MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 298/04/122C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against A medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 19 August 2004

PRESENT: Dr D B Collins QC - Chair

Dr F E Bennett, Dr U Manu, Dr J M McKenzie, Mr G Searancke (members)

APPEARANCES: Ms K P McDonald QC and Ms J Hughson for Complaint Assessment Committee

Dr A

Ms G J Fraser - Secretary

(for first part of call only)

Decision on the application for Name Suppression

Introduction

1. Doctor A is a registered medical practitioner who has vocational (specialist) registration as a xx. He lives in xx. On 28 June 2004 a Complaints Assessment Committee (CAC) laid a charge of professional misconduct against Dr A. The details of the charge are set out in paragraph 5 of this decision. The charge is to be heard on 11 and 12 October 2004.

2. On 19 July the CAC applied for orders suppressing publication of the name and identifying features of the complainant. The CAC also applied for orders allowing the complainant to "give her evidence in private". Doctor A advised the Tribunal he did not oppose these applications.

3. On 23 July Dr A wrote to the Tribunal seeking an order suppressing publication of his name and any identifying features. Doctor A's application was subsequently supported by a brief affidavit dated 3 August 2004. The CAC filed submissions in opposition on 10 August 2004.

4. The Tribunal convened by way of a telephone conference on 19 August. Neither party wished to be heard. They relied upon the documentation they had previously filed. The Tribunal unanimously resolved to grant the CAC's request for orders suppressing publication of the complainant's name and that she give evidence in private. One aspect of the CAC's application (namely a request the complainant give her evidence behind a screen) has been adjourned until 11 October 2004. By a majority of four to one the Tribunal has decided to decline Dr A's application. The reasons for the Tribunal's decisions are set out below.

The Charge

5. The charge against Dr A contains serious allegations. Particulars of the charge allege that between October 2001 and April 2002, during the course of his clinical management and treatment of the complainant, Dr A:

> *"1. Made frequent inappropriate telephone contacts with [the complainant], outside normal office hours and unrelated to her clinical needs; and/or*

> *2. During the course of the telephone contacts particularised in paragraph 1 and on other occasions, made inappropriate repeated references to use of the provisions of the Mental Health Act such that [the complainant] felt that she was being threatened with being re-admitted to hospital under the provisions of the Mental Health Act; and/or*
>
> *3. During the course of the telephone contacts particularised in paragraph 1 [Dr A] attempted to develop a personal relationship with [the complainant] by inviting her, during his telephone contacts with her, to lunch and dinner; and/or*
>
> *4. During a professional consultation with [the complainant] offered her work as his housekeeper and then, when she was at his home, tried to embrace her; and/or*
>
> *5. In professional consultations with [the complainant] and contrary to the therapeutic relationship, began to disclose to her his personal problems and issues."*

Dr A's Application

6. The Tribunal has encouraged Dr A to consult a lawyer however, Dr A has elected to represent himself.

7. Doctor A's affidavit in support of his application was based on a "pro forma" affidavit forwarded to him by the secretary of the Tribunal in an effort to provide Dr A with an indication of the information the Tribunal would normally receive when considering an application for interim name suppression by a medical practitioner.

8. Doctor A's affidavit states:

   8.1 That he emphatically denies the disciplinary charge and intends to defend the proceeding; and

   8.2 He currently resides in xx with a respectable family, and that it would be detrimental to his standing and theirs if his name was published in the local press.

9. The CAC has advanced three grounds of opposition to Dr A's application; namely:

   - That public interest requires there be publication of Dr A's name; and

- The circumstances disclosed by Dr A are insufficient to justify suppression of his name and identifying details, either alone or in combination, and/or do not counterbalance the relevant public interest factors in this case;

- It is not desirable Dr A's name and identifying details be suppressed even on an interim basis.

Principles Applicable to Name Suppression Applications

10. The starting point when considering the principles applicable to name suppression in the medical disciplinary arena is section 106 of the Act. Subsections 106(1) and (2) provide:

> *"(1) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public;*
>
> *(2) Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including (again without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any one or more of the following orders: …*
>
> *(d) … an order prohibiting the publication of the name, or any particulars of the affairs, of any person".*

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

12. Whereas section 106(1) of the Act contains a presumption that the Tribunal's hearing shall be held in public, there is no presumption in section 106(2) of the Act. When the Tribunal considers an application to suppress the name of any person appearing before the Tribunal, the Tribunal is required to consider whether it is desirable to prohibit publication of the name of the applicant after considering:

12.1 The interests of any person (including the unlimited right of the complainant to privacy); and

12.2 The public interest.

Public Interest

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

13.1 The public interest in knowing the name of a doctor charged with a serious disciplinary offence;

13.2 Accountability and transparency of the disciplinary process;

13.3 The importance of freedom of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990[1];

13.4 The extent to which other doctors may be unfairly implicated if Dr A is not named.

14. Each of these considerations will now be examined by reference to Dr A's application. In focusing on these public interest considerations the Tribunal notes no specific submissions were received relating to the complainant's interests in this case. The interests of the complainant have been subsumed into the public interest factors urged upon the Tribunal by the CAC.

