New Zealand Health Practitioners Disciplinary Tribunal

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**DECISION NO:** 488/Den12/218P

**IN THE MATTER** of the Health Practitioners Competence Assurance Act 2003

-AND-

**IN THE MATTER** of a Charge laid by pursuant to Section 91(1)(b) of the Act against **DR RYAN WOONGKI KIM** Dentist of Dunedin

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:** Mr D M Carden (Chair)

Drs B Stanley, C Lloyd, and P Luteru and Ms A Hauk-Willis (Members)

Ms K Davies (Executive Officer)

Ms H Hoffman (Stenographer)

Hearing held at Wellington on 12 October 2012

**APPEARANCES:** Dr J Coates for the Professional Conduct Committee

The practitioner, Dr Ryan Woongki Kim in person by telephone

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**Introduction**

1. Dr Ryan Woongki Kim is presently a periodontist practising in New South Wales, Australia. On 22 July 2011 Dr Kim was convicted in the District Court at Dunedin on three charges under the Crimes Act 1961 and one charge under the Education Act 1989. The Professional Conduct Committee ("PCC") of the Dental Council of New Zealand ("Dental Council") formed the view that the Tribunal was entitled to exercise certain powers in respect of Dr Kim as a consequence of those convictions and charged that they reflected adversely on Dr Kim's fitness to practise as a dentist.

**The Charge**

2. The Charge under the Health Practitioners Competence Assurance Act 2003 ("the HPCA Act") brought by the PCC was as follows (and a small amendment as noted was sought at the hearing and ordered by the Tribunal without objection from Dr Kim):

> ***"TAKE NOTICE*** *that pursuant to sections 91 and 100 of the Health Practitioners Competence Assurance Act 2003 ("the Act"), a Professional Conduct Committee, appointed by the Dental Council of New Zealand under section 71 of the Act, has reason to believe that grounds exist entitling the Health Practitioners Disciplinary Tribunal to exercise its powers under section 100 of the Act, and charges Dr Ryan Woongki Kim, registered Dentist, of Dunedin, as follows:*
>
> *(a) Dr Kim has been convicted of offences that reflect adversely on his fitness to practise (section 100(1)(c));*
>
> ***PARTICULARS OF CHARGE***
>
> *1. On 22 July 2011 Dr Kim was convicted in the Dunedin District Court of:*
>
> *(a) Three charges under section 228 Crimes Act 1961, each offence being punishable by a term of imprisonment not exceeding 7 years, namely:*
>
> *i. On or about 28 November 2008, Dr Kim, at Dunedin, dishonestly and without claim of right used a document, namely a student loan/allowance application form, with*

*intent to obtain a pecuniary advantage, namely a student allowance under the Education Act 1989; and*

ii. *On or about 22 January 2010, Dr Kim, at Dunedin, dishonestly and without claim of right used a document, namely a student loan/allowance application form, with intent to obtain a pecuniary advantage, namely a student allowance under the Education Act 1989; and*

iii. *On or about 12 January 2011, Dr Kim, at Dunedin, dishonestly and without claim of right used a document, namely a student loan/allowance application form, with intent to obtain a pecuniary advantage, namely a student allowance under the Education Act 1989.*

*(b) One charge under section 307AA(2) [ – amended at hearing] Education Act 1989, an offence punishable by a term of imprisonment not exceeding 12 months, namely:*

*i. Between 28 November 2008 and 8 February 2011 Dr Kim, at Dunedin, for the purpose of receiving a student allowance other than that to which he was entitled, wilfully failed to notify the Chief Executive of the Ministry of Social Development that he was legally married to Jin Kim on 28 September 2009.*

*The convictions set out in paragraph 1(a) and 1(b), either separately or cumulatively, reflect adversely on Dr Kim's fitness to practise under section 100(1)(c) of the Act.*

3. That Charge was heard by the Tribunal at Wellington on 12 October 2012. The PCC was represented by counsel. Dr Kim attended the hearing by telephone conference from New South Wales. Questions concerning the Tribunal's jurisdiction to deal with the matter because Dr Kim is no longer on the register as a dentist in New Zealand were canvassed at the hearing. The PCC made submissions and Dr Kim had nothing to say about this. The Tribunal concluded that it did have jurisdiction to hear the matter. The PCC submitted that the Charge was made out. Dr Kim accepted that that was so and made no submissions. The Tribunal is required to consider the matter in any event and reach its own conclusion on that which it did. It concluded that the Charge was made out and announced that to the hearing. The PCC then made submissions on the appropriate penalty to be imposed. Dr Kim did

not give evidence but did answer questions from Tribunal members and was given the opportunity to make submissions. The Tribunal announced its decision on the penalty to be imposed which is set out below and for the reasons which are now set out in writing.

4. There was produced by the PCC to the Tribunal a Bundle of Documents, namely the Certified Copy of the criminal record concerning the convictions, the Summary of Facts (Criminal) as presented to the District Court, the Sentencing Notes of the sentencing Judge in the District Court, the Order for Sentence of Community Work, the Sentence Completion Report from the Department of Corrections, and Dr Kim's application at the time his certificate was due for renewal for removal of his name from the register. There was also produced an affidavit from Carolyn Anne Young of Wellington, the Deputy Registrar of that the Dental Council, deposing to certain matters concerning Dr Kim's status and producing certain documents. There was no objection to any of this from Dr Kim who himself produced no documents. No other evidence was given to the Tribunal.

**Background**

5. Dr Kim graduated with BDS from the University of Otago in 2005. He then moved to Australia to practise as a dental practitioner. On 20 January 2006 he was registered in New South Wales as a dental practitioner under the Mutual Recognition statutory provisions. He has apparently practised as a dental practitioner there for a period of time.

