Medical Practitioners Disciplinary Tribunal

PO Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary

DECISION NO: 102/99/47C

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 **MILES ROGER WISLANG** medical practitioner of Auckland

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Dr F E Bennett, Dr R S J Gellatly,

Associate Professor Dame N Restieaux, Mrs H White (Members)

Ms G J Fraser (Secretary)

Mr R Asher QC (Legal Assessor)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Thursday 7 October 1999 and Thursday 11 November 1999

APPEARANCES: Ms K G Davenport for the Complaints Assessment Committee ("the CAC")

Dr M R Wislang.

SUPPLEMENTARY DECISION - REASONS:

1. THE CHARGE:

1.1 "The Complaints Assessment Committee, pursuant to Section 93(1)(b) Medical Practitioners Act 1995, charges that Dr Miles Wislang, Medical Practitioner of Auckland:

(a) In the course of performing hair transplantations upon Andrew Inglis (also known as Andrew Stylianou) during 1996 and 1997 practised medicine without holding a current practising certificate.

(b) And/or he carried on the business of practice as a hair transplant surgeon without holding a current practising certificate.

being professional misconduct."

2. AMENDED CHARGE:

2.1 **BY** Notice dated 30 August 1999, the Complaints Assessment Committee amended the charge to include an allegation that the particulars of the charge amounted *"to either professional misconduct and/or that Dr Wislang practised medicine outside the extent permitted by, or not in accordance with the conditions of, his registration or any practising certificate held by him"* (Section 109(1)(f)).

2.2 **THAT** amended charge was notified to Dr Wislang by registered letter dated 3 September 1999. In that Notice of the amended charge, the Tribunal advised Dr Wislang that *"you will need to take this into account when preparing your submissions on penalty. You may also wish to seek legal advice to assist you in this matter"*. The hearing then scheduled to take place on 16 September 1999 was vacated in accordance with Section 103(1)(b) of the Act pursuant to which the Tribunal is required to set a hearing date not less than 20 working days after the date on which the notice of the charge is received by the practitioner. In accordance with that requirement, a new hearing date, 7 October 1999, was made and notified to Dr Wislang.

2.3 **COPIES** of the Medical Practitioners Act 1995 and an information brochure *"Disciplinary Proceedings What Happens Following Notice of Disciplinary Proceedings Against a Medical Practitioner - A Guide"* had previously been forwarded to Dr Wislang, together with the Agreed Bundle of Documents prepared by the CAC.

3. THE HEARING:

3.1 **THE** hearing duly commenced at Auckland on 7 October 1999. Dr Wislang was accompanied by a supporter Dr Conyngham. In accordance with the Tribunal's usual practice, the charge (then amended) was read and Dr Wislang was invited to enter a plea. He confirmed his earlier advice that he pleaded guilty to the charge.

3.2 **COUNSEL** for the CAC made submissions first, the tenor of which was that Dr Wislang had practised outside of the conditions on his general registration because it is a condition of registration pursuant to Section 9 or 10 of the Act that:

"*.... No person shall practise medicine under the title of a medical practitioner (as defined in section 2 of this Act) unless he or she holds -*

(a) Both -

(i) Probationary registration, general registration, or vocational registration; and
(ii) A current practising certificate; or ..."

3.3 **THE** CAC alleged that because Dr Wislang had failed to obtain a practising certificate notwithstanding that he was carrying on a medical practice he was practising medicine outside the extent permitted by, or not in accordance with, the conditions of registration, which conditions include the requirement that the practitioner hold a current practising certificate. The CAC alleged that without a practising certificate Dr Wislang was not permitted to practice medicine at all.

3.4 **IT** quickly became apparent to the Tribunal that Dr Wislang had not turned his mind at all to the effect of the amendment, and most particularly to the increased level of potential jeopardy

he faced as a result of the inclusion of the allegation that he had acted in breach of Section 109(1)(f) of the Act.

3.5 **SECTION** 110(2) provides that, if a doctor is found guilty either of disgraceful conduct in a professional respect or of a breach of Section 109(1)(f), his name may be removed from the Medical Register. It was for that reason that the fact that the charge had been altered to incorporate Section 109(1)(f) of the Act was specifically brought to Dr Wislang's attention in the letter notifying him of the amendment to the charge, and he was urged to obtain legal advice.