The Public Interest in Knowing the Name of a Doctor Charged With a Serious Disciplinary Charge

15. The following cases illustrate the importance of openness in judicial proceedings:

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

> *"In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done."*

15.2 In *R v Liddell*[3] the Court of Appeal said:

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1 "Freedom of expression – everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and

> *"… the starting point must always be the importance in a democracy of … open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public' ."*

15.3 In *Lewis v Wilson & Horton Limited*[4] the Court of Appeal reaffirmed what it had said in *R v Liddell*. The Court noted:

> *"… the starting point must always be … the importance of open judicial proceedings, and the right of the media to report Court proceedings."*

15.4 In *Re X*[5] the High Court noted:

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

To these cases can be added *Scott v Scott*[6] and *Home Office v Harman*[7] where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.

16. The Tribunal appreciates it is neither a criminal nor civil court. However, as Frater J noted in *Director of Proceedings v I* [8]:

> *"The presumption in s.106(1) of the Act, in fair and public hearings makes it clear that, as in proceedings before the civil and criminal courts, the starting point in any consideration of the procedure to be followed in medical disciplinary proceedings must also be the principle of open justice.'*

17. In this case the allegations against Dr A are serious. They allege a fundamental breach of the professional obligations owed by a doctor to their patient. There is a strong public interest in allowing the community to know the nature of the allegations and identify Dr A. Part of the reason for there being a compelling public interest in this case is the need for other health professionals and the community to be educated and informed about the Tribunal's disciplinary processes where members of the medical profession face serious charges (refer

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opinions of any kind in any forum".

2 (1991) CRNZ 14

3 [1995] 1 NZLR 538

4 [2000] 3 NZLR 546

5 [2002] NZAR 938

6 [1913] AC 47

7 [1982] 1 All ER532

8 Unreported, HC Auckland, CIV2003-483-2180, 20 February 2004

Director of Proceedings v The Nursing Council[9]*; F v Medical Practitioners Disciplinary Tribunal*[10] and *S v Wellington District Law Society*[11]*).*

Accountability and Transparency of the Disciplinary Process

18. A major criticism of the disciplinary regime under the Medical Practitioners Act 1968 was that disciplinary hearings were not heard in public and that the identity of doctors who appeared before their disciplinary bodies was often suppressed. This led to claims that the disciplinary process was neither transparent nor accountable.

19. It is apparent from an examination of the Hansard records concerning the introduction of the Medical Practitioners Act 1995 that those who promoted the legislation wanted the present disciplinary process to be transparent and accountable.[12]

20. The Tribunal fully recognises there is considerable public interest in maintaining accountability and transparency in the disciplinary process and that this factor weighs heavily against Dr A's application.

The Importance of Freedom of Speech and the Right Enshrined in s.14 New Zealand Bill of Rights Act 1990

21. The public interest in preserving freedom of speech and the ability of the media "as surrogates of the public" to report the Tribunal proceedings has been emphasised on numerous occasions by the Tribunal and appellate Courts.[13]

22. The Tribunal does not know if any media propose publishing anything in relation to the Tribunal's hearings of the charge against Dr A . Regardless of whether or not there is media interest in this case, the Tribunal takes the view that <u>if</u> the media wishes to publish the Tribunal's proceedings and identify Dr A then the importance of freedom of speech enshrined in s.14 New Zealand Bill of Rights Act 1990 is a factor which weighs against suppressing publication of Dr A's name.

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9 [1999] 3 NZLR 360

10 Unreported HC Auckland, AP 21-SW01, 5 December 2001, Laurenson J

11 [2001] NZAR 465

Unfairly Impugning Other Doctors

23. A further factor, in the public interest which Dr A has not addressed is the concern that other doctors may be unfairly impugned if Dr A's name is suppressed. This point has been emphasised on numerous occasions in criminal courts where Judges have declined name suppression to avoid suspicion falling on other members of the public.

24. The Tribunal is concerned to avoid the fundamental unfairness caused to other doctors in xx if they are impugned by reason of Dr A's name being suppressed.

