

HPDT No: 1033/Phys18/420D

UNDER The Health Practitioners Competence Assurance Act 2003 (“the HPCA Act”)

IN THE MATTER of a disciplinary charge laid against a health practitioner under Part 4 of the Act.

BETWEEN **THE DIRECTOR OF PROCEEDINGS** designated under the Health and Disability Commissioner Act 1994

Applicant

AND **PETER WILLIAM CHUM** of Christchurch, Physiotherapist

Practitioner

HEARING held at Christchurch on 1 – 4 July 2019

TRIBUNAL: Mr D M Carden (Chair)
Dr T Pons, Ms K Davie, Ms S Stewart and Ms E Jones
(Members)
Ms G Fraser (Executive Officer)

APPEARANCES: Ms L Preston and Ms C McCulloch for the Director of Proceedings

No appearance of or for the practitioner

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Introduction

- [1] The Director of Proceedings designated under the Health and Disability Commissioner Act 1994 (the Director) has laid a Charge against Mr Peter William Chum, then a physiotherapist practising in Christchurch. The Charge concerned his treatment on 2 May 2016 of a patient (hereafter referred to as “*the Patient*”) at her home.
- [2] There were two particulars of the Charge, the first concerning allegations of breach of professional boundaries during assessment and treatment of the Patient; and the second that the treatment provided departed from accepted standards of care. This was in the context of a referral of the Patient to Mr Chum to review “*laryngeal and cervical muscle tension which may be influencing voicing and swallowing*”. The various particulars made allegations concerning the Patient’s nakedness and areas of massage, including requests for intimate massage. The departure from accepted standards of care allegations referred to the areas said to have been massaged and the circumstances under which this was undertaken.
- [3] The Charge, laid under section 100(1)(a) and (b) of the Health Practitioners Competence Assurance Act 2003 (**the HPCA Act**) alleged malpractice and/or negligence and/or conduct that brought discredit to the physiotherapy profession.
- [4] The Charge was heard by the Tribunal and evidence was called. There was no appearance at the hearing of the Charge by Mr Chum but he had referred certain statements to the Tribunal and asked that these be taken into account.
- [5] The Charge, with a minor amendment since it was laid which is immaterial, is set out in full in the Schedule to this decision.

The hearing

- [6] After the Charge had been laid by the Director there was a significant time that elapsed before it was heard. One of the reasons for this was that questions arose concerning the eligibility of proposed members of the Tribunal for the hearing and availability of personnel. These were resolved eventually and the Tribunal members were selected and duly approved. The

- second reason for delay was that for a time Mr Chum was represented by counsel and lawyers but they did not have instructions to attend the hearing.
- [7] Mr Chum did not appear before the Tribunal nor was he represented by counsel. Evidence was produced to the Tribunal that satisfied it that he had been notified of the hearing and the time and venue. In accordance with directions that had been made there was filed by him with the Tribunal certain copy documents described as “*Briefs of evidence*”. The Director objected to the content of certain parts of these by Memorandum dated 17 April 2019. No decision was made on that objection until the hearing.
- [8] The Directions pursuant to which those statements had been produced referred to their being briefs of evidence of expected witnesses expected to give evidence at the hearing. None of those witnesses attended nor were in any way called to give evidence in accordance with those proposed statements.
- [9] On 28 June 2019 Mr Chum sent to the Tribunal a Memorandum dated 4 June 2019 which included that: “*whilst [he denied] the particulars set out in the [Charge, he did] not have the financial means to defend the matter any further and [would] not be appearing at the hearing on 1-5 July 2019*”.
- [10] The Memorandum also included the respectful request that the six Briefs of Evidence that Mr Chum had earlier provided to the Tribunal be considered by the Tribunal when making its decision; with a brief summary of what those statements would cover.
- [11] That day (28 June 2019) the Executive Officer sent two reply emails to Mr Chum at the direction of the Chair first explaining that it was not necessary for him to be represented by counsel and he could attend himself in person; and secondly explaining that, if those persons were not called to give that evidence nor be available for cross-examination by the Director or questioning by the Tribunal, the Briefs of Evidence could only be given such weight as the Tribunal determined. Despite that, Mr Chum elected not to attend the hearing or be represented.
- [12] At the hearing after the Director had presented her case the Tribunal then considered the statements. Parts of some of them from Mr Chum and a purported expert for him were read. Those statements were not sworn and the Director had no opportunity to cross examine the authors; nor did the