3.6 **IN** response to questions from the Tribunal, Dr Wislang stated:

(i) That he had not held a practising certificate since 1994;

(ii) That during the period April 1994 to April 1998, notwithstanding that he was aware that he had not obtained a practising certificate he had carried on his medical practice, which practise included carrying out hair transplants operations; advertising his medical services in the Yellow Pages and elsewhere; treating patients, including prescribing and administering drugs; and charging fees for medical services rendered in the course of his medical practice.

(iii) That he had obtained prescription medicines, drugs used in local anaesthesia and such other drugs as he considered necessary for his practice from pharmacists and drug suppliers in the knowledge that such pharmacists and drug suppliers thought that he had a practising certificate and dealt with him in the belief that he was legally entitled to obtain such drugs and medications.

(iv) That when he had pleaded guilty to the Charge he was unaware that:

- The amended charge incorporated Section 109(1)(f) of the Act, i.e. notwithstanding that the Tribunal, by letter dated 3 September 1999, gave Dr Wislang written advice of that fact AND that a copy of the Act had previously been provided to him by the Tribunal AND that he was again advised by the Tribunal to seek legal advice; and
- As a result of the amendment he was, by virtue of the operation of Section 110(2)(b), at risk of the Tribunal making an Order that his name be removed from the register of medical practitioners.

3.7 **AS** a result of this evidence and because he was clearly unprepared to present submissions on penalty (as a result of his pleading guilty to the charge), the Tribunal decided that it would be unfair to Dr Wislang if the hearing was to proceed when he was at any disadvantage and in the absence of his being able to seek legal advice.

3.8 **THE** Tribunal also was concerned that Dr Wislang had indicated his intention of recommencing practice as soon as he could get his affairs in order and that he intended to make an application to the Medical Council for a practising certificate as soon as he was able to commence that process.

3.9 **ACCORDINGLY**, the Tribunal adjourned to consider the situation which had arisen and after it considered the evidence and submissions made up to that point in the hearing, it determined that Dr Wislang had demonstrated such a degree of a lack of insight, judgement and overall ability to organise his affairs that it was necessary and/or desirable having regard to the health and safety of members of the public that his registration be suspended pending

the determination of the charge. The Tribunal simply came to the view that in all the circumstances the most prudent course to adopt was to ensure that the status quo was maintained until this matter could be resolved.

3.10 **THE** Tribunal is satisfied that had Dr Wislang made any sensible and prudent attempt to obtain advice, or indeed to have acquainted himself with the relevant provisions of the Act by way of preparing for the 7 October hearing, the significant costs in terms of time and expense caused to himself, the Tribunal and to the CAC as a result of the necessity to adjourn the hearing, and the events that followed in the period after the original hearing was adjourned, would have been avoided.

3.11 **THE** Tribunal is satisfied that all of these costs and the obvious costs in terms of stress and worry caused to Dr Wislang himself because the original hearing had to be adjourned, resulted entirely from Dr Wislang's own conduct. Dr Wislang clearly lacked insight into the seriousness of his failure to obtain a practising certificate, which failure persisted for over four years. The Tribunal is satisfied that Dr Wislang's failure to obtain a practising certificate and to make any adequate preparation for the hearing of the charge resulted from what appears to be a absence of any ability to organise his affairs appropriately.

3.12 **THIS** lack of judgment also displayed itself in other ways. For example, Dr Wislang also appears not to have given any thought to the jeopardy in which he placed other persons with whom he had dealings during the period he was carrying on his medical practice without holding a practising certificate. For example, the pharmacists and drug companies who filled prescriptions and/or supplied him with the medicines he required to carry on his practice, all

in the belief that he was a "practitioner" within the terms of the relevant legislation, i.e. the Medicines Act, the Misuse of Drugs Act and the Medical Practitioners Act and therefore legally entitled to obtain the medicines he required to carry on his medical practice.

