the wording of Section 109(l)(c) of the Act. The respondent also argued that the certification provided by the CAC advising the Tribunal that it is entitled to exercise its powers under Section 109 of the Act is invalid.

2.3 **THE** CAC have filed an affidavit by the Legal Assessor which in summary says that a copy of Mr xx's letter of 23 December 1996 was not sent to the respondent (by inference) but at a meeting on 5 March 1997 in xx, the respondent was shown the letter and was told that Mr xx had raised some matters of concern relating to his letter of 22 November 1996 and they were discussed with him. The Legal Assessor, Ms D'Ath, made a note of the concerns raised with Dr R at that meeting relating to the "cowshed" issue. The CAC says therefore that this issue was brought to the attention of the respondent orally at the meeting with the CAC on 5 March 1997.

2.4 **IN** response to this affidavit the respondent has filed another affidavit in which he says that he was not given a copy of Mr xx's letter as stated by Ms D'Ath in paragraph 12 of her affidavit. He also says that the CAC told him that the meeting was an informal meeting and they did not advise him that Mr xx was laying a further complaint in relation to the "cowshed comment" or that his letter in response could be used as the basis for a further complaint.

2.5 **IN** summary, therefore, the respondent is saying that he ought to have been given a formal notice in writing that the "cowshed comment" was an issue and that he ought to have been given an opportunity to respond to it formally. In contrast the CAC says that by raising the issue with him on 5 March 1997 he was given an opportunity to comment on it and that is all that is required of the CAC.

2.6 **THE** CAC says further that the notification to the respondent of Mr xx's initial complaint was all that was required. In summary it is the CAC's position that the opportunity given to the respondent on 5 March 1997 to comment on the "cowshed comment" complies with the intention and purpose of the legislation, especially Section 92(3)(b) of the Act.

2.7 **THE** sections of the Act which regulate CACs are contained in Sections 83-95. By virtue of Section 89 of the Act a Complaints Assessment Committee can regulate its own procedure subject to any specific provisions in the Act.

2.8 **WHEN** a complaint is received, which can be oral or in writing, the medical practitioner must be told in writing of the particulars of that complaint and the membership of the CAC (Section 90(a)(i) and Section 90(a)(ii)). Section 92(3) of the Act requires ("shall") the CAC to give the practitioner a chance to make a written explanation or statement and then an opportunity to appear before the Committee to make an oral explanation or statement in relation to the complaint or conviction.

2.9 **THE** respondent argues that this means that every complaint (even those arising as a result of an explanation) requires this procedure to be followed, i.e. in writing with a notification of the CAC to hear the matter. The CAC's position is that any subsequent complaint arising out of the issue can be done by oral advice following the written advice of the initial substantive complaint.

2.10 **HAVING** read through all of the provisions relating to Complaints Assessment Committees and considered the general need for justice to be done both fairly (by giving the doctor an opportunity to be heard on each of the particulars) and speedily, it is the Tribunal's view that the requirements of the legislation and the principles of natural justice are as follows:

(a) That any complaint can be written or oral (see Section 83).

(b) That the doctor must be told in writing of the particulars of the initial complaint and the membership of the CAC.

(c) The doctor should be sent a copy of the complainant's response to the doctor's explanation. The complainant should be given the doctor's explanation.

(d) The CAC may then have an oral hearing at which matters raised in correspondence and other matters are discussed. At this oral hearing matters arising out of the response can also be raised and an opportunity given for comment. The Tribunal does not think that a formal warning needs to be given to the doctor that the subsequent material may be the subject of a separate particular of the charge as long as the doctor is fully informed of the nature of the concern arising out of the response and is given an opportunity to comment on it.

(e) The CAC can then draft a charge which should follow either the guidelines set out by the Tribunal or at the very least the terms of the legislation.

2.11 **APPLYING** the provisions of the Act to the case before the Tribunal, it is clear that the respondent was given the initial complaint and the details of the CAC perfectly appropriately. He did not, however, receive a copy of Mr xx's response of 23 December 1996 and he ought to have been given this. However it is the Tribunal's finding that the question of the "cowshed comment" was clearly raised with the respondent at the hearing on 5 March 1997 by the CAC. He was given an opportunity to comment on it and Ms D'Ath recorded those comments. He was not told this could be the subject of a separate complaint, but in the circumstances the Tribunal considers that this warning was unnecessary so long as it is satisfied that the respondent was given the opportunity to make whatever comment he thought appropriate and that the CAC took this into account in reaching their decision. There is no suggestion that the CAC did not properly consider the explanation given by the respondent which had been recorded by the Legal Assessor. The only issue really is whether or not there ought to have been a formal notification that this might

be an issue giving rise to the particulars of the charge. Because of the wording of Section 83 the Tribunal holds that the subsequent complaint can be dealt with orally as long as there is a fair opportunity for the respondent to be heard. The Tribunal, however, has the obligation to consider the material before it, i.e. the affidavit of Ms D'Ath and the respondent, and to determine whether or not it thinks there has been a fair opportunity for the respondent to be heard on this issue. Dr R denies that he was ever shown the letter of 23 December 1996 and despite the fact that Ms D'Ath records that he was, the Tribunal must proceed in the interests of absolute fairness on the basis that the respondent was not shown it and that it was only discussed with him. The conflict cannot otherwise be resolved without cross-examination and it is fairest to assume the worst position. Ms Gibson submits that the matters arising out of the letter of 23 December 1996 in fact constituted a fresh complaint. The question is whether or not this complaint was related to the first complaint or was a new complaint which required express notification in terms of Section 90 and following. The Tribunal's view is that it arose as a result of the initial complaint and could be dealt with in the way that the CAC did under Section 92(3) of the Act.

2.12 **HOWEVER** the Tribunal is not satisfied that the respondent was given a clear opportunity to comment and to discuss this point with the CAC. Thereby the Tribunal considers that the respondent was prejudiced and therefore, for this reason, it strikes Particular 3 of the charge. In so doing it is noted that this issue is not fatal to the entire charge against the respondent.

2.13 **THE** way that the charge has been drafted, however, is clearly not in terms of Section 109(1)(c) of the Act. Again the Tribunal does not find that this is fatal. Accordingly it amends the charge by re-numbering Particular 4 as 3 and making it read as follows:

"The above Particulars 1 and 2 of the charge when considered singularly and cumulatively amount to conduct unbecoming a medical practitioner and that conduct reflects adversely on Dr R's fitness to practice medicine."

Dated at Auckland this 11th day of July 1997.

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P J Cartwright

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DECISION ON THE JOINT APPLICATION FOR PRIVACY

CORRIGENDUM

Paragraph 2.1 of the Decision which was issued on 11 July 1997 is deleted and in lieu is substituted the following paragraph:

"2.1 **THAT** the hearing by the Tribunal of a charge of conduct unbecoming a medical practitioner and that conduct reflects adversely on Dr R's fitness to practice medicine, be heard in private."

In all other respects the Decision of the Tribunal on the joint application for privacy remains unchanged.

DATED at Auckland this 14th day of July 1997.

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P J Cartwright

CHAIRPERSON