MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 127/00/62D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **GRAHAM KEITH PARRY** medical practitioner of Whangarei

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 11 August 2000.

PRESENT: Mrs W N Brandon - Chair

Mr M G Laney, Associate Professor Dame N Restieaux,

Dr B J Trenwith, Mrs H White (members)

APPEARANCES: Mr M F McClelland, Counsel for Director of Proceedings &
Ms Tania Davis, Director of Proceedings

Mr C J Hodson QC for respondent

Ms G J Fraser - Secretary

(for first part of call only)

DECISION ON AN APPLICATION FOR SUSPENSION BY DIRECTOR OF PROCEEDINGS AND FOR NAME SUPPRESSION IN RELATION TO THAT APPLICATION BY RESPONDENT

1.0 THE APPLICATIONS:

1.1 THE respondent faces one charge of professional misconduct in relation to his management and treatment of his patient, Mrs C Poutsma, in 1997 and 1998. The hearing of the charge is currently scheduled to proceed on 9 October 2000. The Director of Proceedings has now applied for an interim order suspending the respondent's registration on the medical register, or placing conditions on his practice, pending the outcome of the hearing of the charge.

1.2 THAT application is opposed, and the respondent has applied for interim name suppression and interim suppression of any identifying particulars in relation thereto, in relation to the application for suspension only.

1.3 AFFIDAVITS in support of the application for suspension, the application for name suppression, and in opposition to the application for suspension have been filed respectively, together with submissions from both Counsel. Those affidavits and submissions, and the cases referred to therein, were provided to the Tribunal members in advance of the hearing of the applications, and have been carefully considered by the Tribunal.

2.0 GROUNDS FOR THE APPLICATION FOR SUSPENSION:

2.1 **THE** application is made pursuant to Section 104 of the Medical Practitioner's Act 1995.

That section provides:

*"**104 Interim suspension of registration or imposition of conditions of practice in disciplinary matters -***

(1) At any time after a notice has been given under section 103 (1) of this Act to a medical practitioner, the Tribunal may, if it is satisfied that it is necessary or desirable to do so having regard to the need to protect the health or safety of members of the public, make an order that, until the disciplinary proceedings in respect of which that notice was issued have been determined, -

(a) The registration of that medical practitioner be suspended; or
(b) That medical practitioner may practise medicine only in accordance with such conditions as are specified in the order.

(2) The Tribunal may make an order under this section on the recommendation of the Director of Proceedings, or a Complaints Assessment Committee, or of its own motion.

(3) The Tribunal shall not be obliged to give any notice to a medical practitioner that it intends to make an order under this section.

(4) Every order made under this section shall—

(a) Be in writing; and
(b) Contain a statement of the reasons on which it is based; and
(c) Contain a clear statement of the medical practitioner's right to apply to the Tribunal for the revocation of the order; and
(d) Be signed by the chairperson or a deputy chairperson of the Tribunal

(5) The Secretary shall ensure that a copy of an order made under this section is given to the medical practitioner concerned as soon as reasonably practicable, and the order shall take effect from the day on which the copy is given to the practitioner."

2.2 **ACCORDINGLY,** the application may be granted only if the Tribunal is satisfied that it is "*necessary and desirable*" to suspend the respondent for the purposes of protecting the health and safety of the public generally. In submissions, the Director set out the background to the complaint giving rise ultimately to the charge laid against the respondent.

2.3 **THE** chronology of this charge is unfortunately characterised by a long period of time between the lodging of a complaint and the presentation of a charge to the Tribunal; in this case a period of some 2 years and 3 months:

7 April 1998	HDC received complaint
30 September 1999	HDC determined that respondent had acted in breach of the Code of Health and Disability Consumers' Rights. Complaint referred to Director of Proceedings for investigation and determination re prosecution.
	HDC's opinion forwarded to Medical Council together with a request for an immediate review of respondent's competence.
20 June 2000	Medical Council advised that disciplinary charge to be laid.
12 July 2000	Charge presented to Tribunal.
28 July 2000	Medical Council orders that respondent undertake a "very strict" competence programme.
1 August 2000	Competence programme commenced.
9 September 2000	Respondent will complete first six weeks of competence programme. The programme to continue over several months provided respondent satisfactorily completes first six weeks.
9 October 2000	Hearing of charge commences (an earlier hearing date was offered by the Tribunal but Counsel and/or witnesses unavailable).

