Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 105/99/55C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **MORGAN FRANCIS FAHEY** medical practitioner of Christchurch

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 8 December 1999

PRESENT: Mrs W N Brandon - Chair

Ms S Cole, Dr R S J Gellatly, Dr J W Gleisner, Dr B J Trenwith (members)

APPEARANCES: Mr M F McClelland for Complaints Assessment Committee

Mr C J Hodson QC for respondent

Ms G J Fraser - Secretary

Mr B A Corkill - Legal Assessor

(for first part of call only)

DECISION ON APPLICATIONS FOR NAME SUPPRESSION AND OTHER ORDERS:

1. BACKGROUND:

1.1 **A** Complaints Assessment Committee (the CAC) established under Section 88 of the Medical Practitioners Act 1995 (the Act) has determined in accordance with Section 92(1)(d) of the Act that a number of complaints against Dr Morgan F Fahey (the respondent) shall be considered by the Medical Practitioners Disciplinary Tribunal (the Tribunal). The charges have not yet been set down for hearing by the Tribunal.

1.2 **THIS** matter is procedurally unusual as, prior to the charges being brought to the Tribunal, the respondent sought and obtained an interim injunction preventing the CAC from lodging the charges with the Tribunal. The Tribunal was named as the First Defendant in those proceedings.

1.3 **THE** Tribunal of course has no jurisdiction to take any steps in relation to any complaint against a medical practitioner until a charge or charges are brought to it. In the absence of any jurisdiction, the Tribunal cannot accept or process any application pursuant to Section 106 of the Act and cannot form any view as to the merits of a charge, or any applications which might be made, or whether it would be necessary or appropriate for it to exercise any other of its discretionary powers provided under the Act, including its power to suspend any practitioner pending the resolution of charges.

1.4 **ACCORDINGLY,** the Tribunal, represented by Counsel, entered an appearance in the High Court proceedings and advised the Court that it would abide any orders made by it and that it reserved its rights in all respects. It took the view that, in the absence of any jurisdiction in the matters before the Court and in advance of any opportunity to receive the charges and to consider any applications in the nature of those before the Court, it would be inappropriate for it to express any views, and, in any event, it had none.

1.5 **THE** Tribunal is now advised that, by consent, the High Court Orders made on 12 November 1999 have been amended to enable the charges to be brought to the Tribunal. Nine charges brought against the respondent were received by the Tribunal on 6

December 1999, together with the applications made on behalf of the respondent and the complainants seeking non-publication and other orders pursuant to Section 106 of the Act.

1.6 **THE** CAC's legal adviser, Mr M McClelland, advises that the CAC is still restrained by the Court orders from notifying the complainants of its determinations, as required by s93(1)(b)(ii) of the Act, and the Tribunal is similarly restrained pending the outcome of these present applications, and any subsequent variation or dismissal of the orders made by the High Court on 3 December 1999.

1.7 **THERE** is also the matter of suspension of the respondent's professional registration. By letter dated 11 November 1999 (which letter was not delivered to the Tribunal because of the interim injunction but which was included in the documents filed by the CAC as Exhibit "JBC8", to the Affidavit of John Barrie Currie, Convenor of the CAC), the CAC expressed the opinion and recommended that the Tribunal should exercise its powers under Section 104(a) of the Act and suspend Dr Fahey's professional registration until the disciplinary charges have been determined.

