MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 327/05/127C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by the Complaints Assessment Committee pursuant to Section 93(1)(b) of the Act against P medical practitioner of xx.

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Miss S M Moran (Chair)

Ms J Courtney, Dr R Fenwicke, Dr M Honeyman, Dr A Stewart (Members)

Mrs K L Davies (Legal Officer)

Ms K O'Brien (Stenographer)

Hearing held on Monday 12 March 2007 by telephone conference

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee and Mr S J Hembrow for Dr P did not participate in the conference but filed written submissions.

SUPPLEMENTARY DECISION

This supplementary decision should be read in conjunction with the Tribunal's substantive decision No. 325/05/127C dated 14 December 2006.

Substantive Decision

1. In its substantive decision, the Tribunal found Dr P guilty of the charge of disgraceful conduct in a professional respect laid against him by the Complaints Assessment Committee (the CAC). The charge arose out of the doctor's relationship of an inappropriate nature with his patient, Ms B, between 2002 and 2004.

2. The Tribunal found proved four of the six particulars of the charge.

The Tribunal's Findings

3. The Tribunal's findings and the reasons for them are set out in its substantive decision. In summary, the Tribunal found:

   (a) With regard to particular (1), that the doctor had intercourse with Ms B who was at the time or had been until recently his patient.
   (b) With regard to particular (2), the doctor had paid money in return for sexual services to Ms B who was at the time or had been until recently his patient.
   (c) With regard to particular (5), following a complaint being made against the doctor by the manager for the Stepping Stone Trust in xx to the Health & Disability Commissioner in or about 2003 concerning his treatment of Ms B, the doctor paid to Ms B a sum of money in return for her not attending a

planned interview she was to have with investigators from the Commissioner's office in September 2003.

(d) With regard to particular (6) the doctor telephoned Ms B on the morning of the CAC's interview of her (2 November 2004) in relation to the complaint made against him by the treating psychiatrist, and attempted to dissuade Ms B from meeting with the CAC in relation to that complaint.

Submissions of the CAC

4. Ms Kristy McDonald QC, counsel for the CAC, submitted that the conduct of the doctor was serious and amounted to disgraceful conduct at the high end.

5. With regard to particular 1 she submitted that while the Tribunal had found Dr P had a sexual relationship with Ms B between May 2002 and 29 August 2002 when he was not registered that nevertheless the Tribunal considered the relationship to be entirely improper in view of Ms B's past and her complex and ongoing psychiatric problems of which the doctor was well aware. In this regard she referred to the ethics to which the Tribunal had referred in its substantive decision which guide medical practice.

6. In relation to particular 2 she stated that while the Tribunal found Ms B to be a credible and reliable witness that, by contrast, the Tribunal had made strong credibility findings against the doctor and that during the period from around the time Ms B left the Stepping Stone Trust in April 2003 until April 2004 the doctor had paid Ms B for sex and that it was about $30 on each occasion and was paid in cash. She referred to the fact that the Tribunal had also found that in the initial period the doctor initiated sexual relationships between them. During this time the doctor/patient relationship endured.

7. With regard to particulars 5 and 6 Ms McDonald submitted that the findings that the doctor had sought to dissuade Ms B from attending interviews with the Health & Disability Commissioner and the CAC and that he had also paid Ms B money not to attend the interview with the Commissioner, were very serious findings and amounted to attempts to pervert the course of justice. She submitted that those

findings demonstrated the doctor's considerable dishonesty and the lengths to which he was prepared to go to conceal his unprofessional conduct.

8. Ms McDonald referred to the doctor's history of dishonesty having previously been convicted of a range of dishonesty offences which were set out in a 1998 decision of the Medical Practitioners Disciplinary Tribunal. She added that the previous convictions and the previous findings of the Tribunal in December 1998 were that the doctor's previous offending reflected on his fitness to practise medicine, at which time his name was struck off the Register as a result of those findings.

