MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 133/99/43C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by a Complaints Assessment Committee pursuant to Section 93(1)(b) of the Act against **ROBERT FRANCIS PHIPPS** medical practitioner of the United Kingdom

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr G D Pearson (Deputy Chair)

Ms S Cole, Dr J W Gleisner, Dr B D King, Dr L F Wilson (Members)

Ms K Davies (Hearing Officer)

Hearing held at Wellington on Thursday 21 September 2000

APPEARANCES: Mr M F McClelland for a Complaints Assessment Committee ("the CAC")

Mr D B Collins QC for Mr R F Phipps.

DECISION ON JURISDICTION

1. THE APPLICATION:

1.1 **MR** Phipps was a consultant surgeon practising at Dunedin. A Complaints Assessment Committee appointed under s.99 of the Medical Practitioner Act 1995 ("the Act") notified this Tribunal that it believed a ground exists entitling the Tribunal to exercise its powers under Section 109 of the Act, and particularised a charge. The charge was received on 26 February 1999. The charge relates to a surgical procedure Mr Phipps undertook in 1994. The Chairperson of this Tribunal issued a notice to Mr Phipps on 5 March 1999 informing him of the charge.

1.2 **MR** Phipps through his counsel contends that the Tribunal has no jurisdiction to deal with that charge. The basis of that contention is that Mr Phipps is no longer a registered medical practitioner in New Zealand. However, there is no dispute that:

- Mr Phipps was a registered medical practitioner at the time of the surgical procedure,

- He was also a registered medical practitioner at the time the charge was brought to the Tribunal, and when the Chairperson issued a notice pursuant to s.103 informing Mr Phipps of the charge.

1.3 **MR** Phipps ceased to be a registered medical practitioner in New Zealand on 19 March 1999. That occurred when Mr Phipps requested the Medical Council to remove his name from the Register. The request was contained in a letter dated 9 March 1999, and apparently received by the Council on 11 March 1999. The letter stated:

"I would be grateful if you would remove my name from the Medical Practitioners List as I no longer live in New Zealand."

1.4 **MR** Phipps' counsel indicated that Mr Phipps received the s.103 notice from the Tribunal in April 1999 (the precise date is not known). By the time that occurred, and at all times since, Mr Phipps has not been a registered medical practitioner in New Zealand. Apparently, Mr Phipps is practising medicine outside New Zealand.

1.5 **ON** Mr Phipps' behalf, his counsel contends that this Tribunal has no jurisdiction to hear the charge because Mr Phipps is not a registered medical practitioner. He contends the Tribunal should recognise that and take no further steps.

2. THE RELEVANT PROVISIONS IN THE ACT:

2.1 **THE** term "medical practitioner" is defined in the Act in this way:

"2. Interpretation—

(1) In this Act, unless the context otherwise requires,—

…

'Medical practitioner' or 'practitioner' means a person registered under this Act:"

2.2 **THE** opening words *"unless the context otherwise requires"* have significance in the present circumstances.

2.3 **THE** provisions of s.44 of the Act are central to the application, it states:

"44. ***Removal from Register on request****—*

(1) The Council shall, on the application of any medical practitioner, order the Registrar to remove the name of that practitioner from the Register.

(2) The Council shall, on the application of any medical practitioner who is registered on the vocational Register in respect of a branch or sub-branch of medicine, order the Registrar to remove the name of that practitioner from the vocational Register in respect of that branch or sub-branch of medicine.

(3) The removal, under this section, of a practitioner's name from the Register or any part of the Register does not affect that practitioner's liability for any act done or default made before the date of the removal."

2.4 **COUNSEL** for both parties accepted that s.44(2) is a mandatory provision, which has the effect of allowing a medical practitioner as of right to have their name removed from the Register.

2.5 **A** number of other sections in the Act are relevant. They include s.97 which sets out the functions of this Tribunal, s.102 dealing with laying charges, 109 providing the grounds on which a medical practitioner can be disciplined, and s.110 dealing with penalties.

2.6 **MATERIAL** parts of those provisions read:

"97. ***Functions of Tribunal****—*

The functions of the Tribunal are—

(a) To consider and adjudicate on proceedings brought pursuant to section 102 of this Act:

(b) To exercise and perform such other functions, powers, and duties as are conferred or imposed on it by or under this Act or any other enactment."