1.8 **THE** reasons for that opinion and recommendation were as follows:

...... **(Paragraph not for publication by Order of the Tribunal).**

1.9 **HOWEVER,** since that time Dr Fahey has advised the Medical Council that he has mislaid his annual practising certificate (and thus cannot return it to the Council) but that he has undertaken that he will not practise as a medical practitioner pending the final determination of the pending criminal and disciplinary proceedings without the consent of the Medical Council. By letter dated 24 September 1999, his Counsel, Mr C Hodson QC, advised the CAC that Dr Fahey:

> *"is not practising at the present time. I am advised he has no intention of doing so in the future. His health has been severely affected by recent events and he is hoping to sell his practice in the near future. On the other hand, he does not accept that there is any justification for him to hand in his practising certificate."*

1.10 **IN** its letter to the Tribunal dated 3 December 1999, the CAC advises the Tribunal that, on the basis of his undertaking not to practise without seeking the consent of the Medical Council, it no longer wishes to recommend that the Tribunal exercise its powers under the Act and suspend Dr Fahey's registration. However, pursuant to Section 104(2) of the Act, the Tribunal may exercise its power to order interim suspension of registration of its own motion, "*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 …*".

1.11 **MR** Hodson QC has asked that the Tribunal not exercise its powers to make any such order, on the basis of the undertakings made by the respondent to the CAC. The Tribunal has also considered that request together with these present applications.

2. THE APPLICATIONS:

2.1 **THE** respondent seeks interim suppression of his name and any identifying particulars until further order of the Tribunal and interim suppression of the particulars of the charges and of the names and identifying particulars of all complainants in respect of charges laid against him.

2.2 **THE** CAC seeks an order prohibiting the publication of the names and any identifying details of the complainants referred to in the charges against the respondent which have been laid before the Tribunal.

3. GROUNDS OF THE RESPONDENT'S APPLICATION

3.1 **THE** Tribunal's Counsel, Mr B Corkill, confirmed to the Tribunal that, in essence, the basis for the orders made by the High Court was the respondent's concern that if it became known that professional disciplinary charges had been laid against him this might have the effect of indicating to potential jurors that he was "*officially considered*" to be guilty of the offences. There is a risk that any publicity about these charges might prejudice the fair hearing of the criminal charges that are pending.

3.2 **MR** Hodson told the Tribunal that there is a risk that a juror, hearing that professional disciplinary charges had been brought against Dr Fahey, might think that the profession or the Tribunal held the view that there was some substance to the criminal charges. Mr Hodson submitted that if the mere fact that disciplinary charges had been laid was publicised that might be sufficient to prejudice a juror and deny the respondent his right to a fair hearing of the criminal charges.

4. GROUNDS OF THE CAC's APPLICATIONS:

4.1 **THE** CAC is seeking non-publication orders. Because of the Court orders which are in place it is not possible for the CAC to obtain supporting affidavits, however, as noted by the CAC, the particulars of the charges provide a sufficient basis for the Tribunal to assess the nature of the charges, and it is satisfied that no such affidavits are necessary.

4.2 **THE** respondent apparently raises no objection to the CAC's application, and in any event, the CAC's application effectively mirrors that sought by the respondent in paragraph 2 of his application.

5. DETERMINATIONS:

5.1 **FOR** the reasons which follow, the Tribunal determines as follows:

(a) That the respondent's application for name suppression is declined. Any publication of the fact that charges have been laid with the Tribunal is to be confined to the fact that disciplinary charges have been laid and will be dealt with by the Tribunal in due course.

(b) That the application for interim suppression of the particulars of the charges and of names and identifying particulars of all of the complainants in respect of the charges laid against him, is granted.

(c) The application by the CAC seeking that the names and any identifying details of the complainants referred to in the charges now laid before the Tribunal be prohibited, is granted. The Tribunal's order in relation to this application extends to any particulars of the charges, in accordance with its determination referred to in paragraph 5.1(b) above.

5.2 **ON** its own motion and acting pursuant to its powers provided in Section 104(2) and Clause 5 of the First Schedule to the Act, the Tribunal has also determined that the respondent's registration should be suspended until the disciplinary proceedings are determined, and that the hearing of the disciplinary charges should be stayed until after the criminal charges have been resolved.