9. Ms McDonald also drew to the attention of the Tribunal the fact that by letter dated 15 April 2004 the Medical Council of New Zealand wrote to the doctor putting him on notice regarding certain aspects of his practice which were of concern to the Council.

10. Ms McDonald submitted that Dr P be deregistered in view of his conduct and the significant findings made against him which made this one of the most serious cases to have come before this Tribunal. Ms McDonald stated that not only did the offending involve serious breaches of trust, abuse of power and exploitation of a vulnerable and damaged client, but that Dr P had attempted to conceal his conduct, had been found to have lied before the Tribunal and had demonstrated that he had no insight into the significance of his offending. She submitted that the seriousness of the doctor's offending should be reflected in the penalty imposed and that the only appropriate penalty was that the doctor's name be removed from the medical register. She submitted that he had forfeited the privilege to remain as a practising member of the medical profession.

11. Ms McDonald submitted that Dr P should also be censured as his conduct was unacceptable.

12. With regard to costs, she submitted it was an appropriate case for the Tribunal to order the doctor to pay part of the costs and expenses of and incidental to the CAC's enquiry and the hearing which should have regard to the doctor's full defence of the charge and taking into account his particular financial circumstances.

13. With regard to name suppression, Ms McDonald referred to the decision of Laurenson J in *F v Medical Practitioners Disciplinary Tribunal* where at paragraph 74 the Judge observed:

> *"… the requirement under the new Act for the hearing to be in public is a clear indication that the legislation intended the public was to be informed. That change must be seen in the context of the principal of protecting the public. Members of the public are entitled to be able to make an informed choice as to which practitioners are engaged."*

Counsel referred to further observations of the Judge that once the practitioner had been found guilty of misconduct the expectation would strongly favour publication of the practitioner's name.

14. Ms McDonald submitted that the public interest requires that the doctor's name be published; that the public has a right to know; that it is in the public's interest that it knows Dr P's name; and it is in the public interest that the outcome of the proceedings is made known if the integrity of the profession is to be maintained. Ms McDonald added that the public interest outweighed any private interests of the doctor and accordingly it was not desirable that his name should remain suppressed.

Submissions of Counsel for the Doctor

15. Mr Stephen Hembrow, counsel for the doctor, submitted that Dr P did not accept the findings as to a sexual relationship with the patient.

16. He submitted that the doctor was noted by witnesses to be a caring and competent doctor and that he gave his skills to those of the lower socio economic end of society.

17. Mr Hembrow submitted that the doctor's name did not need to be removed from the register; and that a suspension for a period of 12 months with a direction that he only practise under the supervision of an experienced practitioner and that he not see female patients on his own, would suffice.

18. With regard to costs, Mr Hembrow stated that Dr P's defence was funded by the Legal Services Agency and that as a result of the charges he had not worked for a

very considerable period of time. He referred to the huge emotional strain on the doctor which had caused the end of one relationship. He stated that the doctor does not own a house, have any substantial assets at all, nor any savings and that any award of costs would be crippling for him and almost certainly lead to consideration of bankruptcy. The Tribunal asked for the doctor's precise financial situation to be verified in an affidavit, which it now has.

19. Mr Hembrow submitted that Dr P's main concern was for continued suppression of his name which was not for his benefit but for the benefit of his three children and, in that regard, referred to an earlier affidavit sworn by him on 30 May 2005 in support of his application for name suppression. He stated that the doctor has continued to maintain a close relationship with his xx older children from his marriage and his xx child, not quite xx years, from his current partner and referred to the distress and effect this would have on the children if the doctor's name were published. In a subsequent affidavit sworn 9 March 2007 the doctor has emphasised that his application *"is simply for the benefit of [his] xx children"*. He has stated that his ex-wife has told him that there have been approaches from a person understood to be a reporter from a local newspaper.

20. Mr Hembrow has sought an extension of 14 days to enable the doctor to file an appeal, should the Tribunal order that the Suppression Order regarding publication of the doctor's name be discharged.

