MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO:	326/02/95C
IN THE MATTER	of the Medical Practitioners Act 1995
BETWEEN	**A COMPLAINTS ASSESSMENT COMMITTEE**
AND	**DR C** a medical practitioner

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Miss S M Moran (Chair)

Dr F E Bennett, Mr G Searancke, Dr J L Virtue, Dr L F Wilson (Members)

Ms K L Davies (Legal Officer)

Ms R Hauraki (Stenographer)

Hearing held at Wellington on 16 November 2006

APPEARANCES: Mr C J Lange for Complaints Assessment Committee

Mr A H Waalkens for Dr C.

The Charge

1. The doctor is charged with disgraceful conduct in a professional respect under the Medical Practitioners Act 1995 (the MPA). The Complaints Assessment Committee (the CAC) alleges that the doctor had sexual intercourse with the complainant in or about March 1985 when she was aged 16 years at a time when she was or had recently been his patient; and that on occasions in or about March/April 1985 supplied to the complainant marijuana, cocaine and nitrous oxide (laughing gas) for which there was no medical reason or justification.

The Present Application

2. The Supreme Court by its judgment given on 29 June 2006 referred back to this Tribunal for decision the doctor's application for access to the medical records of the complainant relating to:

   (a) Psychiatric/psychological status both past and present.
   (b) Medical/counseling records referring to her complaint against the doctor.
   (c) The complainant's current GP records.

When Complaint Made

3. On 2 May 2001 the complainant made her initial complaint to the Health & Disability Commissioner to which she attached a chronology she had prepared in which she referred to attendances on other health professionals since the events which are the subject of the complaint.

4. As the complaint related to a period before October 1994 (when the Health and Disability Commissioner Act 1994 came into force), the complaint could only be dealt with if it was referred to a CAC. On 2 August 2001, the complainant advised the Medical Council of New Zealand that she would proceed with a complaint against Dr C. The complaint was referred to a CAC appointed under the MPA, since repealed by s 175(4) of the Health Practitioners Competence Act 2003.

The Complainant's Statement to the CAC

5. The complainant provided the CAC with a written statement and the chronology of events.

6. The complainant alleges that the doctor had sexual intercourse with her at his home on two occasions during March and April 1985 when she was aged 16 years at a time when she was or had recently been his patient; that on each occasion she had been babysitting earlier in the evening at the doctor's residence and that before sexual activity took place she had consumed wine and, on one of the two occasions, cannabis which she said the doctor had given to her. She further alleged that on another occasion she had inhaled laughing gas (nitrous oxide) and cocaine which the doctor had made available to her. She said that in June 1985 she moved away from her home to attend a course in another centre which she completed, but it was a difficult time as she struggled with depression; that while studying there she visited a counsellor several times with whom she said she discussed the "affair" that she had had with the doctor; that the counsellor said it was outrageous and that she would like to report him; but that she (the patient) pleaded with the counsellor not to tell anyone. She said she had a short course of anti-depressants on prescription at that time. At the end of 1985 the complainant moved to another city for reasons of employment where she stated she spent a year, again struggled with depression and saw two different counsellors for help; and for a few weeks attended group therapy sessions at a hospital (xx Hospital). In July 1988 she was again living in her home town for a period when she said she had consultations with a different medical general practitioner who referred her to a psychiatric hospital (then xx Hospital, now xx Hospital) for treatment as an outpatient. She stated she took what she considered a heavy dosage of anti depressants for about six to eight months at that time. In 1989 the complainant travelled overseas during which time she said she and Dr C

corresponded for a period. She married overseas. From time to time she made return visits to New Zealand and in the latter part of 2000 returned with her husband to reside permanently. Following this, she said she made contact with the doctor and that email messages passed between them, some of which remain available and which the CAC say have evidential significance. The complainant said there then followed some telephone calls between her and the doctor and that in April 2001 she ceased contact with the doctor. She stated that gradually since then she came to acknowledge that the relationship she had with the doctor was wrong and, as something that has caused her great distress, she was getting professional help with it. In January 2002 she sought psychological help as she was finding the matter stressful. She had not talked to anyone about it and was unsure what to expect from the complaints procedure and felt that the relationship had in some way come back to haunt her.

7. The CAC invited the doctor to respond to the complaint but he declined to do so.

8. The CAC determined pursuant to s 92 of the MPA that the complaint should be considered by the Tribunal and framed a charge accordingly under s 93. Section 102(4)(b) of the MPA requires that the charge be prosecuted by the CAC before the Tribunal.

History of Dr C's requests and application for disclosure

9. The history of events regarding the doctor's requests and application for disclosure is contained in the majority judgement of the Court of Appeal (19 April 2005 CA198/04) at paras [6] to [14] which is set out hereunder for ease of reference:

> *[6] By letter of 21 October 2002 Dr C sought access to all documents within the power or possession of the CAC related to the complaint. This request included the complainant's medical files, including any records of consultations with Dr C or any other medical practitioner relating to the allegations against Dr C, records of any counselling, psychological or psychiatric assistance she has received at any time and records or any consultations or treatment for illicit drug or substance abuse problems. Also sought were notes made by CAC members throughout their investigation into the complaint, including any record of meetings or investigations and notes made by counsel for the CAC other than correspondence or advice subject to legal privilege.*

[7] The CAC replied on 17 December 2002, indicating that the CAC had copies of limited medical notes but that it did not have authority from the complainant to disclose those. It commented that there had already been substantial information provided in the material disclosed to date as regards counselling and medical treatment. Dr C was advised to set out specifically if anything else was sought and the reasons for the request.