2.4 **IN** submissions, the application for suspension was advanced on the basis that Part V of the Act provides a statutory power on the part of the Medical Council to review the competence of any practitioner, at any time. In the event that the Council determines as an outcome of the competence review that the practitioner's competence is, or may be,

deficient, it may order that the practitioner undertake a competence programme, or that conditions be placed on that practitioner's registration or practising certificate, or both.

2.5 **IN** this present case, the Medical Council did determine after the competence review that the respondent did not meet standards reasonably to be expected; that there were serious concerns for patient safety; and that an "*extremely rigorous*" competence programme was appropriate. The competence programme set for the respondent is described by the Council's Assistant Registrar as being "*the strictest*" whereby there is currently in place a regime of clinical supervision of all of the respondent's patients (including a review of all patients seen by the respondent in the past two years).

2.6 **THE** Assistant Registrar of the Medical Council has advised the Director of Proceedings that "*in the circumstances, the Council is satisfied it has done everything in it's power to protect the health and safety of the public*". No conditions have been placed on either of the respondent's registration or annual practising certificate.

2.7 **IN** the event that the respondent was suspended, the competence programme would cease.

2.8 **IT** was the essence of the Director's submissions that although the Medical Council had done everything it could to protect the health and safety of the public, it lacked any power to suspend the respondent unless or until the respondent failed to complete a competence programme, or the terms of any competence programme were not fulfilled, i.e. "*even where the competence review establishes that the practitioner's practise of medicine*

creates a risk to the public the Council does not have the power to suspend [the practitioner's registration or practising certificate]."

2.9 **IT** was the Director's submission that the Medical Council had done all it could within the Act to protect the public but an order suspending the respondent's registration was the only effective means of ensuring that the public safety is protected.

2.10 **IN** support of the application for suspension the Director also submitted an affidavit from Ms Nicola Sladden, Senior Legal Adviser to the Health and Disability Commissioner. Included in the annexures to her affidavit were two opinions regarding the respondent's care and management of the complainant which is the subject of the charge against him. These opinions have been obtained from Dr David Cook, a specialist gynaecologist.

2.11 **IN** the second of those reports, Dr Cook is very critical of the respondent's care and treatment of the complainant and calls in question the respondent's clinical judgment and expertise. For example, he states that:

"The performance of a cone biopsy when a biopsy had already clearly established the diagnosis is incomprehensible and suggests a lack of understanding of cervical cancer management principles" and

"… I do consider that fundamental errors of judgement were made in this case and that [the complainant] has reasonable grounds for complaint."

3.0 SUBMISSIONS FOR RESPONDENT:

3.1 **FOR** the respondent, Mr Hodson opposed the application on three grounds:

(a) a strict competence programme entailing close supervision of the respondent's practice is in place;

(b) gynaecological practice (which is the subject of this present complaint) is now only a small part of the respondent's practice;

(c) there has been a significant delay in progressing the complaint.

3.2 **IN** oral submissions, Mr Hodson submitted that *"on it's face"* the delay in bringing this charge against the respondent was "*quite incredible*." While the Medical Council could have placed conditions on the respondent's practice it has not; it has not therefore gone as far as it might have to protect the public safety; presumably the Medical Council had gone as far as they thought was necessary to achieve that purpose.

3.3 **THE** institution of the competence programme was sufficient to alleviate any concerns regarding public safety.

3.4 **IN** terms of the application for name suppression, Mr Hodson submitted that practitioners were encouraged to provide 'full and frank' information and generally to co-operate with competence reviewers on the basis that all of the information provided regarding the practitioner and his or her practice would be kept confidential.

3.5 **SIMILARLY**, the terms of any competence programme should also be kept confidential. In the event that the application for suspension was not granted, the fact that such an application was made against the respondent, and all of the specific information disclosed in that context, should be kept confidential. If the respondent was not suspended then he should be able to complete the competence programme free from the pressure of publicity.

4.0 GROUNDS FOR THE APPLICATION FOR NAME SUPPRESSION:

4.1 THIS application was made on the following grounds:

(a) That the respondent has suffered from considerable stress as a result of the application for suspension being made;

(b) That the respondent would suffer severe prejudice if details of the competence programme were made public in relation to a small part of his practice only;

(c) There is no public interest in identifying the respondent in the context of the competence programme given the strict terms of the programme, and he no longer treats patients in the area of practice in which the complaint arose;

(d) That publication of his name may damage his reputation in relation to his current principal area of practice;

(e) The application is limited to the application for suspension.

5.0 THE DECISIONS:

5.1 FOR the reasons which follow, the Tribunal has determined that the application for suspension is not granted, and the application for interim name suppression in relation to the application, is granted.