6. On 28 September 2008 Dr Kim was married to Jin Kim in Sydney, Australia.

7. Shortly thereafter Dr Kim moved to Dunedin to attend the University of Otago to complete his doctorate qualifications for periodontistry.

8. On 28 November 2008 Dr Kim applied for, and was granted, a Student Allowance under the Education Act 1989. In the application form Dr Kim stated that he was

single. Apparently this was done by ticking the appropriate box which gave that as one of several options.

9. As a consequence of that application and that statement of his status Dr Kim was paid for the period 26 January 2009 to 3 January 2010 the sum of $10,966.13 to which he was not entitled.

10. The same process was followed on 22 January 2010 when Dr Kim applied again for the Student Allowance and again stated that he was single. As a consequence of that application and statement he received for the period 18 January 2010 to 26 December 2010 the sum of $11,342.98, again to which he was not entitled. The same happened again on 12 January 2011 when he applied for the Allowance stating his single status and as a consequence for the period from 10 January 2011 to 6 February 2011 received the sum of $944.16 to which he was not entitled.

11. That made a total overpayment to him of $23,253.27 of Allowances to which Dr Kim was not entitled. It was said in the Summary of Facts before the District Court, taken and not disputed by Dr Kim, that on making the Education Act applications for Student Allowances Dr Kim was made aware that the information he provided was required to be true and correct.

12. Enquiries by the Authorities revealed that Dr Kim's wife, Jin Kim, was at relevant times a dentist employed in Australia and in receipt of income which would have disqualified Dr Kim for the Allowances to which reference has been made.

13. Dr Kim has since repaid the full overpayment, $23,253.27.

14. When the true situation was learned, charges were brought against Dr Kim in the District Court at Dunedin as set out above. The charges under the Crimes Act 1961 carried a maximum penalty of seven years' imprisonment and the charge under the Education Act 1989 a fine of $5,000.00 and/or 12 months imprisonment.

15. Dr Kim pleaded guilty to the four charges in question and was sentenced in the District Court on 22 July 2011. The Tribunal was provided with the Sentencing Notes made by the Judge at the time and has taken the detail of those carefully into account.

*16.* Those Notes record that Dr Kim stated in an interview with the authorities that he was aware of his obligations but that he had *"not advised that [he was] married as [he] did not want to go through the hassle seeing that [his] wife was living in Sydney and [he was] living in Dunedin … [and]… that [he] wanted to simplify the process"*.

17. At the hearing in the District Court Dr Kim, through his then lawyer, sought a discharge without conviction under sections 106 and 107 of the Sentencing Act 2002 and the Court considered that application in detail but declined it. One of the matters mentioned in the Sentencing Notes relevant to that issue was that, if Dr Kim were convicted, he would have to disclose the conviction to the Dental Council of New Zealand and that could result in consequences under the HPCA Act. The Sentencing Notes set out at some length the Judges understanding of the process that advice of the conviction to the Dental Council of New Zealand would have had.

18. On this point the Judge said:

> *"What I am being asked to do in your case, Mr Kim, is in effect to not allow the conviction and the relevant matters surrounding this to be placed before the Dental Council. I am being asked to discharge you without conviction in order that the Dental Council will not be in a position to consider the conviction. That seems to me to be a very similar situation to what was being asked in Blyth where the court was asked to discharge without conviction on the basis that the Police Disciplinary Tribunal would not take into account a conviction in considering a police officer's suitability to continue to be a police officer. The Court of Appeal said in Blyth what should be considered is not necessarily the conviction but the culpability and criminality which is important"*.

19. The Notes specifically referred to the sum of approximately $23,000.00 that Dr Kim had received to which he was not entitled. It was said that this could not be

described "*as a one-off offence*. *It occurred on a number of occasions and it resulted in you failing to disclose information over a period of time*. One of the mitigating factors was described thus:

> *"You are clearly someone with talents and abilities and you also have a charitable and humanitarian side evidenced by the fact that you have been prepared to go and work amongst the aboriginal population in Australia."*

20. The Judge described Dr Kim as not being "*a young naïve and inexperienced offender*" and referred to his ages of 25, 26 and 27 years old when the offences occurred. He described Dr Kim as "*an extremely intelligent and well educated man … evidenced by the doctoral studies which [he was] undertaking*".

21. Having taken all factors into account the Court sentenced Dr Kim on the charges to 100 hours' community work. The Sentencing Notes do include the following paragraph:

> *"I am going to direct, Mr Kim, that my sentencing notes be typed and a copy given to your counsel. I would expect my sentencing notes could be put before the Dental Council. It is entirely a matter for them to determine your fitness to practise in your specialised field. I think it would be an absolute shame if the Dental Council took the view that you were not a fit and proper person to practise in your chosen career. You have spent a number of years studying and it would be a shame for that to go up in flames. You have the ability to help others who might need your dental services and it would be a shame if they were not able to take advantage of that. As I have said, it is a matter for the Dental Council but I would hope that they might see this is a mistake or an error of judgement on your part and look at all the other aspects of your character and your life when considering your application to the Dental Council"*.

22. Despite the obligatory provisions of section 67 of the HPCA Act, apparently the Registrar of the District Court did not send to the Dental Council notice of Dr Kim's conviction. That fact did not come to the notice of the Council until about December 2011.

23. In the meantime, on 30 September 2011 when his Annual Practising Certificate was due for renewal, Dr Kim applied to the Council stating that he did not intend to practise in New Zealand and wished to have his name removed from the register.

