MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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

DECISION NO: 157/00/69C

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 X formerly a registered medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr T F Fookes (Chair)

Dr F E Bennett, Mrs J Courtney, Dr R S J Gellatly,

Dr A D Stewart (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Wellington on Monday 19 February 2001

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

Mr H Waalkens for the applicant

1. POINT AT ISSUE:

1.1. **THE** point which arises for decision in this case is whether the Tribunal has jurisdiction to hear a charge of conduct unbecoming a medical practitioner which was laid by a Complaints Assessment Committee ("the CAC") against a person ("the applicant") who was, both at the time of the alleged conduct and when the charge was laid with the Tribunal and notified to the applicant, a registered medical practitioner for the purposes of Part VIII of the Medical Practitioners Act 1995 ("the Act") but whose name was, prior to the date on which such charge was scheduled to be heard, ordered by the Tribunal to be removed from the register for reasons unrelated to such charge.

2. FACTS PUT BEFORE THE TRIBUNAL BY COUNSEL:

2.1 **AT** a time when the applicant was, for the purposes of Part VIII of the Act, which Part relates to discipline, a medical practitioner, the CAC (established under s.88 of the Act) informed the Tribunal that that Committee had determined in accordance with s. 92(1)(d) of the Act that the complaint (by a person named by the CAC) against the applicant should be considered by the Tribunal and that the CAC had reason to believe that grounds exist entitling the Tribunal to exercise its powers under s. 109 of the Act.

2.2 **THE** charge framed by the CAC and referred by it to the Tribunal pursuant to s. 93(1)(b) of the Act alleged that between 3 and 6 May 1995 the applicant [who was then a registered medical practitioner] acted in a way that amounted to conduct unbecoming a medical practitioner and that that conduct reflects adversely on the practitioner's fitness to practise medicine. Particulars of the allegedly unbecoming conduct were set out in the charge. It was conceded in the written submissions of counsel for the applicant that the applicant was a medical practitioner at the time the charge was laid.

2.3 **THE** Tribunal received the charge and, by written notice, advised the applicant of, inter alia, the charge and the proposed date of hearing.

2.4 **BY** written decision issued after that notice was served upon the applicant the Tribunal ordered, for reasons unrelated to the charge referred to in paragraphs 2.1 to 2.3 hereof, that the applicant's name be removed from the register.

2.5 **BY** application dated 1 February 2001 ("the jurisdiction application") the applicant applied to the Tribunal for an order declaring that the Tribunal has no jurisdiction over or in respect of the applicant.

2.6 **THE** applicant also filed an application for an interim order prohibiting**,** until the further order of the Tribunal, the publication of the name of, or any fact identifying, the applicant. That application was heard by the Tribunal on 9 February 2001 and resulted in the Tribunal making various orders which were set out in its written decision dated 14 February 2001 in respect of that application.

2.7 **THE** Tribunal heard the jurisdiction application on 19 February 2001. No member of the Tribunal who was involved in the hearing which resulted in the order for removal of the applicant's name from the register took part in the hearing of the jurisdiction application.

2.8 **COUNSEL** for both the CAC and the applicant helpfully provided written submissions in relation to the jurisdiction application prior to the hearing. Counsel then spoke to those submissions at the hearing.

3. GROUNDS AND SUBMISSIONS:

3.1 **THE** grounds on which the jurisdiction application was made were that:

(a) the jurisdiction of the Tribunal is in respect of a "medical practitioner" or "practitioner" which means the person registered under the Act;

(b) the applicant has been struck off the register of medical practitioners pursuant to a previous order of the Tribunal;

(c) as from the date of that order the applicant is no longer a "medical practitioner" or a "practitioner";

(d) the "saving" provisions of s. 44 of the Act do not apply;

(e) in no other respects can it be claimed that the Tribunal has jurisdiction in respect of complaints concerning the applicant.

3.2 **THE** principal written submissions made by Mr Waalkens, counsel for the applicant, were that:

(a) the whole scheme of the Act is predicated on the definition of "medical practitioner" or "practitioner" as meaning " a person registered under this Act" – see s. 2 of the Act;

(b) the applicant's status as a medical practitioner ended on the date when the Tribunal removed his name from the register of medical practitioners pursuant to s. 110(1)(a) of the Act;

(c) the long title to the Act makes it clear that the Act is all about regulating medical practice and, as a consequence, "medical practitioners";

(d) the principal purpose of the Act is "to ensure that medical practitioners are competent to practise medicine" and once a practitioner has been removed from the register that principal purpose has no point (unless a special circumstance has been provided as with s. 44(3));

(e) the Tribunal's powers are under s.110 of the Act and all of its powers are in respect of "the medical practitioner", which the applicant is no longer, and as a consequence the Tribunal cannot impose any penalties;

(f) before it could impose any penalties the Tribunal must be satisfied that "the practitioner" has been guilty of any of the matters set out but the applicant is not a "practitioner";