[8] The CAC, by further email dated 20 December 2002, advised that it had not been able to locate any notes made by counsellors and that the limited medical notes held by the CAC had no record relating to Dr C. As regards notes made by CAC members, records of CAC members' discussions with potential witnesses were included but the CAC said it had not disclosed records of internal discussions relating to matters raised by witnesses or the decision making process.

[9] At a directions conference on 23 December 2002 counsel for Dr C, Mr Waalkens QC, said that he was seeking all the complainant's medical files and any information regarding her alleged depression in 1985. He was also seeking counselling reports and information as to whether she had a drug problem at the time of the alleged incidents and whether she still has one. This information was said to be relevant to the complainant's credibility and reliability. Mr Waalkens indicated that he would be prepared to receive the medical records to assess them for relevance without them being provided to Dr C. Counsel for the CAC, Mr Lange, agreed with this suggestion.

[10] It was therefore agreed, with the concurrence of the complainant, that the limited medical notes held by the CAC would be provided to Mr Waalkens so that he could satisfy himself whether there was anything in the notes that may be of relevance. This was on the basis of an undertaking that they would not be disclosed to Dr C without the complainant's consent. If such consent were refused, Mr Waalkens indicated that application would be made to the Tribunal.

[11] By email dated 11 February 2003, Mr Waalkens sought consent to show the records to Dr C. He maintained that the complainant's psychiatric difficulties were of direct relevance to the case as they went to the reliability of her recollections. He also asked for copies of further later medical records, particularly given the history of psychiatric issues and confirmed that his undertaking, as previously given, would apply to any further disclosure.

[12] On 14 February 2003, the CAC responded to say that it had spoken to a senior forensic psychiatrist who had opined that neither depression nor the administration of Doxepin (prescribed for the depression) would have had any effect on the complainant's memory of past events. It said that it did not hold any other medical records. It also stated that the complainant did not agree to the notes currently held by Mr Waalkens being disclosed to Dr C and that, before discussing the further request for access to other medical records with the complainant, the CAC wished to be advised as to what information was believed to be in those records and the relevance of that information.

[13] On the same day, Dr C applied to the Tribunal, citing cls 5 and 7 of the First Schedule to the MPA, for orders for discovery and disclosure. The First Schedule applies to the proceedings of the Tribunal by virtue of s 101 of the MPA. Clauses 5 and 7 read as follows:

> *"**5 Procedure of Tribunal***
>
> *(1) Subject to this Act and to any regulations made under this Act, the Tribunal may –*
>
> *(a) Regulate its procedure in such manner as it thinks fit; and*
> *(b) Prescribe or approve forms for the purposes of hearings.*
>
> *(2) The Tribunal shall publish any rules of procedure made by it.*
>
> *(3) The Tribunal shall observe the rules of natural justice at each hearing.*
>
> ***7 Powers of Investigation***
>
> *(1) For the purposes of dealing with the matters before it, the Tribunal or any person authorised by it in writing to do so may -*
>
> *(a) Inspect and examine any papers, documents, records, or things:*
> *(b) Require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:*
> *(c) Require any person to furnish, in a form approved by or acceptable to the Tribunal, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records.*
>
> *(2) The Tribunal may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this clause shall be verified by statutory declaration or otherwise as the Tribunal may require.*
>
> *(3) For the purposes of its proceedings, the Tribunal may of its own motion, or on the application of any party to the proceedings, order that any information or particulars, or a copy of the whole or any part of any paper, document, or record, furnished or produced to it be supplied to any person appearing before the Tribunal, and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars, or copy."*

[14] The application sought all medical records relating to the complainant's past and current psychiatric/psychological status, her current general practitioner records and all medical and counselling records that may refer to or record her complaint against Dr C. Disclosure was initially sought for Dr C's counsel to assess relevance. It was recorded that disclosure of the records to Dr C and others would then occur only with the consent of the complainant or by order of the Tribunal. An order was also sought that Mr Waalkens be able to disclose the medical records already obtained to Dr C and his expert advisors. Notes of any interviews between the CAC and the complainant and any other person in connection with the matter were also asked for, as well as the copies of the emails between Dr C and the complainant that were to be relied upon by the CAC."

History of Appeals

10. The present application has been the subject of no less than six hearings and four appeals sequentially from the decision of the then Chairperson of the Tribunal (14 February 2003), to the District Court (3 June 2003), the High Court (September 2003), the Court of Appeal (26 May 2004) and finally to the Supreme Court of New Zealand (15 December 2005) which remitted the matter back to this Tribunal for further consideration. The relevant judgments for consideration by the Tribunal are those of the Court of Appeal (referred to above) and of the Supreme Court of New Zealand delivered on 29 June 2006 (SC 27/2005; [2006] NZSC 48). A helpful summary of the history of the appeals and the respective judgments is set out at paragraphs [5] to [12] of the Supreme Court judgment.

Scope of privilege under ss.32 and 35 of the Evidence Amendment (No. 2) Act 1980

11. The appeal to the Supreme Court concerned compulsory disclosure of medical records in disciplinary proceedings under the MPA.

12. Clause 7 of the First Schedule to the MPA (referred to above at paragraph [13] of the Court of Appeal judgment) empowers the Tribunal to require disclosure of information to it from "any person". The Tribunal can require such information to be supplied to any person appearing before the Tribunal "for the purposes of its proceedings".

13. The Supreme Court considered the scope and implications of the privilege contained in ss.32 and 35 of the Evidence Amendment (No. 2) Act 1980 (the EAA). These issues had were also the subject of the Court of Appeal's earlier judgment.