6.0 REASONS FOR DECISIONS:

6.1 IN terms of the opposition to the application for suspension advanced on behalf of the respondent the Tribunal concluded that, while significant, the delay in making the application for suspension was not a relevant consideration. It is to a large degree, a difficulty created by the provisions of the Act that an application for suspension cannot be

made to the Tribunal until a charge is laid. Prior to that, the Tribunal simply has no jurisdiction to consider such an application.

6.2 **IN** practical terms, it may be preferable if either of the Medical Council or the Tribunal had the power to suspend a practitioner on receipt of a complaint, or complaints, which raised serious concerns for public safety. At present, the time between the date a complaint is received by either of the Medical Council or the Health and Disability Commissioner, and the date at which a charge is presented to the Tribunal is around 18 months to 2 ½ years.

6.3 **ON** that basis, the chronology of this case is not atypical. This aspect of the present application raises two possibilities;

(i) the Tribunal should be slow to suspend a practitioner who has apparently been practising without further complaints being raised during the period of the investigation of the complaint or complaints received (which complaints may be in relation to events occurring some time prior to the complaint being made); or

(ii) the Tribunal should suspend a practitioner as soon as it is possible to do so if any risk to the health or safety of members of the public is evidenced by the nature or circumstances of the complaint.

6.4 **GIVEN** the clear terms in which section 104 of the Act is expressed, and the nature of the harm the section is intended to address, the Tribunal considers that the latter course is more likely to have been intended by the legislators. This approach is further supported by the fact that the Tribunal is empowered to suspend a practitioner of it's own motion (s.104(2)),

and that it is not obliged to give any notice to a practitioner that intends to make such an order (s.104(3)).

6.5 **A** practitioner has the right to apply for revocation of any orders made under section 104. As a result, the Tribunal may suspend a practitioner without notice and without giving the practitioner an opportunity to be heard, and the onus of satisfying the Tribunal that the orders should not stand falls to the practitioner.

6.6 **THESE** powers are conferred notwithstanding that the Tribunal is also required to observe the principles of natural justice (Clause 5, First Schedule). It seems clear that Parliament, in enacting this legislation, intended that the Tribunal is able to act promptly and effectively to minimise any risk to public safety it might identify as the result of a charge being laid, or which are brought to it's notice when or at any time after, a charge is laid.

6.7 **UNDER** normal circumstances, concerns arising as the result of unequivocal opinions expressed by a specialist practitioner with relevant specialist expertise and experience, such as are presented to the Tribunal in support of this application, would be sufficient to persuade the Tribunal that the competence of the practitioner was in issue, and that it may be necessary and desirable to suspend the practitioner in order to minimise any risk to public safety.

6.8 **HOWEVER**, in this present case, the competence of the practitioner has also formally been reviewed by the Medical Council and found wanting, and steps have been taken to address identified deficiencies and/or areas of concern. The competence programme under

which the respondent is currently practising provides for close scrutiny of all of the respondent's current practice, and includes a 'look back' extending over all of the patients treated by the respondent over the past two years.

6.9 **IT** is the Tribunal's view that it is in the best interests of the respondent's current and past patients, and members of the public generally, that the competence programme be allowed to continue, and certainly at least until the end of the first six weeks of the programme. The competency review which lead to the competence programme being instituted was requested by the Health and Disability Commissioner. It does not seem to the Tribunal that it would be sensible or practical to now cause that programme to be interrupted.

6.10 **ANY** risk to the public is currently minimised by the extent of the surveillance currently undertaken, and the level of supervision under which the respondent is practising. The first six weeks of the programme provide the most stringent scrutiny and supervision, and the programme only commenced on 1 August 2000.

6.11 **AT** the end of the initial six week period (9 September) the Medical Council will assess and determine whether or not the respondent is, or can, comply with the competence programme. The programme provides that only if at the end of the first six weeks the Council receives satisfactory reports from the respondent's clinical supervisor and it is satisfied that the patients being treated by the respondent are safe with no ongoing concerns for patient safety, will the respondent be permitted to continue with the programme.

6.12 **IN** the circumstances, it seems premature for the Tribunal to make it's determination as to whether or not it is "*necessary and desirable*" to make the order sought prior to the outcome of the first six weeks of the competence programme being known.

6.13 **ALSO**, if the respondent does not, or cannot, satisfy the requirements of the competency programme, or fails to complete it, the Medical Council itself may suspend the respondent, or a further application may be made to the Tribunal, or the Tribunal may act of it's own motion if necessary.

6.14 **AS** to the final ground of opposition, that the area of the respondent's practice which has been put in issue in the context of this present charge is currently a minor part of the respondent's practice, the Tribunal is of the view that this ground, while a relevant consideration, is less persuasive in light of the wider ambit of the Medical Council's findings on the clinical review, and the broad parameters of the competence programme, which involves "*the strictest of programmes including clinical supervision of all of [the respondent's] patients*" and a review of all patients seen by the respondent over the past two years.

The application for name suppression

6.15 **ON** the application for name suppression in relation to the application for suspension, the Tribunal's decision is a majority decision in favour of granting the application. In determining to grant this application, the Tribunal considered all of the grounds advanced, and it has already commented on the submission made in relation to both applications that the Tribunal should take into account that the area of practice which is the subject of the

charge is now only a minor part of the respondent's practice, and that he has ceased seeing patients with symptoms of cervical cancer or abnormal smear reports altogether. However, the underlying reason for this application advanced by Mr Hodson appears to be that the co-operation of medical practitioners largely depends upon the fact that competence reviews, and competence programmes, and any information provided or obtained in those contexts is intended and understood by practitioners to be kept confidential.

6.16 **THIS** rationale is in keeping with the argument that if the public want medical practitioners to be open about reporting adverse events and competency issues for the purposes of preventing future harm or limiting risk, then any such information provided should be used to benefit the public and practitioners alike, and it should not be used to punish individual practitioners. This is of course consistent with the fundamental rule against self-incrimination. It was Mr Hodson's submission that if the application for name suppression in relation to the application for suspension was not granted, then practitioners might be less willing to co-operate with competence reviews in the future.

6.17 **ALL** of the members of the Tribunal accept (albeit perhaps to greater and lesser degrees) this rationale for non-disclosure, but not all of the members accept the submissions made on behalf of the respondent on this point. In this present instance the respondent has avoided suspension *because* he is currently practising under a competence programme; i.e. the Tribunal is satisfied that it is not "*necessary and desirable*" to suspend the respondent because it is satisfied that there are currently adequate measures in place to protect the

health and safety of members of the public, not because it is satisfied that this present charge raises no concerns for the health or safety of members of the public.

6.18 **IF** the competence programme was not in place, the application may well have been decided differently.

6.19 **THE** competence review which lead to the current competence programme being put in place resulted from the complaint which is the basis for this present charge. The information and adverse opinions which provide the grounds for this application arose in the context of that complaint, and the resulting charge, and thus give rise to the Tribunal's jurisdiction, and obligation, to suspend the respondent if it is satisfied that it is necessary and desirable to do so.

6.20 **THUS**, the competence review and competence programme in this present instance arose fairly and necessarily within the context of the investigation of a complaint and disciplinary proceedings - the competence review *did not itself* give rise to the disciplinary proceedings, and thus any risk of punishment or penalty resulting to the respondent.

6.21 **IT** is therefore the view of the Chair and Mrs White that the underlying rationale for confidentiality in relation to competence reviews and competence programmes is not applicable in the present circumstances and, consistent with the principle of open justice, the public have a right to know, and to have the reassurance of knowing, that an application for suspension was made, and the reasons why it was not granted.

6.22 **THE** Tribunal also does not accept that the fact that the application for suspension has caused stress for the respondent should be a reason to grant an application for name suppression. There can be no doubt that any suggestion of suspending any person's right to practice their profession would cause that person a great deal of stress, anguish or sadness. If that was accepted as a ground for granting such an application, then no practitioner would be suspended.

6.23 **THE** only justification for suspending a practitioner is that provided in section 104; that it is necessary and desirable to do so having regard to the health and safety of members of the public. As with all such applications for name suppression the principles of freedom of speech, of open justice, and of maintaining public confidence in the professional disciplinary process and the medical profession generally, must be balanced against the interests of the individual practitioner, and, in the context of section 104, it is the view of the minority that the public interest (i.e. the health and safety of the public) is the overriding concern.

6.24 **FOR** all of these reasons therefore, the Tribunal's decision on the application for suspension is unanimous, but the decision on the application for name suppression in relation to this application is a majority decision only.

7. ORDERS:

7.1 **THE** Tribunal orders as follows:

7.1.1 THAT the application for suspension pursuant to Section 104 of the Act is not granted.

7.1.2 THAT publication of the practitioner's name or any identifying details in relation to the application for suspension is prohibited until further order of the Tribunal.

DATED at Auckland this 21st day of August 2000.

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W N Brandon

CHAIR