6. REASONS:

6.1 **THE** Tribunal considered the applications made on behalf of the respondent on their own merits. It accepts entirely the respondent's right to go to the High Court and to seek such injunctive relief as he, and his legal advisers, consider appropriate. However, the reality is that any such relief cannot extend to restraining this Tribunal from carrying out its statutory duties and obligations. Rightly or wrongly in the respondent's eyes, Parliament has determined that the Tribunal is to have certain discretionary powers which it is to exercise having proper regard to the interests of the individual medical practitioners against whom charges are brought, the medical profession, and the public generally.

6.2 **FOR** the reasons set out above, the Tribunal had no opportunity to consider the respondent's position and any applications he might wish to make when the matter was before the High Court. The Tribunal is a statutory body. It can only act in accordance with its statutory powers. Pre-jurisdiction, it was unable therefore to form any views on the matter, or to assist the Court in any way, except by appearing and confirming to the Court that it was aware of the applications before it, and that it would abide any orders made by it.

6.3 **THE** orders made by the Court fairly preserve the position for the respondent and the complainants to allow the charges to be received by the Tribunal, and to allow the Tribunal to convene, consider and determine any applications made pursuant to the Act. The Tribunal does not understand that the High Court intended to restrain it from receiving and determining applications which are within its statutory powers to determine. In light of the determinations which it has made, the Tribunal will ask Counsel to return to the High Court and seek a variation to the orders it has made to allow the Tribunal's decision to be effected. The High Court will then have the opportunity of considering the respondent's application for injunctive relief with the benefit of knowing that the Tribunal has now considered the matter and come to a view.

6.4 **THE** Tribunal considered therefore that, whilst it accepts entirely the fact that certain orders have been made, and the reasons for that, that fact does not confer any special status or privilege on the respondent which ought to inhibit the Tribunal from approaching its consideration of his application any differently to that which it adopts in relation to all such applications.

6.5 **IN** his Memorandum to the Court dated 2 December 1999, Mr Hodson advised the Court that if the Tribunal did not grant the application for name suppression then the respondent could either appeal that Decision to the District Court or seek a review of the Tribunal's decision in the High Court. Either way, said Mr Hodson, the present orders suppressing publication made by the High Court would remain in place. The

6.6 Tribunal will ask Mr Corkill to seek an indication from the Court on this issue and will abide any orders made in this regard.

6.7 **ON** the basis that it should proceed to consider all of the applications on their own merits, taking into account all relevant principles and considerations and the views of the High Court reflected in the orders that it has made, the Tribunal unanimously came to the view that the respondent's application for name suppression should be declined. All of the members consider that, having regard to all of the relevant factors it must consider, such a conclusion is inevitable.

6.8 **IT** accepts that other courts may take a different view. However, it is a specialist statutory body, comprising a mix of a lay member, a legal Chair, and medical professionals. The Tribunal brings to its deliberations its collective judgment, and its experience adjudicating within a jurisdiction confined by its statutory parameters and defined by the nature of the interests it is required to take into account.

6.9 **HAVING** decided to grant all of the applications except the respondent's application for name suppression, the Tribunal discussed at length the basis given for the granting of injunctive relief. On balance, it is not persuaded that the concerns held by the respondent that any publication of the fact that disciplinary charges have been brought against him might prejudice his right to a fair trial, and that such concerns outweigh the other relevant considerations which this Tribunal must take into account.

6.10 **IN** considering such applications the Tribunal must be satisfied that it is desirable to make the orders sought *"having regard to the interests of any person ... and the public interest ..."* . It is therefore, a matter of balancing the interests of the respondent, the complainants and the public interest. It must also take into account the general principle reflected in Section 106(1) that hearings of the Tribunal are to be conducted in public.

6.11 **IT** is now well-established that the public interest identified in the Act is clearly the process of disciplining doctors transparently and openly. There is a public interest embodied in the legislation itself: see *W v CAC* MA 122-98, 9/7/98 (DC)*; ZX v MPDT* [1967] DCR 638; and *P v MPDT,* AP 2490/97, 18/6/97 (DC).