14. For ease of reference ss 32 and 35 are set out below:

> ***"32. Disclosure in civil proceedings of communication to medical practitioner or clinical psychologist***
>
> *(1) Subject to subsection (2), no registered medical practitioner and no clinical psychologist shall disclose in any civil proceeding any protected communication, except with the consent of the patient or, if he is dead, the consent of his personal representative.*
>
> *(2) This section shall not apply -*

(a) in respect of any proceeding in which the sanity or testamentary capacity or other legal capacity of the patient is the matter in dispute:

(b) to the disclosure of any communication made to a registered medical practitioner or a clinical psychologist in or about the effecting by any person of an insurance on the life of himself or any other person:

(c) to any communication made for any criminal purpose.

"Protected communication" is defined in s 32(3) as:

a communication to a registered medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the registered medical practitioner or clinical psychologist to examine, treat, or act for the patient.

35. Discretion of Court to excuse witness from giving any particular evidence.

(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or product the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:

(b) The nature of the confidence and of the special relationship between the confidant and the witness:

(c) The likely effect of the disclosure on the confidant or any other person.

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes -

(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and

(b) Any other person acting judicially.

15. As observed by the Chief Justice in the Supreme Court decision, *"privilege is an exception to the general rule that relevant and otherwise admissible evidence can be compelled to be given to a court by a witness or a party. Privilege arises in respect of relationships in which the public interest in maintenance of special confidence outweighs the public interest in ensuring that the court has all the information it needs to come to a correct decision."* (Paragraph [13] S.Ct.)

16. Section 32 provides a limited privilege in civil proceedings for confidences made to medical practitioners and clinical psychologists by a patient (paragraph [16]).

17. Part 3 of the EAA provides privilege for communications made within categories of confidential relationship and s.35 gives the court a discretion to excuse disclosure if it would be a breach of confidence in other relationships which are not categorised (paragraph [16] S.Ct.):

> *"Under s.32 medical records as such are not privileged. The section applies only to protected communications, themselves narrowly defined by reference to communications the patient believes necessary for the purpose of treatment. Section 32 does not protect information obtained by a medical practitioner during the course of advising or treating a patient unless the information is communicated by the patient and otherwise qualifies. Because of the privilege, patients are assured that confidences imparted for the purpose of medical treatment or advice will not be disclosed in proceedings without their consent. The privilege is a legislative balance between the competing public interests in the administration of justice and the preservation of confidences necessary to obtain proper medical treatment."*
>
> *"Under cl.5 of the MPA, the Tribunal may regulate its procedure as it sees fit, but must "observe the rules of natural justice at each hearing". The Tribunal is subject to the Evidence Act 1908, "as if the Tribunal were a court within the meaning of that Act". Although the Tribunal has general power to receive evidence not admissible in a court of law as long as it observes natural justice, such general power does not authorise it to override privilege." (Paragraph [18] S.Ct.)*

18. Clause 7 of the MPA is to be read subject to s.32. The Supreme Court held that the statutory privilege in s.32 prevents disclosure under cl 7 and prohibits a medical practitioner (or clinical psychologist) from disclosing any *"protected communication"* except with the consent of the patient:

> *"Where medical records contain protected communications, disclosure of the records is disclosure of what the medical practitioner says was communicated by the patient. Whatever the source, disclosure of such records in substance constitutes disclosure by the practitioner. It effects breach of the very confidence s.32 is designed to protect. To construe the section narrowly, as providing only a prohibition on disclosure by the medical practitioner, would effectively nullify its purpose. … until the patient consents to disclosure, the communication remains a protected communication to the medical practitioner. The privilege applies even if the protected communication [has] been passed to someone else …* " (paragraph [34] S.Ct.).

19. The Supreme Court held that "*the records, made by the patient's medical practitioners of the confidences made to them, remain privileged unless the patient consents to disclosure in the proceedings, even though the records may be in the hands of a third party …*" and that "*the patient cannot be compelled to disclose medical records of protected communication if the records have come into her hands. Nor does s.32 allow the patient to be compelled to disclose directly what she communicated.*" (emphasis ours) (paragraph [37] S.Ct.).

Consent

20. The complainant corresponded with the CAC during the period that it was investigating the matter. During the exchange between the CAC and the complainant, the complainant signed a written form of consent as follows:

> *"CONSENT*
> *I (name of complainant) consent to the Complaints Assessment Committee and any legal assessor assisting them having full access to:*
>
> - *Correspondence provided by me in relation to my complaint.*
> - *Any and all of my medical records*
>
> *in relation to their investigation of the concerns raised by me.*
>
> *I also agree to the doctor who is the subject of my complaint having access to my medical records so that he or she is able to comment on them.*
>
> *Signed……. (name of complainant)* *24.1.02*
> *Date*
>
> *……N/A……former name at time of complaint if applicable*
>
> *[Complainant's date of birth (only required to enable medical records to be obtained)*

21. The written form of consent was produced at this hearing, but for reasons which only emerged during the present hearing of the Tribunal, it was not produced to the Chair of the Tribunal who first heard the application for disclosure nor any of the Courts which subsequently adjudicated on the matter. Indeed, when giving the judgment of the majority of the Supreme Court Her Honour Elias CJ observed:

> *"[41] The Court was asked to determine that there had been an implied consent by the complainant to disclosure. We are unable to make such a determination. The relevant facts have not at any stage been properly investigated. For example, the circumstances in which the records of the protected communications were sent to the Complaints Assessment Committee are not known. We were told at the hearing that a completed consent form was sent, apparently after the records had been provided to the Committee, to the medical provider who supplied the records. But the terms of the consent were not before us. Nor is it known whether any terms and conditions were imposed on release of the information. The question of consent must therefore be sent back for consideration by the Tribunal."*

22. This Tribunal, presently constituted, is therefore in the unique position of being the first body to adjudicate on the matter which has seen the written form of consent signed by the complainant. The decision of the Chair of the Tribunal and the subsequent judgments of all four Courts were made, therefore, without the benefit of that knowledge.

