MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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NAME OF RESPONDENT	**DECISION NO:**	140/00/63C
NOT FOR PUBLICATION	**IN THE MATTER**	of the Medical Practitioners Act 1995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 K medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr T F Fookes (Chair)

Ms S Cole, Dr B D King, Dr A D Stewart, Dr L F Wilson (Members)

Mr B A Corkill (Legal Assessor)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Wellington on Thursday 26 October 2000

APPEARANCES: Ms K P McDonald QC for a Complaints Assessment Committee ("the CAC")

Mr C W James for Dr K

1.0 THE CHARGE:

1.1 PURSUANT to section 93(1)(b) of the Medical Practitioners Act 1995 the CAC charged that Dr K registered medical practitioner, had been convicted by the District Court of two offences against section 11(1)(B) of the Misuse Of Drugs Act 1975 and one offence against section 56(1) of the Land Transport Act 1998. The charge alleged that each offence was punishable by imprisonment for a term of three months or longer and that the circumstances of the offences reflect adversely on the fitness of Dr K (hereinafter referred to as "the practitioner") to practise medicine.

1.2 THE charge was admitted and the practitioner thereby admitted first the convictions and secondly that the circumstances of the offences reflect adversely on his fitness to practise medicine.

1.3 THE issue for the Tribunal to determine thus became one of penalty.

1.4 EACH offence against the Misuse Of Drugs Act 1975 involved an allegation that with intent to defraud by a false pretence the practitioner had presented a number of controlled

drug prescription forms at a pharmacy and had thereby obtained possession of class B controlled drugs. The offence against the Land Transport Act 1998 involved an allegation that the practitioner had driven a motor vehicle on a road while the proportion of alcohol in his breath exceeded 400 micrograms of alcohol per litre of breath in that it was 500 micrograms of alcohol per litre of breath.

2.0 CIRCUMSTANCES SURROUNDING THE OFFENCES:

2.1 **THE** summary of facts presented to the Court when the practitioner appeared in relation to the offences against the Misuse of Drugs Act 1975 indicated that years before the offences were committed the practitioner became addicted to opiates, namely the class B controlled drugs pethidine and morphine, and was subsequently suspended from practising as a doctor for four months. Upon his return to practice he voluntarily restricted himself from prescribing controlled drugs. Nevertheless, between then and 1999, he admitted, he intermittently administered morphine to himself. Early in 1999 he became depressed and between 31 January and 1 July of that year stole controlled drug prescription forms from another medical practitioner. He used that practitioner's personalised stamp to indicate on the prescription forms that they had been authorised by that practitioner. He subsequently completed the forms.

2.2 **HE** did not take them to the pharmacist in the place where he practised because he knew he would be known there. He took the forms to two other pharmacists, in another place, and obtained from them a number of morphine ampoules and pethidine ampoules. He administered the contents of the ampoules to himself intravenously. In explanation he said that at the time of the offending he was “burnt out, isolated, under work pressure and

stressed". He admitted that he was an addict but said that he had not supplied the controlled drugs to anyone else. He said that he was pleased that the offending had been detected as he had obtained professional counselling for his addiction and wanted to finalise the matter.

2.3 **ON** 9 September 1999 the Minister of Health issued a notice in the Gazette prohibiting the practitioner from prescribing class B controlled drugs.

2.4 **ON** 11 November 1999 the practitioner appeared in the District Court on the two charges under the Misuse Of Drugs Act. The judge who heard the case convicted the practitioner and ordered him to come up if called upon within the next 12 months. He declined an application for suppression of the practitioner's name and extensive publicity, in relation to the practitioner's appearance in court and his addiction, then followed in newspapers, on radio and by electronic means. The publicity was sufficient for it to reach people overseas.

2.5 **ON** 24 January 2000 the practitioner appeared in court on the charge under the Land Transport Act, pleaded guilty, was convicted and fined $400 and ordered to pay court costs of $130 and was disqualified from holding or obtaining a driver's licence for a period of six months from and including that date. The summary of facts indicated that the police had, because of a complaint about his driving, stopped a car which was being driven on a state highway by the practitioner. The practitioner said that he had been drinking earlier that day.

2.6 **THE** drink-driving offence occurred despite the practitioner having undergone the Salvation Army's Bridge Programme commencing on 2 August 1999 and graduating therefrom on 24 September 1999.

3.0 **PREVIOUS HISTORY:**

3.1 **INFORMATION** put before the Tribunal by counsel for the practitioner shows that the practitioner's addiction illness (opiate dependence and alcohol abuse) first came to the attention of the Medical Council in 1987. Since that time the practitioner has periodically struggled with his addiction, culminating in a significant relapse at the beginning of 1999. In July 1988, at the direction of the Medical Council, he consulted a psychiatrist for continuing psychiatric oversight and rehabilitation following the retirement of that psychiatrist's colleague. It had been determined that the practitioner had abused opiate drugs and had voluntarily admitted himself to Ashburn Hall Hospital, Dunedin, for intensive detoxification and therapy. He had retained intermittent, at times regular, contact with the psychiatrist ever since because of relapses into drug abuse, misuse of alcohol, depression and marital stress. Between 1988 and 1999, it seems fair to say, the practitioner's recovery had been only partial and temporary but despite his various and recurrent lapses into substance abuse and depression there is no evidence that he ever jeopardised the health, safety or welfare of any of his patients. Indeed all of the reports which the psychiatrist had from his professional colleagues and others suggested that the practitioner's clinical performance had consistently been of the highest order and that he had an extremely loyal following of patients and a very busy practice. In fact, it seems from the psychiatrist's report, overwork played a major part in the practitioner's downfall in 1999.