6.12 **AS** recent events have demonstrated, the public perception that self-regulation is not in the public interest has not diminished. Parliament clearly intended that proceedings of the Tribunal should be conducted in the public domain so that the public should have confidence in the integrity of the professional disciplinary process. If complaints are heard in private, and kept secret, especially complaints which are of a serious nature and which involve fundamental issues, any public perception that in matters involving the conduct of professional practice the professions 'look after their own' is heightened and the profession may be brought into disrepute.

6.13 **IN** such circumstances, prejudice may be caused to the profession generally, and to the individual practitioner concerned. The fact that the public might believe that no disciplinary charges have been brought against the doctor, notwithstanding the serious and fundamental issues raised and the fact that all of the allegations arise squarely within the context of the respondent's professional practice, might very well be the subject of adverse comment, both in the media and among members of the public generally.

6.14 **THE** Tribunal considers that, far from being perceived as some sort of "official" acknowledgment that the charges may have substance, the public (and thus potential jurors) may well look askance at a profession which was apparently taking no steps to subject such allegations to the scrutiny of a professional disciplinary hearing.

6.15 **THERE** can be no doubt that the allegations which found the charges brought to the Tribunal raise possibly the most serious issues which could arise in the context of the doctor-patient relationship. As has been said on many occasions, trust is at the heart of any doctor-patient encounter. It is absolutely fundamental to the professional relationship. This trust is nurtured by a doctor's commitment to honest and effective communication, to professional competence and to the quality and safety of every patient encounter. Underpinning this personal trust is a public trust - a trust in the profession's commitment to self-regulation by ensuring that doctors collectively accept a responsibility for maintaining standards, monitoring performance, and for receiving and processing complaints appropriately.

6.16 **THESE** values underpin the public interest identified in Section 106. The Tribunal considers that it is in the spirit of these values that it not only apply them, it must be seen to do so, or the integrity of the professional disciplinary process will be undermined and the profession generally may be brought into disrepute. This is consistent with the approach of the Tribunal, and its appellate courts, that the public interest resides in the principle of open justice, the public's expectation of the accountability and transparency of the disciplinary process, the importance of freedom of speech and the media's right to report Court proceedings fairly of interest to the public.

6.17 ......**(Paragraph not for publication by order of the Tribunal.)**

6.18 **IT** has also been accepted by the Tribunal when considering applications for name suppression, that while the interests of a respondent medical practitioner in keeping the fact that charges have been laid from becoming public knowledge is a matter which the Tribunal can properly take into account under Section 106, if that were to be the determining factor then no disclosure could be made as there is unlikely ever to be an instance where the applicant's interests in terms of his or her reputation, family or commercial interests will not be in issue simply by virtue of the fact that he is facing disciplinary charges.

6.19 **A** number of cases have been referred to in support of the respondent's application. These are conveniently summarised in *L v Medical Practitioners Disciplinary Committee & Anor*, CP 20/96 (unreported) High Court, Wellington, 29/2/96, and *Angus v H & Anor*, CP129/99 (unreported) High Court, Wellington, 17/6/99. However, in all of the cases cited the applicant sought orders either to stay the hearing of disciplinary charges, or to prevent details of any such hearing from being publicised pre-trial. This present application is different in that the respondent seeks orders that even the mere fact that disciplinary charges have been laid should be suppressed.

6.20 **IN** *R v M*, CA84/98 (unreported) 24/8/98, a case in which the appellant was seeking permanent name suppression following conviction, the Court of Appeal held that:

> *"This Court has declined to be definitive about the factors which may justify name suppression. In every case, the sentencing Judge must determine in his or her discretion whether the detrimental effect of publication upon the accused would be disproportionate to the gravity of the offending and outweigh the public's general right to know of the activities of the Courts . It is for that reason that this Court has avoided laying down specific guidelines or what was described by Cooke P in R v Liddell (at p547) as a "fettering code". Each case must be decided on its own merits*

6.21 **AS** stated above, the Tribunal has taken that approach in considering this application, and it is persuaded not to grant the application. It has come to this view for all of the reasons given, but a principal factor for the Tribunal is the fact that the charges all arise in the

context of the respondent's professional practice. Accordingly, the Tribunal is firmly of the view that the public and the profession have every right to expect that allegations such as those made in the charges laid against the respondent will receive the scrutiny of the professional disciplinary process; such scrutiny should be inevitable.