After enquiry of the Health and Disability Commissioner which revealed there was nothing on the database about Dr Kim, the Council cancelled Dr Kim's registration on 3 October 2011 under section 144(3) of the HPCA Act. In her affidavit to the Tribunal Ms Young, the deputy registrar of Dental Council, said that she would not have actioned Dr Kim's request to cancel his registration had she been aware of the conviction but instead the matter would have been referred to the Council with a recommendation that the registration not be cancelled until inquiries were made into the conviction and the circumstances of the offending.

24. The Council requested the Sentencing Notes and these were supplied in January 2012. On 15 February 2012 Dr Kim applied to the Dental Council for registration in the Periodontic Specialist scope of practice and Dr Kim had ticked "yes" to the question whether he had ever been convicted of an offence punishable by imprisonment for a term of three months or longer and attached a copy of the order for sentence of community work. Because the application form was incomplete it was returned for completion.

25. On 6 March 2012 at a Council meeting the information relating to Dr Kim's conviction was referred to and it resolved to refer to the matter to a PCC. On 2 April 2012 the Council resolved to defer consideration of Dr Kim's application for registration as a Periodontic Specialist until the outcome of the PCC investigation was known and then on 11 June 2012, having been informed of the decision to lay the Disciplinary Charge before this Tribunal, to defer consideration of the application further until the outcome of the Tribunal hearing was known.

26. Dr Kim advised the Tribunal at the hearing that he had since withdrawn his application for registration as a Periodontic Specialist in New Zealand.

**The PCC case**

27. The PCC submitted that the convictions separately and cumulatively are of the appropriate level of severity and do reflect adversely on Dr Kim's fitness to practise in dentistry and that the Charge has been made out. Each of the four charges in the District Court carry penalties which are punishable by imprisonment for terms of three months or longer and therefore section 100(1)(c) and 2(b) applied giving the Tribunal jurisdiction.

28. The submission was also made that if the Charge is proven on the balance of probabilities it must also be established that the conduct requires disciplinary sanction.

29. The Tribunal had jurisdiction, it was submitted, despite the fact that at the time the Charge was laid and at the time of the hearing Dr Kim was not on the register in New Zealand. Reference was made to sections 5(3) and 148(1) of the HPCA Act.

30. In canvassing the question of whether the convictions in the courts have reflected on fitness to practice various authorities were considered and submissions made. It was said:

30.1. That it is not necessary that the convictions conclusively demonstrate that the practitioner is unfit to practice although there is a high threshold to be met.

30.2. A determination of fitness to practise does not solely relate to the practitioner's clinical ability or competence but includes:

30.2.1. A consideration of whether the conduct was immoral or unethical; and

30.2.2. A consideration of character.

30.3. If the conviction were likely to bring discredit to the profession this might indicate that it reflected adversely on fitness to practise but this was not conclusive.

30.4. Conduct which involves a document to obtain a pecuniary advantage reflects adversely on fitness to practise.

30.5. The criminal offending need not occur within the direct context of professional practice.

30.6. Regard may also be had to the purpose of disciplinary proceedings, namely protection of the public and maintaining public and professional confidence in the profession.

31. It was submitted that Dr Kim's conduct reflected adversely on his fitness to practise and that the Charge separately or cumulatively was established.

32. Despite Dr Kim's name no longer being on the register, The PCC sought that the Tribunal give rulings on the matter and a clear statement of its view so that this could be taken into account were Dr Kim ever to make application for registration in New Zealand again and indeed might be of relevant importance to the authorities at the place at which he is presently practising.

33. Dr Kim had no submissions to make on the subject of whether the Charge was made out and indeed accepted that it was.

34. It is important that the Tribunal consider the matter separately and reach its own conclusion.

**Jurisdiction**

35. The Charge against Dr Kim is dated 20 June 2012. By that stage Dr Kim's name was no longer on the register of dental practitioners in New Zealand. He had, as is noted above, indicated his wish to have his name removed from the register in the application dated 9 September 2011 and this had been done with registration cancelled on 3 October 2011. The Dental Council was not aware at the time of the decision to cancel his registration that he had had the convictions to which the Charge in this matter refers.

36. The Tribunal is required to consider whether it has jurisdiction to deal with the matter at all in those circumstances. No submission was made on this point by Dr Kim.

37. For the PCC it was submitted that the case of *P v The Medical Practitioners Disciplinary Tribunal*[1] had little relevance because, first, that case concerned a Charge brought under a previous statute with different provisions and, secondly, a critical distinguishing factor was that the practitioner there was still on the register at the time when the Charge was brought but not when it was heard (he having had his name removed from the register in the meantime because of another unrelated matter).

38. The Tribunal accepts that submission but also notes that it was conceded by the PCC that in that case the further distinction included that the name had been removed by order rather than by election.

39. In the present matter the PCC relies on section 148(1) of the HPCA Act which provides:

> "*The cancellation of the entry in a register relating to a health practitioner does not affect his or her liability for any act or default occurring before the cancellation*".

40. The PCC also relies on section 5(3) of the HPCA Act which reads:

> "*In Parts 4 and 5, **health practitioner** includes a former health practitioner*". (These Parts deal with complaints and discipline and appeals).

41. It was submitted that on the authority of those statutory provisions the Tribunal has jurisdiction and that submission is upheld.

**Charge - General Principles**

42. The burden of proving the Charge is on the PCC.

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[1] Wellington HC, CP 58/01, 2 August2001, Ellis J dealing with the decision on appeal from 157/00/69C of The Medical Practitioners Disciplinary Tribunal dated 27 February 2001

43. The standard of proof is the balance of probabilities, the standard that applies in civil litigation. The gravity of the allegation is an important factor. The more serious the allegation, the greater part must be the degree of satisfaction on the balance of probabilities.