(g) s. 44(3) has been enacted to provide a "saving" in the circumstance where the medical practitioner initiates the removal of his own name and in that special circumstance that act of removal does not affect "that practitioner's liability for any act done or default made before the date of the removal";

(h) this is plainly to sensibly include the situation where a practitioner may endeavour to circumvent a disciplinary inquiry by having his/her name removed voluntarily;

(i) while s. 44(3) does not apply to the applicant's case, the fact that Parliament has found it necessary to provide especially for that circumstance and yet not provide a similar saving provision where the practitioner's name is removed for any other reason reinforces the point that this Tribunal has no jurisdiction;

(j) if Parliament had intended the Tribunal to have jurisdiction where the practitioner's name had been removed by the Tribunal it could easily have done so and the absence of a similar saving provision in respect of orders by the Tribunal to remove the practitioner's name supports the submission that the Tribunal has no jurisdiction;

(k) a passage in the Tribunal's decision in the case against *Dr Phipps* (Decision 133/99/43C dated 3/10/2000) was wrong and created an absurdity because whilst the applicant is, Mr Waalkens argued, unable to be charged in respect of other complaints which have not yet been the subject of a charge, a charge such as the present one must be prosecuted simply because at the time the charge was laid the applicant was "a medical practitioner" and yet now is not;

(l) to the extent that clause 5.16 of the Tribunal's decision in the case of *Dr Phipps* may be interpreted as suggesting that the Tribunal has jurisdiction if at the time of charging the person he was a "practitioner" (even if subsequently and before the hearing he is no longer so - other than in the special circumstances of ss.44(3) or 45(4)) it is wrong;

(m) that the Tribunal has no jurisdiction in respect of the applicant is consistent with the policy of the Act which is concerned only with registered medical practitioners and the only circumstances where the Tribunal may consider the liability or responsibility of someone other than a registered medical practitioner is under the provisions of ss. 44(3) or 45(4).

3.3 **IN** oral submissions Mr Waalkens made a number of additional points. These included the following:

(a) As the applicant's name has already been removed, the CAC could – if the case proceeded to a hearing – only seek a fine or costs and this makes a nonsense of the case proceeding.

(b) It is a principle of legal policy that a person should not be penalised except under clear law or in other words should not be put in peril upon an ambiguity; so the Court, when considering in relation to the facts of a case, which of the opposing constructions of an enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which subjects a person to any detriment where the legislator's intention to do so is doubtful, or penalises him in a way which was not made clear by the legislation in question – see *Halsbury's Laws of England*, 4th ed (reissue), vol. 44(1), para 1456. If Parliament had wanted to make it clear that the Tribunal still had jurisdiction after the removal of a practitioner's name it could easily have done so (but had not). The CAC is seeking a detriment and the Act should be construed against it.

(c) Parliament could so easily have provided, in relation to the Tribunal, along the lines of s. 44(3) but had not done so.

(d) Whereas counsel for the CAC claimed that certain words in s. 109 of the Act ("a charge laid under section 102 of this Act against a medical practitioner") are directed to the person's status at the time a charge is laid, the words "against a medical practitioner" are entirely superfluous if they relate only to the point of laying. If counsel for the CAC is correct, Mr Waalkens submitted, those words are

unnecessary. They are, he submitted, to be read in conjunction with the preceding words of s. 102 i.e. "a hearing on" and lead to the conclusion that a hearing on a charge against a medical practitioner is the only basis on which the Tribunal may make one or more of the orders authorised by s. 110 of the Act.

(e) The dicta in para. 5.16 of the Tribunal's Decision in *Phipps* **(**Decision No. 133/99/43C, 3 October 2000) was obiter and is plainly not correct.

(f) S. 6 of the Interpretation Act 1999, by providing that "An enactment applies to circumstances as they arise", could only mean that the Tribunal has no jurisdiction in relation to the applicant given the absence of any saving provision like ss 44 and 45 of the Act.

3.4 **QUESTIONED** by the Tribunal Mr Waalkens made it clear that his argument is that if a practitioner's name has been removed from the register pursuant to an order of the Tribunal the Tribunal no longer has jurisdiction over that practitioner for as long as his or her name is removed. Mr Waalkens agreed that a practitioner has a right of appeal to the District Court against such an order and that if the practitioner exercised that right and the appeal succeeded and, for whatever reason, the practitioner's name was restored to the register it was his position that the Tribunal would then have jurisdiction and the charge against the practitioner could then be heard. He also agreed that if the matter then went to the High Court on a point of law and the decision of the District Court were reversed, with the result that the practitioner's name was once again removed, it was his case that the Tribunal would once again not have jurisdiction until such time as the applicant's name was restored to the register. Finally, Mr Waalkens maintained that if, after a practitioner's name

had been removed by order of the Tribunal, it was restored to the register by order of the Council a charge against the practitioner could then be heard.