6.22 **FURTHER**, the Tribunal has no hesitation in postponing its inquiry until after the criminal charges have been dealt with. The risk of prejudice for the respondent, to the Tribunal's mind, would certainly be present if the Tribunal were to conduct its hearing of the charges laid in advance of the Court hearing, notwithstanding that the focus and purpose of the Tribunal's inquiry is quite different to the Court's.

6.23 ....**(Paragraph not for publication by order of the Tribunal.)**

6.24 **IT** is perhaps significant that in *L v The Medical Practitioners Disciplinary Committee & Anor*, (supra) that the Court suggested that disciplinary proceedings might be conducted before civil litigation, and that would not unduly prejudice the respondent if he, as plaintiff in a civil proceeding, did not seek or no longer sought a jury trial, but agreed to trial by Judge alone, on the basis that "*A Judge can be regarded as immune*". That is, there may be circumstances where the possibility of prejudice is diminished.

6.25 **THE** Tribunal considers that the circumstances of this case, particularly the express requirement contained in Section 106 that in determining applications for name suppression the Tribunal is to take into account the public interest (as that has been identified by the Courts), the risk of prejudice to the respondent is similarly diminished, or at least outweighed by other relevant considerations. It is satisfied that the public, and the profession, and certainly the complainants, are entitled to expect that these allegations will be properly investigated by the respondent's professional disciplinary bodies, and they should be told that these processes have been invoked and will run their course.

6.26 **THE** Tribunal has also taken into account the number of charges, allegations and complainants, and the fact that the events giving rise to the complaints are alleged to have occurred over a long period of time. It may be the case that if the fact that disciplinary

charges have been brought against Dr Fahey is made public, other complaints may arise. ....**(Not for publication by order of the Tribunal)**

6.27 **IN** the professional disciplinary context it is clearly in the public interest that any patients or former patients who feel that they also have grounds for complaint are encouraged to come forward, either to make their own complaint or to corroborate or support other complainants. The Tribunal considers that this is a legitimate public interest ground warranting publication.

6.28 **ALL** things considered, the Tribunal has no doubt that if the orders of the High Court did not exist, it would not grant name suppression to the respondent. Accordingly, it is satisfied that the application for name suppression for the respondent should be declined, and that the High Court should be advised of the Tribunal's decision, and the reasons for that. The Tribunal's decision is unanimous.

6.29 **IN** relation to the applications on behalf of the complainants, the considerations are quite different; refer *M v Wilde & CAC* MA 106/99, District Court, Wellington, 22/4/99 an appeal from the Tribunal. The nature of the interests of the respondent and the complainants are quite different. There is nothing disclosed to the Tribunal which suggests that there is, either in the information as to the identity of the complainants or of the details of the charges, anything which requires recognition of a greater public than private interest; *Proctor v* R [1997] 1 NZLR 295 (CA); *Director of Proceedings and Anor v The Nursing Council of New Zealand*, (HC) Wellington, 774/98, 7/12/98, Baragwanath J.

6.30 **THE** Tribunal has no hesitation in granting all of the other applications sought.

Suspension

6.31 **FOR** reasons outlined by the CAC in its letter dated 11 November 1999 (referred to in paragraph 1.8 herein) the Tribunal has also determined that it should make a formal order suspending the respondent's registration. It accepts that the Medical Council is content to

rely upon the respondent's undertaking that he is not practising medicine, and that he will not resume medical practice without seeking the Council's consent.