44. The Supreme Court has affirmed this in *Z v Dental Complaints Assessment Committee*[2] that the balance of probabilities standard is to be applied flexibly dependent on the seriousness of the matters to be proved and the consequences of proof. It affirmed that the standard in disciplinary proceedings is that civil standard of balance of probabilities. It endorsed the judgment in *Briginshaw v Briginshaw*.[3]

45. The Tribunal has followed the principles enunciated in *Z* in its decisions including in Decisions *Professional Conduct Committee v Dawson*[4] and *Professional Conduct Committee v Karagiannis.*[5]

46. In *PCC v Chand*[6] the Tribunal applied the principles as stated *in B v Medical Council of New Zealan.*[7] Elias J (as she then was) said:[8]

> "*The structure of the disciplinary processes as set up by the Act, which rely in large part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standard applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in a disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards are not permitted to lag. The disciplinary process in part is one of setting standards*."

47. Orders can be made under section 100(1)(c) of the HPCA Act if the Tribunal, after conducting a hearing on a Charge laid, makes the finding that the practitioner has

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[2] [2009] 1 NZLR 1
[3] (1938) 60 CLR 336 per Dixon J.
[4] HPDT 300/Nur09/139P
[5] HPDT 181/Phar08/91P
[6] HPDT 106/Nur06/49P
[7], HC Auckland, 11/96, 8 July 1996, Elias J

been convicted of an offence that reflects adversely on his fitness to practise. The offence qualifies if it is an offence punishable by imprisonment for a term of 3 months or longer. The offences for which Dr Kim was convicted are each punishable by imprisonment for a term exceeding 3 months.

48. The Tribunal has said that the HPCA Act envisages that not all offences will reflect adversely on a practitioner's fitness to practise and that while fitness to practise bears some relationship to competence and quality assurance, fitness to practise is not simply a reference to competence.[9]

49. It was said in the context of medical practitioners' discipline that the conduct would

> *"…need to be of the kind that was inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine.*" [10]

50. Fitness in the context of nursing has been contrasted with competence. [11]

> *"'Fitness' often may be something difference to competence… Aspects of general deterrence as well as specific deterrence remain relevant. So, too, is the broader consideration of the public or community's confidence and the upholding of the standards of the nursing profession."*

51. A contrast was drawn in *Winefield* [12] between reflecting on fitness to practice on the one hand and bringing or likely to bring discredit to the profession on the other. In the *Winefield's* case a pharmacist had fraudulently obtained money on 898 occasions and had been overpaid $10,000.00. He was convicted in the District Court on four representative charges of using a document to obtain a pecuniary advantage and 18 charges of forgery. These convictions were found by the Tribunal to reflect adversely on his fitness to practise as a pharmacist, the Tribunal saying:[13]

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[8] at page 15
[9] *Winefield* HPDT 60/Phar06/30P
[10] *Re Zauka* MPDT 236/03/103C
[11] *Professional Conduct Committee v Martin* (Wellington HC CIV 2006-485-1461, 27 February 2007, Gendall J)
[12] 83/Phar06/30P confirmed on appeal - HC Wellington, CIV-2006-485-2225,18 December 2007, Clifford J
[13] HPDT 60/Phar06/03D – paragraph 43

> *"It seems a reasonable conclusion that the term "fitness to practise" bears some relationship to competence but is also expected to encompass other meanings.*
>
> *Furthermore, the concept of activity which reflects adversely on fitness to practise cannot simply mean activity which "has brought or was likely to bring discredit to the profession". This is the wording that is found in s.100(1)(b). Again it is to be reasonably expected that different phrases have different meanings. The fact that different phrases are used in s.100(1)(b) and in s.100(1)(c) strongly suggests that the concept of reflecting adversely on one's fitness to practise was not to be read as having (or as only having) the meaning of bringing discredit to the profession. That said, it also appears sensible that the concept of "reflecting adversely on fitness to practise" would bear some relationship or linkage to the concept of bringing discredit to the profession. There is certainly no reason to consider that the concept of fitness to practise should preclude consideration of the impact of the conduct on the profession."*

52. It was emphasised in *Dalley*[14] that*:*

> *"… the phrase "fitness to practise medicine" includes consideration of the ethical aspects of practise as well as those of a clinical nature…*
>
> *A matter may reflect adversely on the practitioner's fitness to practise medicine without making him or her incompetent to practise, and without elevating, e.g. "conduct unbecoming" above "professional misconduct.""*

53. In the case of *Murdoch*[15] the Tribunal dealt with the case of a physiotherapist who had been convicted in the District Court of charges of dishonesty. The decision included:

> *"Fitness to practice cannot, in the context of a conviction, relate only to the practitioner's clinical ability. It must also involve a moral consideration and conduct which offends the law or is immoral or unethical, must affect adversely on the practitioner's fitness to practice. Registration carries with it obligations to behave in a way which is ethical, honest and in accordance with the law. Failure to uphold the law or dishonesty must adversely affect a practitioners' fitness to practice."*

54. The dishonest use of a document to obtain a pecuniary advantage has been held in many cases by the Tribunal to reflect adversely on the practitioner's fitness to practise and these cases are mentioned in this decision.

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[14] MPDT decision 8/97/4C
[15] 76/Phys06/45P

55. Having weighed up the principles concerning the issue of whether the criminal convictions reflect on fitness to practise and the submissions made, the Tribunal finds that the Charge is made out and that the convictions referred to do reflect adversely on Dr Kim's fitness to practise.

56. Dr Kim was, as noted by the District Court Judge, not a young man at the time of the offending. He was in his mid twenties and had already qualified with a university degree and was studying for a Doctorate. The offending occurred on three occasions spread over three years.