3.5 **THE** principal written submissions of Ms McDonald QC, counsel for the CAC, may be summarised as follows:

(a) the Tribunal has jurisdiction to consider the charge against the applicant;

(b) the primary purpose of the disciplinary powers of the Tribunal is the protection of the public although a further purpose is to maintain the integrity of the profession;

(c) the disciplinary process is also about setting standards;

(d) s. 102 of the Act provides that a charge against a medical practitioner may be laid before the Tribunal by a CAC pursuant to s. 93 and where it is there is a mandatory requirement on the Chairperson of the Tribunal pursuant to s. 102(2) to convene a hearing of the Tribunal to consider the charge;

(e) s. 103 provides that where the Chairperson is required to convene a hearing to consider a charge against a medical practitioner the Chairperson **shall** (emphasis added) give the practitioner notice stating the matters set out in that section and there is no dispute that that is what occurred in this case;

(f) s. 109 sets out the grounds on which a medical practitioner may be disciplined;

(g) under that section the Tribunal must be dealing with "a charge laid under section 102 of the Act against a medical practitioner" and that wording is directed to the person's status at the time the charge was laid and subsequent references simply identify that person;

(h) 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;

(i) accordingly the references to "medical practitioner" and "practitioner" have to be interpreted as including any person properly subject to a charge before the Tribunal;

(j) s. 110 applies "in any case to which section 109 of this Act applies" and then refers to " the medical practitioner" and those words are sufficient to identify the person against whom the charge has been established as liable to the penalties;

(k) s. 110 provides that the Tribunal may impose a penalty – the requirement is discretionary;

(l) the legislative provisions, in summary, provide that the complaint is referred to a CAC, that the CAC must make a determination, that if that determination is that the complaint should be considered by the Tribunal then the CAC must frame a charge and lay it before the Tribunal and that the Tribunal must convene a hearing and give notice to the practitioner;

(m) once the charge has been framed and laid with the Tribunal, the Tribunal has no discretion but to hear the charge;

(n) considering how the term "medical practitioner" is used in sections 102, 109 and 110 an interpretation in the context of the Act requires that once the disciplinary process has commenced the legislation requires that it be concluded and the "context qualification" in the s. 2 definition of "medical practitioner" puts the matter beyond argument;

(o) to deny jurisdiction would be to leave the complainant without remedy and, for policy reasons, that could not be the intention behind the legislation in circumstances where the charge was laid before the applicant's name was removed from the register.

3.6 **IN** oral submissions Ms McDonald joined issue with a number of the points which Mr Waalkens had advanced. It is not necessary to record all that she said but she particularly disagreed with Mr Waalkens' submission that the enactment of ss. 44(3) and 45(4), and the absence of a corresponding provision in relation to a practitioner whose name was removed from the register by order of the Tribunal, meant that the Tribunal had no jurisdiction to hear a charge against a person who is not registered at the time of the hearing. She submitted that ss. 44(3) and 45(4) could have been inserted out of an abundance of caution and that they may not have been necessary. She also submitted that s. 102 is talking about the past and that looking back is consistent with the interpretation she was contending for.

3.7 **THE** Tribunal took due note of and has carefully considered all submissions made, and arguments advanced in relation to those submissions, whether or not they have been set out herein. It has also carefully considered the comments made by each counsel in relation to the other's written and oral submissions.

4. WHAT IS NOT BEING DECIDED:

4.1 **THE** Tribunal has no intention of deciding in this case whether it has jurisdiction to hear a charge against a person whose name was, because of a previous order of the Tribunal under s. 110(1)(a) of the Act, removed from the register before that charge was framed and referred to the Tribunal. That is not the factual setting in this case and a decision on those facts must be left until a case which involves them comes before the Tribunal for decision.

4.2 **THE** relevant facts in this case, the Tribunal repeats, are that for the purposes of Part VIII of the Act the applicant was a medical practitioner both when the conduct in question is alleged to have been committed and when the charge against the applicant was framed, referred to the Tribunal, incorporated in the notice sent to the applicant (with advice of the date of hearing) and served but that subsequently the applicant's name was ordered by the Tribunal to be removed from the register. The question for decision is whether in those particular circumstances the Tribunal has jurisdiction to hear and determine the charge against the applicant.

5. INTERPRETATION:

5.1 **S. 5** of the Interpretation Act 1999 applies and thus the meaning of an enactment must be ascertained from its text and in the light of its purpose and the matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

5.2 **THAT** section appears to replace s. 5(j) of the former Acts Interpretation Act 1924, which required an Act to receive such fair, large and liberal construction and interpretation as would best ensure the attainment of the object of the Act. S. 5 of the new Act leaves open the way in which the Courts should interpret an enactment in light of its purpose but does not, explicitly or implicitly, require a stricter or literal approach to interpretation.