23. The Supreme Court observed that the privilege for the medical practitioner under s.32 can be waived by the patient either by express consent to disclosure or by conduct from which such consent can be inferred because it is inconsistent with maintenance of the privilege in the proceedings (paragraph [38] S.Ct.).

24. The statute does not make it necessary that consent be *"informed"*. The Court stated that the notion of *"informed consent"*, which may suggest reference to principles developed in relation to consent to treatment, was not helpful in this context. The proper enquiry is whether the patient has consented expressly or by implication to disclosure. The Supreme Court (majority) saw no practical distinction between the concept of consent under s.32 and that of waiver as it applies to the law of privilege generally (paragraph [38] S.Ct.).

25. The medical records which are presently held by the CAC include notes concerning what the complainant told the doctors and psychologist who made them, and is accepted that what she told them included *"protected communications"* under s.32.

26. The complainant's written form of consent (paragraph 22 above) is in express terms. It imposes no conditions or obligations. It gives the CAC *"full access to any and all of my medical records"*.

27. It then records the patient's agreement that the doctor, who is the subject of her complaint having access to *"my medical records so that he [or she] is able to comment on them"*. The reference here to *"medical records"* must be a reference to the *"all or any"* medical records which the CAC can access *"in relation to their investigation of the concerns"* raised by the complainant.

28. It is necessary to refer to the *"context"* in which the documents (in dispute) came into the possession of the CAC.

(a) On 28 February 2002 the convenor of the CAC wrote to the complainant informing her that the CAC had been set up by the Medical Council to look into her complaint and to introduce himself and to let her know that the CAC had commenced its work. In his letter, he thanked the complainant for the signed consent form and stated that the CAC would be seeking access to her medical records. He noted that the records would be in her maiden name and asked whether it were possible that her records had been sent on to another doctor or medical centre and, if that were so, the details of where they might now be which would be helpful to the CAC. The convenor then explained the CAC process and how it worked.

(b) On 5 March 2002 the complainant wrote to the convenor of the CAC thanking him for his letter. Immediately under that is a heading "Re: medical records". The complainant then describes that she was living in New Zealand until she was 18. She then explains in the letter that her records were at a particular medical centre until she was about 17 after which she lived in other centres in New Zealand but did not believe her records would have been sent on to one centre but may have been forwarded to another centre but she could not recall

who her GP was at that other centre. She stated that since returning to New Zealand she had registered with another centre in the city where she is living and expressed her concern about the doctor getting access to her "recent" medical records. On 10 May 2002 the complainant wrote to the convenor of the CAC referring to her meeting with the CAC (which the Tribunal was told was on 3 May 2002). In that letter she confirmed that she was compiling a more comprehensive list of dates and events for the CAC's information and referred to witness contact details. The penultimate paragraph in her letter is headed "Medical records" and states that she had contacted xx Hospital, formerly xx Hospital, where she was an outpatient in 1988 and that she had *"started the ball rolling for obtaining medical records"* and that she would forward those records to the CAC when she had received them.

(c) On 8 March 2002 the convenor wrote to Dr Maryanne Stemmer who the complainant had consulted subsequent to the allegation which is the subject of the charge against Dr C. The convenor asked Dr Stemmer if she could determine whether she had any records available for the complainant and if so to forward a copy of those to the CAC. To that end the convenor enclosed a consent form signed by the complainant (which the Tribunal was told was the same as the one referred to at paragraph 22 above). The convenor informed Dr Stemmer that any information she may have retained would be helpful to the CAC and concluded that the CAC would appreciate hearing from her whatever the information she had, even if it were a "complete negative".

(d) On 27 March 2002 one of the principals of the xx Medical Centre wrote to the convenor of the CAC informing him that Dr Stemmer had retired but that the practice had managed to track down the complainant's notes from 1988 to 1989. Attached to that letter are the clinical notes for the practice when the complainant consulted Dr Stemmer and a selection of documents and records from the complainant's file at xx Hospital.

(e) On 4 June 2002 the complainant wrote to the convenor of the CAC enclosing *"some documents"* which included the chronology and expressed the wish that she hoped it straightened out any issues with regard to dates. Among the

documents which the complainant forwarded in that letter were what she referred to as *"a section of medical records from xx Hospital"*. She made two corrections to one of the documents which was a xx "face sheet". She concluded that these documents were *"all I have for you"*. Also enclosed with this letter was an email dated 20 March 2002 from a counsellor at AUT to the complainant confirming that the counsellor whom the complainant had consulted in 1988 had left to live overseas without leaving any records but that she had asked a nurse at the service to check through their old files to see if there was any medical notes and would let the complainant know when she had time to go back through those files.

(f) On 16 August 2002 the convenor of the CAC wrote to a particular health centre referring to his letter of two days previously and apologizing for omitting to enclose a copy of the complainant's consent form which he enclosed with this letter and which he expressed to be *"authorising us to receive full access to any and all of [the complainant's] Medical Records"*.

(g) The complainant wrote a further letter to the CAC which is undated although there is a handwritten date in the corner referring to 7 February 2003 but it may not be the correct date. This letter refers to a telephone communication which the complainant had had with the convenor and provided further persons and contact details whom the CAC might wish to contact.