The Law

21. The principal purpose of the Medical Practitioners Act is to ensure that members of the public are protected from unsafe practice. Section 3 provides *"The principal purpose of this Act is to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine."*

22. Section 110 of the Act sets out the range of penalties which the Tribunal may impose. They are removal of the doctor's name from the medical register; suspension of the doctor's registration for a period not exceeding 12 months; that for a period not exceeding three years the doctor be permitted to practise medicine only

in accordance with such conditions as to employment, supervision, or otherwise as specified by the Tribunal; censure; imposition of a fine; and payment of costs. However, a practitioner's name can only be removed from the register where there has been a finding of disgraceful conduct as distinct from professional misconduct or conduct unbecoming a medical practitioner.

23. While it is not necessary to refer to all the cases which encapsulate the various principles relating to the protection of the public, the Tribunal refers to some of them.

24. In *Guy v Medical Council of New Zealand* [1995] NZAR 67 when referring to proceedings before the Council under the previous Medical Practitioners Act (1968) the Court observed at p77:

> *"[Proceedings before the Medical Council] are designed primarily to protect the public from incompetent and improper conduct on the part of medical practitioners. The powers given to the Medical Council are exercised primarily in the interests of the public and the profession itself and are only incidentally penal in nature."*

25. In *Teviotdale v Preliminary Proceedings Committee of the Medical Council of New Zealand* [1996] NZAR 517 the Full Court observed at 520:

> *"It is well settled that the Council is entitled to exercise its disciplinary functions only in the public interest and while any decision of the Council to exercise its disciplinary powers will inevitably have a punitive effect, nonetheless it does not have jurisdiction to impose or enforce punitive sanctions against members of the medical profession where there has been no impact on the public interest."*

26. In *Pillai v Messiter* [No. 2] [1989] 16 NSWLR 197 Kirby P observed at 201:

> *"In giving meaning to the phrase "misconduct in a professional respect" in the context within which it appears, it must be kept in mind that the consequence of an affirmative finding is drastic for the practitioner. The purpose of providing such a drastic consequence is not punishment of the practitioner as such but protection of the public. The public needs to be protected from delinquents and wrongdoers within professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements. Such people should be removed from the Register or from the relevant roll of practitioners at least until they can demonstrate that their displaying imperfections have been removed."*

DECISION AND REASONS

De-registration

27. The Tribunal accepts and agrees with the submissions of the CAC, and is unanimous in its view that Dr P's name should be removed from the Register of Medical Practitioners.

28. As the Tribunal observed in its substantive decision (paragraph 322) the doctor crossed all boundaries including the sexual relationship with a patient. Ms B was both a former patient and a current patient. As her psychiatrist observed, she was a very damaged and very vulnerable person. The doctor had had a long-term therapeutic relationship with Ms B commencing at the age of 16 years including in a dual role as both general practitioner and counsellor. She had a complex and ongoing psychiatric history of which he was aware and he was the first person to whom she had disclosed sexual abuse. When they met again in May 2002, she was in 24 hour psychiatric care. He provided counselling and entered into a sexual relationship with her which continued after he was re-registered on a probationary basis. As the nature of the relationship changed he paid her for her sexual services; and when those professional persons who were responsible for her care and ongoing treatment became concerned and complained through the appropriate authorities (the Health & Disability Commissioner and later the CAC) he sought to dissuade her from attending interviews and providing the necessary information so that proper investigation could take place. In the case of the complaint to the Health & Disability Commissioner he also paid her money not to attend the interview.

29. In its substantive decision the Tribunal, having carefully considered the relevant legal principles and the levels of misconduct and applying those principles to the proved facts, reached the view that the conduct of Dr P amounted to disgraceful conduct in a professional respect and was at the high end of it.