5.3 **THE** long title of the Act is: *"An Act to consolidate and amend the law relating to medical practitioners, and, in particular,-*

(a) To impose various restrictions on the practice of medicine; and

(b) To provide for the registration of medical practitioners, and the issue of annual practising certificates; and
(c) To provide for the review of the competence of medical practitioners to practise medicine; and
(d) To provide for the notification of any mental or physical condition affecting the fitness of a medical practitioner to practise medicine; and
(e) To provide for the disciplining of medical practitioners; and
(f) To provide for matters incidental thereto".

5.4 **S. 2(1)** of the Act, headed *"2. **Interpretation**-"sets out a number of words and phrases and ascribes a meaning to each. Among other definitions it provides as follows: " In this Act, unless the context otherwise requires, -*

…….……(other definitions)

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

5.5 **MR** Waalkens' submissions do not appear to refer to the words "unless the context otherwise requires" but they are plainly of importance in interpreting the Act and the definitions contained in s.2. The words must be taken to involve a recognition by Parliament that there will or may be circumstances in which the context requires some meaning other than that set out in s. 2 to be given to the word or phrase under consideration. Unless that is what Parliament intended, there would have been no point in the inclusion of the words " unless the context otherwise requires" and no meaning other than that set out in s. 2 could ever be given to any of the words and phrases defined therein. The Tribunal therefore proceeds on the basis that if the context otherwise requires it may be necessary for the terms "medical practitioner" and "practitioner" to be given some meaning other than that set out in s. 2.

5.6 **THE** principal purpose of the Act is set out in s. 3 and *" 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". S. 3(2) lists a number of ways in which the Act seeks to attain its principal purpose. These ways are, in effect, those which are set out in (a) to (e) of the long title to the Act and have already been quoted. They include the disciplining of medical practitioners.

6. DECISION:

6.1 **THE** Tribunal is unanimously of the view that it has jurisdiction to hear the charge against the applicant and will now give its reasons.

6.2 **S. 102(1)** provides that a charge against a medical practitioner may be laid before the Tribunal by The Director of Proceedings or a Complaints Assessment Committee. There is no dispute that the charge in this case was laid by a CAC. Nor can there be any dispute that the charge was framed and laid before the Tribunal prior to the Tribunal's order that the applicant's name be removed from the register. The CAC was therefore entitled to lay a charge against the applicant and we do not understand Mr Waalkens to suggest the contrary.

6.3 **THE** charge having been properly laid (in a legal sense – we of course know nothing about the merits and are not expressing any view in relation to them) s. 102(2) comes into play. It provides that where, under s. 102(1), 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.

6.4 **THE** Tribunal accepts Ms McDonald's submission that where (as here) a charge is laid before the Tribunal pursuant to s.93 of the Act there is a mandatory requirement on the Chairperson of the Tribunal to convene a hearing of the Tribunal to consider the charge. Were the Chairperson, in the face of the requirement in s. 102(2) that (s)he shall convene a hearing of the Tribunal to consider the charge, to refuse to do so (s)he could only be seen to be acting contrary to a mandatory requirement of the Act and would rightly be exposed to the risks of criticism and possible legal action to enforce compliance.

6.5 **S. 103** is also relevant. S. 103(1) provides that where the Chairperson of the Tribunal is required to convene a hearing of the Tribunal to consider a charge against a medical practitioner (which the applicant plainly was when the charge was received and the Chairperson's obligations in relation to it took effect) he or she "shall" forthwith cause to be given to the practitioner a notice stating and specifying the matters set out in paragraphs (a) to (d) of s. 103(1).

6.6 **S. 109(1)** provides that, subject to subsections (3) and (4) of s. 109, if the Tribunal, after conducting a hearing on a charge laid under s. 102 of the Act against a medical practitioner, is satisfied that the practitioner has been guilty of certain specified conduct, has been convicted of certain offences, has practised medicine otherwise than in accordance with certain conditions or has breached any order of the Tribunal the Tribunal may make one or more of the orders authorised by s. 110 of the Act. The Tribunal considers that Ms McDonald is correct in her submission that the opening words of s. 109 are directed to the person's status at the time the charge is laid. The charge in this case was "laid under section 102 of this Act against a medical practitioner". That is beyond

dispute. If that charge proceeds to a hearing the question at the conclusion will be whether "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 has committed any of the conduct specified in paragraphs (a) to (g). We note Mr Waalkens' submission in relation to the word "practitioner" but consider that it merely identifies, by convenient words, the "medical practitioner" against whom the charge was laid.

6.7 **THE** Tribunal has no doubt that the words "a charge laid under section 102 of this Act against a medical practitioner" must include a medical practitioner whose name had not been ordered to be removed from the register before the charge was laid. (Whether they also include a person who was a registered medical practitioner when the conduct complained of was committed but whose name had been ordered to be removed before a charge relating to that conduct was laid does not arise for decision on this application.) Mr Waalkens draws attention to the preceding words ("a hearing on"). We have considered them but they do not affect the validity of Ms McDonald's submission. In our view all that they mean is that, in relation to a charge laid under s. 102 against a medical practitioner, the Tribunal must, before it can make an order authorised by s. 110, have conducted a hearing of that charge. (Of course it must also be satisfied of one of the matters set out in (a) to (g) of s. 109(1).)