3.13 **AS** the result of both the tenor and volume of the material submitted to the Tribunal by Dr Wislang after the hearing was adjourned, the Tribunal decided to engage a Legal Assessor to provide a legal opinion as to whether or not Section 109(1)(f) was applicable in the circumstances. Dr Wislang himself also requested that a legal assessor be appointed, notwithstanding that the charge was adjourned on a part-heard basis.

3.14 **DR** Wislang was orally advised of the course the Tribunal proposed to adopt and he was given written notice of the Order suspending his registration under Section 104(1)(a) of the Act by formal Order of the Tribunal dated 8 October 1999. The Order also contained advice to Dr Wislang that, pursuant to Section 105 of the Act he could apply to the Tribunal for a revocation of the Order at any time.

3.15 **FOLLOWING** the adjournment of the 7 October hearing the Tribunal received numerous letters and facsimile notices from Dr Wislang. Most of these were directed at objecting to the amendment of the charge to include a charge under Section 109(1)(f).

3.16 **MR** Raynor Asher QC, Barrister, of Auckland was appointed by the Tribunal, and the Chair, Mrs Brandon, met with Mr Asher to provide him with a copy of the Tribunal's file. After receiving and considering the advice provided to the Tribunal by Mr Asher, it determined that, in the circumstances of this case, i.e. in the absence of any substantive complaint and thus any

evidence beyond the anecdotal and often confusing evidence given to the Tribunal by Dr Wislang himself in response to questioning by the Tribunal, the allegation that Dr Wislang breached Section 109(1)(f) of the Act should be withdrawn.

3.17 **ACTING** under its power to amend charges provided in Clause 14 of the First Schedule to the Act the Tribunal decided to amend the charge by deleting that allegation. Thus the charge as originally framed remained for hearing at the resumed hearing which was rescheduled to take place in Auckland on 11 November 1999. By letter dated 5 November 1999, Dr Wislang applied for revocation of the Order suspending his registration.

4. THE RESUMED HEARING:

4.1 **AT** the resumed hearing Dr Wislang appeared accompanied by a supporter, Mr A Thomas. Ms Davenport again appeared as counsel for the CAC. At the commencement of the resumed hearing Dr Wislang was invited to enter a plea to the charge of practising without a practising certificate (Section 109(2)). He entered a plea of guilty to practising without a practising certificate but not guilty to professional misconduct. The Tribunal explained the effect of Section 109(2), and Dr Wislang then entered a plea of not guilty to the charge as framed.

5. DETERMINATION:

5.1 **HAVING** heard the submissions on behalf of the CAC and by Dr Wislang, the Tribunal determined as follows:

5.1.1 Dr Wislang's registration is suspended for two months;

5.1.2 Dr Wislang be censured.

5.1.3 Dr Wislang is to pay a fine in the sum of $8,500.00.

5.1.4 Dr Wislang is to pay 35% of the total costs and expenses of and incidental to all of the items referred to in Section 110(1)(f) (ii) to (iv), namely:

(a) The inquiry made by the Complaints Assessment Committee in relation to the subject-matter of the Charge;

(b) The prosecution of the Charge by the CAC;

(c) The hearing by the Tribunal.

5.2 **THE** Decision is to take effect from the date it was advised to Dr Wislang, 11 November 1999.

5.3 **THE** Tribunal advised Dr Wislang of his rights in relation to any appeal against this Decision provided in Part IX of the Act.

6. REASONS:

Suspension:

6.1 **SECTION** 109(2) provides that a medical practitioner is guilty of professional misconduct if, being the holder of general registration, he practises medicine while not holding a current practising certificate. Pursuant to Section 110 of the Act, a practitioner found guilty of professional misconduct may be suspended for a period not exceeding 12 months (Section 110(1)(b)).

6.2 **IN** terms of a finding of professional misconduct, Dr Wislang's conduct, again in the absence of any substantive complaint against him, at first glance appears open to an argument that it is offending at the lower end of the scale.