Tribunal members have the opportunity to question them. The statements in question were:

- a) Mr Chum himself.
- b) Ms Tania Jane Clifton-Smith, a qualified physiotherapist.
- c) Ms Hinekoia Rotohiko Tomlinson, a singer and voice tutor.
- d) Ms Kelly Jean Hocking, a vocal and performance coach, singer and actor.
- e) Ms Teresa Ann Hoult, a physiotherapist and
- f) Ms Vanessa Anne Jerome, a speech and language therapist.

[13] The Director had filed an objection to parts of those proposed statements and the whole of the statement of Ms Jerome when she was anticipating those witnesses would give evidence to the Tribunal; and those objections were maintained in the event that the Tribunal chose to give any weight to the content of the statements.

[14] Under clause 6(1), Schedule 1, of the HPCA Act, the Tribunal may receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law. That is, however, subject to clause 5(3) which requires that the Tribunal observe the rules of natural justice at each hearing.

[15] The Tribunal did initially consider that the signed statements might assist it to deal effectively with the matters before it, particularly in the context that it could be said that natural justice required that it consider the matters put before the Tribunal by the practitioner, Mr Chum. Reference is made to some of the content of that material in this decision, but the Tribunal has only been able to give limited weight, if any, to what is said in those statements, having regard to the absence of the authors, the fact that they were not sworn, and the inability for the authors to be questioned.

[16] [].

[17] [].

[18] [].

Background

- [19] In early April 2016 the Patient had sustained a traumatic brain injury in [an] accident. This resulted in various consequences including constant fatigue, severe headaches, partial hearing loss in her left ear, problems from nerve damage causing weak cough reflex and difficulty swallowing, and changes to her voice and pitch which resulted in her not being able to sing.
- [20] The Patient underwent surgery on 7 April 2016 and was discharged on 18 April 2016 to a residential rehabilitation unit run by the Laura Ferguson Trust. The Patient underwent a neuropsychological test on her discharge from the Laura Ferguson Trust which included a “*Borderline*” range for speed of information processing, it taking her longer to memorise than she had done before the accident.
- [21] On her discharge from the Laura Ferguson Trust the Patient was referred by her speech and language therapist to Mr Chum to address problems with voicing and swallowing. By arrangement she met with Mr Chum at her home on 2 May 2016. At the time she had two flatmates who were not at home. Her mother was initially present but left soon after Mr Chum’s arrival.
- [22] Mr Chum then carried out certain therapy to her vocal chords and voice which the Patient found beneficial. None of this physiotherapy treatment is controversial for the purpose of the Charge against Mr Chum. The Patient then mentioned to Mr Chum that she had suffered a lower back injury many years earlier when she was 12 years of age and that lead to a discussion about the acupuncture she had had some 12 years later. She also referred to being sore from having been lying on one side for so long in the hospital (because of the injury to the other side of her head).
- [23] It was what happened after those exchanges that form the substance of the Charge and are addressed below. Following the therapy session between the Patient and Mr Chum which lasted approximately 40 - 45 minutes, Mr Chum left the premises. The Patient then texted her friend who gave evidence to the Tribunal and further said that over the next days she told two friends, her mother and her occupational therapist what had happened. They encouraged her to do something about this.
- [24] Mr Chum telephoned the Patient twice over the following week and then sent an email to her. The detail of that is referred to below. The Patient also said

that when she first met Mr Chum she told him that her voice was the thing that affected her the most. She said that when Mr Chum started his treatment she noticed a change in her voice straight away. She also said, however, that her encounter with him added to her stress and she was fearful of engaging with new therapists.