3.2 **IN** July 1999 the practitioner met with the Health Committee of the Medical Council to discuss his relapse. He agreed to the committee's request to withdraw from practice immediately and subsequently to refer himself for intensive treatment as an outpatient at the Salvation Army's Bridge Programme Treatment Centre for addiction. Following his completion of that programme and a thorough assessment of his health, approval was given by the Council for the practitioner to resume practice with effect from 27 September 1999 subject to a number of conditions which were set out in a contract with the Council's Health Committee which was in the form of a voluntary undertaking by the practitioner.

3.3 **ON** 3 December 1999 the Council was advised that the practitioner had been arrested the previous evening on the drink-driving offence referred to earlier herein. The practitioner admitted himself to the Queen Mary Hospital in Hanmer to undertake a five-week course of inpatient treatment and he was discharged from the hospital on 14 January 2000. Arrangements were made by the Health Committee for him to be independently assessed and on 8 February 2000 approval was given for him to resume work under a revised voluntary undertaking with the Health Committee. The most recently signed undertaking is dated 15 April 2000 and contains 19 separate provisions. It is a comprehensive document which imposes detailed obligations on the practitioner and is designed not only to assist the practitioner's rehabilitation but, as far as possible, to secure the health and safety of his patients.

3.4 **THE** practitioner appeared before the Health Committee the day before the Tribunal's hearing (ie on 25 October 2000). The committee apparently decided to continue with the current undertaking and to review the practitioner's progress in a further six months time.

4.0 THE HEARING:

4.1 **AT** its hearing on 6 October 2000 the Tribunal received a considerable amount of written material and this included a number of medical reports. It also received submissions from Ms McDonald for the Complaints Assessment Committee and Mr James for the practitioner. The practitioner and his wife both gave evidence and their evidence was of material assistance to the Tribunal in deciding what penalty should be imposed in this case.

4.2 **THE** Tribunal also received advice from its appointed legal assessor, Mr B A Corkill.

5.0 TRIBUNAL'S ASSESSMENT OF CURRENT SITUATION:

5.1 **HAVING** seen the practitioner give evidence the Tribunal is satisfied that he is currently highly motivated to grapple determinedly with his addiction and to refrain from the use of narcotics and alcohol. The Tribunal recognises the extent of the efforts which the practitioner has made since his discharge from Hanmer to overcome his addictions and be a drug-free practitioner.

5.2 **THE** Tribunal is satisfied that in his efforts the practitioner has the strong support of his wife who we found to be an impressive witness plainly devoted to the restoration of her husband's health and to supporting him in his efforts to achieve that.

5.3 **THE** Tribunal nevertheless considers, and the practitioner agrees, that he is at a very early stage in his recovery and that there is manifestly a need for continued steps to be taken to monitor his ongoing progress and to subject him to continued oversight in his own and his patients' interests.

5.4 **THE** practitioner clearly believes that his admission to Queen Mary Hospital at Hanmer represents a turning point in his life. He has been drug-free since then and this has been able to be verified by virtue of the conditions imposed by the Health Committee. He is also taking medication which is designed to consolidate his resolve to abstain from alcohol. He has not partaken of opiate drugs since July 1999 nor of alcohol since December 1999.

5.5 **THE** stress of the Tribunal's hearing weighed upon him to an extent that some signs of clinical depression recurred and at the time of the hearing he was on medication on the prescription and under the direction of his own general practitioner. Although he seemed bright, spirited and determined at the time of his appearance before the Tribunal we nevertheless consider that his current state of health is fragile and that there is some risk that he might again resort to drugs or alcohol if he became sufficiently stressed.

5.6 **A** further risk, which cannot be disregarded, is that with the passage of time his current enthusiasm for being and remaining drug-free might diminish.

6.0 **ROLE OF THE TRIBUNAL:**

6.1 **IT** is <u>not</u> the role of the Tribunal to punish the practitioner for his breach of the criminal law. That is the prerogative of the Court and it has discharged its duty.

6.2 **THE** role of the Tribunal is to consider whether, in view of the convictions and any other relevant circumstances, any of the penalties set out in s. 110 of the Medical Practitioners Act 1995 ("the Act"), and if so which, should be imposed upon the practitioner.

6.3 **IN** discharging that role the Tribunal will have regard not only to the public interest but also to the interests of the practitioner concerned. The public and private interests which are involved may well conflict with each other. The Tribunal must consider the conflicting interests and arrive at the decision which it considers appropriate in all the circumstances of the case.