29. The Tribunal is of the view that it can be fairly inferred from this exchange between the CAC and the complainant that the CAC considered it desirable, if not necessary, in its investigation of the complaint to have full access to the complainant's medical records and the complainant willingly provided them or otherwise authorised the CAC to obtain them.

30. With regard to the documents referred to at paragraph 30(d) and 30(e) above it is not readily apparent to the Tribunal whether the section of medical records from xx Hospital which were forwarded to the CAC under cover of the letter of 27 March 2002 from the xx Medical Practice and that section of records from xx Hospital which the complainant forwarded with her letter of 4 June 2002 are the same documents. The Tribunal notes that during the hearing Mr Lange on behalf of the

CAC said that all of the documents which were in the possession of the CAC had been disclosed to the Tribunal, and Mr Waalkens said that he accepted what Mr Lange said. However, in order to avoid any confusion, it would be helpful if Mr Lange were to make that enquiry of the CAC.

31. The medical records and section of xx Hospital records which have been made available to the Tribunal are:

(1) Letter of 27 March 2002 from the xx Medical Practice to the CAC enclosing:
   (a) The complainant's notes covering the period 5 July 1988 to 12 January 1989 (three pages).
   (b) A letter dated 25 July 1988 from the Acting Charge Nurse at the xx Clinic at xx Hospital to Dr Stemmer.
   (c) A laboratory report dated 11 August 1988.
   (d) A medical report dated 3 August 1988 setting out the medication the complainant was prescribed, her presenting problem and findings and diagnosis.
   (e) A letter dated 25 August 1988 from a student social worker at xx Hospital to Dr Stemmer.
   (f) A letter dated 8 September 1988 from the same student social worker to Dr Stemmer.
   (g) A face sheet from xx Hospital started on 22 July 1988.
   (h) A process recording form (two pages) dated 23 August 1988 signed by a supervisor being the report of the same social worker.
   (i) A document entitled *"Termination and Case Summary Report"* dated 8 September 1988 signed by the same social worker (two pages).

32. Additionally, the Tribunal also had before it:

(1) The written complaint of the complainant to the CAC concerning Dr C.
(2) A chronology of events covering the period February 1985 to February 2002 which summarised the time, the place, the event which occurred (which included references to medical treatment and counselors), the supporting documents and possible witnesses which was prepared by the complainant.
(3) The complainant's brief of evidence for presentation before the Tribunal.

(4) Affidavits of the doctor sworn in November 2003 and of two doctors qualified in psychiatry, one of whom provided affidavit evidence on behalf of the CAC and one on behalf of the doctor.

(5) Some correspondence between the doctor and the CAC and some limited correspondence between counsel for the parties.

Submissions for Dr C

33. Mr Waalkens submitted that for completeness the orders of disclosure were sought against both the CAC (which is the party to the proceedings) and the complainant (who is a witness).

34. He submitted that the doctor rigorously denies the allegations of sexual misbehaviour and other impropriety as set out in the particulars of the charge and that credibility will be in issue. The doctor's denials are contained in an affidavit he made.

35. Mr Waalkens submitted that the Supreme Court judgment made it abundantly clear that by referring the matter back to the Tribunal it was expected that evidence be provided as to the *context* in which medical records have thus far been provided. He stated that the doctor was in no position to provide the context and relevant details other than as to the extent thus far disclosed or discovered by the CAC and, in that regard, disclosure has been incomplete.

36. Mr Waalkens referred to matters of factual background and matters of an evidential nature already before the Tribunal and made reference to the various documents (referred to above) which were annexed to the doctor's affidavit and which were provided to the Tribunal; as well as correspondence between the CAC and the complainant and other documents (already referred to above).

37. With regard to the issue of relevance, Mr Waalkens submitted that there could be no serious suggestion that the documents already provided and those which are further sought are not relevant. In particular, he referred first to the fact that the complainant had made reference to and/or had used her medical attendances in the proceeding (which he said started with her complaint) as part of bolstering the accuracy of her complaint which was investigated by the CAC and which directly

gave rise to the charge being issued against Dr C; and secondly that the records are relevant as to issues of reliability of her recollection/account of events. He noted that there has been disagreement between the doctor and the CAC on this latter issue.

38. He added that the documents are relevant is made all the more clear by the conduct of the complainant and the CAC; and that the CAC, as part of its investigation into the complaint, had obviously requested not only the complainant's medical records relating to the time that she alleges she was consulting with the doctor as her GP (which he said was a matter in issue) but also as to her psychological response to the allegations of improper conduct on his part. He submitted that this much was clear from the complaint letter and from the chronology of events which the complainant had provided.

39. He referred to the Supreme Court decision which made the point that the *context* in which the records were provided or used is all important.

40. At the time Mr Waalkens' written submissions were filed he said he was not aware of the written form of consent (referred to at paragraph 22 above). He said the first he had seen it was the morning of the hearing before the Tribunal but accepted it had been sent to him at a much earlier time by Mr Lange. For some reason it had not come to his attention. He therefore addressed issues of implied consent or waiver in his written submissions and submitted that they had occurred in this case.

41. Mr Waalkens addressed issues of fairness and stated it was appropriate that the Tribunal draw the conclusion that inconsistent use and considerations of fairness, coupled with the lack of provision of context to the contrary by the CAC, had been met.

42. He submitted that the complainant had impliedly consented to disclosure in three separate ways, that is, (a) referring to privileged material in her written complaint and chronology; and/or (b) providing privileged documents to the CAC; and/or (c) consenting to the disclosure of privileged documents to counsel for the doctor. He said that even if the three ways in which he had submitted that the complainant had impliedly waived privilege were not accepted separately then, when viewed

collectively, they constituted behaviour that was inconsistent with confidentiality. He added that having now seen the written form of consent, there were four ways in which the complainant had consented to disclosure.