6.3 **HOWEVER** it must be borne in mind that Dr Wislang practised without a practising certificate for more than four years. He was aware that he did not have a practising certificate but for a variety of reasons simply failed to obtain one. Notwithstanding, throughout that period he held himself out as a medical practitioner properly qualified and entitled to claim that status. He continued to treat patients and, most worryingly, to obtain, prescribe and administer drugs. He admitted that he was aware that all persons, including patients, pharmacists and drug companies, entered into their dealings with him on the basis that he was entitled in all respects to carry on his practice as a hair transplant surgeon and that aspect of his offending and the potential consequences for innocent third parties has already been referred to in this Decision.

6.4 **THE** legislation clearly intended that practising without a practising certificate constitutes a serious offence both by making it an offence of strict liability and deeming it to be an offence at the level of professional misconduct. This is not a case where Dr Wislang's failure to obtain a practising certificate was a mere oversight on his part and, whilst the Tribunal accepts his submission that he was not "*intentionally anarchistic*", nevertheless it cannot disregard the fact that the period of the offending and the potential consequences for others, and for the public generally, are not insignificant.

6.5 **ACCORDINGLY**, the Tribunal determined that a period of suspension was unavoidable.

6.6 **IN** the course of his submissions, Dr Wislang referred the Tribunal to a decision of the English Court of Appeal *Re a Solicitor* [1972] 2LER 811. In this case a solicitor, absent any malfeasance, fraud or other wrongdoing, had failed to keep clients' account books properly written up. Following a hearing of the Law Society's Disciplinary Committee he had been found guilty of professional misconduct and was suspended from practice for six months to enable him during that period to submit an Accountant's Report. The Court of Appeal found that the suspension order should not be enforced however because, having regard to the accountant's certificate, the position which the Disciplinary Committee desired had been achieved in that at the relevant date his accounts were in order.

6.7 **ALTHOUGH** the Committee being functus officio could not have lifted the suspension order, the Court of Appeal on re-hearing could do so and in place of the suspension order the solicitor was ordered to pay all of the costs of the Law Society in the proceedings.

6.8 **THE** relevance of this case to this present hearing was that the U.K. Court of Appeal was referred to a New Zealand case, *Re M* [1930] NZLR 285 in which it was held that the failure of the solicitor to have his Trust Accounts audited amounted to professional misconduct. *"In that case it was argued that his failure was due merely to carelessness, and that as there had been no dishonesty, it was not professional misconduct. But the Court of Appeal in New Zealand held that neglect amounts to professional misconduct. So here. The negligence of the solicitor was reprehensible. He failed for three years 1967-1970 to see that the books were written up. ... Then when proceedings were taken against him and constant pressure brought on him, even after two hearings of the disciplinary committee, he still failed to do it to their satisfaction. This failure and delay was so*

reprehensible that the Committee was entirely justified in finding him guilty of professional misconduct".

6.9 **IN** this case of course the finding of professional misconduct for Dr Wislang's failure to obtain a practising certificate is determined by Section 109(2). However in relation to the question of suspension, the (UK) Court of Appeal dealt with the issue in terms of the purpose which the suspension order was to serve, rather than regarding it simply as a means of punishing the solicitor for his wrongdoing.

6.10 **DR** Wislang submitted that, on that basis, this Tribunal should similarly consider the question of whether or not his registration should be suspended in terms of the purpose any period of suspension would achieve, rather than imposing a period of suspension simply to punish him.

6.11 **THE** Tribunal accepts that submission has validity and accordingly it approached the question of whether or not it should suspend Dr Wislang on that basis. Dr Wislang, understandably, defined *"the purpose"* that might be achieved by suspending his registration narrowly in terms of the purpose which could be achieved in the context of his own situation. The Tribunal however considers that any such *"purpose"* should be considered in a wider context.

6.12 **THE** purposes of imposing a sanction for disciplinary offences are at least three-fold:

- To punish the practitioner;
- As a deterrent to other practitioners; and
- To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct

6.13 **IN** the context of professional discipline sanctions are essentially about holding professional persons accountable. Taking all of these factors into account, the Tribunal was satisfied that a relatively short period of suspension would serve the dual purpose of demonstrating the view it had come to regarding the seriousness of the offending and of demonstrating the Tribunal's and undoubtedly the public's, condemnation of practitioners who wilfully disregard a lawful requirement which, after all, is intended to protect the public from medical practitioners who might seek to practice medicine outside of the formal structures of the profession.