"*102.* ***Laying of charge before Tribunal****—*

(1) A charge against a medical practitioner may be laid before the Tribunal by—

…

(b) A complaints assessment committee, pursuant to section 93 or section 94 of this Act.

(2) Where, under subsection (1) of this section, a charge is laid before the Tribunal, the chairperson of the Tribunal shall, as soon as reasonably practicable after the laying of the charge, convene a hearing of the Tribunal to consider the charge.

…"

"*103.* ***Notice of disciplinary proceedings to be given to practitioner****—*

(1) Where the chairperson of the Tribunal is required to convene a hearing of the Tribunal to consider a charge against a medical practitioner, he or she shall forthwith cause to be given to the practitioner a notice—

(a) Stating that the Director of Proceedings, or a complaints assessment committee, as the case may be, has reason to believe that a ground exists entitling the Tribunal to exercise its powers under section 109 of this Act; and

(b) Containing such particulars as will clearly inform the practitioner of the substance of the ground believed to exist; and

(c) Specifying the particulars of the charge; and

(d) Specifying a date (being not less than 20 working days, and not more than 60 working days, after the date on which the notice is received by the practitioner) on which the Tribunal intends to hear the matter.

…"

"*109.* ***Grounds on which medical practitioner may be disciplined****—*

(1) Subject to subsections (3) and (4) of this section, if the Tribunal, after conducting a hearing on a charge laid under section 102 of this Act against a medical practitioner, is satisfied that the practitioner—

(a) Has been guilty of disgraceful conduct in a professional respect; or

(b) Has been guilty of professional misconduct; or

(c) Has been guilty of conduct unbecoming a medical practitioner, and that conduct reflects adversely on the practitioner's fitness to practise medicine; or

… —

the Tribunal may make any 1 or more of the orders authorised by section 110 of this Act.

…"

"*110.* ***Penalties****—*

(1) In any case to which section 109 of this Act applies, the Tribunal may,—

(a) Subject to subsection (2) of this section, order that the name of the medical practitioner be removed from the Register or any part of the Register:

(b) Order that the registration of the medical practitioner be suspended for a period not exceeding 12 months:

(c) Order that the medical practitioner may, for a period not exceeding 3 years, practise medicine only in accordance with such conditions as to employment, supervision, or otherwise as are specified in the order:

(d) Order that the medical practitioner be censured:

> *(e) Subject to subsections (3) and (4) of this section, order that the medical practitioner pay a fine not exceeding $20,000:*
>
> *(f) Order that the medical practitioner pay part or all of the costs and expenses …"*
>
> …"

2.7 **IN** respect of the power to impose a fine, if the charge in the present case were proved, the fine would be limited to $1,000 as the allegation relates to events that pre-date the Act coming into force.

3. THE CONTENTION FOR MR PHIPPS:

3.1 **THE** primary argument advanced for Mr Phipps by Mr Collins QC is that various provisions in the Act dealing with the jurisdiction, procedure and powers of this Tribunal relate to a "medical practitioner". Mr Phipps is not now a medical practitioner as defined in s.2 of the Act. It follows, that this Tribunal has neither jurisdiction nor power to deal with the charge relating to Mr Phipps. In particular sections 102, 103, 109 and 110 are said to relate only to medical practitioners, not former medical practitioners.

3.2 **THE** submission went on to contend that the purpose of disciplinary hearings is to ascertain if a medical practitioner is guilty of a disciplinary offence, and if so, exercise the power to impose a penalty. The disciplinary process in the Act is said not to concern anyone who is not a Medical Practitioner at the time the charge is heard. Additionally, the contention was that because the power to impose penalties relates only to medical practitioners, no penalty could be imposed on Mr Phipps even if the charge advanced to that point.

3.3 **MR** Collins contended, in the course of the hearing, Parliament may have deliberately excluded former medical practitioners from the disciplinary process, intending only to cover persons practising at the time of a disciplinary hearing. The argument was that the objectives of the disciplinary process would be met by voluntary de-registration. Though, as an alternative Mr Collins said that those who drafted s.44(3) may not have fully appreciated the implications of the subsection. In particular, he said they might not have fully understood that the subsection does not confer jurisdiction on this Tribunal.