43. Mr Waalkens addressed the issue of fairness. He referred to the implied waiver of legal professional privilege set out in the O*phthalmological Society of New Zealand Inc v Commerce Commission* 2003 2 NZLR 145 which the Court of Appeal applied by analogy (at paragraph [20])

> *"As it is of the essence of privilege that the material to which it attaches is confidential where a party's use of the material … is inconsistent with the party legitimately continuing to asssert [confidentiality], the privilege is treated as waived."*

44. He submitted that the second component of the test for implied waiver of privilege as set out in the *Ophthalmological Society* case was a consideration of fairness; and that given the use to which the complainant/CAC had already put the medical records and the circumstances of the case, it was fair and reasonable that the extent to which privileged information was contained in the records be treated as having been waived.

Submissions of CAC

45. Mr Lange, on behalf of the CAC, submitted that the records already before the Tribunal could not be used by the doctor, and the Tribunal could not simply make an order declaring that the doctor could use the records in the proceeding unless the complainant consented to such use where those records and information were subject to s.32 of the EAA. He stated that considerations of s.35 of the EAA may also apply.

46. Mr Lange submitted that the doctor could not now seek an order against the CAC which was in direct conflict with the decision of the Court of Appeal (paragraph [123]) that *"No-one can be compelled to disclose documents which are not in his or her possession or power"*.

47. Mr Lange referred to the written form of consent which he submitted was expressed as relating to the investigation by the CAC and was not a consent to disclosure in the proceedings before the Tribunal.

48. In that regard, he referred to the observation of the Supreme Court which held that: *"Since the privilege exists for the purposes of proceedings, the relevant consent must be a consent to the disclosure of the confidences in the proceedings."*

49. Mr Lange submitted that "the proceedings" was the hearing of the charge before the Tribunal and that it commenced when the proceedings before the CAC ended.

50. He stated that following the commencement of the proceedings before the Tribunal, counsel for the doctor was advised by letter of 17 December 2002 from the CAC on behalf of the complainant that she did not consent to the disclosure of her medical records at the hearing of the charge.

51. Mr Lange submitted there was a clear distinction between proceedings before the CAC and proceedings before the Tribunal and that the scheme of the MPA was clear in that –

(a) The function of a CAC was to determine complaints referred to it (ss.88-95 MPA) and that the CAC may regulate its own procedure.
(b) The functions of the Tribunal are separate and distinct (ss.98-112 MPA); and that these proceedings before the Tribunal commenced by the laying of charges following which the Chairperson convenes a hearing (s.102).

52. Mr Lange referred to the fact that while a letter of complaint which the complainant made available to the CAC referred to medical attendances, they were not referred to in the complainant's brief of evidence which was filed with the Tribunal after the laying of the charge; and that in this way what the complainant may have put in issue regarding medical attendances before the CAC, she had not done so before this Tribunal and that, as the proceedings were separate and distinct, the form of consent was limited to the investigation by the CAC and had since been withdrawn after the proceedings before the Tribunal had commenced.

53. Mr Lange referred to "protected communications" and said there had not been any waiver by the complainant. He submitted that in accordance with the decision of the Supreme Court the issue was whether the complainant had consented to disclosure of the *"protected communication"* in the proceedings either expressly or impliedly and referred to the observation in paragraph [39] of the Court's decision when it observed *"… Since the privilege exists for the purposes of proceedings, the relevant consent must be a consent to the disclosure of the confidences in the proceedings."*

54. Mr Lange emphasised in his submissions that the proceedings are those which are now before the Tribunal and that the investigation of a complaint by a CAC is an entirely separate matter with a separate function. He referred to paragraph [39] of the Supreme Court decision:

> *"An implied consent under s.32 must be to disclosure in the proceedings. Enquiry is not, as the Court of Appeal held, whether there was consent to disclosure to a certain person, such as C, but whether there was consent to disclosure in or for the purposes of the particular proceedings … Since the privilege exists for the purposes of proceedings, the relevant consent must be consent to the disclosure of the confidences in the proceedings. That was the view taken in Victoria in Carusi v Housing Commission. Again support from the view expressed by the Privy Council in B v Auckland District Law Society that a partial or limited waiver of privilege for a particular purpose does not result in a loss of privilege."*

55. He submitted that it was abundantly clear from the appeal decisions of both the Court of Appeal and the Supreme Court that consent cannot be inferred from the reference to medical records in a letter of complaint. In this regard he referred to the Supreme Court observation at paragraph [50]: *"Her consent cannot be implied simply from the making of the complaint or her acknowledgement (for example through the supply of the information to the Committee) of the relevance of any of the communications"*.

56. Mr Lange addressed the issues of implied consent and referred to the Supreme Court decision which, he said, made it clear that consent may be inferred by conduct which is inconsistent with the maintenance of privilege in the proceedings and referred to paragraph [38] where the decision records:

> *"The privilege for the medical practitioner under s.32 can be waived by the patient either by express consent to disclosure or by conduct from which such*

consent can be inferred because it is inconsistent with maintenance of the privilege in the proceedings."

Decision

What is meant by "proceedings"?

57. Under the MPA, Part VIII provides for "*Discipline*". Sections 83 to 87 provide for complaints against practitioners; ss.88 to 95 relate to the constitution of and functions of the CAC. Sections 96 to 112 relate to the constitution of and functions of the Tribunal; ss.113 and 114 deal with miscellaneous provisions relating to funding of Tribunal and disciplinary proceedings and recovery of fines and costs.