Doctor A's Interests

25. Doctor A's personal interests can be distilled to three considerations, namely:

25.1 He denies the charge;

25.2 His professional standing;

25.3 The standing of the family which Dr A lives with.

Denial of the Charge

26. The Tribunal fully appreciates the charge against Dr A contains allegations which may never be proven. The Tribunal has carefully weighed this and other factors advanced by Dr A against the public interest considerations referred to in paragraphs 15 to 24 of this decision. In the final analysis a majority of the Tribunal has concluded the fact that the charge against Dr A is not proven at this juncture does not outweigh the public interest factors which favour declining Dr A's application.

Doctor A's Professional Reputation

27. The Tribunal accepts that a doctor's professional reputation is an important factor that must be carefully evaluated when considering applications to suppress a doctor's name.[14]

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[12] See for example Hon J Shipley New Zealand Parliamentary Debates Vol 544 p.5065

[13] See for example *R v Liddell* and *Lewis v Wilson & Horton Limited* supra

[14] Refer *Director of Proceedings v I,* supra

28. The Tribunal has very little information about Dr A but proceeds on the basis that he has an unblemished record and good reputation.

29. In assessing the potential risk of damage to a doctor's reputation it is important for the Tribunal to take into account the degree of the doctor's alleged misconduct. In this case the Tribunal has concluded Dr A's alleged misconduct is serious and strikes at the very heart of a doctor's professional obligations. In the circumstances of this case, allowing publication of Dr A's name weighs heavily against the concern of potential risk to Dr A's reputation.

The Reputations of Others

30. Doctor A has advised that he lives with a reputable family and that there is risk of harm to their standing if Dr A's application is denied. The Tribunal has no information about the family Dr A lives with. The Tribunal does not know if Dr A is related to the family in question, or how long he has lived with them. The Tribunal cannot assess the extent to which members of the community will associate Dr A with the family in question (if at all). The Tribunal has done its best to give Dr A the benefit of the many doubts raised by the paucity of the evidence before the Tribunal. However, ultimately the Tribunal cannot make guesses to fill significant gaps in the evidence. The Tribunal has concluded there is insufficient evidence before it to allow the Tribunal to reach any meaningful conclusions about the risk of harm to the standing of the family Dr A lives with.

Conclusion in Relation to Dr A's Application

31. In weighing the competing public interest considerations against Dr A's interests the Tribunal has concluded by a majority of four to five that Dr A's application must be declined.

32. One member of the Tribunal, Dr Manukulasuriya is concerned that declining Dr A's application may adversely affect Dr A's ability to defend himself when the charge is heard. This concern is based on the belief that Dr A, like any practitioner facing a disciplinary hearing, will be stressed by the events and that this stress will be compounded if Dr A has to deal with media attention in addition to defending the charge. The majority of the Tribunal understand this concern but believe that there is insufficient evidence before the Tribunal to enable the Tribunal to reach the conclusion favoured by Dr Manukulasuriya.

CAC's Applications

33. The CAC has made two applications. The first is for an order prohibiting publication of the name of the complainant and any factors which can identify her. The second application concerns a request that the complainant's evidence be given in private and that a screen be placed between her and Dr A when she gives her evidence.

Suppression of Complainant's Name

34. Section 106(2) requires the Tribunal to be satisfied that it is desirable to prohibit publication of a complainant's name after having regard to the public interest, the unlimited interests of a complainant to privacy, and the interests of any other person.

35. In addition to the emphasis contained in s.106(2) to respecting the privacy of the complainant, the Tribunal must also have regard to the special provisions of s.107.

36. Section 107 provides:

> "***107. Special protections for complainants*** *- (1) This section applies in respect of any hearing of the Tribunal on a charge laid under section 102 of this Act, where the charge relates to or involves –*
>
> *(a) Any matters of a sexual nature; or*
>
> *(b) Any matter that may require or result in the complainant giving evidence of matters of an intimate or distressing nature.*
>
> *(2) Without limiting section 106(2) of this Act, where this section applies in respect of any hearing of the Tribunal –*
>
> *(a) Before the complainant begins to give oral evidence, the presiding officer shall –*
>
> *(i) Advise the complainant of the complainant's right to give his or her oral evidence in private; and*
>
> *(ii) Ascertain whether or not the complainant wishes to exercise that right; and*
>
> *(b) If the complainant wishes to exercise that right, the presiding officer shall –*
>
> *(i) Ensure that no person other than one referred to in paragraph (c) of this subsection is present in the room in which the hearing is being held; and*

(ii) Advise the complainant of the complainant's right to request the presence of any person under paragraph (c)(iii) of this subsection; and