6.4 **AS** to the conflicting interests it has often been said that medical practitioners are people of high standing in the community. It is expected of them that they will be honest in their dealings with funding authorities, other health professionals and patients. Trust is placed in the integrity and reliability of members of the medical profession and the Tribunal is entitled to and does view as a matter of grave impropriety any significant departures from the standards of conduct which are called for by reason of that trust. Medical practitioners who claim to pharmacists that controlled drugs are required to treat a patient, when those drugs are in fact for the use of the practitioners, not only breach trust and disgrace themselves and their profession but commit an act which may be difficult to detect. The offending in the case of the two offences against the Misuse of Drugs Act 1975 must be regarded as extremely serious and, as to the offence against the Land Transport Act 1998, if there is any section of the community which should be more aware than others of the potentially catastrophic consequences of driving motor vehicles with a higher level of alcohol in the driver's system than the law permits, and of the injuries, suffering, harm and expense which can be caused by drivers who have partaken of an excessive quantity of alcohol, it is the medical profession. That offence, too, must be regarded as serious.

6.5 **THE** Tribunal has to balance against its view of the seriousness of the conduct which gave rise to the practitioner's convictions his personal circumstances and, in particular, the fact that all three offences are attributable to addictions by which the practitioner has been afflicted, and with which he has struggled, for something like 13 years. Those addictions do not in any way excuse his commission of the offences but they do explain the background to them and constitute circumstances which the Tribunal must not only take into account but also carefully weigh before making its decision.

7.0 APPROACH OF TRIBUNAL TO THE QUESTION OF PENALTY:

7.1 **IN** arriving at its decision the Tribunal needs to take into account the need to deter this practitioner, and other medical practitioners, from committing similar conduct. The Tribunal has, however, endeavoured to balance with that need the need for it to be constructive in its approach towards erring practitioners. The Tribunal also reminds itself of the provisions of section 3(1) of the Medical Practitioners Act 1995 which provides that the principal purpose of the Act is to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine.

7.2 **THE** Tribunal is satisfied that the practitioner is competent to practise medicine. The decision which it has made has regard to the need for deterrence but is also designed to be constructive and to protect the health and safety of members of the public. It takes account of the very serious consequences, for both the practitioner's patients and his practice associate, which there would be - in the semi-rural area where he practises, and where it is extremely difficult to obtain the services of a locum - if his name were to be

removed from the register or he were to be suspended. As he is a competent practitioner, and the Tribunal is satisfied that appropriate safeguards can and should be put in place to protect the health and safety of members of the public, the Tribunal considers that it is in the public interest, as well as in the practitioner's interests, that he be permitted to continue to practise subject to conditions.

7.3 **THE** Tribunal has the power under section 110 of the Act to order that the practitioner's name be removed from the register but does not consider it appropriate to exercise that power.

7.4 **IT** also has the power to order that his registration be suspended for a period not exceeding 12 months, but does not consider it appropriate to exercise that power either.

7.5 **IN** the particular circumstances of this case, where the Tribunal is dealing with matters which constitute offences for which the practitioner has been convicted by a court, the Tribunal is prohibited by section 110(3) of the Act from imposing a fine on the practitioner.

7.6 **MR** James, in his submissions, said that the practitioner acknowledged that it was in his own interests for conditions to be imposed (in relation to the practitioner's right to practise). He also submitted that it was important that there be some form of policing in the sense that should there be a breach of conditions it be acted upon fairly swiftly. Ms McDonald submitted that the penalty should reflect the need for the practitioner's on-going monitoring and supervision. It should also reflect the seriousness of the offending and the need for deterrence. It should be consistent with the Health Committee's approach.

Through Ms McDonald the CAC recommended a penalty of censure and the imposition of conditions consistent with those imposed by the Health Committee but at the maximum level of three years' duration. Costs were also sought.

7.7 **IN** the circumstances, and after carefully considering the submissions of counsel, the Tribunal proposes to deal with this matter by imposing the following penalties on the practitioner pursuant to section 110 of the Act:

(a) censure pursuant to section 110 (1)(b);

(b) an order that the practitioner may, for three years from the date of this decision, practise medicine only in accordance with the conditions specified in paragraph 11.3 of this decision.

(c) an order that the practitioner pay 45% of the costs and expenses of, and incidental to, the inquiry made by the CAC in relation to the subject-matter of the charge, the prosecution of the charge by the CAC and the hearing by the Tribunal.

7.8 **AS** to costs the Tribunal has considered the evidence which was given as to the practitioner's assets, liabilities, commitments in respect of the education of his daughters and income. It has taken account of the income he has lost and the expenses he has incurred since his convictions, that he has no liquid assets and that he has a significant, but reducing, bank overdraft. It has also taken account of his having admitted the charge. But the fact remains that the only reason why it was necessary for the CAC to carry out an inquiry and prosecute a charge, and for it and this Tribunal to incur costs and expenses, is the commission of criminal offences by the practitioner. In two other cases, arising from convictions of medical practitioners for offences punishable by imprisonment for a term of

imprisonment of three months or longer, which the Tribunal has considered this year, an order was made in one case for payment of 35% of all costs and expenses, and in the other case for payment of 75%. Having carefully considered all the circumstances of this case, including the information as to the financial position of the practitioner, the Tribunal has decided that he should pay 45% of the costs and expenses. This is, in the Tribunal's opinion, a significant reduction from what might properly have been ordered to be paid. If the practitioner contends that he needs time to pay he should make that known and an appropriate arrangement in that regard can be considered.