58. The CAC, having considered a complaint, is then obliged to determine whether (a) the Medical Council should review the competence of the practitioner to practise medicine, or (b) review the ability of the practitioner to practise medicine, or (c) the complaint should be the subject of conciliation, or (d) the complaint (or conviction) should be considered by the Tribunal, or (e) no further steps should be taken.

59. If the CAC decides that the complaint should be considered by the Tribunal then the CAC lays the charge and then prosecutes the charge against the practitioner.

60. In the Tribunal's view, the proceedings commence with the making of the complaint to the CAC and continues when the CAC lays the charge, and when the CAC prosecutes the charge before the Tribunal. It is the CAC which remains the same party throughout from start to finish.

61. The Tribunal does not accept the narrower meaning which Mr Lange has sought to place on the meaning of "*proceedings*". The Tribunal is of the view that the wider sense of that term is the one that should be adopted which effectuates the plain intention of the MPA.

62. The Tribunal has had regard to some authorities regarding the meaning of *"proceedings"*. Although some of them have dealt with the meaning of proceedings in relation to appeals, the approach of the courts has been to construe the word as having a wide expression and not reading its meaning restrictively. In particular, the

Tribunal found the Court of Appeal decision *Comalco New Zealand Limited v The Broadcasting Standards Authority* (1995) 2 NZPC 372 to be helpful.

The Complainant's Written Consent

63. The form of consent which the complainant signed gave consent to the CAC to have *"full access"* to *"any and all"* of the complainant's medical records in relation to their investigation of the concerns which she had raised; and it gave consent to the doctor having access to those medical records so that he was able to comment on them.

64. The Tribunal does not construe that consent as denying the doctor the right to access to those medical records before the Tribunal so that he is unable to comment on them before the Tribunal or, as Mr Lange put it, the doctor being restricted in his access to those records and the ability to comment on them only during the investigation stage and not during the hearing. Further, there is no material before the Tribunal suggesting that there was any limitation imposed on the form of consent nor any that the consent form should be read down.

Consideration of Fairness

65. The Chief Justice in the Supreme Court decision observed (paragraph [39]) *"… the fact that the patient may have made the information relevant to the proceeding would not necessarily be sufficient to permit an inference of consent to disclosure. It depends upon the context. It is the nature of privilege that it permits relevant evidence to be withheld."* but added at paragraph [40] *"In some cases, the refusal of the complainant patient to give consent may make it unfair to proceed without reference to the confidential material which may be a ground for stay of the proceeding."*

Relevance

66. As was recognised by both counsel, the disclosure obligations apply only to relevant documents.

67. The Tribunal agrees with the observations of the Court of Appeal that the documents are not necessarily relevant just because they were referred to in the letter of complaint by the complainant; and that it is sometimes difficult for people who are very involved in their case to understand what is and what is not relevant to it. The test of relevance is not subjective (paragraphs [54-55] C.App.).

68. While the Court of Appeal and Supreme Court expressed some views about the submissions of counsel in relation to relevance, they did not wish to express any concluded view on the topic as they did not hear the evidence and any necessary assessment would be better made in the first instance by the expert Tribunal.

69. Mr Lange referred to the decision of the Ontario Court of Justice in *The College of Physicians and Surgeons of Ontario v Dr Mervyn Deitel* (1997) 99 OAC 241 and, in particular, paragraphs [150] to [155] in the judgment which referred to the case of *R v O'Connor*. The Court in *O'Connor* stated that it would be insufficient for the accused to demand protection on the basis of *"a bare, unsupported assertion"* that the records might impact on 'recent complaint'; and equally inadequate was *"a bare unsupported assertion"* that a prior inconsistent statement might be revealed.

70. In the *Deitel* case the Committee recognised that the request was a fishing expedition and was without merit. The Court commented that such a general request reflected stereotypical thinking, namely, that the very existence of psychiatric records was highly relevant and held that to assume such records by their very nature, were relevant material and should be made accessible to the defence was an improper approach to such private documents.

71. However, there is no evidence before the Tribunal that the Committee in *Deitel* had a clause 7 procedure available to it, which this Tribunal has; and the Tribunal finds that the assertions made by Mr Waalkens in his submissions are neither "*bare"* nor *"unsupported"*.

72. The Tribunal would like to examine the documents referred to at paragraphs 81, 82, 83, 85, 87, 88, 89 and 90 below. Once it has examined them it can then apply the approach contended for by Mr Lange and referred to in the Court of Appeal judgment in *R v Price* CA 2/92 29.9.92 to which Mr Lange referred:

> *"In our view it cannot sensibly be held that the prosecution is under a duty to convey information to the defence unless the information can reasonably be recognised as relevant to issues involved in the trial and of a nature which might, at least within reasonable contemplation of its holder, be of assistance to the defence."*

73. Mr Lange referred the Tribunal to the High Court decision *St John of God (R v A & B* CRI 2003-009-002462, 012476 9.12.2004) wherein the two accused (who were facing serious criminal charges of a sexual nature, alleged to have occurred between 1967 and 1972) sought access to counsellors' notes relating to all complainants, in the wider sense, and also hospital records. Hansen J. observed where such applications are irrelevant, fishing, speculative, oppressive, fanciful, disruptive or unmeritorious the Court should dismiss them. He added that the test is clearly higher than when documents are in the prosecution's possession or control.

74. The judgment records that in the course of argument it was put to the accuseds' counsel that the highest the accused could put their applications was that there may be something in the counselling notes or hospital records that could assist the accused in relation to claims of cross-contamination and falsified allegations; and the response was a general fairness based submission that until there was access it was impossible for the defence to know whether or not the material would be relevant. Hansen J. observed that such a general fairness based submission had all the hallmarks of a *"fishing expedition"*. In that particular case the Court held that it was not enough for the accused to show the material was likely to be relevant to, or may assist in, the defence.