3.4 **IT** is clear that Mr Phipps was a registered medical practitioner when the charge was laid with the Tribunal (s.102 and consequent action under s.103). Furthermore, s.109 appears to use the words "medical practitioner" and "practitioner" with reference to the status at the time the charge was laid. Similarly, s.110 appears to apply to any person found guilty under s.109. In reply to the Complaints Assessment Committee ("the CAC") relying on that, Mr Collins referred to s.6 of the Interpretation Act 1999. He argued that s.6 of the Interpretation Act 1999 by providing "An enactment applies to circumstances as they arise" requires that the person affected be a medical practitioner at the time of the hearing of the charge.

3.5 **IN** relation to s.44(3) of the Act Mr Collins contended it does not confer jurisdiction on the Tribunal, and if it were to have that effect the text should have expressly referred to the jurisdiction under s.102, and the powers under s.109 and 110. The argument was that s.44(3) "may prevent a person escaping liability in other forms (e.g. at common law and under other statutes which impose liability on persons registered or formerly registered as medical practitioners)". However, at the hearing Mr Collins was not able to point to any

examples of liability, other than the disciplinary process, where s.44(3) preserved liability. Ordinarily medical practitioners are responsible on the basis of their status at the time they performed particular acts or made particular omissions. Mr Collins accordingly suggested that the function of s.44(3) was to confirm that the Health and Disability Commissioners Act 1999 applied to former practitioners, as it does in its terms. Mr Collins conceded:

"The Health and Disability Commissioners Act 1994 defines a medical practitioner to mean '… <u>any person for the time being</u> registered as a medical practitioner under the Medical Practitioners Act 1995 …'. The additional words <u>'for the time being'</u> means registered at the time of the alleged breach of the Code."

3.6 **ACCORDINGLY**, the position taken for Mr Phipps was that s.44(3) did not apply to the disciplinary process as it did not refer to it specifically. The only apparent function of the provision was said to be to confirm what was already contained in the Health and Disability Commissioners Act. We note, one of the functions of the Health and Disability Commissioner is to direct complaints into the disciplinary process.

4. THE RESPONSE BY THE CAC:

4.1 **FOR** the CAC Mr McClelland and Ms Manning replied, with three responses:

- First, that the objectives of the disciplinary process are compromised if medical practitioners can exercise their right to have their names removed from the Register, and prevent or stop disciplinary proceedings being brought against them.
- Second, that s.44(3) unambiguously and directly prevents a medical practitioner avoiding any liability, including liability under the disciplinary process, by having their name removed from the Register.

- Third, as the charge was laid before the Tribunal while Mr Phipps was still registered, the relevant sections on their face require this Tribunal to deal with the charge, convene a hearing; and if the charge is proved, apply the provisions relating to penalty.

5. DECISION:

5.1 **IN** our view this application is fundamentally misconceived. First s.44(3) clearly applies, indeed on current legislation, it appears that the only effect of s.44(3) may be to preserve liability under the disciplinary process.

5.2 **AS** s.44(3) applies, the application cannot succeed. In addition, the charge was laid while Mr Phipps was a registered medical practitioner. The provisions of the Act require the Tribunal to deal with the charge, regardless of the direction contained in s.44(3).

5.3 **THE** wording of s.44(3) is plain and unambiguous. The subsection preserves "liability for any act done or default made before the date of removal [of the practitioner's name from the Register]". There can be no doubt that such a liability is liability under the disciplinary process. There is no merit in the suggestion for Mr Phipps that those plain words should be ignored as the legislation does not use a narrower formulation that only refers to the disciplinary process. It would be untenable for this Tribunal to chose to ignore the effect of plain words, on the basis that some other formulation of words could have been used.

5.4 **THE** appropriateness of applying the plain meaning of the words is reinforced by a number of other factors.

5.5 **FIRST**, it appears that the primary purpose of s.44(3) is to preserve liability under the disciplinary process. There are few occasions when a person can disclaim liability for acts or omissions performed when they had a particular status, on the basis that they have ceased to hold that status by the time they are held to account. Counsel for Mr Phipps has not been able to point to any circumstances where that could apply to a medical practitioner, except for the disciplinary process. Accordingly, inherent in the argument for Mr Phipps is the result that under current legislation s.44(3) would have no effect.