6.32 **HOWEVER** Section 104 of the Act permits the Tribunal to make orders suspending a practitioner's registration, or requiring a practitioner to practise only in accordance with conditions determined by it to be appropriate, if it is satisfied that it is necessary or desirable for it to do so, having regard to the health and safety of members of the public. It may make such orders of its own motion and without notice to the practitioner.

6.33 **IN** considering issues of public safety, the Tribunal has taken the approach that the consideration of what constitutes 'public safety' should not be confined to purely clinical issues. Medical practice, involving as it does fundamental issues of trust and the care of persons whose capacity might be diminished or compromised by age, illness or particular vulnerability, requires that the concept of what constitutes public health and safety should be given its widest possible interpretation.

6.34 **IN** the circumstances of these complaints, the Tribunal has no doubt that suspension is warranted. It is satisfied that the public has a right to know that the respondent is not entitled to practice medicine *at all* pending the determination of these complaints. ....**(Not for publication by Order of the Tribunal.)**

6.35 ....**(Not for publication by Order of the Tribunal.)** The charges fall squarely for consideration within the ambit of Section 104; they do raise the possibility that the health and safety of the public, would be at risk if the respondent was permitted to continue, or resume, his medical practice. Notwithstanding the serious nature of the charges, by letter dated 24 September 1999 Mr Hodson QC advised the CAC that Dr Fahey *"... does not accept that there is any justification for him to hand in his practising certificate.*" Dr Fahey has since advised the CAC and the Medical Council that he has mislaid his practising certificate and that he will return it to the Council if it is found.

6.36 .... (**Not for publication by order of the Tribunal.)** There should be no room for any misunderstanding on the part of the respondent, his advisers, his patients and former

patients, and the public generally, that Dr Fahey is not currently entitled to practise. While suspended the respondent may not consult with *any person* for the purposes of giving any medical advice, care or treatment. That includes obtaining, prescribing and administering any drugs and medicines.

6.37 **PURSUANT** to Section 104(4)(c) the Tribunal is required to advise the respondent that he has the right to apply for revocation of the order suspending his registration, at any time in accordance with Section 105 of the Act.

6.38 **BECAUSE** the fact of suspension of Dr Fahey's registration will be recorded on the Medical Register (Section 37(1)(h)), and the Registrar of the Medical Council is required by Section 49(3) of the Act to keep the register open for public inspection at the offices of the Council during the ordinary hours of the Council, the issue as to whether or not notice of Dr Fahey's suspension would contravene any name suppression orders should be clarified.

6.39 **THE** Tribunal for its part, does not consider that any advice that Dr Fahey's registration is currently suspended, without any reasons being given, is prevented by name suppression orders made in relation to the charges. A doctor's registration may be suspended, for a number of reasons and the Council is not required to give notice of the reason for the suspension.

6.40 **FOR** all of these reasons therefore, the Tribunal considers that it is necessary and desirable to suspend the respondent's registration pending the determination of the charges. The Tribunal's decision is again unanimous.

7. ORDERS

7.1 **ACCORDINGLY,** the Tribunal makes the following Orders:

7.1.1 That the publication of the names and any identifying details of the complainants referred to in the charges against Dr Fahey laid before the Tribunal on 3 December 1999 is prohibited.

7.1.2 That publication of the details of any of the charges against Dr Fahey laid before the Tribunal on 3 December 1999 is prohibited until further order of the Tribunal.

7.1.3 That Dr Fahey's registration as a medical practitioner is suspended pending determination of the charges laid before the Tribunal on 3 December 1999.

7.1.4 That the hearing of the charges is stayed pending the determination of the criminal charges laid against Dr Fahey.

7.2 **THE** Tribunal will request its Counsel, Mr Corkill, to make application to the High Court for a variation of the Orders made on 3 December 1999 so that this Decision may be given effect and for such other consequential orders as may be required.

DATED at Auckland this 14th day of December 1999.

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W N Brandon

CHAIR