75. The Tribunal has taken into account those observations and the submissions of Mr Lange but finds that the present application before it is clearly distinguishable. It does not consider that Dr C's application can be categorised as a fishing expedition or by any other of the epithets referred to by Hansen J in *St. John of God.*.

76. Further, that case was concerned with the criminal jurisdiction which is an adversarial process. Here, the proceedings are civil and the role of the Tribunal is inquisitorial, hence the clause 7 procedure which the criminal courts do not have.

77. The Tribunal agrees with and accepts Mr Waalkens' submissions regarding relevance. The complainant made reference to and used her medical attendances in

the proceedings in order to substantiate the accuracy and credibility of her complaint. They are relevant as to issues of reliability of the complainant's recollection and account of events. They are relevant in the *context* which includes the exchange between the CAC and the complainant as to how they were introduced, how further records were sought and provided, and the use to which they have been, or may have been put. The Supreme Court made clear that the *context* in which the documents were provided or used is all important.

78. The charge before the Tribunal is a serious one alleged to have occurred in 1985.

79. In the Tribunal's view, any communication which may indicate that sexual intercourse and/or the giving of drugs did or did not occur, is relevant.

80. The Tribunal had before it and examined some documents from xx Hospital which were created in 1988. The time and the content of the documents are relevant. These documents were annexed to the letter of 27 March 2002 from the xx Medical Centre.

81. The complainant was treated for depression and investigated as to what may have caused it. If a sexual history is taken it may help a medical practitioner or psychologist reach a diagnosis. That history may outline if there have been previous events in the complainant's life which have caused the depression. Such documents could be relevant as to whether the events in the charge did or did not occur.

82. The xx documents could assist the Tribunal on issues of reliability and credibility; and also may be corroborative.

83. It is apparent from the xx Hospital records which were produced to the Tribunal that they are incomplete. The Tribunal would expect more than the notes which have been produced, such as a GP referral; handwritten notes of the initial team assessment on which the report of 25 July 1988 was written. The assessment was undertaken on 22 July 1988 and is referred to in the report of 25 July 1988.

84. The documents make no specific reference to Dr C but do refer to the complainant's psychological problems and do make references to her rape and distrust of men.

85. The Tribunal refers also to the xx document (Termination and Case Summary Report) which refers to the Hudson Contentment scores. The Tribunal would expect that there is actual material available about the scores, which are absent and indicates that the records which have been produced are incomplete. If the Tribunal is to look at part of the notes then it should look at the whole notes.

86. The complainant's chronology which was produced to the CAC is relevant.

87. While there has been a general reference on the part of counsel to "medical notes" and "medical records" that is a generic term as some are notes of health practitioners and counsellors who are not medical doctors or psychologists. For example, the report of xx Hospital to Dr Stemmer dated 25 July 1988 is a medical record although signed by an acting Charge Nurse, but other documents signed by a student social worker are not.

88. It is not clear whether there has been an approach to xx Hospital for the complainant's full file. In this regard we refer to the correspondence addressed to Dr Stemmer who was the complainant's GP in 1988.

89. With regard to the chronology compiled by the complainant, this refers to contact made by her in July 1985 with a student counsellor at the AUT Counselling Service. In the chronology, the complainant states that she told this counsellor about the rape and about what had happened with the doctor and that she also had a short course of antidepressants which was prescribed through the student health service.

90. In her chronology, the complainant referred to her attendances in January 1986 to two different counsellors (in New Plymouth) from which she sought help in February of that year and the GP whom she consulted but whose name she cannot now remember and attending group therapy sessions once a week at the local hospital (xx Hospital) for a few weeks.

91. The Tribunal is unanimous in its view that the content of the documents which it has examined are relevant and believes that the further documents referred to may well contain material of a relevant nature. The Tribunal would like those documents to be produced and have the opportunity to examine them.

92. The Tribunal is aware that it must not go on a *"fishing expedition"*. The Tribunal does not consider that calling for the further documents referred to, as above mentioned, is a *"fishing expedition"*.

93. With regard to any current medical records, the only ones which the Tribunal would like produced and wishes to examine are any current notes of the complainant's general practitioner but only if the earlier notes to which we have referred to above are attached to them or contained in the GP's file.

Directions of the Tribunal

94. The Tribunal, pursuant to clauses 7(1)(b) and 7(3) of the First Schedule to the Medical Practitioners Act 1995:

(a) Requires the CAC to produce to the Tribunal the documents which are in the possession of the CAC and which the Tribunal has inspected and examined as set out below.

(b) Requires the CAC to furnish copies of those documents to Dr C and his counsel.

(c) Limits the use of those documents for the purpose of the hearing of the charge against Dr C.

95. Requires the complainant to produce for inspection and examination by the Tribunal the following documents which are in the possession of the complainant or under the complainant's control and to allow copies of those documents to be made:

(a) The complainant's complete file and/or records held by xx Hospital (now xx Hospital) commencing in 1988.

(b) The complainant's file and/or records held at xx Hospital in 1986.

(c) The complainant's file and/or records held at the ATI (now AUT) in July 1986.

(d) The complainant's current GP records only to the extent that they may have attached to them the complainant's earlier records covering the period 1985 to 1989.

96. The parties are encouraged to refer matters back to the Tribunal for further directions, should that be necessary.

DATED at Wellington this 15th day of March 2007.

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Sandra Moran

Senior Deputy Chair

Medical Practitioners Disciplinary Tribunal