6.14 **ACCORDINGLY**, the Tribunal decided that a period of suspension for two months from the date of its decision was sufficient for all present purposes. The Tribunal is satisfied that a period of suspension is desirable and appropriate notwithstanding that Dr Wislang is not currently practising medicine in any event.

7. CENSURE

DR Wislang is to be censured (Section 110(b)). Dr Wislang accepted that censure inevitably follows a finding of professional misconduct and the Tribunal is satisfied that censure is warranted in this particular case.

8. FINE:

8.1 **THE** Tribunal determined that Dr Wislang should pay a fine in the sum of $8,500.00. In making his submissions to the Tribunal, Dr Wislang suggested that he should pay a fine which reflected approximately the equivalent cost he would have incurred had he properly obtained practising certificates in 1994, 1995, 1996 and 1997. The annual cost of obtaining a practising certificate is currently approximately $700.00. Taking that cost into account,

together with GST, over a period of four years, the Tribunal approximates the costs of obtaining a practising certificate which Dr Wislang avoided to be $3-3,500.00. Such a sum should be included as a component of a fine.

8.2 **IN** addition, the Tribunal is satisfied that the quantum of a fine should also include a payment by way of sanction. To date there is an absence of any similar cases being determined under the 1995 Act, which substantially increased the maximum fine payable to $20,000 (up from $1,000).

8.3 **MS** Davenport submitted that a fine in the vicinity of $10-15,000.00 would be appropriate, in addition to conditions being imposed upon his practice. However given that Dr Wislang is not currently practising and will have to apply to the Medical Council for a practising certificate (which will need to be considered by the Council as a whole because of the lapse of time since his last application, Section 52(1)(d)) the Tribunal determined that it would not be appropriate or practical for it to impose any conditions at this time.

8.4 **IN** fixing the total amount of the fine, the Tribunal also took into account that Dr Wislang is currently a bankrupt, although he has advised the Tribunal that an application to annul his bankruptcy is to be dealt with by the High Court in the near future. He submitted to the Tribunal that it should assume that he is in a position to pay a fine, either from his own resources or with the assistance of supporters.

8.5 **ACCORDINGLY** the Tribunal proceeded on the assumption that Dr Wislang will be able to pay a fine, but that it should take into account his present circumstances, including the fact that he is apparently unemployed and he has a large, young family. In all the circumstances,

the Tribunal considers that a total fine in the amount of $8,500.00 appropriately takes into account a component representing the fees Dr Wislang avoided by not renewing his practising certificate, and a sanction component.

9. COSTS:

9.1 **PURSUANT** to Section 110 of the Act the Tribunal has the power to order Dr Wislang to pay part or all of the costs and expenses of and incidental to the inquiry and hearing.

9.2 **DR** Wislang submitted that a large proportion of the total costs incurred had occurred as a result of the CAC's amending the charge and that he had incurred legal costs obtaining advice in the period between the adjourned hearing (7 October 1999) and the resumed hearing on 11 November 1999.

9.3 **THE** Tribunal has taken those matters into account. It has also taken into account the fact that Dr Wislang pleaded guilty to the charge on both occasions he was invited to plead. However the Tribunal also considered that it was appropriate to take into account the inescapable fact that had Dr Wislang given this matter the attention it required in the period between the time he was advised of the amended charge and the commencement of the hearing, a period of almost one month, the positive deluge of material which he generated following the adjourned hearing would have been avoided as it largely comprised material which could have been presented to the Tribunal in the form of submissions in the usual way. The Tribunal and the Complaints Assessment Committee have both undoubtedly incurred significant additional costs as a result of Dr Wislang's failure to organise himself for the hearing

and to take advantage of the material and assistance given to him by the Tribunal prior to the commencement of the hearing of the charge.