30. The Tribunal refers to the doctor's previous offending, raised in the submissions of the CAC. In December 1997 following a defended hearing in the District Court, Dr P was convicted of 18 criminal offences involving offences of dishonesty covering a period of approximately one year from January 1993 to January 1994. There were

15 convictions for using a document for pecuniary advantage, two of forgery and one of wilfully attempting to defeat the course of justice. The 15 counts of fraud related to claims which the doctor had made for general medical services which he had not provided. The convictions for forgery and attempting to defeat the course of justice arose from what the doctor did when aware that his fraudulent General Medical Services claims were subject to official scrutiny. He created false records purporting to confirm the counselling sessions for which he had claimed but which had never taken place. He then submitted those false records to Health Benefits Limited. The doctor was sentenced in the District Court to 21 months imprisonment and ordered to make reparation of $6,000. On appeal to the Court of Appeal against both conviction and sentence, the appeal for conviction was not pursued but the appeal against sentence was and the effective result was that the total sentence was reduced from 21 months imprisonment to 12 months imprisonment. As a result of this the doctor's name was removed from the medical register in 1998 following a hearing of the Tribunal. The CAC also drew to the attention of the Tribunal the letter of the Medical Council of 15 April 2004 in which the Council put the doctor on notice regarding its concern about certain aspects of his practice.

31. While these matters indicate certain deficits in the doctor's character, the findings of the Tribunal regarding the present charge are of such a nature as to warrant de-registration regardless of any previous history of offending. Further, the doctor has served his sentence regarding the criminal convictions. The Tribunal has not had regard to them in relation to its decision regarding the matter of registration, but has had regard to them in relation to name suppression as they tend to display a similar pattern of conduct.

32. The Tribunal is satisfied that in order to protect the health and safety of members of the public nothing less than removal of Dr P's name from the Register of Medical Practitioners will suffice.

33. The Tribunal would be very concerned if the doctor returned to the practise of medicine in the future.

Censure

34. The Tribunal does not consider the imposition of a censure necessary as de-registration is the ultimate censure.

Fine

35. While the Tribunal has had regard to the doctor's financial status it is of the view that a fine should be imposed due to the circumstances of this particular case. It is a very bad case of its kind. The Tribunal believes that a fine of $5,000 is appropriate and is aware that arrangements can be made for the payment of it over time where the doctor is unable to pay it in one sum.

Costs

36. Section 110(1)(f) of the Act confers on the Tribunal jurisdiction to order a medical practitioner to pay part or all of the costs and expenses of and incidental to:

(a) The investigation made by the Complaints Assessment Committee in relation to the subject matter of the charges.
(b) The prosecution of the charge by the Complaints Assessment Committee.
(c) The hearing by the Tribunal.

37. In Dr P's case -

(a)	The costs of the investigation by the CAC and the prosecution by the CAC were:	$124,978.47
(b)	The costs of the hearing by the Tribunal were:	$ 59,148.01

38. As the doctor's defence was funded by the Legal Services Agency, the Tribunal has had to have regard to s.40 (as amended) of the Legal Services Act 2000. That section provides that no order for costs may be made against an aided person in a civil proceeding (which this is) unless the Court (in this case the Tribunal) is satisfied that there are "*exceptional circumstances*". Section 40 sets out what amounts to exceptional circumstances. They do not apply here.

39. Section 40 also provides that if, because of the section, no order for costs is made against the aided person, an order may be made specifying what order for costs

would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

40. The Tribunal believes a distinction can be drawn when assessing the costs a doctor should pay in relation to the costs incurred by the CAC on the one hand and the costs incurred by the Tribunal on the other.

41. In *Vasan v Medical Council of New Zealand* (unreported High Court Wellington AP No. 43/91 18 December 1991) Jefferies J observed that in relation to the costs incurred by the Tribunal:

> *"… the choices between the [Dr] who was …found guilty … and the medical profession as a whole"*

42. These observations arise from the fact that the costs of the operation of the Tribunal are met in the first instance by the entire medical profession. The High Court has stated that it is not unreasonable to require a professional to pay 50% of the costs incurred by the professional disciplinary body.