(iii) Advise the medical practitioner to whom the charge being heard relates of his or her right to request the presence of any person under paragraph (c)(ix) of this subsection; and

(c) If the complainant chooses to exercise the right to give his or her oral evidence in private, then, while the complainant is giving oral evidence at the hearing, no person shall be present in the room in which the hearing is being held except the following:

(i) The members of the Tribunal;

(ii) The medical practitioner to whom the charge being heard relates;

(iii) The person who is prosecuting the charge;

(iv) Any barrister or solicitor engaged in the proceedings;

(v) Any officer of the Tribunal;

(vi) Any person who is for the time being responsible for recording the proceedings;

(vii) Any accredited news media reporter;

(viii) Any person whose presence is requested by the complainant;

(ix) Any person whose presence is requested by the medical practitioner to whom the charge being heard relates, unless the complainant objects to that person being present;

(x) Any person expressly permitted by the Tribunal to be present.

(3) Without limiting section 106(2) of this Act, where this section applies in respect of any hearing of the Tribunal, the Tribunal may, if it is of the opinion that the interests of the complainant so require, make an order under section 106(2)(b) of this Act forbidding publication of any report or account giving details of any acts alleged to have been performed on the complainant or of any acts that the complainant is alleged to have been compelled or induced to perform or to consent to or acquiesce in."

37. The Tribunal does not have any evidence before it at this stage. However the particulars of the charge lead to the inevitable conclusion that the complainant is likely to be giving evidence in relation to matters of a sexual nature and/or which may be of an intimate or distressing nature. It is therefore inevitable that the complainant must be afforded the special protections set out in s.107.

38. Section 107 does not limit s.106(2). However, it is apparent that when s.107 is read in conjunction with s.106(2) Parliament intended the Tribunal to have special regard to a complainant's request for privacy, particularly in cases where complainants give evidence of a sexual, intimate or distressing nature.

39. The Tribunal has evaluated the following public interest considerations when assessing the application made by the CAC:

    39.1 The public interest in knowing the name of a complainant who has made a serious allegation against a doctor;

    39.2 Accountability and transparency of the disciplinary process;

    39.3 The importance of freedom of speech and the right enshrined in s.40 New Zealand Bill of Rights Act 1990.

Public interest in knowing the name of a complainant who has made a serious allegation against a doctor.

40. Whilst there may be a public interest in knowing the name of a complainant who has made a serious allegation against a doctor, there is also a counterbalancing interest which the Tribunal must take into account. It is never easy for complainants to give evidence of a sexual, intimate or distressing nature. Those who step forward to give evidence of the kind anticipated in this case should not be deterred by knowing their name will be published in circumstances where that is contrary to their wishes. The Tribunal takes the view that it is in the over-riding public interest that a complainant's identity be suppressed when that is their wish in cases involving allegations of a sexual, intimate or distressing nature. To override a complainant's request for privacy in such circumstances risks complainant's not giving evidence and/or not bringing concerns to the attention of the appropriate authorities. It is overwhelmingly in the public interest that complainants be assisted, not frustrated when giving evidence to the Tribunal.

Accountability of the Disciplinary Process and s.14 New Zealand Bill of Rights Act 1990

41. The Tribunal has already recorded its appreciation of the need for accountability and transparency in the disciplinary process. The Tribunal has also noted its understanding of the

importance of s.14 New Zealand Bill of Rights Act 1990. These are important considerations which weigh against the complainant's application. However, the Tribunal believes these public interest considerations do not outweigh the complainant's interest to privacy in this case.

Dr A's Interests

42. Doctor A's interests can legitimately be taken into account when considering the application made by the CAC on behalf of the complainant. In this case Dr A has advised he does not oppose the application and has provided no objections to the complainant's name and identifying features being suppressed. Accordingly, the Tribunal can identify no interests on behalf of Dr A which counterbalance the complainant's application.

Conclusion in Relation to the CAC's First Application

43. After weighing the public interest factors identified in paragraph 39 against the interests of the complainant to privacy, the Tribunal is unanimously of the view that the complainant's request for privacy must be respected. Accordingly, the Tribunal orders that nothing be published which names or otherwise identifies the complainant.

Complainant Giving Evidence in Private

44. The second application made on behalf of the complainant is that she give her evidence in private. As part of this request the complainant has asked that a screen be placed between herself and Dr A.