8.0 APPLICATION FOR PERMANENT SUPPRESSION OF THE PRACTITIONER'S NAME AND IDENTIFYING PARTICULARS:

8.1 **PRIOR** to the commencement of the hearing the Tribunal made an order prohibiting publication of the name of and any particulars which might tend to identify the practitioner. A similar order was made in respect of the practitioner's practice associate. A further order was made prohibiting publication of any particulars which tend to or do identify the name or place of practice of the practitioner or the place of any offence to which the charge relates.

8.2 **AT** the hearing an application for permanent suppression of the practitioner's name and any identifying particulars was made by Mr James. The CAC adopted a neutral position towards the application. In considering the application the Tribunal takes as its starting point the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as surrogates of the public: *R v Liddell* [1995] 1NZLR 538,546. It bears in mind that the Court of Appeal reiterated in *Lewis v Wilson & Horton Limited* (unreported, Court of Appeal, CAC131/00, 29

August 2000), that the prima facie presumption as to reporting is always in favour of openness. It takes account of the five factors which (at pp. 17-18) the Court of Appeal said it was usual to take into account in deciding whether that presumption should be displaced in a particular case. It has regard to that Court's statement at p18 that:

"Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome."

8.3 **THE** Tribunal also bears in mind the various authorities to which it referred in its decision on the application for interim suppression of the practitioner's name.

8.4 **IT** has had particular regard to the fact that the practitioner's name was not suppressed on either of the occasions when he appeared in court in relation to the three offences his conviction for which has resulted in his appearance before the Tribunal. It has also had particular regard to the decision in *M v Police* (1991) 8 CRNZ 14 in which Fisher J said at p15:

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

Against those considerations, however, there are balancing considerations seen from the viewpoint of the defendant and those associated with the defendant. These will include the social, financial and professional consequences to the defendant personally and to the members of his family, employers, employees and acquaintances. Particular regard will be paid to any members of that group who are peculiarly vulnerable to adverse publicity due, for example, to poor health or sensitive business or professional reputations.

When those competing considerations have all been identified in any given case, they must be weighed against each other. It seems to me that at this point one must recognise a crucial difference between the approach which is appropriate where the

defendant is merely charged with an offence, and the approach where he or she has been convicted. Publication of name is frequently a major and appropriate element of an offender's punishment once it is established that he or she is guilty."

8.5 **IN** this case the defendant's appearance on the charges involving the offences against the Misuse of Drugs Act 1975 was widely publicised. His appearance in relation to the drink-driving conviction was also the subject of publicity but it was by no means as extensive. In both of those instances no order for suppression was made.

8.6 **SECTION** 106 of the Act provides that, except as provided in sections 106 and 107, every hearing of the Tribunal shall be held in public. Section 106 (2) provides that where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any one or more of certain orders. Among these is an order prohibiting the publication of the name, or any particulars of the affairs, of any person. Section 106 (5) provides that an order made under section 106 shall continue in force until such time as may be specified in the order or, if no time is specified, until revoked by the Tribunal under section 108 of the Act. The Tribunal therefore has a discretion as to whether to make an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

8.7 **IN** considering whether to exercise that discretion in this case, the Tribunal has had regard to the fact that it is, in the public interest, generally desirable that patients should know of anything which might affect the quality of care given to them by an individual doctor. It notes, however, that there is no evidence to suggest that the practitioner is not a competent

medical practitioner, nor that his addictions have ever resulted in the quality of his patients' care being compromised. The evidence before the Tribunal is that by far the majority of his patients know of his convictions and the addictions which gave rise to the offences for which he was convicted. His practice associate knows of the offences and of the events which preceded them and will plainly be on his guard for any signs of recurrence. Nursing staff are also aware of the position. The practitioner himself told the Tribunal and we accept that, while he does not as a matter of routine volunteer information about his convictions or the addictions, he does talk openly to patients about his addictions in circumstances where he feels that it could be of benefit to the patients to be aware of his own experiences. Thus, for example, he told us that he will offer to drive certain patients to meetings of Alcoholics Anonymous which he will himself be attending.

8.8 **WE** do not consider that the public interest requires that his name be further publicised so as to ensure that his patients know of his offences or addictions. We are satisfied that, in the case of at least most of his patients, they are already aware of the position. It is also important to make the point that, in this case, there is no need for further publicity with a view to "flushing out" possible further offences.

8.9 **THE** Tribunal has also had regard to the public interest in patients being aware that a member of a profession which requires honesty and integrity from its members has been convicted of offences two of which involved at least an element of dishonesty, but it is once again satisfied that as the offences in question have already been the subject of extensive publicity in the area in which the practitioner practises, there is no necessity for further publicity for the purpose of ensuring public awareness.

8.10 **WE** have considered whether any, and if so what, good purpose would be served by further publicising the offences which the practitioner committed and his convictions as a consequence of those offences. Given that there has already been extensive publicity and that by far the majority of his patients already know of the events in question, we find it difficult to see any compelling reason for further publicity.