43. In *Cooray v Preliminary Proceedings Committee* (unreported AP23/94 High Court Wellington 14.9.1995), Doogue J reviewed the relevant authorities when considering an award of costs by the Medical Council under the previous 1968 Act and observed:

> *"Whilst I accept that the proportion of costs awarded in other cases cannot be a final determinator of what is a reasonable order for the costs in the present case, nothing has been put forward which would justify a proportion of costs in the present case considerably in excess of the highest proportion of costs awarded in any other case brought to the attention of the Court or upheld in earlier cases before this Court. It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downwards adjustment. In cases before this Court where an appeal has been allowed to a greater or lesser extent the Court has, in reflecting that determination, adjusted the costs in a downward direction. In other cases where there has not been such conclusion the order for costs by the Council has, in general been upheld."*

44. With regard to the costs incurred by the CAC, the Tribunal has had regard to the following principles:

(a) A doctor found guilty following a disciplinary hearing should expect to pay costs of the CAC. The extent to which a prosecution succeeds is a relevant factor for the Tribunal to take into account under this heading (in this case, the prosecution succeeded on the charge in four of the six particulars).
(b) A costs award should reflect the complexity and significance of the proceeding.
(c) Costs should reflect a fair and reasonable rate being applied to the time taken to investigate the complaint as well as preparing for and conducting the prosecution. The emphasis is on reasonable as opposed to actual costs.

45. But for the provisions of s.40 of the Legal Services Act 2000, the Tribunal, having carefully assessed the reasonableness of the costs incurred by the CAC and the Tribunal and the fact that the doctor has been found guilty of the charge in four of the six particulars, it would have ordered him to pay 40% of the costs incurred by the CAC and 40% of the costs incurred by the Tribunal. In this case however, no such order can be made.

Name Suppression

46. The Tribunal has had regard to its earlier decision when it granted to the doctor interim name suppression; to the submissions which both counsel made at that time and now, and to the doctor's affidavits.

47. When a doctor is found guilty of disgraceful conduct, in circumstances such as the present then, in all probability, his name will be published. It is regrettable that members of the doctor's family may be hurt by the publication but that is a foreseeable consequence. It is a balancing act for any adjudicating body between the private interests of the doctor on the one hand and the public interests on the other.

48. The Tribunal has had regard to the serious findings it has made. It has also had regard to the previous offending by the doctor and notes that Dr P has frequently

acted in the role of a counsellor to vulnerable persons who, on his own submission, are at the lower socio-economic end of society.

49. The Tribunal is of the view that this is a case where the public interest outweighs the private interests of the doctor and that the interim suppression order suppressing the publication of the doctor's name should be discharged.

50. The Tribunal has also had regard to the request of the doctor that this particular order be suspended for a period of 14 days to enable him to file an appeal, should he so instruct his counsel.

ORDERS AND CONCLUSIONS

51. Accordingly, for the reasons set out above, the Tribunal makes the following orders:

(a) Dr P's name be removed from the Register of Medical Practitioners pursuant to section 110(a) of the Medical Practitioners Act 1995.
(b) Dr P is fined $5,000.
(c) The Tribunal makes no order as to costs. However, if the doctor had not been legally aided then the Tribunal would have ordered the doctor to pay 40% of the costs of the CAC investigation and prosecution and 40% of the costs of the Tribunal.
(d) The order for suppression of Dr P's name be discharged pursuant to s.108 of the Medical Practitioners Act 1995 but that this order be suspended for a period of 14 days from the date of this decision to enable the doctor to file an appeal in respect of this order, should he so decide.
(e) A report of the Tribunal's substantive decision and this decision is to be published in the New Zealand Medical Journal, subject to any suppression orders.

DATED at Wellington this 15th day of March 2007.

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Sandra Moran
Senior Deputy Chair
Medical Practitioners Disciplinary Tribunal