The evidence in support of the Charge

[25] The Director called several witnesses who gave evidence and were available to be questioned by the Tribunal. As noted, Mr Chum was not present or represented and there was no cross-examination of them by him or on his behalf. The witnesses for the Director were:

- a) The Patient who gave her evidence in detail as described in this decision.
- b) The friend (referred to herein as Mr Y) to whom the Patient sent text messages following the consultation and from whom she received replies.
- c) Another friend (referred to herein as Ms T) with whom the Patient had earlier been to university and who visited the Patient several times in hospital and at the Laura Ferguson Trust. She referred to what the Patient said to her about the detail of the physiotherapy session with Mr Chum.
- d) [].
- e) Dr Sarah Mooney (**Dr Mooney**), the expert called by the Director who gave evidence concerning her qualifications and experience, the consultation between Mr Chum and the Patient, the documents that were completed as part of that consultation, and matters relevant to Mr Chum's physiotherapy treatment and his own alleged reasons behind it.

[26] The Director also produced a bundle of documents and affidavits to verify the content of certain of the matters. The Tribunal is satisfied that the documents in the bundle are satisfactorily proven, particularly in the absence of any objection or evidence to the contrary. That bundle included:

- a) A transcript of a special meeting of the Physiotherapy Board on 23 June 2016 at which Mr Chum was present and questioned at length by the members of that Board.
- b) An email written by Mr Chum to the Patient dated 2 May 2016.
- c) A sketch showing portions of the Patient's anatomy and places where she alleged that Mr Chum had touched or massaged her.
- d) A position statement from Physiotherapy New Zealand on "*Clear Sexual Boundaries in the Patient – Physiotherapist Relationship - a Guide for Physiotherapists*". It was acknowledged by the Director that this was a document produced by an independent organisation of which Mr Chum was not a member but did express, it was submitted, standards and principles which do apply to proper physiotherapy practice.
- e) The Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct promulgated by the Physiotherapy Board of New Zealand (PBNZ).
- f) An order of the PBNZ pursuant to section 69(2)(b) of the HPCA Act dated 24 June 2016 referred to below.
- g) A decision of this Tribunal dated 14 June 2017 concerning Mr Chum also referred to below.

Physiotherapy treatment by Mr Chum to the Patient's back and legs area

[27] The physiotherapy treatment that Mr Chum had carried out to the vocal chords and voice for the Patient, had included massage around the muscles of her throat, the front and back of her neck and onto her shoulders, with accompanying breathing exercises. Following this there was the discussion mentioned about a lower back injury that the Patient had sustained when playing ice hockey when she was 12 years of age with resultant acupuncture she had had some 12 years later. There was also discussion concerning her being sore from lying on one side. The discussion between the Patient and Mr Chum then moved to other topics.

[28] The Patient said that Mr Chum explained the connection between muscles in the lower back and diaphragm to the voice and that lower back massage could be helpful, to which the Patient agreed.

- [29] Mr Chum then asked the Patient to “*take all of [her] clothes off*”. The Patient thought this was strange and double-checked with Mr Chum who confirmed that he did want her to remove her clothing and asked if she had a bathrobe or the like to put on. The Patient said that Mr Chum said he would be using towels to cover her. She still thought that this was strange but she trusted Mr Chum that he knew what he was doing.
- [30] While Mr Chum organised the plinth in the living room that he had brought for the purpose, the Patient went back to her room and removed all her clothing returning wearing only a bathrobe. The Patient said she got onto the bed and lay on her stomach and Mr Chum told her to take the bathrobe off. She said that he gave her a towel and moved away from the bed while she removed the bathrobe. She arranged the towel so that it covered her from her shoulders to just below her buttocks, the towel being a standard size similar to a bath towel.
- [31] The Patient said that Mr Chum began massaging her lower back, the area near to her buttocks where her sacrum is and onto the top of her buttocks. The Patient said this was the area affected by her ice hockey injury and was sore from the bed rest and she felt “*alright*” about the treatment because it was similar to massages she had had before.
- [32] The Patient said that as Mr Chum worked, he moved the towel around so that he could massage directly onto her skin, which she also felt was acceptable because that had happened before with other massaging. There was chat between the two about the effect of the lower muscles on the voice.
- [33] Mr Chum then told the Patient that “*if [she] was comfortable he would massage the other side*”. He asked the Patient to roll over so that she was lying on her back and Mr Chum then placed the towel so that it was draped over her front from underarm to just below her crotch. Mr Chum then began massaging the outer and then middle of her thighs.
- [34] The Patient said that she began to feel uncomfortable but “*couldn't quite pinpoint*” what was making her feel this way. The Patient said that Mr Chum asked if she was “*comfortable*” with his massaging her inner thigh and she agreed, although again she felt uncomfortable but could not pinpoint why; she saying that she “*just felt weird about it*”.

- [35] Mr Chum then began massaging the Patient's inner thigh and the Patient described that Mr Chum was very calm which reassured her that that must be normal practice and she said she wondered if she was meant to say "no" at some point.
- [36] Every time Mr Chum moved to massage a new area or change the legs in question, the Patient said that he moved the towel and as he did that she "was exposed". She would try to cover herself up again and she was worried because Mr Chum "could see [her] vagina, since [she] didn't have any underwear on".
- [37] The Patient described how Mr Chum then "moved higher and higher up [her] inner thigh" all the time "talking very calmly and professionally". The Patient continued to think that the treatment must be normal but said that at that point "the thing that really alarmed [her] was that he could see [her] vagina and [she] was feeling extremely uncomfortable about the towel moving and leaving [her] uncovered".
- [38] The Patient then said that Mr Chum told her "he was going to massage [her] clitoral region, and asked was [she] comfortable with that". The Patient replied "no", Mr Chum said "that's fine" and the massage stopped.
- [39] The Patient referred to a flat mate's returning home, Mr Chum having left the room, the Patient putting her bathrobe back on and having sat on the couch, and Mr Chum having returned to the room and starting to pack his things. The Patient said that the treatment had stopped abruptly and that Mr Chum had gone silent and was not engaging with her which was different from how he had been earlier in the session. She said she felt very confused but tried to "play it cool".
- [40] The Patient referred to the sketch which was in the bundle of documents and had been prepared for other purposes and gave evidence about the areas on her thighs that Mr Chum had massaged. She said that he started with the outside of her right thigh, then moved behind her and massaged the outside of her left thigh, returning to the right side and massaging the middle of her right thigh, repeating this on the other side to her left middle thigh, and returning back to the right side and massaging the inner part of her right thigh. She then referred in oral evidence to his having returned to the left side and massaged the inside of her left thigh; but the Tribunal is left in doubt

concerning this because there is no mark on the sketch indicating that that had been done.

[41] The Patient asked Mr Chum whether he had massaged other clients in that way which Mr Chum said he had; and the Patient then asked him whether, when he did this to other clients, he put this in his reports to which Mr Chum said he did not. The Patient asked Mr Chum if he gave that “*treatment*” to everyone to which Mr Chum replied that he did not and that he would “*read the person and offer it on a client-by-client basis*”. When the Patient ask why Mr Chum had offered this treatment to her Mr Chum it told her that it had been because they had been talking about alternative treatments such as Chinese medicine and acupuncture and “*he could tell [she] would be open to trying other techniques*”. Mr Chum said that the whole body was connected and that when there is tension in that region, it is helpful to have that release to which the Patient replied that she could take care of that herself.

[42] The Patient gave evidence to the Tribunal about her interpretation of these exchanges and her understanding of what Mr Chum had meant. It is those exchanges to which particular 1(vi) of the Charge refers. The Tribunal cannot hold against Mr Chum the interpretation of these exchanges that the Patient had subjectively had, although the context is noted.

[43] The therapy session ended by Mr Chum saying he would be in touch about another appointment to which the Patient responded in a neutral way.

Events following treatment

[44] The night after Mr Chum had been to give this physiotherapy treatment the Patient exchanged text messages with her friend Mr Y. These included texts from the Patient in which she described Mr Chum as having “*just got kinda weird*” and that he asked her “*if he could do clitoral massage on her*”. She also spoke to her friend, Ms T, shortly after the physiotherapy session about the events and the physiotherapy session and Ms T gave evidence about that to the Tribunal. It included that the patient said that “*she had to take all her clothes off for the massage*” despite her having double checked this. Ms T also said that the patient told her that the “*massage got closer and closer to her vagina*” and that the physiotherapist “*had asked if he could massage near or around her clitoris*”.

[45] On 6 May 2016, some four days after the treatment date, Mr Chum sent the Patient an email which included that he was “*writing to issue [her] an apology and an explanation for [their] appointment on Monday*”. Mr Chum said that he felt “*that [he] overstepped his] professional scope and ... that may have left [the Patient] offended or confused by [his] role in the management of [the Patient’s] vocal symptoms when recovering from [her] injury*”. Mr Chum acknowledged that his intervention “*may not have been appropriate*” and that his approach “*towards the end of [the] session was not a reflection of [his] normal practice*”. Mr Chum sincerely apologised for any offence or embarrassment and expressed that he was happy to discuss this further if need be.

Mr Chum’s version of events

[46] The Tribunal is unable to give significant weight to what Mr Chum has written in his signed statement given that he has not sworn the statement nor appeared at the hearing for cross-examination by counsel or for examination by the Tribunal. Furthermore, neither Mr Chum nor any counsel on his behalf were present to put to relevant witnesses for the Director extracts from that proposed evidence for them to refute or comment upon. That is normally done and affects the credibility of what is said in the event that there is any conflict in evidence. It is not the function of counsel for the Director nor of the Tribunal to do that, although some questions were asked by the Tribunal in the normal way.

[47] The referral of the Patient to Mr Chum from the Laura Ferguson Trust was to require a review of “*Laryngeal and cervical muscle tension which may be influencing voicing and swallowing*”, referring to these as having “*developed as a result of traumatic brain injury substantiated [sic] on 8/4/16*” and to the “*depressed comminuted base of skull fracture extending to the left tempoparietal region*” sustained from the [] accident when the Patient had fallen forward and hit her head.

[48] Mr Chum described the records that he had been sent with the referral and his views on them. He noted that a videostroboscopy was scheduled in just under two weeks from the referral and considered that it was appropriate for him to have seen the Patient before that appointment.

- [49] He described the mechanics of making his arrangement to see the Patient and suggested, he said, an initial consultation at his clinic; but that the Patient had said she was not then able to drive because of her accident and that made attendance at his clinic difficult. Mr Chum said that his preference was to have had two appointments with the Patient before the videofluoroscopy was undertaken so that he could provide a full report.
- [50] The arrangement was accordingly made for Mr Chum to meet the Patient at her home. When Mr Chum attended the Patient's home she was wearing, he said, a long thick dressing gown and possibly a pair of track-pants and appeared to have just woken up and got out of bed.
- [51] A consent form and a form named the Nijmegen Questionnaire were completed by the Patient at Mr Chum's request. From initial discussion between Mr Chum and the Patient, Mr Chum formed the provisional diagnosis that the Patient had muscle tension dysphonia (**MTD**) with an underlying breathing pattern disorder (**BPD**).
- [52] Following discussions with the Patient Mr Chum completed a subjective examination form for this. Mr Chum described in detail the rationale behind, and treatment of the Patient's upper torso, neck and voice. Mr Chum said that the Patient had reported, unprovoked by him, that she had experienced pain in her lumbar spine whilst she was in hospital and, in response to a question from him, the Patient had said that she had suffered back pain in the same area as the result of an injury to the pelvis as a teenager.
- [53] Mr Chum's statement then discussed the issues that he saw as relevant and said that "... *this started to establish a clinical pattern of musculoskeletal imbalance and asymmetry*" which he said "*is common in patients presenting with vocal dysfunction*".
- [54] Mr Chum's statement then described in detail his exchanges with the Patient and his physical contact with her in the context of the anterior and lateral aspects of her cervical spine, and this included what he called a "*sniff test*" and swallowing to establish the laryngeal position. He further described in his statement his on-going processing of the issues concerning the matters for which she (the Patient) had been referred. He said that after the second or third round of the treatment process the Patient told him that her voice was

feeling “*free-er*” and this is consistent with the Patient’s own evidence that that aspect of the treatment had given her relief.

[55] Mr Chum described him having placed one hand on the Patient’s abdomen and one hand on her upper chest in the context of education and breathing re-training. He referred to diaphragmatic breathing exercises and exercises to stretch the suprahyoid muscles. By this stage Mr Chum had, he said, spent roughly just over half an hour with the Patient.

[56] Mr Chum described the Patient as “*very inquisitive*” and seeming to want a thorough understanding of the links between symptoms, muscle tension dysphonia and the treatment Mr Chum had provided.

[57] Mr Chum then described the further discussion with the Patient and the suggestion made that he “... *treat the lumbar spine and abdomen by loosening the muscles in those areas using techniques similar to those used to treat [the Patient’s] neck and throat*”. Mr Chum described his clinical rationale for treatment of lumbar spine and hip flexors as creating the best environment possible to enable establishment of an efficient breathing pattern; suggestion from his discussion with the Patient of a musculoskeletal imbalance of the left lumbar spine and the superficial abdominal musculature; that, because a significant musculoskeletal imbalance impacts easily on diaphragmatic breathing, the body finds another way of breathing often involving the use of accessory muscles; and that he considered it important that he was comprehensive in addressing any musculoskeletal influences on her voice.

[58] Mr Chum said that, given the improvements in the Patient’s voice as a result of the myofascial release carried out by him on her neck and throat, he considered treatment of the lumbar spine and hip flexor by myofascial release to complement that treatment.

[59] The statement then said that Mr Chum said to the Patient that he would need to access her lower back and asked that she ensure she was changed appropriately for this. The statement said that Mr Chum did not ask the Patient to take all of her clothes off.

[60] The Patient went to her bedroom and returned shortly wearing her dressing gown and the statement said that Mr Chum was not aware that the Patient was not wearing anything underneath this. It was when the Patient was lying

face down on the plinth and Mr Chum asked to see her lower back that the Patient moved her dressing gown such that Mr Chum could see that her back was bare. The statement said that Mr Chum did not raise an issue with this as he “... *did not want to embarrass her by making this request*”. The Patient was still wearing the dressing gown covering her from around her mid-back to mid-calf, the statement said.

[61] Mr Chum acknowledged that at that point he should have paused the treatment and asked the Patient to put on some more clothes. Mr Chum then described his on-going physiotherapy treatment to the Patient and his discussion with her as this was proceeding and his having placed a towel over the Patient’s back over the dressing gown. The statement referred to palpation and the work Mr Chum said he was going to carry out to release tension.

[62] Mr Chum’s statement then said he told the Patient he would need to turn her on to her back so that he could assess and treat her hip flexor muscle group. Mr Chum described the manipulation of two towels such that they overlapped and meant that the Patient was able to roll over whilst still being fully draped.

[63] The statement spoke of Mr Chum’s advice to the Patient that he would palpate the muscles in her lower back to loosen them. It referred to the Patient’s still engaging with Mr Chum and to the absence of “*verbal cues*” or “*non-verbal cues*” to indicate that the Patient was “*feeling uncomfortable*”.

[64] The statement further described Mr Chum’s treatment for the Patient and made further references to her not having given the indication of being “*uncomfortable*”. The statement referred to other palpation and manipulation by Mr Chum of the Patient including her hip flexor, her rectus abdominus at the “*level of her belly button*”, the left iliacus muscle by pressing on the top of the hip, the psoas major and right iliacus muscle, and the rectus femoris.

[65] The statement said that when Mr Chum said he needed access to the front of the Patient’s thigh she agreed and described how he dealt with this, including that “*it became apparent to [him that the Patient] was not wearing any shorts underneath her dressing gown and that she was possibly not wearing any*

underwear". The statement said that Mr Chum did not raise this question with the Patient because he "*did not want to embarrass her*".

[66] In his statement Mr Chum denied being able to see the Patient's vagina because the groin area was well covered by two towels and denied touching the Patient's right or left inner thighs.

[67] Mr Chum said he "*certainly did not ask [the Patient if he] could massage her clitoris*" and denied massaging any area close enough to the Patient's vagina that could be misconstrued as this having occurred.

[68] In the statement Mr Chum said the treatment "*came to a natural conclusion*" and referred to the discussion he had with the Patient following treatment.