9.4 **THE** costs of the hearing have amounted to $52,288.97 apportioned:

Tribunal Expenses:

Hearing Fees			10,535.41
Accommodation and Meals			1,152.43
Advertising			86.68
Equipment and Room Hire			594.44
Legal Assessor			3,990.00
Photocopy			11.70
Stenographer's fees			1,425.68
Tolls			221.34
Travel			5,384.74
			23,402.42
CAC Costs:	Legal Counsel's Fees	14,767.99	
	Member Fees	5,057.81	
	Catering	54.12	
	Sundry Expenses	215.61	
	Hire Room & Equipment	185.00	
	Legal Assessor Fees	8,606.02	28,886.55
TOTAL			**$52,288.97**

9.5 **INCLUDED** in the Tribunal's expense is $3,990.00 for the cost of appointing a Legal Assessor. This was a cost which was incurred, at least in part, at the request of Dr Wislang.

9.6 **AS** a general guide, a finding of guilt at a level of professional misconduct generally attracts an order for costs in the vicinity of 35-45% of the total amount of costs. For the CAC Ms Davenport submitted that an appropriate order for costs against Dr Wislang would be at the upper level; 45% of the total costs of the prosecution and hearing of the charge. Ms Davenport conceded that this would be higher than normal, but suggested that the additional

time spent by the Tribunal and the CAC in prosecution of the charge would make such an order appropriate.

9.7 **AS** far as the Tribunal is concerned, this matter should have been determined within a one day hearing. This was well-demonstrated by the fact that the resumed hearing was able to be completed in half a day leaving the Tribunal time to adjourn to deliberate and to resume the hearing to announce its decision. The Tribunal has no doubt that had Dr Wislang properly prepared and organised himself for the hearing of the charge, even in its amended form, the hearing could have been completed quite comfortably within the single day originally allowed.

9.8 **THE** principles which apply to the exercise of the Medical Council's powers to make orders as to costs pursuant to the 1968 Act are equally applicable to the Tribunal's powers under the 1995 Act. This principle was established by the Tribunal in Decision No. 14/97/3C.

9.9 **IN** *Gurusinghe v Medical Council of New Zealand* [1989] NZLR 139 the appellant medical practitioner had been ordered to pay costs amounting to $20,000.00. This amount was approximately half of the actual expenses incurred. The full Court of the High Court held that such a sum was not excessive and noted that the ordering of payment of costs was not in the nature of a penalty, but rather to enable the recovery of costs and expenses of the hearing.

9.10 **IN** a previous appeal, also dealt with in the High Court, an order for costs of $50,000 being two-thirds of the actual costs incurred, was upheld; *O'Connor v Preliminary Proceedings Committee* (High Court, Administrative Decision, Wellington, 23/8/90 Jefferies J, CP

280/89). In that case as with *Gurusinghe* the orders made against the doctor prevented him from practising. Jefferies J in *O'Connor*, acknowledged that orders for costs in this type of proceedings will be substantial and commented that this should be known to any doctor to be so.

9.11 **HOWEVER**, the Tribunal is also minded not to lose sight of the fact that the charge did not include any substantive complaint of misconduct in terms of Dr Wislang's clinical practice. Taking all of these matters into account including the fact that Dr Wislang advises that he has personally incurred considerable costs, the Tribunal is satisfied that an order that Dr Wislang pay 35% of the total relevant costs incurred is fair and appropriate.

10. ORDERS:

10.1 **ACCORDINGLY**, after taking into account all of the factors referred to herein and other relevant matters, the Tribunal makes the following orders:

10.1.1 Dr Wislang's registration is suspended for two months;

10.1.2 Dr Wislang be censured.

10.1.3 Dr Wislang is to pay a fine in the sum of $8,500.00.

10.1.4 Dr Wislang is to pay 35% of the total costs and expenses of and incidental to all of the items referred to in Section 110(1)(f) (ii) to (iv), namely:

(a) The inquiry made by the Complaints Assessment Committee in relation to the subject-matter of the Charge;

(b) The prosecution of the Charge by the CAC;

(c) The hearing by the Tribunal.

10.2 **THE** Decision is to take effect from the date it was advised to Dr Wislang, 11 November 1999.

DATED at Auckland this 10th day of December 1999

.....

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal