Medical Practitioners Disciplinary Tribunal

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DECISION NO: 29/97/17D

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by the Director of Proceedings pursuant to Section 93(1)(b) of the Act against **RICHARD JONATHAN CHARLES WALKEY** medical practitioner of Auckland

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr P J Cartwright (Chair)

Dr J W Gleisner, Dr M-J P Reid, Dr A D Stewart,

Mr G Searancke (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Date of Hearing:	2 March 1998 at Auckland
Date of Receipt of Submissions:	20 April 1998 and 14 May 1998
Date of Decision:	27 May 1998

APPEARANCES: Ms K G Davenport, Director of Proceedings

Mr C W James for Dr R J C Walkey ("the respondent").

1. PARTICULARS OF CHARGE:

THE Director of Proceedings pursuant to section 102 of the Medical Practitioners Act charges Richard Walkey of Auckland Medical Practitioner that between 13 and 21 November 1996 his management and treatment of A was inappropriate.

Namely:

1. That he is in breach of Rights 1, 4(2), 4(3), 6(1)(a) and 7(1) of the Code of Health and Disability Services Consumers' Rights.

RIGHT 1

Right to be Treated with Respect

1) Every consumer has the right to be treated with respect.

2) Every consumer has the right to have his or her privacy respected.

3) Every consumer has the right to be provided with services that take into account the needs, values, and beliefs of different cultural, religious, social, and ethnic groups, including the needs, values, and beliefs of Maori.

RIGHT 4

Right to Services of an Appropriate Standard

2) *Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.*

3) *Every consumer has the right to have services provided in a manner consistent with his or her needs.*

RIGHT 6

Right to be Fully Informed

1) *Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive. including -*

   a) *An explanation of his or her condition; and*

RIGHT 7

Right to Make an Informed Choice and Give Informed Consent

1) *Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise.*

AND/OR

2. He failed to provide a chaperone during his internal examination/intimate examination of Ms A.

3. He failed to obtain Ms A's consent to the application of the cream to her vaginal area.

4. He failed to inform Ms A of the nature of her condition and the purpose of the treatment proposed and the fact that he intended to apply the ointment himself.

5. That his application of the ointment to Ms A's vagina amounts to indecent assault or sexual violation as that term is defined in the NZ Medical Council's statement for the Profession on Sexual Abuse dated June 1994.

6. He failed to take into account in his overall management of Ms A's recurrent pruritus vulvae the fact that she had been sexually abused and was in need of particularly sensitive treatment when he knew or ought to have known she had been so abused.

7. He failed to treat her with correct dignity and respect as set out in Right 1 of the Code of Health and Disability Services Consumer's Rights.

Such conduct reflects adversely on the practitioner's fitness to practice medicine, being disgraceful conduct in a professional respect."

2. AMENDMENTS TO PARTICULARS OF CHARGE:

2.1 **PURSUANT** to Clause 14 of the First Schedule of the Act, the Tribunal has the power, at any time during the hearing of any charge laid under Section 102 of the Act, to amend the charge in any way.

2.2 **EXERCISING** that power at the conclusion of the hearing the Tribunal amended the particulars of the charge in the following manner:

- Particular 3 by deletion of the word "vaginal" and substitution of the word 'vulval" in its place.
- Deletion from Particular 5 of the words "vagina", "indecent assault" and "violation" and consequential re-formulation to read:

  "5. That his application of the ointment to Ms A's vulva amounts to sexual impropriety as that term is defined in the NZ Medical Council's statement for the Profession on Sexual Abuse dated June 1994."

3. PRIVACY ORDER:

3.1 **IN** Decision No. 26/97/17D which issued on 25 February 1998 the Tribunal made an Order (following application from Ms Davenport on behalf of Ms A) pursuant to Section 106(2)(a) of the Act that the whole of the hearing by held in private, such order to continue in force pending further order of the Tribunal, but on the basis that any permanent privacy order would be a matter for the Tribunal's consideration following determination of the charge or at such earlier date as either party or the Tribunal in its discretion may consider appropriate.

3.2 **IN** the same Decision the Tribunal made an order (following application from Mr James on behalf of Dr Walkey) pursuant to Section 106(2)(d) of the Act prohibiting publication of the name of Dr Walkey pending the outcome of the proceedings against him.

4. BACKGROUND:

4.1 **MS** A made a complaint to the Health and Disability Commissioner on 20 November 1996. She complained that at a visit to her general practitioner, Dr Walkey, on 18 November 1996 he had inappropriately touched her vulva and clitoris and inappropriately applied cream to her vulva and clitoris. Further she alleged that Dr Walkey applied the cream onto her vulva and clitoris without her knowledge or consent. Ms A had suffered from the same complaint in the past and the doctor had always given her the cream to apply to herself.

4.2 **MS** A had been sexually abused in the past. Dr Walkey was aware of this. Ms A complained that Dr Walkey still acted in a manner that she felt was inappropriate for someone who had suffered sexual abuse previously. He failed to offer her a chaperone and had actively discouraged her from having her mother sit in with her at earlier consultations.

4.3 **MS** A was so distressed by the incident that she went to see another general practitioner the next day and asked if the application was appropriate or not. Her complaint to the Health and Disability Commissioner was made two days later.

4.4 **THE** Commissioner referred Dr Walkey to the Director of Proceedings and the charge, as amended by the Tribunal, has been laid against him. The basis of the charge is that the actions

by Dr Walkey are in clear breach of the Medical Council's Chaperone Statement and its Statement on Sexual Abuse In the Doctor/Patient Relationship.

5. EVIDENCE FOR THE DIRECTOR OF PROCEEDINGS:

A:

5.1 **DR** Walkey had been her GP since she was a small child and he was the GP of her mother.

5.2 **SHE** has xx children who are xx. After the birth of her xx child she began to receive counselling for sexual abuse that had happened to her in her youth. It was in about April 1991 that she first saw Dr Walkey to claim on ACC for counselling for the sexual abuse. To the best of her recollection Dr Walkey asked her some questions about the sexual abuse at that time, so that he was familiar with the circumstances.

5.3 **OCCASIONALLY** Dr Walkey would ask her about matters when she came to visit him after that. He was aware that she was seeing a counsellor and she said she knew that he felt very upset and distressed for her because he kept asking if she was okay and he would hug and often kiss her when she came to visit him. Initially she said this was a kiss on the cheek, but towards the end of the time that she was visiting with Dr Walkey (1995-1996) *"This became a kiss on the lips"*. Ms A explained *"This did not feel right to me but I did not know how to protest against it. It was often after a consultation that he would give me a hug and then a kiss on the cheek. It became very uncomfortable for me when this progressed from a hug to a kiss on the lips"*.

5.4 **HER** mother used to accompany her on visits to Dr Walkey when she had personal problems and would accompany her into the room to see Dr Walkey. One day Dr Walkey said to her he thought she was old enough to be there without her mother who could stay in the waiting room if she wished. Ms A felt pressured to agree to this and thereafter her mother stayed in the waiting room but she did not feel comfortable after this.

5.5 **MS** A works as a sales assistant and in November 1996 she had a very bad recurrence of the vulval itching and irritation that she had experienced previously. It was so bad that her manager at work took her to the A&E clinic on 13 November 1996. The clinic declined to treat her, saying that she needed to go and see Dr Walkey.

5.6 **SHE** duly saw Dr Walkey and he gave her some cream. On her second visit, about a week later, she had to come back and see him to have the problem checked. It was still very itchy and she told Dr Walkey this. He said lets have a look and she hopped up on the examination couch. He did a normal examination, asking her where it was sore. Thinking back now she does not know why he asked her where it was sore because it was always sore in the same place and *"..... he knew this because I had been seeing him about the problem that I call the same problem all the time"*.

5.7 **MS** A explained Dr Walkey then said he had to do an internal examination. Ms A said she said no because it was always normal internally *"but he just did it anyway"*. She did not further object to this but then he began to apply some cream to her. He did not tell her he was going to do this before the application, rather he informed her at the time of the application. He just began to do it. He said *"I will put some cream on you and he put the*

cream on the side where it was itchy which was ok". Then he began to rub it on or near her clitoris which she knew was wrong. She got off the couch and put her underwear on again and said to him that it was still sore. Dr Walkey told her to get back up again and he would put on some anaesthetic cream. Ms A said *"..... he did that and again he not only rubbed it over where it was itchy and sore but also into my clitoris. This was not where I was in pain and he knew this. It felt wrong and I felt very distressed and incredibly upset about it"*.

5.8 **MS** A explained, because she felt embarrassed, that she went away from Dr Walkey without saying anything. She waited at the reception desk while some inquiries were made about her going to see a skin specialist. That night she told her partner and was very distressed. Her partner encouraged her to see another doctor.

5.9 **SHE** went to see Dr Rasmussen at the Union Health Centre in Otara and has been seeing her ever since. The experience with Dr Walkey has added to her feeling of distrust of doctors. With her history of sexual abuse she feels she cannot trust them any more. She feels far more comfortable with a woman doctor.

Janine Rasmussen:

5.10 **DR** Rasmussen, a general practitioner practising at Otahuhu, first saw Ms A on 19 November 1996 when she came to her with an itchy and sore vulva. Ms A informed her that ointment had been applied on her vulva by her previous doctor together with an internal examination which she had considered inappropriate. She told her that she felt unhappy with this. She also stated that on occasions Dr Walkey had hugged and kissed her and this had made her

feel very uncomfortable and she had felt powerless. After discussing this Dr Rasmussen referred her on for further counselling and made an ACC claim for her.

5.11 **DR** Rasmussen recalled that at the first consultation Ms A was very distressed and upset about what she said had happened to her with her former general practitioner.

6. EVIDENCE FOR THE RESPONDENT

6.1 **IN** opening the case for Dr Walkey Mr James explained it was accepted and admitted by Dr Walkey that he did not offer or give Ms A the option of applying the ointment herself, or arrange a chaperone, or give cognisance to Ms A's serious history of sexual abuse. However Mr James said Dr Walkey would emphatically deny that he had inappropriately fondled Ms A's vulva and clitoris in *"rubbing"* in the ointment. Furthermore Dr Walkey would strenuously deny hugging and kissing Ms A on the cheek or on the lips.

Richard Jonathan Charles Walkey:

6.2 **HIS** qualifications are MB BS (1957, Lond).

6.3 **HE** has been the general practitioner for Ms A since 1973, and Ms A's mother as well. At the time of the consultations in November 1996 when Ms A complained of severe pruritis vulvae, he was not conscious of her previous history of sexual abuse and did not turn his mind to it.

6.4 **HE** did not recall referring Ms A for counselling in April 1991, though he had it noted that she was having counselling for sexual abuse. He felt sorry for her and occasionally he inquired

how she was getting on. These inquiries were made in passing in 1991 and 1992 as far as he could recall. Such inquiry was sometimes associated with a sympathetic gesture such as putting a hand on Ms A's shoulder. Physical contact was confined to this cursory gesture.

6.5 **MS** A's mother would often accompany her on visits, but some years ago he recalled Ms A telling him that she did not like the way her mother tended to supervise her care of her children. She commented to him along the lines that she considered she was an adult and should be allowed to look after her children herself, without interference from her mother who tended to monopolise things. At no time did he discourage Mrs A Senior from coming into the surgery with her daughter, though he suggested to Ms A that she might prefer to see him alone. She did this and Mrs A Senior would stay in the waiting room. Ms A appeared quite comfortable and at ease on her own. He certainly did not pressure her to do this. In fact he did not care one way or the other and merely suggested that she might like to attend on her own if that was her wish.

6.6 **ON** 13 November 1996 Ms A came to see him concerning a severe pruritis vulvae. She had earlier that day left work and was seen at xx Hospital's Accident and Emergency Department. They in turn sent her to see him for further management. He was led to believe that the itch had been so severe that she could not refrain from scratching and that this understandably caused her embarrassment at work, hence her urgent visit to A&E.

6.7 **IN** the past Ms A had had treatment on occasions for pruritis vulvae and the condition had responded to Pimafucort cream.

6.8 **IN** September 1993, when Ms A had a recurrence of symptoms, swabs were taken which excluded herpes, chlamydia and Trichomonal infection. Kenacomb local application was prescribed which had eased her symptoms. This reinforced his impression that eczema had a lot to do with the problem. Ms A earlier had an eczematous rash over the back of her head and hand which had settled with Dermovate Scalp Application.

6.9 **ON** the occasion of the visit on 13 November 1996, and having these symptoms described to him, he ordered a full blood count and also a blood sugar and urine test to exclude diabetes. He also prescribed Eurax lotion to see if this would help, an anti-pruritic and anti-parasitic agent as he could not be sure that a parasite was not present.

6.10 **WHEN** Ms A returned on 18 November 1996 complaining that the itch had not improved, he decided that further investigation was necessary and he asked Ms A to get onto the examination couch for that purpose. He did not suggest a chaperone, though on reflection he could have and should have asked her to invite her mother in. At the time he had the impression that Mrs A Senior was in the waiting room as was often the case. Alternatively he could have arranged to have his nurse/receptionist attend. Of course he now realises that he should have made this offer to Ms A, especially with her history of sexual abuse. He regrets that he did not give any thought to her sexual abuse history at this time as his focus was singularly on her presenting condition of recurring pruritis.

6.11 **MS** A did not object to getting on the couch and did not appear embarrassed. She did not indicate that she would like to have a chaperone present. However he concedes that is not really the point as it was his obligation to raise the matter of a chaperone with her.

6.12 **ON** examination he discovered that the whole labial area and pubis were inflamed through scratching. He suspected secondary infection and took a vulval swab using a standard *"swab on a stick"* and sent it off for culture. He did not carry out an internal examination.

6.13 **HE** informed Ms A that the result would be back in three days and that he would arrange an appointment for her to see a specialist.

6.14 **HE** then applied some Kenacomb drops which he spread with a gloved finger to the affected areas. This application did not involve *"rubbing"* as such, but rather a gentle wiping action over the general vaginal area which included the vicinity of the labia and the clitoris, this being the inflamed area she had caused by scratching. He considered that this would soothe the irritation.

6.15 **WHILST** she was getting dressed or after she had dressed, Ms A said that the itch was still troubling her so he asked her to return to the couch so he could apply a local anaesthetic ointment, Proctosedyl, to the affected area. Dr Walkey said *"This application again involved a gentle wiping action over the same affected area in order to get the anaesthetic ointment into contact with the inflamed skin"*. He said he explained to Ms A that the Proctosedyl would numb the itch and allow the Kenacomb time to start working. Application of the Proctosedyl was intended as a temporary measure.

6.16 **AT** the completion of the consultation Ms A left his rooms with normal demeanour. Nothing inappropriate or untoward occurred during this consultation and Ms A gave no indication that she was upset in any way.

6.17 **DR** Walkey concluded his evidence in this vein:

"I was extremely upset to learn that my management had been given this interpretation and that I had caused so much distress. I am not overstating the situation to say that I am devastated to realise that such a misunderstanding has been attributed to my conduct which is depicted as inappropriate and salacious. It is an absolute anathema to me to be portrayed in such a way. I emphatically refute wrong-doing in the sense as alleged, though on reflection I can see that my management could be termed paternalistic in that I did not offer or give Ms A the option of applying the ointment herself or arrange a chaperone or give cognisance to Ms A's serious history of sexual abuse. It is in this sense that I have let Ms A down, let myself down and let down the medical profession. I practised medicine for over 40 years without blemish and at the age of 70 I am in the process of winding down and retiring.

I have offered Ms A my sincere apologies through the Health and Disability Commissioner's office for any offence which I inadvertently caused and for failing to provide a chaperone. I reiterate my apologies and further regret and apologise for not applying my mind to her past history of sexual abuse and not recognising the sensitivities associated with this background. In these respects, and in these respects only, I am guilty in failing to discharge my obligations to Ms A and thereby breached her rights. I am sorry."

Sheryn Pope:

6.18 **MS** Pope explained that she had been employed by Dr Walkey for seven years as his receptionist and that she knew Ms A who had been a patient in the practice for some time.

6.19 **MS** Pope recalled the circumstances of 18 November 1996. Following her consultation with Dr Walkey, Ms A came into the reception room and waited whilst she made arrangements for an appointment with the skin clinic. Ms A chatted to her in a normal fashion and did not appear in any way flushed or disturbed. No indication was given, either by what she said or her demeanour or manner, which indicated that anything was wrong or had caused her concern.

6.20 **ON** hearing that an allegation of impropriety had been made against Dr Walkey in respect of that consultation, she cast her mind back and can only offer the comment that she was indeed surprised by the allegation, particularly bearing in mind Ms A's demeanour when she chatted to her immediately afterwards. Ms Pope explained Ms A *"was so normal and settled that I find her allegation of impropriety difficult to believe"*. The actions complained of by Ms A do not accord with what she knows of Dr Walkey, who is a gentlemen practitioner whom she got to know reasonably well over the seven years of employment with him.

7. ALLEGATION OF HUGGING AND KISSING:

7.1 **HAVING** recorded in general terms the evidence of the witnesses, the Tribunal will first consider Ms A's allegation, that Dr Walkey would hug and often kiss her when she came to visit him. This allegation does not form part of any of the six particulars of the charge. Accordingly it can be dealt with as a separate matter.

7.2 **IT** was Ms A's evidence that initially there was a kiss on the cheek, but towards the end of the time she was visiting Dr Walkey in 1995-1996 it became a kiss on the lips. Ms A said the kissing did not feel right to her, that it was a *"clinch"*-like gesture which she did not know

how to protest against. This evidence conflicts with the evidence of Dr Walkey who denied either hugging or kissing Ms A. It was Dr Walkey's evidence that his inquiries of Ms A were sometimes associated with a sympathetic gesture such as putting a hand on her shoulder. Dr Walkey was emphatic that physical contact was confined to this cursory gesture.

7.3 **MR** James was critical of this aspect of the matter in three respects. First he noted no allegation of this nature was recorded as ever having been investigated by the Health and Disability Commissioner. Secondly there was Dr Walkey's categoric denial that there was ever any hugging or kissing of Ms A on his part. And thirdly, Mr James elicited in evidence from Dr Walkey that Ms A was a hepatitis B carrier and the health problems implicit in kissing a known hepatitis B carrier.

7.4 **THE** Tribunal is bound to conclude that it is unable to resolve this conflict in the evidence. However in the event it is not necessary that this conflict be resolved, given that the allegation of hugging and kissing does not form part of any of the particulars of the charge. It is for the sake of completeness that the Tribunal has turned its mind to this aspect of the matter.

8. PROFESSIONAL GUIDELINES:

8.1 **ALTHOUGH** the Tribunal is a newly constituted body under the Medical Practitioners Act 1995, it has the resources of past statements of the governing bodies of the medical profession on which to draw when assessing professional standards.

8.2 **EFFECTIVE** from 24 June 1993, well before the events to which these proceedings relate, the Medical Council of New Zealand issued a Chaperone Statement for the profession. The

statement confirms that patients have the right to a mutually acceptable third party being present during internal/intimate examinations. The statement requires doctors to inform patients that they may bring a person of their choosing with them. Alternatively in some cases the statement indicates that doctors or institutions will be able to provide a third party. The statement continues that doctors have the right to insist that a third party be present during internal/intimate examinations. Doctors may refuse to conduct a routine internal/intimate examination if a patient refuses consent for a third party to be in the room. There is provision for waiver in life threatening situations.

8.3 **ATTACHED** to the agreed bundle of documents were copies of other Medical Council statements, one titled Trust in the Doctor/Patient Relationship (June 1994), another titled Sexual Abuse in the Doctor/Patient Relationship Statement for the Profession. In summary, these two statements explain the Medical Council's position, which is that any exploitation of a patient, particularly sexual exploitation of the professional relationship, is abusive. The Council's primary concern is protection of the public. The Medical Council does not tolerate sexual abuse by a doctor.

8.4 **FOR** the purpose of disciplinary action, the Medical Council has defined sexual abuse under three categories:

- Sexual impropriety
- Sexual transgression
- Sexual violation

8.5 **SEXUAL** impropriety is defined as (including but not exclusively) any behaviour such as gestures or expressions that are sexually demeaning to a patient, or which demonstrate a lack of respect for the patient's privacy. Several examples of activities considered by the Council to amount to sexual impropriety are given. One of those examples which the Tribunal considers has some application in this case is:

"- Examining the patient intimately without their consent".

8.6 **GIVEN** that the listed examples are qualified as not being exclusive, the Tribunal considers that another example of sexual impropriety would be failure of a doctor to inform a patient that she (or he) has the right to have a chaperone present during an internal/intimate examination. The Tribunal considers that a follow-on further example of sexual impropriety would be the conducting of the actual internal/intimate examination in the absence of a chaperone.

8.7 **SEXUAL** transgression is defined as including (but not exclusively) any inappropriate touching of a patient that is of a sexual nature, short of sexual violation.

As was the case with sexual impropriety, several examples of conduct considered by the Medical Council to amount to sexual transgression are given. Two of those examples which the Tribunal considers may have application in this case are:

"- Touching of breasts or genitals, except for the purpose of appropriate physical examination or treatment.

- The touching of breasts or genitals when the patient has refused or withdrawn consent for the examination or treatment."

8.8 **SEXUAL** violation is irrelevant to the focus of the charge under consideration and need not be examined.

8.9 **FINALLY** the Tribunal will touch on two further points made by the Medical Council in its June 1994 Statement on Trust in the Doctor/Patient Relationship:

1. A victim often finds it very difficult to speak up about abuse and for various reasons, colleagues may remain silent about members of their profession.
2. Consent is not a defence. While doctors may not be aware of their power over patients, patients usually perceive a power differential between themselves and their doctors.

9. PARTICULAR TWO OF THE CHARGE:

9.1 FINDING:

THE Tribunal finds that Dr Walkey failed to provide a chaperone during his internal examination/intimate examination of Ms A.

9.2 DISCUSSION:

9.2.1 **THE** obligation of the Tribunal is to make clear its findings on each particular of the charge, and its finding on any comprehensive charge. In the normal course of events it should also give a reasonably full explanation of its reasons. However in respect of this particular of the charge that is not necessary given that it was admitted by Dr Walkey and by Mr James on his behalf, experienced counsel in this jurisdiction.

9.2.2 **AS** was explained by Mr James at the outset, Dr Walkey has probably practised medicine latterly in a rather paternalistic way. The requirement of the Medical Council that doctors inform patients of their right to have a chaperone present during internal/intimate examinations is clear and unambiguous. The Council's Statement to doctors to that effect pre-dated this complaint by some three years. In the Tribunal's view Dr Walkey's failure to provide a chaperone on the occasion in question was a serious omission, especially given Ms A's past history of sexual abuse. Such omission was compounded by Dr Walkey's admission that he had not bothered to keep up with Medical Council requirements of this nature. Dr Walkey indicated he was not a member of the College of GP's and that his continuing medical education was limited to reading a few journals but nothing much else apart from attendances at a few seminars.

10. PARTICULAR THREE OF THE CHARGE (AS AMENDED):

10.1 FINDING:

THE Tribunal finds that Dr Walkey failed to obtain Ms A's consent to the application of cream to her vulval area.

10.2 DISCUSSION:

10.2.1 **LARGELY** this particular of the charge was admitted by Dr Walkey when he said in his brief of evidence *"I did not offer or give Ms A the option of applying the ointment herself"*. In examination in chief Dr Walkey acknowledged that this was a serious error of judgement on his part.

10.2.2 **FROM** the evidence it was learned that Ms A had suffered from and been treated by Dr Walkey for pruritis vulvae on a number of occasions in the past. Pimafucort cream had been prescribed for Ms A to apply herself. From the evidence of Ms A the impression seems clear enough that it was only on the occasion in question, the 18th of November 1996 consultation, that Dr Walkey had taken the liberty of manually applying medication to Ms A's vulval area.

10.2.3 **THIS** being the case this aspect of Dr Walkey's conduct, or omission, is the gravamen of the complaint. In stark contrast to Dr Walkey's accustomed conduct simply to prescribe when necessary, is the consultation of 18 November 1996. On this occasion Dr Walkey chose, quite contrary to his settled practice in the past, to apply cream or ointment to Ms A's vulval area, and without her consent.

10.2.4 **THE** Tribunal must refute any suggestion that by getting on to the couch Ms A gave an implicit consent to Dr Walkey's manual application of either drops and/or cream/ointment to her vulval area.

11. PARTICULAR FOUR OF THE CHARGE:

11.1 FINDING:

11.1.1 **FIRST** the Tribunal finds not established, to the required standard, the balance of probabilities, that Dr Walkey failed to inform Ms A of the nature of her condition and the purpose of the treatment proposed.

11.1.2 DISCUSSION:

THE Tribunal makes this finding by way of an overview of all of the evidence generally. Given the several occasions in the past when Ms A suffered and was treated by Dr Walkey for pruritis vulvae, it seems inconceivable that she was not fully informed on this occasion. In fact in paragraph 7 of her brief Ms A states *"I had a very bad recurrence of the personal itching and irritation that I experienced"* (Tribunal's emphasis).

11.2 FINDING:

11.2.1 THE Tribunal finds that Dr Walkey failed to inform Ms A that he intended to apply the ointment himself.

11.2.2 DISCUSSION:

LITTLE explanation is necessary to justify this finding. Comments already made to support the finding made in respect of Particular 3 of the charge would seem to have equal application to this Particular.

12. PARTICULAR FIVE OF THE CHARGE (AS AMENDED):

12.1 FINDING:

THE Tribunal finds that Dr Walkey's application of ointment to Ms A's vulva amounts to sexual impropriety as that term is defined in the New Zealand Medical Council's Statement for the Medical Profession on Sexual Abuse dated June 1994.

12.2 DISCUSSION:

12.2.1 **THIS** particular of the charge as originally framed, was absolutely denied by Dr Walkey.

12.2.2 **DESPITE** the unfortunate nature of the task, it is the responsibility of the Tribunal to try and establish just exactly what did happen.

12.2.3 **DR** Walkey acknowledged that he applied both Kenacomb drops and a local anaesthetic ointment to the affected area, *"the general vaginal area which included the vicinity of the labia and the clitoris"*. Dr Walkey explained that the application did not involve *"rubbing"* as such *"but a general wiping action"*.

12.2.4 **ON** the other hand Ms A was emphatic that Dr Walkey applied the drops not only on the side where it was itchy, but also on her clitoris which she said *"I know was wrong"*. When it came to application of the anaesthetic ointment she explained that Dr Walkey *"not only rubbed it over where it was itchy and sore but also into my clitoris"*.

12.2.5 **OBVIOUSLY** the Tribunal is unable to resolve precisely what did happen. But in the event it considers that any conflict in the evidence may be more apparent than real. The fact of the matter is that Dr Walkey chose despite Ms A's objection, and without having given her the option of having a chaperone present, or himself insisting one be present, to apply drops and ointment over her general

vaginal area, which included the labia and the clitoris. Accordingly the Tribunal has made a finding, that Dr Walkey's application of ointment to Ms A's vulva, in the manner described by her, amounts to sexual impropriety, in place of the more serious allegation of indecent assault or sexual violation. On the evidence the Tribunal is not satisfied, to the required standard, that sexual violation, wilful clitoral stimulation, occurred. Nevertheless the Tribunal is satisfied that Ms A had good cause to be distressed resulting from Dr Walkey's application of drops and ointment to her vulval area. Dr Walkey's omission on the subject of the chaperone has left him vulnerable to acceptance by the Tribunal of Ms A's version of the events.

12.2.6 **BRIEF** comment is appropriate by reference to the evidence of Ms Pope, Dr Walkey's receptionist. She explained after the consultation of 18 November 1996 that Ms A gave no indication, either by what she said or her demeanour or manner which indicated that anything was wrong or had caused her concern.

12.2.7 **THE** only construction which the Tribunal considers it can take from this evidence is that a victim of a very unpleasant experience, such as was suffered by Ms A in this case, often finds it very difficult to speak up, and consequently will often remain silent, at least initially. The Tribunal does not construe Ms Pope's evidence as in any way diminishing of what was suffered by Ms A on the occasion in question.

13. PARTICULAR SIX OF THE CHARGE:

13.1 FINDING:

THE Tribunal finds that Dr Walkey failed to take into account in his overall management of Ms A's recurrent pruritis vulvae the fact that she had been sexually abused and was in need of particularly sensitive treatment when he knew or ought to have known she had been so abused.

13.2 DISCUSSION:

LITTLE explanation is necessary to justify this finding. It has been admitted by and on behalf of Dr Walkey. In failing to give cognisance to Ms A's serious history of sexual abuse, Dr Walkey acknowledged that he let Ms A down, let himself down and the medical profession as well.

14. PARTICULAR SEVEN OF THE CHARGE:

14.1 THE Health and Disability Commissioner formed the opinion that Dr Walkey was in breach of Right (1) of the Code of Health and Disability Services Commissioner's Rights. No finding needs to be made by the Tribunal in this respect. The findings already made by the Tribunal will suffice.

15. DETERMINATION:

15.1 THE statement of the Medical Council was prepared to define clearly for New Zealand doctors, the parameters of the doctor/patient relationship and the Council's unequivocal position with regard to sexual abuse in that relationship.

15.2 **THERE** has been considerable discussion as to what level of misconduct we consider has been established arising out of our findings. Immediately following their announcement the Tribunal indicated it considered that they amounted to disgraceful conduct in a professional respect, in accordance with the charge. Although Ms Davenport had reminded the Tribunal in closing submissions of its power to amend charges, no submissions were made that a lower level of offending than that charged may be appropriate.

15.3 **AFTER** further consideration a majority of the Tribunal has determined that the offending, as found, should be reduced to the level of professional misconduct. Primarily the reason for this determination is the inability of the majority to find that Dr Walkey's misconduct was, in any sense, either wilful, deliberate, intended or premeditated, or occurred with sexual intent or for the purpose of sexual gratification. In light of the amendments made to the particulars of the charge, it is the majority's conclusion that the conduct in question, although extremely distressing to the complainant, falls short of disgraceful conduct in a professional respect. The majority has satisfied itself that there is helpful precedent, by reference to past decisions of the Medical Practitioners Disciplinary Committee (under the 1968 Act), which justify its determination as to the reduced level of offending.

15.4 **DESPITE** the decision of the majority, Dr Reid remains satisfied that the level of offending in this case constitutes disgraceful conduct in a professional respect. Dr Reid's dissent is recorded accordingly. Leave is reserved to Dr Reid to write a dissenting opinion should she wish to do so.

16. ORDERS:

16.1 **AFTER** considering submissions as to penalty the Tribunal orders:

16.1.1 **THAT** Dr Walkey by censured;

16.1.2 **THAT** Dr Walkey pay a fine of $2,000.00;

16.1.3 **THAT** Dr Walkey contribute 40% of the costs and expenses of and incidental to the investigation made by the Health and Disability Commissioner, prosecution of the charge by the Director of Proceedings, and the hearing by the Tribunal.

16.1.4 **THAT** publication of the name, or any of the particulars of the affairs of Ms A be prohibited;

16.1.5 **THAT** the order made in Decision No. 26/97/17D prohibiting publication of the name of Dr Walkey pending the outcome of the proceedings be discontinued.

16.1.6 **THAT** publication under Section 138 of the Act be made in the New Zealand Medical Journal.

17. REASONS FOR ORDERS:

17.1 **A** censure is an official expression of disapproval which is entirely appropriate on the facts of this case.

17.2 **THE** Tribunal has power to order payment of a fine not exceeding $20,000.00. Given the initial determination of disgraceful conduct made against Dr Walkey, Ms Davenport submitted that a comparatively substantial fine should be imposed.

17.3 **LIKEWISE** there is statutory authority for recovery, in whole or in part, of the costs and expenses of the Health and Disability Commissioner, the Director of Proceedings and the Tribunal.

17.4 **THE** Tribunal has received an affidavit sworn by Dr Walkey which indicates that his net worth is approximately $43,000.00. The affidavit further states, having retired from practice, that Dr Walkey does not receive any income and in the future will be reliant on National Superannuation.

17.5 **MR** James submitted:

17.5.1 **COGNISANCE** should be given that the Tribunal considered Dr Walkey's transgressions were not the most serious examples of disgraceful conduct;

17.5.2 **DR** Walkey is entitled to leniency and credit for the fact that from the outset he admitted that his conduct was inappropriate, and both in writing and during the hearing offered an apology to the complainant;

17.5.3 **DR** Walkey's relatively modest financial circumstances should be taken into account, bearing in mind that it is he and not his defence body which will be responsible for any financial penalties.

17.6 **THERE** is merit in all three of these recorded submissions.

17.7 ***KAYE*** v Auckland District Law Society (High Court, Auckland, HC 74/97, 4 November 1997, Cartwright, Giles and Barker JJJ) is authority for the proposition:

"As a matter of principle, we consider that the Tribunal ought to take into account a practitioner's ability to pay when determining the quantum of costs orders. Costs should not be punitive."

17.8 **HAVING** taken careful account of the submissions made by Mr James, and Dr Walkey's financial position, the Tribunal considers that a fine of $2,000 and costs, 40% of actual, is an appropriate order.

17.9 **IT** is considered desirable that the effect of the earlier order, made on the application of the complainant, that the hearing be in private, should be preserved. Non-publication of her name or any particulars of her affairs, should effect this end.

17.10 **THE** outcome of the proceedings against Dr Walkey has been determined. The reasons advanced by Dr Walkey on which reliance was placed for the order prohibiting publication of his name, no longer seem to apply. Accordingly the spirit of the legislation and current law principles of open reporting and the public interest, will best be served by discontinuation of the order prohibiting publication of Dr Walkey's name.

17.11 **SUBJECT** to any order made under Section 106 of the Act and any order of any Court, Section 138(2) of the Act provides:

138. Publication of orders - .....

(2) Where the Tribunal makes an order under this Act in respect of any medical practitioner, the Secretary shall cause a notice stating -

(a) The effect of the order; and

(b) The name of the medical practitioner in respect of whom the order is made; and

(c) A summary of the proceedings in which the order is made -

to be published in such publications as the Tribunal may order."

17.12 **FINALLY** it is necessary to comment on the Tribunal's stated earlier intention, that of suspending Dr Walkey from practice.

17.13 **AT** the conclusion of the hearing, after announcing its findings, the Chair conveyed to the parties the proposal of the Tribunal, that Dr Walkey be immediately suspended from practice for a period. Opportunity was given for counsel to make submissions in this regard. It was confirmed that such action was being considered from the perspective of patient safety. It should be explained that the Tribunal had in mind a relatively brief period of suspension, to facilitate Dr Walkey's re-education in matters of basic principle, matters which he seemed to have woefully neglected in recent years.

17.14 **IN** pleading for Dr Walkey to be given time to *"put his house in order"*, Mr James confirmed the Tribunal's impression, that Dr Walkey had it in mind to retire. Mr James explained that Dr Walkey, irrespective of the outcome of the disciplinary hearing, intended to retire at the end of the March 1998. It had been his long-term goal for some time. To that end he had not renewed his practising certificate.

17.15 **ON** the basis of undertakings given by Dr Walkey not to practise medicine beyond 31 March 1998, not to renew his practising certificate and not to conduct intimate examinations of female patients other than in the presence of a chaperone, the Tribunal acceded to Mr James' request not to impose a period of suspension.

17.16 **IN** his final submissions Mr James asked, irrespective of Dr Walkey's retirement from practice at the end of March 1998, that the period of suspension be defined. Given the Tribunal's understanding that Dr Walkey has now sold his practice and has retired, the Tribunal is of the view that the subject of suspension from practice is now closed.

DATED at Auckland this 27th day of May 1998

.....

P J Cartwright

Chair

Medical Practitioners Disciplinary Tribunal