5.6 **SECOND**, it is clear that s.44(3) is an important saving provision directly linked with the immediately preceding subsection that confers a right for practitioners to have their names removed from the Register. It is only appropriate that exercising that right does not excuse the practitioner from liability for acts or omissions before that point in time. Most liabilities will of course inure regardless of that provision. It may be that the only liability that involves substantive or procedural reference to being a medical practitioner, at the time liability is enforced, is the disciplinary process. Regardless, it is no doubt appropriate for the legislation to be in a general form rather than confining it by a specific reference to the disciplinary process. The general expression of the principle in s.44(3) ensures the principle applies to any new legislation, or unforeseen circumstances, we can discern no reason why the legislation should not be expressed in that way.

5.7 **THIRD**, if a medical practitioner can avoid disciplinary processes by adopting the expedient of having their name removed from the Register, it results in a serious defect in the integrity of the registration and disciplinary regime contained in the Act.

5.8 **FOR** some practitioners facing disciplinary proceedings, voluntary removal from the Register is not a significant inconvenience:

- A number of serious disciplinary cases involve practitioners who are prison inmates at the time the disciplinary proceedings are dealt with. Such persons are obviously not able to in fact practise medicine, whether their names are on the Register or not. Furthermore, when persons are facing serious disciplinary charges based on compelling evidence, likely to result in their removal from the Register, voluntary removal from the Register to circumvent the charges is clearly an attractive option.
- In addition, it is not at all uncommon for practitioners to leave New Zealand and practise in other countries, such persons have no need for New Zealand registration.
- Some practitioners have retired from practice for a range of reasons by the time disciplinary charges are heard.

5.9 **WE** note that when practitioners leave New Zealand to practise overseas, their standing in New Zealand can be relevant to an overseas registering authority. New Zealand has no right, obligation or interest in maintaining the standards of practitioners outside New Zealand. None the less, New Zealand does present itself as a country where medical practitioners are subject to an occupational licensing regime with integrity. Section 46 of the Act treats a practitioner's standing with an overseas registering authority as relevant to registration in New Zealand, the converse no doubt applies.

5.10 **IN** the absence of an adverse disciplinary finding, practitioners are entitled to the presumption of innocence. It would be a serious deficiency if:

- Practitioners were able to defeat charges by exercising the right to have their names removed from the Register, practise elsewhere, or not practise for a time; and furthermore
- Be able to seek restoration to the Register at a later point, without any disciplinary finding to impede that.

Mr Collins suggested such circumstances should not cause concern, as the disciplinary proceedings could be revived upon restoration to the Register. The potential difficulties in reviving a disciplinary prosecution after a substantial interval of time are too obvious to require discussion.

5.11 **THERE** are compelling reasons why disciplinary charges should proceed, whether or not a practitioner exercises their right to have their name removed from the Register, if the registration and discipline regime is to maintain its integrity. The function of the disciplinary process is two-fold:

- First, protecting the public.
- Second, the setting and maintenance of professional and ethical standards in the profession (*B v Medical Council* Elias J, High Court, Auckland Registry HC 11/96 8/7/96).

An important element of the first function is providing redress for patients who have been harmed by improper conduct by practitioners. It would be patently unjust for such persons to be denied the opportunity of redress by the practitioner having their name removed from the Register. There are also many instances where the disclosure of impropriety is a necessary element in protecting the public. It could be seriously

detrimental to the public interest to allow practitioners to avoid disclosure, while enjoying the presumption of innocence; and potentially returning to the Register at a later point in time. As to the second element, allowing practitioners to avoid the disciplinary process plainly subverts the setting and maintenance of professional and ethical standards.

5.12 **WE** do not accept, as was contended for Mr Phipps, that if this Tribunal finds the charge before it established no penalty can be imposed on Mr Phipps. Section 44(3) is clearly directed at preventing that occurring. Sections 109 and 110 must apply to a former practitioner by virtue of that provision. In addition, the definition of "medical practitioner" in s.2 of the Act applies subject to the qualification "unless the context otherwise requires". Having regard to s.44(3) the context clearly required that s.110 apply to persons who were practitioners at the time of any offending that is established. Accordingly, censure and a fine are potential penalties.