57. The question that was asked was straightforward with a straight answer, namely whether Dr Kim was single or not. There could have been no confusion about it and he elected dishonestly and without claim of right to use the document to obtain a pecuniary advantage. Not only that, but this occurred only two months after he had in fact married and that was to a person who has been in practice in New South Wales as a dentist earning income which disqualified Dr Kim from the Allowances he was applying for.

58. Furthermore, he repeated the dishonesty not once but twice again in subsequent years. The amounts that he received in total were significant, some $23,000.00.

59. What is required of practitioners in the dental profession is that they act with honesty and integrity not only in their professional lives but also in their personal lives. The dental profession is significantly reliant, as are many other health professions, on the supply of government funding and this funding can only be availed of if there is honesty in application. The system relies heavily on health professionals being honest in their applications for the funding which is provided by the taxpayer.

60. In his dealings with his patients, Dr Kim is required to show honesty and integrity. His consultations, his prognoses, his reporting to other professionals, and the totality

of the provision of his health professional services require that he act with honesty and integrity.

61. For him to have been convicted of these offences referring to three quite separate and well spread out occasions and involving dishonesty on his part does, in the Tribunal's view, reflect adversely on his fitness to practise.

62. It was also submitted for the PCC that there was the further issue to be determined, namely whether the convictions were of such severity as to warrant discipline. That test is normally required where there has been a Charge under section 100(1)(a) or 100(1)(b) of the HPCA Act, that is a Charge of professional misconduct or a Charge of act or omission which brought or was likely to bring the relevant profession into disrepute.

63. Reference was made to *Price.*[16] In that case Mr Price, a pharmacist, was charged with two charges, one relating to a conviction which was found to reflect adversely on his fitness to practice and another of misconduct. In relation to the first charge, although the Tribunal found that there was the qualifying conviction which did reflect adversely on Mr Price's fitness to practice, it did say:[17]

> *"However, having regard to the "special reasons" finding made by the Court which the Tribunal has to take into account, it has concluded that the charge was not sufficiently serious as to warrant discipline."*

64. It appears from the decisions that the context of a reference to severity such as to warrant discipline in relation to a conviction reflecting adversely on fitness to practise was that there had been special reasons referred to by the court in which the conviction was entered.

65. Because the matter was raised by the PCC, but without deciding that it is necessarily a requirement in all cases, the Tribunal is of the view that the convictions that were

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[16] HPDT 287/Phar09/134;
[17] paragraph 34

entered against Dr Kim were of sufficient severity to warrant discipline, that is, for the protection of the public, the maintenance of standards and/or punishment Dr Kim.

66. There were significant sums of money involved. The dishonesty was patent. It occurred on three occasions over a period of time. The public needs protection from dental practitioners who are involved in behaviour which is dishonest; the dental profession needs to have standards maintained by sanctioning behaviour of this kind, and, to the extent that this is relevant given that Dr Kim has already been punished by the court process, there is an element of punishment required at least to the extent of the censure which has been ordered.

67. Accordingly the Tribunal finds the charge made out as was announced at the hearing and there is then the question of Penalty.

**Penalty**

68. The PCC conceded that it was not open to the Tribunal to cancel Dr Kim's registration as a dental practitioner or to suspend his registration, given that he is no longer registered in New Zealand as a health practitioner. It was submitted that other penalty provisions of section 101 of the HPCA Act are available to the Tribunal, namely the imposition of conditions, censure, and an order for costs. It was conceded that there could be no fine penalty imposed given that Dr Kim had been convicted by the court and section 101(2) of the HPCA Act applied.

69. Having referred to the four established functions of the disciplinary process, protecting the public, maintaining professional standards, punishment and, where appropriate, rehabilitation, the PCC submissions then canvassed recent and relevant cases on removal of the practitioner's name from the register and recent and relevant cases on suspension of the practitioner.

70. Aggravating factors referred to in Dr Kim's case were said to be the seriousness of the offences involving some $23,000.00, that the conduct was over a lengthy period of time, and that the Sentencing Notes made it clear that Dr Kim was likely to be aware of the potential impact that his conviction would have on his registration.

71. The mitigating factors referred to were that reparation in full had been made at an early stage, the fact that this was a first offence, references in the Sentencing Notes to other good aspects of Dr Kim's character and life and Dr Kim's participation in the Tribunal process.

72. Effectively the PCC conceded that, had Dr Kim's name been on the register, this was more likely to be a case where there would be a suspension rather than removal.

73. The PCC sought to have the Tribunal spell out in clear terms what it would have ordered had Dr Kim's name still been on the register. This would, it was said, be helpful to the Dental Council should there ever be an application by Dr Kim to return to the register in New Zealand; and it could be of assistance to other equivalent authorities offshore New Zealand, particularly in New South Wales where Dr Kim is presently practising, in considering his status in practice in such situation.

74. In addition, the PCC submitted that there should be conditions on practice including:

    74.1. Practise under supervision for a period of no more than three years or such lesser period as was considered appropriate; and

    74.2. Practising in a group practice environment.

75. The PCC sought an order for censure. It also sought an order for contribution to costs which is referred to below.

**Dr Kim's response on penalty**

76. Dr Kim really had nothing to volunteer so far as penalty was concerned. He did not in any way express regret or remorse. He needed to be questioned concerning his current position and basic relevant factors. He declined to take the oath.

77. In response to questions from the Tribunal he said that he was aged 29 years and married with no children. When asked about his income and means he said that he had been working for nine months of the current financial year and could not say what his income was. He said he was supporting his family and his wife's family and his father was in debt.

