MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

PO Box 5249, Wellington • New Zealand
Ground Floor, NZMA Building • 28 The Terrace, Wellington
Telephone (04) 499 2044 • Fax (04) 499 2045
E-mail mpdt@mpdt.org.nz

DECISION NO.: 132/00/63C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 6 September 2000. Deliberations by the Tribunal were held by a further teleconference on Wednesday 13 September 2000.

PRESENT: Mr T F Fookes - Chair

Dr G S Douglas, Dr B D King, Dr A D Stewart, Mrs H White (members)

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee

Mr C W James for respondent

Ms G J Fraser - Secretary

(for first part of 6 September 2000 call only)

DECISION ON THE APPLICATION FOR INTERIM NAME SUPPRESSION

1.0 THE APPLICATION

1.1 **A** Complaints Assessment Committee has laid a charge against Dr K, registered medical practitioner of xx ("the practitioner"), alleging that he was convicted by a District Court of three offences punishable by imprisonment for a term of three months or longer and that the circumstances of the offences reflect adversely on his fitness to practise medicine.

1.2 **THE** charge is to be heard on 26 October 2000 in Wellington.

1.3 **COUNSEL** for the practitioner filed an application for an interim order prohibiting the publication of the practitioner's name or any details leading to his identification. The application was made on one stated ground and upon further (unstated) grounds which the application said were to be provided before 6 September 2000. (On that date counsel for the parties were to be and were heard by the Tribunal.).

1.4 **THE** Chair of the Tribunal, Mrs W N Brandon, directed on 25 August 2000 that material in support of the application was to be provided prior to 6 September.

1.5 **IN** fact the material containing the further grounds was not made available to the Tribunal until 6 September. This caused the members of the Tribunal considerable inconvenience. Most members read the 36 pages of material during the last hour before the hearing commenced but one member had no opportunity to read it before commencement of the hearing. The Tribunal made this situation clear to counsel but it was agreed that the hearing

should nevertheless proceed and it did proceed at the appointed time. Members were, however, not prepared to make a decision on 6 September as they considered that they needed more time to digest the contents of the material. Accordingly a further teleconference between members was arranged for 13 September 2000 and the application, evidence and submissions were further considered then. That is the reason for the delay between the hearing of the application and the issue of this decision.

2. GROUNDS OF THE APPLICATION

2.1 **THE** grounds of the application were as follows:

2.1.1 that it was desirable to make the order in the interests of the practitioner;

2.1.2 the grounds appearing in the supporting material (which included an affidavit from the practitioner, documents provided by two medical practitioners, a letter from the Medical Council's Health Committee, a transcript of the observations made by the learned Judge who sentenced the practitioner on two of the charges and a copy of a voluntary undertaking given by the practitioner to the Health Committee).

2.2 **THE** grounds which appeared from the supporting material will be dealt with later in this decision.

3. SUBMISSIONS

3.1 **FOR** the applicant Mr James submitted that:

3.1.1 this was an interim application only;

3.1.2 that in this case there was no question of publicity being desirable to "flush out" other concerns;

3.1.3 that the practitioner had survived considerable publicity in connection with his appearance in the District Court on two of the three charges, had suffered quite extensively from it and had resorted to alcohol as a result;

3.1.4 that there had been a big investment (by others) in the practitioner since the events in question and that it would be a shame to put that in jeopardy;

3.1.5 that the practitioner's young daughters had had a "rough time" as a result of the publicity in connection with two of three charges and that the imposition of the father's sins on them was not called for.

3.2 **FOR** the CAC Ms McDonald submitted that the CAC left it to the Tribunal to decide, that the CAC did not consent to the application but that it was not the sort of case where the CAC wished to take a strong line in opposition to the application. She noted however that the Tribunal would be well aware of the increasing trend in Court decisions towards openness in judicial, and quasi-judicial, proceedings. She also noted that this was a case involving referral of convictions which would not be denied. It was therefore to be distinguished from a situation in which a charge against a medical practitioner was to be denied.

4. THE LAW

4.1 **IN** *R v Liddell* [1995] 1 NZLR 538, when dealing with an appeal by the Solicitor-General against suppression which had been granted to *Liddell*, the Court of Appeal said

at p546 that in considering whether the power to suppress (conferred by s 140 of the Criminal Justice Act 1985) should be exercised:

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

The basic value of freedom to receive and impart information has been re-emphasised by s 14 of the NZ Bill of Rights Act 1990 ..."

At p 547 the Court said:

"Departures from the principles are necessary at times to avoid prejudice in pending trials ...

The room that the legislature has left for judicial discretion in this field means that it would be inappropriate for this Court to lay down any fettering code. What has to be stressed is that the prime facie presumption as to reporting is always in favour of openness. Name restrictions as to victims of sexual crimes are automatic (subject to the possibility in a range of cases of orders to the contrary) and they are permissible for accused or convicted persons. But they are never to be imposed lightly, and in cases of conviction for serious crime, the jurisdiction has to be exercised with the utmost caution."

4.2 **IN** *Lewis v Wilson & Horton Limited* (unreported, Court of Appeal, CAC 131/00, 29 August 2000) the Court of Appeal reiterated (at p 17) that the prima facie presumption as to reporting is always in favour of openness, set out (at pp 17-18) five factors which it is usual to take into account in deciding whether that presumption should be displaced in a particular case and then said (at p 18):

"The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield. And since the Judge is required by s3 to apply the New Zealand Bill of Rights Act 1990, it will be necessary for the Judge to consider whether in the circumstances the order prohibiting publication under s 140 is a reasonable limitation upon the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5). Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome."

4.3 **IN** *M v Police* (1991) 8 CRNZ 14, Fisher J said (at p 15):

"In general the healthy winds of publicity should blow through the workings of the Court. The public should know what is going on in their public institutions. It is important that justice be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, the publicity might lead to the discovery of additional evidence or offences, or the absence of publicity might present the defendant with an opportunity to re-offend.

....

When these competing considerations have all been identified in any given case they must be weighed against each other ...."

4.4 **SECTION** 106 (1) and (2) of the Medical Practitioners Act 1995 provide as follows:

"(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 (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 ...

(a) ...
(b) ...
(c) ...
(d) Subject to subsection (7) of this section, an order prohibiting the publication of the name, or any particulars of the affairs, of any person."

4.5 **WHEN** determining an application under section 106 the Tribunal has to balance the general principle that every hearing of the Tribunal shall be in public (with the consequent protection to the public and the medical profession) against the interests of a practitioner and, where applicable, his or her family. Those interests compete with the interests of the public generally, this latter interest identified variously in previous cases as residing in the principle of open justice, the public expectations of accountability and transparency in the disciplinary process, the importance of freedom of speech and the media's right to report Court proceedings fairly of interest to the public. As to these matters, the decisions in *S v*

Wellington District Law Society (AP 319/95, High Court, Wellington, 11 October 1996), *P v MPDT* (AP 2490/97, District Court, Auckland, 18 June 1997), *W v Complaints Assessment Committee* (MA 122/98, District Court, Wellington, 9 July 1998) and *M and another v CAC* (106/99, District Court, Wellington, 22 April 1999) have all been considered.

5. RELEVANT FACTS:

5.1 **THE** following matters appear from the material put before the Tribunal on behalf of the practitioner and appear to it to be relevant:

5.1.1 **FOLLOWING** the practitioner's first two convictions the learned judge who dealt with his case declined to suppress the practitioner's name.

5.1.2 **THE** practitioner then endured considerable publicity in national newspapers and on radio.

5.1.3 **HE** has sworn that media representatives:

(a) endeavoured to photograph his xx year-old daughters at the school they attended and were so intrusive that the representatives had to be escorted off the premises;

(b) also kept knocking on the door of his home and hid in the near vicinity to take pictures.

5.1.4 **HIS** daughters found such activities disruptive and stressful and were subjected to taunting and teasing at school and came home crying every day. The older daughter became withdrawn and has still not fully recovered. The younger daughter refused to go back to school and had recurrent nightmares.

5.1.5 **IT** became necessary to change the daughters' school to give them a fresh start and now, nine months later, they are beginning to settle and find new friends.

5.1.6 **IN** November 1999 the practitioner became depressed due to the newspaper and radio publicity and how it was affecting his family and resorted to alcohol which resulted in his being convicted of an alcohol-related driving offence the following month. (It is not known to the Tribunal whether this offence resulted in further publicity.)

5.1.7 **THE** offences which resulted in the practitioner's first two convictions are alleged to have occurred between January and July 1999 and resulted from an addiction which he has had since 1987 and the alcohol-related driving offence brought to light a separate dependence on alcohol.

5.1.8 **AT** a meeting with the Health Committee of the Medical Council on 7 July 1999, the practitioner agreed to the Committee's request that he withdraw from practice immediately and to refer himself for intensive treatment which he subsequently undertook. He resumed practice with effect from 27 September 1999.

5.1.9 **FOLLOWING** the alcohol-related driving offence in December 1999 he admitted himself to the Queen Mary Hospital in Hanmer to undertake the five-week course of in-patient treatment and he was discharged from the hospital on 14 January 2000. On 8 February 2000, following an independent assessment of him, approval was given by the Health Committee for him to resume work under an extremely detailed voluntary undertaking to that committee which the Tribunal considers to be appropriately strict and comprehensive. The Health Committee

is satisfied that he is fit to practise provided he remains compliant with the commitments he has made to that committee.

5.1.10 **THE** practitioner's own general practitioner has noted that the practitioner has acknowledged his dependency problems and is positively addressing them, perhaps for the first time in his life. He is optimistic that the practitioner will rehabilitate to continue his high standard of medical practice.

5.1.11 **THE** practitioner feels that his progress to-date in respect of rehabilitation could be affected by further publicity. He is still in a fragile state, being once again fearful of the effects of further publicity on his daughters. He acknowledges the considerable trust which has been invested in him and is fearful that he could somehow put this at risk if his name were not suppressed as old wounds would open with the publicity and fear for the well-being of his daughters.

5.1.12 **A** full psychiatric report is to be provided to the Tribunal when it hears the charge against the practitioner on 26 October.

6. THE BALANCING EXERCISE:

6.1 **WE** have already noted the Court of Appeal decisions which emphasise that the starting point is the presumption in favour of openness and that the balance must come down clearly in favour of suppression if the presumption in favour of open reporting is to be overcome.

6.2 **WE** also unreservedly accept the general desirability of the healthy winds of publicity blowing through the hearings of the Tribunal and of the transparency of proceedings before

it and have asked ourselves whether there is any sufficient basis for the principle of open justice yielding in this case.

6.3 **IN** this particular case considerable care and caution are required because of the public interest in knowing of the identity of medical practitioners with convictions for ostensibly serious offences, because the convictions are a matter of record and because it might well be asked what has changed since the District Court refused to suppress the name of the practitioner.

6.4 **THE** Tribunal has a discretion as to whether or not to grant suppression and may grant it if it considers that desirable. The Court of Appeal in *Lewis v Wilson & Horton Limited* (at p 17) specifically included, in its list of factors which it is usual to take into account in deciding whether the prima facie presumption should be displaced in a particular case, two which are relevant in this case namely *"adverse impact upon the prospects for rehabilitation of a person convicted"* and *"circumstances personal to the person appearing before the Court, his family, or those who work with him and impact upon financial and professional interests"*.

6.5 **SINCE** this is an application for an interim order only, what we have to decide is essentially whether, between now and the decision of the Tribunal which hears the charge against the practitioner on 26 October, it is desirable that his name and any particulars which might tend to identify him should be suppressed.

6.6 **WE** have come to the conclusion that it is desirable that in the interim his name and identifying particulars should be suppressed and we propose to make an order accordingly.

6.7 **A** summary of the reasons for our decision is as follows:

6.7.1 **WE** are satisfied that publicity could have a seriously adverse impact upon the practitioner's prospects for rehabilitation. We accept that he is still in a fragile state and that his fears about the effects that further publicity would have on his daughters are genuinely held. He is apparently a practitioner of ability. His rehabilitation is desirable in both his and the public interest. To expose his prospects of successful rehabilitation to the risk of significant harm flowing from his name being made public before the hearing of the charge, and to disrupt his medical management during that period, is in our opinion unjustified.

6.7.2 **WHILE** noting that circumstances personal to the person and his family are usually taken into account in deciding whether the prima facie presumption in favour of openness should be displaced the Court of Appeal said that as it was usual for distress and embarrassment to attend criminal proceedings some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting. In this case we consider that interim suppression is also desirable having regard to the interests of the practitioner's young daughters. They have already suffered to an extent which we do not consider can reasonably be described as usual or ordinary and further publicity prior to the hearing of the

charge could well have a seriously adverse effect upon them at a time when they are beginning to recover and settle.

6.7.3 **WE** are satisfied that the terms of the practitioner's undertaking, the strictness of his supervision and the Health Committee's opinion mean that everything which it is reasonably possible to do to make it safe for him to practise has been done and that it is not necessary that, in the few weeks between now and when the charge is to be heard, his name should be made public so as to remind patients of his addictions. Patients living in the area where he practises have already had the opportunity of learning of at least one of his addictions through the extensive publicity which there has already been in newspapers and on radio following his conviction on two of the three charges. (The learned Judge when sentencing the practitioner specifically referred to the underlying reason for the offending being an addiction which he said the practitioner had.)

6.7.4 **WHAT** has changed since the learned District Court Judge refused to grant suppression is that the practitioner:

6.7.4.1 subsequently committed the alcohol-related offence;

6.7.4.2 then underwent the five-week course at Hanmer;

6.7.4.3 is now positively addressing his dependency problems and is making good progress (evidenced by his not having relapsed since leaving Hanmer in mid-January 2000);

6.7.4.4 is the cause of optimism as far as his general practitioner's view of his prospects for successful rehabilitation is concerned.

6.7.5 **IN** his affidavit the practitioner has sworn that when it hears the charge against him the Tribunal will be provided with a detailed psychiatric report on the topic of

name suppression. We must say that it would have been helpful had that report been provided to us before we heard this application but we believe that it is desirable that the Tribunal which hears the charge should have all its options open to it whereas if we refused name suppression now and the practitioner's name was publicised before the hearing, or in reports of the hearing, suppression of name by that Tribunal (if that course were possible and commended itself to the Tribunal) would effectively be futile since the practitioner's name, his appearance before the Tribunal and the reasons for that appearance would already have been publicised.

6.7.6 **THERE** is, as Ms McDonald rightly said, an increasing trend in the Courts towards openness in reporting. We have noted that trend and given full weight to the relevant Court decisions. We are however satisfied that this is a case in which the balance does come down clearly in favour of interim suppression and that in the circumstances an order to that effect is desirable.

6.7.7 **PROVIDED** that the practitioner continues to comply with the terms of his undertaking we do not think that there is any appreciable risk to public safety if the application for interim suppression is granted. We intend to deal with the possibility that he may not so continue by way of one of the orders we propose to make.

6.7.8 **WE** do not consider that the media' s right to report proceedings fairly of interest to the public would be unduly compromised by prohibiting publication of the practitioner's name until the charge has been determined.

7. OBSERVATIONS:

7.1 **THE** Tribunal wishes to make the following observations:

7.1.1 **NOT** all of the Tribunal members who heard and determined this application will hear the charge laid by the CAC. Nothing in this decision is intended to or should influence in any way the Tribunal's decision on the CAC's charge or on any application which may be made to that Tribunal for permanent suppression. Our decision is only that interim suppression should be granted.

7.1.2 **THE** Tribunal understands that the Health Committee is to meet the practitioner on 25 October 2000 and notes that if the CAC's charge is admitted by the practitioner (or found proved) it would be helpful if up to date information from that meeting were provided to the Tribunal on 26 October while all members are present and able to ask questions.

7.1.3 **AN** important, although by no means the only, consideration in the Tribunal's arriving at this decision is that the practitioner is currently considered by the Health Committee to be safe to practise as long as he is compliant with the terms of his undertaking. This has been important to us in balancing all aspects of the public interest against the interests of the practitioner and his family. Were the practitioner no longer compliant it is, to say the least, possible that the Tribunal's attitude towards interim suppression continuing could change. Should the practitioner, at any time before the hearing scheduled for 26 October 2000, depart in any material way from the terms of the undertaking the Tribunal would wish to be informed of that immediately so that it could consider whether interim suppression had ceased to be appropriate. For that reason it proposes to reserve leave to the CAC to move for revocation of the order granting interim

suppression if it considers that the practitioner has in a material respect failed to comply with one or more of the terms of his undertaking to the Health Committee.

7.1.4 **WE** have not granted interim suppression lightly but, for the reasons set out herein, we are - after considering the interests of the practitioner and his daughters and the public interest - satisfied that it is desirable to suppress the practitioner's identity at this stage. The members of the Tribunal which sits on 26 October will determine whether the CAC's charge against the practitioner is proved and, if so, what is to be the position thereafter.

7.2 **THE** Tribunal's decision is unanimous.

8. **ORDERS:**

8.1 **THE** Tribunal hereby orders that:

8.1.1 publication of the name, and any particulars of the affairs, of the practitioner is prohibited until the further order of the Tribunal;

8.1.2 leave is reserved to the CAC to apply to the Tribunal, at any time between the date of this decision and the date on which its charge against the practitioner is heard, for revocation of this order if the CAC considers that the practitioner has in a material respect failed to comply with one or more of the terms of his undertaking to the Health Committee of the Medical Council.

DATED at Wellington this 25th day of September 2000.

_____

T F Fookes

SENIOR DEPUTY CHAIR