45. The complainant is entitled to give her evidence in private if she chooses. This conclusion is inevitable in light of the wording of s.107(2)(c) Medical Practitioners Act 1995. If the complainant exercises her right to give evidence in private the only persons who will be present in the hearing room are:

The members of the Tribunal;

Dr A;

Counsel for the CAC;

Any barrister or solicitor engaged in the proceedings;

> Any officer of the Tribunal;
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> Any person who is for the time being responsible for recording the proceedings;
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> Any accredited news media reporter;
>
> Any person whose presence is requested by the complainant;
>
> Any person whose presence is requested by Dr A to whom the charge being heard relates, unless the complainant objects to that person being present;
>
> Any person expressly permitted by the Tribunal to be present.

46. Doctor A has advised he does not object to the complainant's request that she give her evidence behind a screen. It would appear therefore Dr A does not perceive a breach of natural justice if the complainant gives her evidence in the way suggested by the CAC.

47. The Tribunal believes however that it must satisfy itself that it is appropriate to grant the application, particularly in view of the fact Dr A is not represented by counsel.

48. There is nothing specifically contained in the Medical Practitioners Act 1995 which authorises the Tribunal to allow a witness to give their evidence whilst "screened" from the doctor appearing before the Tribunal.

49. Clauses 5(1) and (3) of the First Schedule to the Medical Practitioners Act 1995 permits the Tribunal to regulate its own procedure in such manner as it thinks fit subject only to the requirement that the Tribunal observe the rules of natural justice at each hearing.

50. The fact the Medical Practitioners Act 1995 does not contain provisions similar to those found in s.23E(d) Evidence Act 1908 does not mean the Tribunal is powerless to grant the complainant's request that she give her evidence with a screen shielding her from Dr A. Section 23E Evidence Act 1908 enables criminal courts to allow complainants 17 years and younger (and some other complainants) to give evidence from behind a one way screen or partition in cases involving certain sexual offences. Section 23E Evidence Act 1908 was enacted in 1989.

51. Prior to the 1989 amendments to the Evidence Act 1908 the Court of Appeal held that, in criminal trials, the Judge, jury, witnesses and accused are all, in general in sight of each other.

The Court held however that in some exceptional circumstances, especially those involving children giving evidence in sexual abuse cases, the Courts have a duty to modify their procedures to protect witnesses. The whole Court held that the inherent jurisdiction of the Court to control their own procedure provided a mechanism to protect witnesses by one way screens where that was shown to be reasonably necessary[15]. In *R v Holden*[16] the High Court relied on its inherent jurisdiction to allow an adult complainant to give evidence behind a one way screen. Other reported cases of assistance are *R v Daniels*[17]*; R v Coleman*[18]*; R v Mohe*[19].

52. Although the Tribunal does not have inherent jurisdiction, it has the ability to regulate its own procedures. To this end, the Tribunal derives considerable assistance and guidance from the cases referred to in paragraph 51. The Tribunal believes its power to regulate its own procedure enables it to grant a witness the ability to give evidence in a way which shields them by way of a one way screen from the doctor who is charged.

53. Having determined the Tribunal has a jurisdiction to grant the CAC's request that the complainant give her evidence from behind a screen that shields her from Dr A, the Tribunal must also decide if such an order is reasonably necessary. There is no evidence supporting the application. The only information before the Tribunal is set out in the CAC's application which states:

> *"If Dr A is to attend the hearing, the complainant <u>would prefer</u> to give her oral evidence from behind a screen so that she will be unable to see him while she is giving her evidence".* (Emphasis added.)

54. The Tribunal is sympathetic to the CAC's application. However, there is insufficient evidence presently before the Tribunal to satisfy it that it is "reasonably necessary" that the complainant give her evidence from behind a one way screen.

55. The Tribunal prefers to defer ruling on whether or not to grant this aspect of the CAC's application until it has had an opportunity to determine whether or not a one way screen is

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15 *R v Accused* (T4/88) [1989] 1 NZLR 660

16 High Court Auckland, T9/81 504, 31 August 1998, Randerson J

17 (1993) 10 CRNZ 165

18 (1996) 14 CRNZ 258

19 [1996] 1 NZLR 263

"reasonably necessary" in this case. The Tribunal will rule on this issue after the CAC has opened its case, and before the complainant gives her evidence. A one way screen should be available for use in the event the Tribunal rules that the complainant can give her evidence behind a one way screen.

Conclusions in Relation to the CAC's Applications

56. Nothing may be published which identifies the complainant.

57. The complainant may give her evidence in private in accordance with the terms of s.107 of the Medical Practitioners Act 1995.

58. A decision on whether or not the complainant gives her evidence behind a one way screen which shields her from Dr A is deferred until 11 October 2004.

DATED at Wellington this 6th day of September 2004

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D B Collins QC

Chairperson

Medical Practitioners Disciplinary Tribunal