6.8 **SO** far, therefore, it appears to the Tribunal that:

(a) when the CAC considered the complaint in this case it was considering a complaint in relation to a medical practitioner(s. 92(1));

(b) it determined in accordance with s. 92(1)(d) of the Act that the complaint should be considered by the Tribunal;

(c) it framed the charge which it considered appropriate and laid it before the Tribunal(s. 93(1)(b));

(d) the Senior Deputy Chairperson of the Tribunal convened a hearing of the Tribunal to consider the charge(s. 102(2)) and also gave the practitioner the notice required by s. 103.

Every one of those steps took place before the Tribunal ordered the name of the applicant to be removed from the register. Until, and including, the last of those steps there was no legal reason why the charge should not proceed to a hearing.

6.9 **SUBSEQUENTLY**, but before the scheduled hearing took place, the applicant's name was ordered to be removed from the register, The question, in the opinion of the Tribunal, is whether that development means that the Senior Deputy Chairperson, who was plainly required by the Act to, and did, convene a hearing of the Tribunal to consider the charge should now direct that that hearing is not to take place because the Tribunal no longer has jurisdiction to hear the charge.

6.10 **THE** Tribunal considers that the Chairperson should not give any such direction and that it still has jurisdiction. While it accepts that the applicant's name is no longer on the register the Tribunal considers that:

(a) the applicant's name had not been ordered to be removed from the register when the alleged conduct was committed, when the complaint relating to it was considered, when the charge was framed, when the charge was referred to the

Tribunal, when it was notified by the Tribunal to the applicant and the date for hearing was fixed and when the notice from the Tribunal to the applicant was served;

(b) there is no doubt that the disciplinary process was, in a legal sense, properly commenced;

(c) that process should continue until its end, i.e. until a decision has been made following a hearing of the charge, unless because of some clear direction in the Act from which the Tribunal derives its powers it is clear that an event has occurred which means that the charge should not be heard;

(d) there is no provision in the Act which directs the Tribunal that despite the disciplinary process having been properly commenced it is to be brought to a halt if a person charged ceases to be registered;

(e) in those circumstances the Tribunal not only continues to have jurisdiction to hear the charge against the applicant but is under a legal duty to do so.

6.11 **MR** Waalkens has, as we have noted, submitted that as from the date when the applicant's name was ordered to be removed from the register the applicant was no longer a "medical practitioner" or a "practitioner". He submitted that the saving provisions in ss. 44(3) and 45(4) do not apply in this case and that in no other respects can it be claimed that the Tribunal has jurisdiction in respect of complaints concerning the applicant. He submitted that if Parliament had intended that the removal of a practitioner's name by order of the Tribunal did not affect the practitioner's liability for any act done or default made before the date of removal it could easily have made provision to that effect. We have

given these submissions careful consideration but think that there are a number of answers to them.

6.12 **THE** first, and we regard it as important, is that it must have been within Parliament's contemplation that more than one complaint could be made concerning an individual medical practitioner and that such a person could face more than one hearing. If Parliament had intended that the removal of a person's name from the register by order of the Tribunal should automatically result in all other existing disciplinary proceedings against that person being brought to a halt, either permanently or at least for as long as the person's name stayed removed , it surely would have said so in unmistakable language. There is, however, nothing of the sort anywhere in the Act.

6.13 **ON** the contrary, there are clear indicia in the Act that practitioners' liability for acts done or defaults made before the date of removal is intended to continue notwithstanding the fact of removal. S. 44(3) effectively provides that if a practitioner's name is removed by the registrar of the Medical Council by order of the Council from the register or any part of the register such removal does not affect that practitioner's liability for any act done or default made before the date of removal. Similarly s. 45(4) of the Act provides that the removal by the Council under s. 45(1)(c) of a practitioner's name does not affect that practitioner's liability for any act done or default made before the date of removal. The two provisions plainly show an intention on the part of Parliament that the removal by the Council of a practitioner's name from the register, whether on his or her own initiative or not, should not and does not free the practitioner from liability for acts done or defaults made before the removal. Although Mr Waalkens relies on these provisions, and on the

absence of a corresponding one in the case of an order by the Tribunal for removal of name, before we could accept that Parliament intended that there should be a very significant difference between the position of someone whose name was removed by the Council and someone whose name was removed by order of the Tribunal we would require clear evidence, in the provisions of the Act, that removal by order of the Tribunal was intended to stay all existing proceedings against the person the subject of that order for as long as the person's name stayed removed. There is no such evidence in the Act's provisions.

6.14 **IN** respect of Mr Waalkens' submission that from the date when a person's name is ordered to be removed (s)he is no longer a "medical practitioner" or a "practitioner" we draw attention to the words used in ss. 44(3) and 45(4). In both of those cases the fact that the person's name had been removed did not prevent Parliament continuing to refer, in the latter part of each subsection, to "that practitioner's liability". The term "practitioner" can therefore be and has been used by Parliament to refer to someone who has ceased to be a registered person.

6.15 **MR** Waalkens is of course correct in submitting that the saving provisions, as he called them, in ss. 44(3) and 45(4) apply only to orders for removal of name made by order of the Council and it is a legitimate question as to the effect of there being no similar provision in respect of removal by order of the Tribunal. Ms McDonald submitted that the two subsections may have been enacted out of an abundance of caution. We think it is also possible that they may have been enacted to make it clear to everyone involved in the medical disciplinary process that removal of name by the Council, whether acting on its

own initiative or that of a registered practitioner, being an event occurring outside the confines of that process was not to have any effect on it. Whatever the reason was, we are not persuaded that providing that if someone's name is removed by order of the **Council** their liability for previous acts and defaults is not affected can validly be construed as indicating that Parliament thereby intended that the liability of someone whose name is removed by order of the **Tribunal** is not only affected but is to be stayed for as long as their name remains removed.

6.16 **THE** Tribunal is unable to discern any reason why Parliament could have considered it desirable to bring about such a situation as that which Mr Waalkens contends for. If he is correct, charges which were properly commenced against a medical practitioner cannot be heard if the practitioner's name is – before the date of hearing – ordered by the **Tribunal** to be removed from the register. Yet, as we have already seen, the liability of a practitioner whose name was removed from the register by order of the **Council** is unaffected. Such a situation would clearly result in injustice among doctors. If Mr Waalkens is correct, those practitioners whose names were removed by order of this Tribunal could rest secure in the knowledge that, while they could not practise, charges which had been laid against them while they were registered could not be heard for as long as their name remained removed. On the other hand, practitioners whose name had been removed by the Council under s. 44 or s. 45 would have to face a hearing of all charges which were laid against them in relation to conduct which occurred before their name was removed.

6.17 **THE** injustice would not be confined to medical practitioners. Complainants who had persuaded a CAC that their complaint should be considered by a Tribunal could "have

their day in Court" against a person who had been registered but had had his or her name removed by order of the Council under s. 44 s. 45. But complainants on whose behalf a charge had been laid against a person who was, at the time when the charge was laid, a medical practitioner but whose name had subsequently been removed by order of the Tribunal would have to be told that the charge could not be heard for as long as the practitioner's name remained removed. Apart from involving unequal treatment of complainants, this could result in matters which were more grave than those which resulted in the removal of name never coming before the Tribunal.

6.18 **THE** Tribunal can see nothing in the Act which suggests that Parliament intended that an order made by the Tribunal for removal of a practitioner's name should operate as a stay of proceedings which had previously been properly commenced against a registered medical practitioner. It does not accept that the enactment of ss. 44 and 45 leads to that conclusion and it does not see any basis on which Parliament could have thought it desirable that such different consequences should follow, according to whether the order for removal of name was made by the Council on the one hand or the Tribunal on the other.

6.19 **THE** Tribunal also notes another curious consequence which there would be if Mr Waalkens were correct. Under s. 31 of the Health and Disability Commissioner Act 1994 ("the HDC Act") any person may make a complaint to the Commissioner alleging that any action of any health care provider or disability services provider is or appears to be in breach of the Code of Health and Disability Services Consumers' Rights. "Health care

provider", unless the context otherwise requires, means (among others) "Any registered health professional" – see s. 3 of that Act.

6.20 **BY** s. 4(1)(a) of that Act "registered health professional" means a medical practitioner, which for the purposes of that Act means any person for the time being registered as a medical practitioner under the Medical Practitioners Act.

6.21 **COMPLAINTS** under that Act can, after investigation, result in charges being laid by the Director of Proceedings against a medical practitioner and being heard by the Tribunal.

6.22 **THE** Medical Practitioners Act 1995 recognises the existence of the Director of Proceedings and the Director's right to decide that proceedings should be taken against a medical practitioner – see, for example, s. 103 of that Act.

6.23 **THE** words "for the time being" in s. 4(1)(a) of the HDC Act must mean at the time of the action complained of (i.e. the alleged breach of the Code) or at the time of any charge being laid in relation to that breach. While it is no doubt the case that the HDC Act does not determine the position under the Act it may nevertheless be considered unlikely that in one of two Acts which are inter-related Parliament directed its attention to a medical practitioner's status at the time of the conduct in question, or a charge based thereon, but in the other focused entirely on the practitioner's status at the time of the hearing of the charge. Yet this would be the effect of adopting Mr Waalkens' submission that the Tribunal's jurisdiction over a practitioner ceases the moment his or her name is ordered by the Tribunal to be removed from the register.

6.24 **IF** Mr Waalkens is correct the Director of Proceedings could lay a charge against a medical practitioner but be unable to bring it to a hearing if, after the charge is laid but before it is heard, the practitioner's name is ordered by the Tribunal to be removed. This would be the case despite the definition in the HDC Act of "registered health professional" and despite the fact that if the practitioner's name were removed by order of the Council, rather than by order of the Tribunal, there would be no bar to the charge being heard.

6.25 **THE** first ground on which we rest our decision is that, the charge having been properly laid against a person whose name – both when the conduct in question was allegedly committed and when the charge was laid, notified and served, – had not by then been ordered to be removed from the register, the Tribunal was required by the provisions of the Act to, and did, convene a hearing of the Tribunal to consider the charge and that that hearing should now take place because there is nothing in the Act which indicates that it should not. The Tribunal has a duty to hear the charge.

6.26 **THE** second ground relates to the fact that Parliament, by including near the commencement of s. 2 of the Act the words "unless the context otherwise requires", recognised that there may be situations in which the words and phrases defined in s. 2(1) should bear a meaning different from that ascribed to them in that subsection. If we are wrong in our view that the ordinary meaning of the words used in s. 102 requires us to convene and hold a hearing to determine the charge then we accept Ms McDonald's submission that the context of the Act requires that once the disciplinary process has been commenced the legislation requires that it be concluded. We are satisfied that the context requires that the terms "medical practitioner" and "practitioner" should be construed as

including a person whose name had not been ordered to be removed from the register before the conduct is alleged to have been committed and the charge was laid, notified and served or, as Ms McDonald put it, any person properly subject to a charge before the Tribunal. The applicant is undoubtedly such a person.

6.27 **WE** wish to deal with Mr Waalkens' argument that since the applicant's name has already been removed from the register the CAC could only seek the payment of a fine or costs and that this made a nonsense of its proceeding. There are a number of reasons why we do not consider that submission to be determinative of the issues in this case:

(a) in the first place the charge is one of conduct unbecoming; no order for removal of name could be made in any event – see s. 110(2) – and this was the position from the time the charge was laid and is not affected by the subsequent order for removal of name;

(b) speaking generally and not with particular reference to the applicant, a practitioner charged with conduct unbecoming whose name is ordered by the Tribunal to be removed from the register has a right of appeal to the District Court and it is therefore at least possible that by the time a charge against such a practitioner is heard his or her name might have been restored to the register, following a successful appeal, in which event all of paragraphs (b), (c), (d), (e) and (f) of s. 110 would be available as penalty options if guilt were proven;

(c) even if no such appeal were made or had by then been heard we can see no reason why the Tribunal, in a particular case, could not indicate if it found a charge proved that in other circumstances it would have imposed a certain penalty but that because the person's name had already been removed from the register it had decided, in the

exercise of its discretion, to impose another penalty. Such information could be useful to the Council if it subsequently had to consider an application, by the person concerned, for restoration of name to the register;

(d) the penalty provisions are discretionary; no penalty **must** be imposed; the fact that in a particular case one or more of the penalties set out in s. 110 may not be available to the Tribunal does not appear to us to bear on its jurisdiction to hear the charge

6.28 **IN** relation to the citation from *Halsbury* the Tribunal is not satisfied that there is an ambiguity. The Tribunal is satisfied that the construction of the Act which gives effect to the legislators' intention is that the Tribunal is required to hear a charge against a person whose name had not been ordered to be removed from the register before the conduct was allegedly committed and the charge was laid, notified and served.

6.29 **IT** has many times been said that the decisions of the Tribunal are important in setting standards in the profession. If, because a practitioner's name has previously been ordered by the Tribunal to be removed, charges previously laid against him but not heard before the date of that order were not able to be heard while his name remained removed then the profession and the public would lose such benefit as would have been gained from the charge being heard by this specialist Tribunal and the appropriate standards being set by it in relation to the issues of professional conduct involved.

6.30 **IT** should also not be overlooked that the hearing of a charge provides the opportunity for a successful defence. It may be better for a practitioner whose name has been removed to have a charge against him or her heard while the evidence is fresh in the mind of the

practitioner than to leave it until such time as the practitioner's name is restored to the register. For the whole of that period the practitioner would have the charge hanging over him or her and would have to live with the knowledge that even if his or her name were restored one of the first things which would happen is that he or she would have to face the charge, the hearing of which had been deferred.

6.31 **WHILE** this is not a question for us to decide, there is another possible reason why it may be questioned whether it is necessarily in the interests of a practitioner whose name has already been removed from the register by order of the Tribunal to seek to have the hearing of existing charges against him or her deferred until restoration of name to the register occurs. That reason results from the wording of s. 13(d)(i) of the Act. If a practitioner successfully asserted that the Tribunal has no jurisdiction over him or her, because his or her name had already been removed, and existing disciplinary proceedings against him or her were thus deferred, he or she could, given that s. 13 prohibits the registration of a person the subject of professional disciplinary proceedings, jeopardise his or her prospects of subsequently becoming registered. That is, however, not a matter for this Tribunal to determine.