78. Dr Kim gave no explanation for his actions or raised any matters by way of mitigation of his behaviour.

**Penalty Discussion and Decision**

79. The authority to impose penalties on the practitioner under section 101 of the Health Practitioners Competence Assurance Act 2003 are:

79.1. That registration be cancelled.

79.2. That registration be suspended for a period not exceeding 3 years.

79.3. That the health practitioner be required, after commencing practice following the date of the order, for a period not exceeding 3 years, to practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise specified.

79.4. Censure.

79.5. A fine of up to $30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him (which applies in this case)).

79.6. Costs.

80. The functions of disciplinary proceedings are:

80.1. Protecting the public especially having regard to the provisions of s. 3(1) of the Act which reads:

> *"The principal purpose of this Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions."*

80.2. Maintaining professional standards.[18] The Tribunal takes into account the following extract from the judgment in *Young v PCC:*[19]

> *"The protection and maintenance of professional standards is an important part of the protection of the public. It is through the maintenance of high professional standards that the public is protected. Deterrence is in the same category. This is intended to discourage others from acting in the same way reflected in the severity of the punishment imposed."*

80.3. Punishing the practitioner in question.[20]

80.4. In appropriate circumstances, rehabilitation of the practitioner.[21]

81. In *A v Professional* Conduct *Committee*[22] the High Court, having considered the range of sanctions available to the Tribunal, cited with approval the decision in *Taylor v The General Medical Council*[23] and said that four points could be expressly and a fifth impliedly derived from the authorities namely:[24]

> *"First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element'. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amenable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish."*

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[18] Refer *Dentice v Valuers Registration Board* [1992] 1 NZLR 720; *Ziderman v General Dental Council* [1976] 2 All ER 344

[19] Wellington HC, CIV 2006-485-1002, 1 June 2007, Young J

[20] Refer *Dentice*; also *Patel v Complaints Assessment Committee* (Auckland High Court (CIV 2007– 404 – 1818; 10 August 2007, Lang J) and *Winefield* HPDT 83/Phar06/30P).

[21] *Patel*; also *J v Director of Proceedings* (HC Auckland, CIV 2006–404–2188, 17 October 2006 Baragwanath J)

[22] HC Auckland CIV 2008-404–2927, 5 September 2008, Keane J

[23] [1990] 2 All ER 263

[24] Para81

82. The Court went on:[25]

> *"Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v The General Medical Council [2005] EWHC 2143, though '… the maintenance of public confidence … must outweigh the interest of the individual doctor', that is not absolute – 'the existence of the public interest in not ending the career of a competent doctor will play a part.'"*

83. The Tribunal is also mindful of the remarks of Randerson J in *Patel v Dentists Disciplinary Tribunal.*[26] That case involved an appeal by a dentist whose name had been removed from the register by the Dentists Disciplinary Tribunal in relation to Charges arising from his treatment of an elderly couple for whom he carried out crown and bridge work, accepted by the Court as being "grossly incompetent and completely unacceptable."[27]

84. In discussing the purpose of disciplinary proceedings the Court said:

> *"[28] The Dentist Act does not provide any guidance on this subject but I am satisfied that the following statement of principle by Eichelbaum CJ in Dentice v Valuers Registration Board [1992[1 NZLR 720, 724-725 is apposite in this case:*
>
> > *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them; see, generally, Re A Medical Practitioner [1959] NZLR 784 at pp 800, 802, 805 and 814. In New Zealand, such provisions exist in respect of medical practitioners, barristers and solicitors, dentists, architects, pharmacists, real estate agents and a number of other professionals and callings, as well as valuers; …*
>
> *[29] In the light of those general purposes, it is also relevant to consider the purpose of the removal of a practitioner's name from a professional register. There is authority for the proposition that removal*

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[25] Para 82
[26] HC;Auckland, AP77/02, 8 October 2002
[27] Paragraph 32

*from a professional register is a protective purpose and is not designed to punish the professional concerned; Re A Medical Practitioner [1995] 2 QBR 154, 164. Plainly, removal from the register does serve to protect the public but it also serves the function identified in Dentice of maintaining professional standards and maintaining public confidence in the standing of the profession. It also acts as a deterrent to the individual concerned and others in the profession.*

*[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practise against the need for removal and its consequences to the individual: Dad v General Dental Council at 1543. As the Privy Council further observed:*

> *Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name be erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.*

*[31] I respectfully adopt the observations of the Privy Council and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case. As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large."*

85. The Tribunal seeks to maintain reasonable consistency in the penalty decisions that it makes. This is obviously fair to practitioners and an appropriate course.[28] The Tribunal accepts the submissions on behalf of the PCC that sentencing principles also include:

85.1. That the existence of the public interest and maintenance of public confidence must be balanced against the interests of the individual practitioner and in not ending the career of a competent practitioner.[29]

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[28] *Patel v Complaints Assessment Committee* (HC Auckland, CIV 2007-404-1818, 10 August 2007)
[29] *Giele v General Medical Council* [2005] EWHC 2143

85.2. That denunciation and deterrence are relevant sentencing principles that can properly be considered.[30]

85.3. Also whether or not the practitioner is prepared to appear before the Tribunal and give evidence and answer questions.

86. The PCC referred to a number of cases where there had been cancellation of registration including:

86.1. The case of a nurse who over a five week period stole cash on 10 different occasions and an item of jewellery;[31]

86.2. An enrolled nurse convicted of charges relating to dishonest use of a document, namely a colleague's credit card, for purchases totalling $1,222.47.[32]

86.3. A medical practitioner convicted of offences concerning fraudulent GMS claims over a period of one year resulting in 15 counts of using a document to obtain a pecuniary advantage where the sums involved totalled approximately $6,000.00.[33]

86.4. A nurse who, over a period of 13 years, made fraudulent claims on ACC under a false name resulting in payments to her of $206,000.00 to which she was not entitled, who was convicted in the court and whose registration was cancelled.[34]

**Potential removal from register**

87. The Tribunal does not consider that, weighing up all those principles, this is a case that would have warranted an order removing Dr Kim's name from the register. It

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[30] *G v New Zealand Psychologists Board* (HC Wellington, CIV–2003-485-2175, 5 April 2004, Gendall J)
[31] HPDT *Bain* 387/Nur11/176P
[32] HPDT *Condon* 23/Nur05/13P
[33] MPDT *Dassanayake* 554/98/31C
[34] HPDT *Healey* 123/Nur07/70P

would have considered the alternatives available including suspension and conditions and would not have been persuaded that this case was in the category where removal of registration would be appropriate.

**Potential Suspension**

88. The Tribunal does, however, take the view that, had Dr Kim's name still been on the register, this would have been a case where suspension would have been appropriate.

89. Contrasting cases are:

89.1. *Satya,*[35] concerned a pharmacist who made twice monthly subsidy claims with intent to obtain a pecuniary advantage on 73 occasions who was suspended for a period of six months with conditions.

89.2. *Winefield,*[36] a case concerning a pharmacist engaged in fraudulent transactions on 898 occasions involving sums totalling about $10,865.00 who was suspended for nine months, a decision upheld on appeal.[37]

89.3. *Palmer,*[38] a physiotherapist case concerning 20 charges under the Accident Compensation legislation with false invoices, the amounts claimed totalling some $4,432.09 where the practitioner was suspended for six months.

89.4. *Burton,*[39] a case of a pharmacist convicted of 58 offences and sentenced to 15 months' imprisonment with reparation ordered totalling $14,707.35 who was suspended for nine months by the Tribunal with conditions.

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[35] HPDT 365/Phar10/169P
[36] HPDT 60/Phar06/30P
[37] Winefield v PCC (HC Wellington; CIV-2006-485-2225: 18 December 2007; Clifford J)
[38] HPDT 96/Phys06/43P
[39] HPDT 142/Phar07/78P

89.5. *Marchand,*[40] where a practitioner was convicted of three representative charges of using a document with intent to defraud and one representative charge of dishonesty of using a document to obtain a pecuniary advantage. The practitioner was sentenced to eight months home detention and the sums involved totalled $30,497.00. Mr Marchand was suspended for nine months with conditions.

89.6. *Chiew,*[41] involved a case of a pharmacist convicted of 130 charges relating to claims to HealthPAC. Total reparation was $220,994.20 and Mr Chiew had been sentenced in court to one year's home detention and 300 hours of community work and was further suspended by the Tribunal for nine months.

89.7. *Payne,*[42] was a case of a dentist convicted of four charges under the Crimes Act involved totalling $9,820.00 who was suspended for nine months but with the period of suspension itself suspended for a further period of 24 months. The Tribunal also imposed conditions on his practice for a period of three years.

90. The aggravating factors in Dr Kim's case are these:

90.1. That there were three separate occasions spread over three years where there was offending.

90.2. That the document itself was clear as to the question that was being asked and there could be no suggestion of any confusion.

90.3. That, particularly in relation to the first offence, Dr Kim's marriage had occurred only some two months before he declared in the form that he was single.

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[40] HPDT 280/Med09/133P
[41] HPDT180/Phar08/95P
[42] HPDT405/Den11/184P

90.4. That there were significant sums involved totalling some $23,000.00.

90.5. That the receipt of those monies by Dr Kim on the basis he had declared he was single was in direct face of the fact that his wife was in receipt of income as a dentist which would have disqualified him from that allowance benefit.

90.6. The matters referred to by the District Court in the Sentencing Notes to which reference has been made above.

91. The mitigating factors are:

91.1. Those matters referred to by the District Court in the Sentencing Notes which the Tribunal has taken seriously into account. It is mindful of the views expressed by the Judge but is also mindful that the Judge was aware that ultimately competence discipline was a matter for the Dental Council and this Tribunal and was not appraised of the issues that arise in that context or of other cases where similar questions have been considered.

91.2. This is a first offence by Dr Kim in the context of his professional life.

91.3. Reparation has apparently been paid in full and at an early stage.

91.4. Other aspects of Dr Kim's character and life referred to in the Sentencing Notes.

91.5. The fact that Dr Kim has participated in the Tribunal process. His attendance by telephone was perfectly in order.

91.6. Dr Kim gave answers to questions but did not wish to do this on oath.

92. Having taken all those factors into account the Tribunal is of the view that, had Dr Kim's name been on the register in New Zealand, the Tribunal would have ordered him to be suspended for a period of nine months.

**Conditions**

93. Under section 101 (1) of the HPCA Act the Tribunal may:

> " *… order that the health practitioner may, after commencing practise following the date of the order, for a period not exceeding 3 years, practise his or her profession only in accordance with any conditions as to employment, supervision or otherwise that are specified in the order.*"

94. The Tribunal is of the view that there should be conditions of that kind imposed and this can be ordered despite the fact that Dr Kim is not presently on the register in New Zealand.

95. What this means is that when and if Dr Kim at any time in the future may choose to go back on the register in New Zealand (and due process will be required to be followed in accordance with the then applicable statutory provisions), he can only practise his profession as a dentist or periodontist or other registered oral health practitioner in accordance with the conditions that are imposed.

96. These conditions are:

96.1. That Dr Kim practise under supervision for a period of 12 months, such supervision to be by a person approved by the Dental Council and paid for by Dr Kim and to be on such conditions, including conditions as to reporting to the Dental Council on a regular basis, as the Dental Council may impose.

96.2. That Dr Kim have first provided a certificate of good standing from the environment in which he had been practising prior to his application for registration and prior to his commencement of practice, such certificate to be to the satisfaction of the Dental Council and to deal with such matters as the Dental Council should require concerning Dr Kim's practice in that environment as a dental practitioner.

97. The Tribunal considered the further condition sought by the PCC that Dr Kim must for the period practise in a group practice environment, but took the view that this was not required to be ordered given that there was a measure of duplication in that

proposed condition with the practice under supervision condition that has been ordered.

**Censure**

98. The Tribunal is of the view that it should order censure under section 101(1)(d) of the HPCA Act. That is a penalty which is available despite to Dr Kim's having been convicted in the court and despite his not being currently on the register. It is not a formality but expresses the Tribunal's significant disquiet as to the convictions that have been entered by the courts, the circumstances of those in full and as to detail, and the impact that this has on Dr Kim's fitness to practise.

**Costs**

99. The PCC sought an order for contribution to the costs of the PCC and the costs of the Tribunal in relation to this matter. It indicated that the cost to the PCC was likely to be in the range of $9,000 - 11,000.00 excluding GST. The Tribunal costs are estimated to be in the vicinity of $14,070.00 excluding GST.

100. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*[43] there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion.

101. In *Winefield*[44] the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:

101.1. The hearing being able to proceed on an agreed statement of facts.

101.2. Co-operation of Mr Winefield.

101.3. The attendance of Mr. Winefield at the hearing.

101.4. Consistency with the level of costs in previous decisions.

101.5. Costs not paid by Mr Winefield would fall on the profession as a whole.

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[43] HC Wellington,; AP 23/94, 14September 1995, Doogue J
[44] HPDT 60/Phar06/30P

102. The Tribunal has considered the matter in the context of these principles and took into account the fact that Dr Kim did participate in the hearing and effectively accepted the Charge and the facts supporting it. He did not give effectively any detail of his means to meet costs nor any reason why there should not be an order made against him. Indeed, the Tribunal formed the view that he was being evasive about his income which could be assumed to be reasonable having regard to his work as a periodontist in New South Wales and his other personal circumstances. Dr Kim showed no remorse for his conduct or any apology for the consequential cost incurred through this disciplinary process.

103. Having taken all matters into account the Tribunal is of the view that, of the total estimated cost of $24,070.00 excluding GST, Dr Kim should contribute $10,000.00 which should be divided equally between the PCC and the Tribunal costs.

**Publication**

104. The PCC sought a direction for publication of a notice stating the effect of the decision on the Health Practitioners Disciplinary Tribunal and Dental Council websites and in the newsletter of the Dental Council of New Zealand.

105. Section 157(2) of the HPCA Act provides:

> *"If the Tribunal makes an order under this Act in respect of a health practitioner, the appropriate executive officer of the Tribunal must publish, in any publication the Tribunal directs, a notice stating –*
>
> *(a) the effect of the order; and*
> *(b) the name of the health practitioner; and*
> *(c) a summary of the proceedings in which the order was made."*

106. The Tribunal is of the view that such order as sought should be made and further that notice of this proceeding, the Charge that has been brought against Dr Kim, the decision and reasons of the Tribunal and the outcome should further be published in New South Wales where Dr Kim is currently in practice. Because the Tribunal cannot specifically direct such publication, it orders that the Executive Officer notify

the appropriate authorities in New South Wales with the request that there be publication of these matters, namely the effect of the order, the name of Dr Kim as the health practitioner, and a summary of the proceedings in an appropriate publication or publications in New South Wales and otherwise in Australia as is appropriate.

**Conclusion and Orders**

107. Had Dr Kim's name been still on the register of dental practitioners in New Zealand, the Tribunal:

107.1. would not have ordered that the registration be cancelled.

107.2. would have ordered under section 100(1)(b) of the HPCA Act that his registration be suspended for a period of nine months.

108. Pursuant to section 100(1)(c) of the HPCA Act, the Tribunal orders that if Dr Kim seeks to practise his profession in New Zealand as a dentist or periodontist or other oral health practitioner following the date of this order he do so for a period of 12 months only on these conditions:

108.1. That Dr Kim practise under supervision for a period of 12 months, such supervision to be by a person approved by the Dental Council and paid for by Dr Kim and to be on such conditions, including conditions as to reporting to the Dental Council on a regular basis, as the Dental Council may impose.

108.2. That Dr Kim have first provided a certificate of good standing from the environment in which he had been practising prior to his application for registration and prior to his commencement of practice, such certificate to be to the satisfaction of the Dental Council and to deal with such matters as the Dental Council should require concerning Dr Kim's practice in that environment as a dental practitioner.

109. Pursuant to section 100(1)(d) of the HPCA Act Dr Kim is ordered to be censured.

110. Pursuant to section 100(1)(f) of the HPCA Act Dr Kim is ordered to pay a contribution of $10,000.00 towards the prosecution of the Charge by the PCC and the hearing by the Tribunal, to be divided as to $5,000.00 to the PCC and $5,000.00 to the Tribunal.

111. That pursuant to section 157(2) of the HPCA Act, the Executive Officer of the Tribunal publish a notice stating the effect of the order and the name of Dr Kim as health practitioner and a summary of the proceedings in the newsletter of the Dental Council of New Zealand and on the Health Practitioners Disciplinary Tribunal and Dental Council's websites.

112. That the Executive Officer of the Tribunal notify the appropriate authorities in New South Wales with the request that there be publication of these matters, namely the effect of the order, the name of Dr Kim as health practitioner, and a summary of the proceedings in an appropriate publication or publications in New South Wales and otherwise in Australia as is appropriate

**DATED** at Auckland this 13th day of November 2012

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David M. Carden
Chairperson
Health Practitioners Disciplinary Tribunal