5.13 **IN** the course of argument, there was discussion as to whether the penalty of striking off could apply. In an earlier decision of this Tribunal *Dassanayake* (23 December 1998, 54/98/31C) circumstances similar to the present case arose, in that the practitioner had exercised his right to have his name removed from the Register before disciplinary charges were heard. The Tribunal applied s.44(3), and treated it as a deeming provision. The deeming effect was considered to maintain the power to direct that the practitioner's name be removed from the Register. That was despite the fact that the name was not on the Register at the time the penalty was imposed. The Tribunal considered this conclusion was necessary to give s.44(3) full effect because:

"The order that a name be removed has consequences not only as regards practice in New Zealand, but also in other jurisdictions. Part of the protection of the public

is protecting not only the New Zealand public now, but prevention of a doctor leaving New Zealand and going, for example to Australia, being able to get registered there and, unless a removal order be made, using Australian registration as a pre-requisite for re-registration in this country. We agree with Mr Lange the scheme of the Act is such that there are consequences which flow from the making of a removal order under Section 110 of the Act that go beyond simple removal from the Register on request, pursuant to Section 44 of the Act."

5.14 **IT** is neither necessary, nor appropriate, to determine whether that view is correct or not to deal with the present application. It is sufficient that we are satisfied that if the charge before the Tribunal is established, the Tribunal has power to impose the penalties of censure and fine.

5.15 **WHILE** the application of s.44(3) is determinative, we record that we also accept the alternative submission for the CAC, that it is not necessary to rely on s.44(3). As Mr Phipps was a registered medical practitioner at the time the charge was laid, no issue can be taken regarding laying the charge under s.102, or the procedures initiated under s.103. It follows that the Tribunal is obliged to deal with the charge (s.97).

5.16 **SECTION** 109 also applies in its terms, as the Tribunal must be dealing with "a charge laid under section 102 of this Act against a medical practitioner". The wording is clearly directed to the person's status at the time the charge was laid, and subsequent references simply identify that person. Furthermore, the context requires that the words include a person who was a "medical practitioner" at the time of the alleged conduct, or when the charge was laid. Accordingly, the references to "medical practitioner" and "practitioner" have to be understood as including any person properly subject to a charge before the Tribunal.

5.17 **SECTION** 110 applies "In any case to which section 109 of this Act applies", and then refers to "the medical practitioner". Those words are sufficient to identify the person against whom the charge has been established as liable to the penalties. The "context qualification" in the s.2 definition of "medical practitioner" puts the matter beyond argument.

5.18 **IN** our view:

- The untenable results inherent in the argument contended for by Mr Phipps,
- The obligation to ascertain the meaning of the Act (s.5 of the Interpretation Act),
- The fact that Mr Phipps was a "medical practitioner" when the charge was laid, when combined with the wording in s.109 and 110, and
- The provision in s.2 of the Act that "medical practitioner" has the meaning appropriate to the context in the Act

are in themselves sufficient to require that s.102, and all the provisions dealing with subsequent disciplinary processes, extend to persons who were registered medical practitioners at the time of alleged disciplinary offences.

6. ADVANCING THE PROCEEDINGS:

6.1 **THESE** proceedings have been delayed. The subject matter of the complaint involves a surgical procedure undertaken in February 1994. There have been various legal proceedings connected with the subject matter of the complaint. The proceedings have been in progress from November 1994 to 27 June of this year. Those proceedings have, apparently, affected the progress of what is now a charge before this Tribunal.

6.2 **IT** is not necessary to explore the reasons for the delay. Mr McClelland has expressed concern on behalf of the complainant that this charge should be heard soon. Mr Phipps prior to this present application applied to have the charge struck out on the grounds of delay.

6.3 **THIS** Tribunal wishes to hear and determine the charge at the earliest possible date.

6.4 **COUNSEL** have indicated that the hearing will take no more than two days, but it will be necessary to contact witnesses to establish when the hearing can take place. The hearing is to take place at Dunedin.

6.5 **AT** this point, the Tribunal can hear the matter on any of the following dates this year:

- **October** 9 -12
- **November** 13 & 14 or 30 & 1/12/00
- **December** 11 - 15

6.6 **WE** request that counsel confer with each other and the Secretary of the Tribunal and agree on a date. If that is not possible within 5 days of receiving this Decision, counsel should notify the Tribunal of the dates available and a date will be set.

6.7 **WE** further direct that 14 days before the hearing, the CAC is to file and serve briefs of evidence, and 7 days prior to the hearing Mr Phipps is to file and serve briefs of evidence.

6.8 **LEAVE** is reserved for either party to apply to vary the directions regarding the filing and exchange of briefs of evidence.

DATED at Wellington this 3rd day of October 2000

.....

G D Pearson

Deputy Chair

Medical Practitioners Disciplinary Tribunal