8.11 **IN** *Lewis v Wilson & Horton Limited* the Court of Appeal set out, at p16-17, the factors which it is usual to take into account in deciding whether the prima facie presumption in favour of openness as to reporting should be displaced in a particular case. They include any adverse impact upon the prospects for rehabilitation of a person convicted, and circumstances personal to the person appearing before the court, his family, or those who work with him, and impact upon financial and professional interests. The Court said, however, that as it is usual for distress, embarrassment, and adverse personal and financial consequences to attend criminal proceedings, some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case, is required to displace the presumption in favour of reporting. The Tribunal has already noted the decision of Fisher J in *M v Police* in which the learned Judge said that as against the desirability of *"the healthy winds of publicity"* and the importance of justice being seen to be done there are balancing considerations which include the social, financial and professional consequences to the defendant personally and to the members of his family, and that particular regard will be paid to any members of that group who are peculiarly vulnerable to adverse publicity due, for example, to poor health.

8.12 **HAVING** considered all the evidence in the case and the submissions of Mr James and Ms McDonald in respect of the application for permanent suppression we are satisfied that:

(a) Publicity would have a seriously adverse impact upon the prospects for rehabilitation of the practitioner. In arriving at this conclusion we have had particular regard to the specific psychiatric evidence that, were he to be again exposed to the glare of publicity, historical precedent would strongly suggest that, at the very least, he would revert to alcohol and/or drug abuse regardless of the consequences because of his desperation.

(b) Because of his fragile medical condition, his current state of health, the early stage of recovery which he is currently at, his personality and his propensity to become clinically depressed, the practitioner is peculiarly vulnerable to adverse publicity, and serious harm to his health could result from his name not being suppressed. In arriving at this conclusion we have had particular regard to the psychiatrist's report (dated 5 October 2000) which includes the following passage:

"(The practitioner's) current hold on his self-confidence and esteem is so delicate that it would take very little to crush him. I do not exaggerate when I say that he would present a high risk of suicide were he to be again exposed to the glare of publicity."

(c) As a result of the publicity which followed his appearance in relation to the offences against the Misuse of Drugs Act 1975 there was an impact on the practitioner which the psychiatrist has described as *"catastrophic"*. *"Unable to cope emotionally, the practitioner endeavoured to drown his anguish in drink and was apprehended by the police for driving whilst under the influence of alcohol. In a state of mental crisis, he was urgently admitted to the psychiatric unit at (name of) hospital where he was diagnosed as suffering from a major*

depressive episode. He was given emergency treatment with medication, and then on his own initiative and at his own expense he was transferred to Queen Mary Hospital, Hanmer Springs for intensive rehabilitation." We do not consider that the public interest requires the practitioner to be exposed to the risk of a recurrence of developments like these.

(d) Further publicity could have seriously adverse effects upon the practitioner's children. They have already suffered very substantially as a result of the earlier publicity; although they are making progress, having been shifted to a different school and almost a year having passed since the earlier publicity, one of the two children still suffers recurrent nightmares which appear to be directly attributable to the publicity and the presence of reporters on the practitioner's home property. The Tribunal is seriously concerned as to the effects which further publicity might have on either or both of the children, and does not consider that the damage to them could reasonably be regarded as "usual" or "ordinary".

(e) The practitioner's wife has also suffered materially as a result of the earlier publicity and, while the consequences of further publicity would be less serious for her than for her husband and children, it would nevertheless take a toll on her. There are particular circumstances relating to her background, beliefs and attitudes which have prompted the Tribunal to arrive at this view.

(f) While in some cases (and there was recently one) the Tribunal might, notwithstanding the potentially serious consequences to a practitioner's health of doing so, order publication of a medical practitioner's name in the interests of "flushing" out possible further offences this is simply not such a case.

(g) A compelling case for suppression is necessary to override the public interest in freedom of speech and open reporting. In this case the Tribunal is unanimously of the view that a compelling case for permanent suppression has been made out. Exposing the practitioner to further publicity is likely to have a destructive effect on him whereas we can see little or no constructive purpose which would be served by it. The public interest can be protected by other means.

9.0 NOTICE UNDER SECTION 138(2):

9.1 THE Tribunal considers it important that there should be a notice under section 138(2) stating the effect of the orders against the practitioner and summarising the circumstances of the case. There are a number of reasons for this. In the first place, it is important for members of the medical profession to be aware that they are at risk of drug dependency and of the need for them to be constantly on guard against that risk materialising. Another important factor in favour of the publication of a notice is that the rest of the profession will be able to see that both the Health Committee of the Council and this Tribunal adopt a constructive approach to the question of whether an addicted practitioner can continue to practise. This may attract members of the profession who know that they have an established drug dependency to self-disclose. It is far better that doctors should be encouraged to disclose any difficulty they may be facing in relation to drug dependency than that they should conceal the problem, obtain no help and run the risk of ultimately finding themselves in the position of the practitioner now before the Tribunal, namely that, after denying to himself and others who tried to help him that he had a problem, he ultimately committed criminal offences to obtain the drugs he needed to satisfy his dependency.

9.2 **THE** first question which arises is whether, when the Tribunal has ordered suppression of a practitioner's name, it is possible to publish a notice under section 138(2) with the practitioner's name suppressed.

9.3 **PURSUANT** to the power contained in clause 15 of the First Schedule to the Act the Tribunal appointed a legal assessor, Mr B A Corkill, to be present at the hearing and advise the Tribunal on matters of law, procedure and evidence.

9.4 **MR** Corkill addressed the Tribunal on a number of matters including the provisions of sections 106 and 138 of the Act. He referred in particular to sections 106(2)(d), 106(7), 138(2) and 138(4).

9.5 **HE** directed the Tribunal that:

(a) in a case where the Tribunal has suppressed the name of a practitioner under section 106(2)(d), section 106(7) does not prohibit the publication of a notice (under section 138(2)) relating to the effect of an order;

(b) section 138(4) specifically provides that sections 138(2) and 138(3) shall apply subject to any order made under section 106 and any order of any Court;

(c) a notice published under section 138(2) is subject to a suppression order made under section 106.

9.6 **MS** McDonald and Mr James endorsed Mr Corkill's direction. Ms McDonald suggested that the interpretation which had been put to the Tribunal by Mr Corkill was beyond argument.

9.7 **MR** Corkill advised the Tribunal that there was a decision of the District Court which appeared to reach a different conclusion. He said, however, that in that case (*W v The Complaints Assessment Committee*, CMA 182/98, District Court, Wellington, 5 May 1999) (hereinafter referred to as "*W*"), (in which both he and Ms McDonald appeared as counsel), the point in question was not argued fully before the learned Judge and that the latter did not (in his decision) refer to all the subsections to which Mr Corkill had referred in directing the Tribunal.

9.8 **THE** Tribunal has considered the decision in *W*. The question which the Court was deciding at pp 8 and 9 was whether, on the facts of that case, the Tribunal's order for publication under section 138(2) breached its own suppression order and those of the Courts.

9.9 **AT** p 9 the Court said:

"Mr Hodson submitted that given the extent of the orders made by the Tribunal, and by the Courts, it was almost impossible to devise any meaningful notification which did not breach one or all of them. I think that submission must be right. The Tribunal's suppression order is a blanket one, including the appellant's name and any report or account of any part of the hearing.

"In any event, the terms of s138(2) seem to pose an obstacle to selective or partial publication. The Tribunal has the power to direct which publication shall carry the notice. If the Tribunal makes no such order, it follows that there will be no publication at all. But it does not, on a plain reading of the section, have the power to direct that, for instance, the practitioner's name be suppressed, while the other specified matters are published. The section seems to permit only of an "all or nothing" publication. Whether this was an intended result, I do not know, but it does not sit easily with the powers contained in s106.

"Be that as it may, I do not see how the Tribunal's publication order can be put into effect without breaching its own suppression orders, and those of the Court. In fact the conflict between them is so stark that the purported order under s138(2) is, with all respect to the Tribunal, impossible to follow."

9.10 **AS** can be seen, the Court said in the first of those paragraphs that the submission that, given the extent of the orders made by the Tribunal and the Courts, it was almost impossible to devise any meaningful notification [under section 138(2)] which did not breach one or all of them must be right. And in the third of those paragraphs the Court said that it did not see how the Tribunal's publication order could be put into effect without breaching its own suppression orders and those of the Court. Those rulings were by themselves sufficient to decide and dispose of the point at issue in that case.

9.11 **THE** observations contained in the second of those paragraphs refer to section 138(2) but not to section 138(4). While there is a reference in the last sentence of the observations to the "powers contained in s106" there is no reference to section 106(7) (which is not an empowering provision). While paying full respect to what the Court said in the paragraph in question concerning the terms of section 138(2) the Tribunal notes that the Court was referring only to those terms. The Tribunal has however had other relevant provisions drawn to its attention and is plainly obliged to consider them.

9.12 **HAVING** done so, the Tribunal proposes to follow the direction given to it by the legal assessor. It considers that:

(a) pursuant to section 106(2)(d) it is entitled to prohibit publication of the name and any particulars of the affairs of any person;

(b) pursuant to section 106(5) an order made under section 106 shall continue in force until such time as may be specified in the order or, if no time is specified, until revoked by the Tribunal;

(c) pursuant to section 106(7), section 106(2)(d) shall not apply to or in respect of the publication, under section 138, of "the effect of any order";

(d) this is intended to mean that while a person's name and/or other particulars may be suppressed under section 106(2)(d) that does not prevent the publication under section 138 of the effect of an order;

(e) pursuant to section 138(2) the Secretary shall, where the Tribunal makes an order under the Act in respect of a medical practitioner, cause a notice stating:

(i) the effect of the order (the same words as are used in section 106(7)); and

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

(iii) a summary of the proceedings in which the order is made

to be published in such publications as the Tribunal may order;

(f) while the words used in section 138(2) do, if taken by themselves, "seem to pose an obstacle to selective or partial publication", and do not by themselves seem to confer "power to direct that, for instance, the practitioner's name be suppressed, while the other specified matters are published" and while section 138(2) if viewed in isolation "seems to permit only of an "all or nothing publication", just as the Court observed in *W*, it is also necessary for the Tribunal to consider the important provision contained in section 138(4);

(g) it provides that section 138(2) shall apply subject to any order made under section 106;

(h) if therefore the position is that an order has been made suppressing the name and other identifying particulars of a person under section 106, section 138(4) requires that section 138(2) applies subject to the section 106 order;

(i) in turn this means that it is possible to publish a notice under section 138(2) which states the effect of the order made by the Tribunal, and a summary of the proceedings in which the order was made, but also observes and complies with any order made under section 106;

(j) if this were not the case section 138(4) would be meaningless and ineffective and section 138(2) would have to be applied as though it were the only relevant provision and section 138(4) had never been enacted;

(k) this cannot have been Parliament's intention; on the contrary it was that, as section 106(7) indicates, an order under section 106(2)(d) was not intended to prohibit the publication of a notice under section 138 stating the effect of an order made in respect of a practitioner whose name has been suppressed and, as section 138(4) indicates, what section 138(2) provides about the contents of a notice is to apply subject to any order made under section 106.

9.13 **THE** result is that the legal assessor's direction to the Tribunal appears to it to be correct and that a notice under section 138(2) is subject to a suppression order under section 106.

9.14 **IN** the middle of the three quoted paragraphs on p 9 of the decision in *W* the Court was, in the first five sentences of that paragraph, discussing solely the words of section 138(2). Far from disagreeing with it the Tribunal, with great respect, accepts the Court's view that those words - considered by themselves and without reference to other provisions - do not suggest that the Tribunal has the power to direct that a practitioner's name be suppressed while the other specified matters are published. Whereas, however, the Court in those

sentences was considering only the words of section 138(2) the Tribunal needs to consider the other provisions to which its attention has been drawn and it is its view that when regard is had to those other provisions it becomes clear what Parliament intended and that the legal assessor's direction to the Tribunal is correct.

9.15 **WHILE**, therefore, deferring and giving full weight to the Court's view of the meaning of the words used in section 138(2) the Tribunal considers, for the reasons it has endeavoured to explain, that those words do not present an obstacle to the adoption by it of the legal assessor's direction as to the effect on those words of other relevant provisions in the Act.

9.16 **THE** Tribunal, being satisfied that it has the power to do so, and that it should exercise that power, proposes to order that the Secretary publish a notice under section 138 (2) but with the name of, and any particulars which might tend to identify, the practitioner being omitted because of the Tribunal's order for permanent suppression thereof.

10.0 **WARNING TO THE PRACTITIONER:**

10.1 **THE** Tribunal has already noted that the practitioner is currently highly motivated and appears genuinely determined not further to resort to drugs other than those which have been prescribed for him by his own medical practitioners.

10.2 **THE** Tribunal must, nevertheless, have regard to the fact that there have been a number of previous relapses by the practitioner, even after he has undergone seemingly intensive treatment with an eye to his rehabilitation. The Tribunal has decided that for the next three

years (which represents the maximum period for which the Tribunal can make such an order) the practitioner may practise medicine only in accordance with the conditions set out in paragraph 11.3 of this decision.

10.3 **THESE** conditions, it will be noted by the parties, bear a strong resemblance to the provisions of the current voluntary undertaking given by the practitioner to the Health Committee of the Medical Council. It should, however, be clearly understood by the practitioner that, whereas his undertaking to the Health Committee is voluntary, the conditions set out in the order are conditions imposed by this Tribunal. They must be complied with, in full, by the practitioner and for the next three years he is permitted to practise medicine only in accordance with those conditions.

10.4 **HE** also needs to understand that, if he breaches any order of the Tribunal, including the order that he may practise only in accordance with those conditions for the next three years, he can be charged under section 109(1)(g) of the Act with breaching an order of the Tribunal made under section 110 of the Act. If he is charged, he should be aware, the Tribunal has the power under section 104 of the Act, if it is satisfied that it is necessary or desirable to do so, having regard to the need to protect the health or safety of members of the public, to make an order for his registration to be suspended until the disciplinary proceedings in respect of that charge have been determined.

10.5 **THE** Tribunal wishes to make it clear that, in the event of breach by the practitioner of any of the conditions specified in this decision, the Tribunal would expect the practitioner to be promptly charged under section 109(1)(g). It would then be necessary for the Tribunal to

consider whether the circumstances were such as to call for the practitioner's suspension until that charge was determined.

10.6 **THE** practitioner should, therefore, be in no doubt of the importance of full compliance with the conditions set out in paragraph 11.3 hereof.

11.0 ORDERS

11.1 **THE** Tribunal, after conducting a hearing on a charge laid under section 102 of this Act against the practitioner, is satisfied that he has been convicted by a Court in New Zealand of three offences punishable by imprisonment for a term of three months or longer and that the circumstances of those offences reflect adversely on his fitness to practise medicine.

11.2 **THE** Tribunal hereby orders:

(a) pursuant to section 110(1)(d) of the Act that the practitioner be censured;

(b) pursuant to section 110(1)(c) of the Act that the practitioner may, for three years from the date of this decision, practise medicine only in accordance with the conditions set out in paragraph 11.3 of this decision;

(c) pursuant to section 110(1)(f) of the Act that the practitioner pay 45% of the costs and expenses of and incidental to the inquiry made by the Complaints Assessment Committee in relation to the subject-matter of the charge, the prosecution of the charge by the Complaints Assessment Committee and the hearing by the Tribunal;

(d) pursuant to section 106(2)(d) of the Act that publication of all or any of the following is to remain prohibited:

(i) the name of, or any particulars which might tend to identify, the practitioner;

(ii) the name of, or any particulars which might tend to identify, the practitioner's practice associate;

(iii) any particulars which might tend to or do identify the name or place of practice of the practitioner or the place of any offence to which the charge relates.

11.3 **THE** practitioner may, for three years from the date of this decision, practise medicine only in accordance with the following conditions:

(a) He may practise medicine only in such place or places, and whether on his own account or as an employee, as has or have previously been approved in writing by or on behalf of the Health Committee of the Medical Council of New Zealand ("the Health Committee").

(b) He is not to permit himself to attend, or be consulted by, a greater number of patients per day, and/or per week, than has for the time being been fixed in writing by, or on behalf of, the Health Committee.

(c) He is to remain under the supervision of, and in regular contact with, a general medical practitioner who has been approved by the Health Committee and who is to fulfil the role of mentor/peer as well as that of personal health care provider to the practitioner.

(d) (i) He is to see a psychiatrist, nominated in writing by the Health Committee, in a therapeutic relationship as often as the psychiatrist determines and is to accept and pursue whatever reasonable treatment or assessment that psychiatrist might direct;

(ii) If he terminates his therapeutic relationship with the psychiatrist nominated by the Health Committee, he is to notify the Health Committee immediately and is to establish a new therapeutic relationship with a health professional with appropriate experience in the area of addiction illness and promptly notify the Health Committee of the new therapist's name.

(e) He is to permit his mentor/peer and a psychiatrist to report to the Health Committee if he should suffer a relapse or fail to attend or comply with treatment.

(f) He is to continue with the consumption of Antabuse as frequently as the Health Committee may direct, and is not to discontinue the programme of Antabuse consumption except in consultation with, and with the concurrence of, the doctors treating him. In the event that they agree that the consumption of Antabuse should be discontinued, he is to notify the Health Committee in writing within five working days.

(g) He is to attend meetings of Alcoholics Anonymous or Narcotics Anonymous at least twice per week (unless the Health Committee, in writing, has:

(i) agreed to a lesser number of weekly attendances; or

(ii) in relation to any particular week or weeks, agreed to his attending once or not at all)

and is to request his sponsor to report to one or more of his treating doctors in the event that he does not so attend.

(h) He is to maintain total abstinence from alcohol and any other mood-changing drugs and medications not prescribed for him by one or more of his treating doctors.

(i) He is not to prescribe prescription medicines or drugs for, or to dispense prescription medicines or drugs to, himself.

(j) He is prohibited from prescribing Class B controlled drugs.

(k) He is to comply with any procedures which are set up, by or with the concurrence of the Health Committee or any medical practitioner with or for whom he practises medicine, for the purpose of limiting his access to controlled drugs, controlled drug prescription forms and Medical Practitioners Supply Orders.

(l) He is to record in the Drug Register kept at any place at which he practises medicine, the use of each and every TRAMAL (Tramadol) injection which the Health Committee may previously, in writing, have agreed to his being provided with for the purpose of administration to patients in an emergency and is to permit any person with or for whom he practises medicine to inspect the register and report any anomalies to the Health Committee.

(m) He is to continue to permit the Health Committee to inform the Regional Medicines Control Advisor that he is having treatment for drug dependency and that he is under the supervision of the Health Committee, and is to permit the Regional Medicines Control Advisor to report to the Health Committee if s/he has any concerns about his prescribing.

(n) He is to continue to submit himself to a random urine screening programme to the extent specified by the Health Committee, and to pay any costs associated with the testing.

(o) He is to agree to provide, if and as often as requested by the Health Committee, a specimen of blood for blood alcohol screening, and to permit the results of any such test to be made available to the Health Committee.

(p) He is to attend such psychiatrist as may from time to time be nominated by the Health Committee, as and when directed by it, and is to permit such psychiatrist to release to the Council and the Health Committee every report which s/he may prepare, in relation to the practitioner's fitness to practise medicine.

(q) He is to meet with members of the Health Committee, for a review of his progress, or for such other purpose as that Committee may determine, at such times and places as it may specify in writing.

(r) He is to observe and comply fully with each and every one of these conditions unless, in the case of any particular condition, it has previously, and in writing, been revoked or varied by this Tribunal - or any other body which during those three years becomes responsible for the discipline of medical practitioners - on application made to it.

(s) If a condition set out in this decision has been varied by the Tribunal in writing, he is to observe and fully comply with the condition as varied.

11.4 **LEAVE** is reserved to the parties to apply to the Tribunal, or any other body which becomes responsible for the discipline of medical practitioners, at any time during the three years following the date of this decision for revocation or variation of any condition set out in paragraph 11.3. The Tribunal signifies that if any such application is made it will require a report to be obtained from the Health Committee concerning its attitude towards the variation or revocation sought.

12.0 COUNSEL:

12.1 **THE** Tribunal expresses its gratitude to Mr James and Ms McDonald for the way in which, and the thoroughness with which, they prepared and presented the cases of their respective clients and thanks Mr Corkill for his advice and assistance to the Tribunal.

DATED at Wellington this 29th day of November 2000

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T F Fookes

Senior Deputy Chair

Medical Practitioners Disciplinary Tribunal