6.32 **COUNSEL** advised us that there were no Court decisions on the point but referred to previous decisions of this Tribunal in *Dassanayake* (Decision 54/98/31C) and *Phipps* (Decision 133/99/43C). In both of those cases a practitioner had requested the removal of his name from the register and the request had been acted on. In both cases jurisdiction was considered and held to exist. Both cases are, however, distinguishable from the present situation, where the practitioner's name was removed by order of the Tribunal. We

have considered the remarks of the Tribunal in *Phipps* at paragraphs 5.15 to 5.17. While they may be regarded as obiter dicta they substantially accord with our own views.

6.33 **WE** want to revert to Mr Waalkens' answers to questions put to him by the Tribunal (see paragraph 3.4 above). If he is correct, the Tribunal has no jurisdiction to hear a charge which was properly laid against a medical practitioner whose name was removed by order of the Tribunal before the charge could be heard. It would, on his argument, have jurisdiction if the applicant's name were restored to the register as a result of a successful appeal to the District Court against that order or a decision by the Council. It would not have jurisdiction if the High Court, on an appeal to it by way of case stated on a question of law, ruled that the District Court's decision had been incorrect and the Tribunal's order were thus restored. Such a situation would, to say the least, cause difficulty for the Tribunal's staff. In relation to every charge received they would have to establish whether the person charged was or was not currently a registered medical practitioner. If he was not, they would have to establish whether his name had been removed from the register by the Council under s. 44 or 45 or by order of the Tribunal. In the case of the latter they would then have to determine whether the person charged had persuaded the Council to restore his or her name. If that had not occurred they would have to establish whether the person had appealed to the District Court and, if so, whether the appeal had been successful and the person's name had been restored. If it had been successful they would need to determine whether there had been an appeal to the High Court and, if so, what stage had been reached with that. Only then could they be sure whether the charge should proceed to a hearing. Even then, changed circumstances could invalidate their previous view.

6.34 **THE** adoption of the position for which Mr Waalkens contends would mean that the jurisdiction of the Tribunal in relation to a person whose name had previously been removed by order of the Tribunal (but not by order of the Council) would or might switch on and off like a light. The Tribunal is strongly of the view that such a situation cannot possibly have been intended by Parliament, that there is nothing in the Act which leads to the conclusion sought by the applicant and that the correct position is that it has jurisdiction to, and indeed must, hear a charge which was properly laid against a person whose name had not been ordered to be removed from the register before the time of the alleged conduct or before the charge was laid, notified and served.

6.35 **WE** also note that the applicant's position, if correct, would mean that some complainants would never have the charge which had been laid considered by the Tribunal. Others might have it heard years after the event if the person charged achieved restoration of name. Complainants would effectively be left "in limbo" in the sense that they would not know whether the charge which had been laid would be heard by the Tribunal or not. The difficulties of hearings conducted years after the events in question are already familiar to this Tribunal. Further delays could only exacerbate the position.

6.36 **MR** Waalkens' submissions were presented with skill and care but, with respect, we do not accept that the applicant's position on jurisdiction is valid or that Parliament could possibly have intended the consequences which would flow from the adoption of that position. We hold that the Tribunal has jurisdiction to hear the charge laid against the applicant by the CAC.

6.37 **FOR** the foregoing reasons the jurisdiction application is dismissed and the charge must now proceed to a hearing.

7. DATE OF HEARING:

7.1 **THE** hearing is currently scheduled to commence on 1 March. There is only a very short time between the date of this decision and that date. In addition the Tribunal made it clear in its decision on the applicant's application for interim suppression that it wished to review the question of suppression following the delivery of this decision. Counsel were, in that decision, granted time to make certain applications. The time for doing so will not have elapsed by 1 March and in any event time will be needed to hear any applications and issue a written decision thereon.

7.2 **IN** the circumstances it is not feasible to proceed on 1 March and the hearing is adjourned to a date to be fixed in a Directions Conference which the Secretary is requested to convene and will involve counsel attending before the Chair by way of telephone conference. It may be helpful if that telephone conference is set for a date which is more than seven days after the date of this decision but before the hearing of any applications relating to suppression.

8. FINAL MATTERS:

8.1 **THE** Tribunal reminds the parties of the interim suppression orders set out in Decision 154/00/69C, which orders remain in force pending the further order of the Tribunal, and of the times (stated in paragraphs 8.1.3 and 8.1.4 of that Decision) within which they may make applications in that regard.

8.2 **PENDING** the further order of the Tribunal this present Decision is not to be published beyond the Tribunal, the parties or their counsel in a form which contains any reference to the name, first letter of the surname or place of residence, of the applicant.

8.3 **COSTS** in relation to the jurisdiction application are reserved.

DATED at Wellington this 27th day of February 2001

.....

T F Fookes

Senior Deputy Chair

Medical Practitioners Disciplinary Tribunal