[69] Mr Chum's statement further referred to his working diagnosis, analysis, planning and goals and contact he had had or tried to have with the Patient following the appointment. As to the email he wrote to the Patient he said he was not aware that she thought he had seen her vagina, asked to massage her clitoris or spoken of giving patients orgasms as a way of releasing tension.

[70] He said that it had not been apparent to him that the Patient had interpreted the treatment and discussion following the treatment in a sexualised way. As to the expressions in the email "*overstepped my professional scope*", "*my intervention my [sic] not have been appropriate*" and "*my approach towards the end of a session was not a reflection of my normal practice*", these were references to his treatment of the Patient's lower back and not a reference to the extent to which the Patient was clothed.

[71] The statement said that Mr Chum could understand that the email could be misconstrued for apologising for the events as the Patient had perceived them; and acknowledged that he should have attended the Patient's home with a chaperone or ensured that her mother stayed for the duration of the appointment.

[72] Mr Chum's statement then referred to his comments on the proposed evidence of Dr Sarah Mooney, mentioned below. He referred to events that have happened since the matters to which the Charge refers and his current circumstances which are irrelevant to the question of whether the Charge is made out but may be relevant to any questions of penalty.

- [73] Apart from a proposed statement of evidence of Ms Tania Jane Clifton-Smith referred to below, Mr Chum also asked in his Memorandum that the Tribunal take into account other signed, but not sworn, statements of proposed witnesses. These have been noted by the Tribunal, but there has been no evidence given pursuant to them nor any opportunity for the Director to cross-examine, or the Tribunal to question, the authors of those statements. None of what they may have said by way of evidence was put to any witness for the Director.
- [74] The statements from Ms Tomlinson, Ms Hocking, and Ms Hoult were largely character references and included reference to Mr Chum's skills and that his "*hands never strayed*", Mr Chum's ability to "*pinpoint specific areas of tension*", his "*being an excellent communicator*", that his hands were "*always direct and confident yet also incredibly gentle*"; and his "*warm and gentle personality*".
- [75] There was a proposed statement from Ms Vanessa Jerome, a speech and language therapist. The Director objected to that evidence in its entirety on the ground that Ms Jerome lacked the impartiality required of an expert witness. It contained no agreement to abide by the requirements of the Tribunal's Practice Note Number Three concerning expert witnesses (as had apparently been included in an earlier version of the proposed statement of evidence). The statement from her remained almost identical to the original statement provided and contained, it was submitted, Ms Jerome's opinion of Mr Chum's practices based on her knowledge and experience as a speech and language therapist. Various extracts from her proposed statement were referred to in the Director's objection. The Director also produced a copy of a statement that Ms Jerome had made which had been produced by Mr Chum to the PBNZ when he appeared in relation to issues currently before the Tribunal; and it was submitted that that statement by Ms Jerome was strong advocacy for Mr Chum in this matter.
- [76] The Tribunal has considered this objection in the context of the circumstances. Under clause 6(1), Schedule 1 of the HPCA Act the Tribunal may receive any statement "*that may in its opinion assist it to deal effectively with the matters before it*". The proposed statement from Ms Jerome has been tendered by Mr Chum but is not sworn and has not been the subject of

evidence; nor put in any way to the expert witness for the Director, Dr Sarah Mooney. Ms Jerome has not been available for cross-examination by the Director or examination by the Tribunal. There is significant confusion between any matters of fact to which Ms Jerome was to depose in the proposed statement and comments of the nature of expert evidence.

[77] The Tribunal accepts the Director's submission that there has been strong advocacy of Mr Chum by Ms Jerome in her statement produced to the PBNZ. For these reasons, the Tribunal did not consider that the proposed statement by Ms Jerome will assist it to deal effectively with the matters before the Tribunal. The Tribunal is obliged to observe the rules of natural justice in this respect and it does so. The conclusion is that this statement of proposed evidence should be disregarded.

Professional standards

[78] Evidence was called by the Director from Dr Sarah Mooney, a Physiotherapy Advanced Clinician in cardio-respiratory physiotherapy. She gave her evidence on oath, which included agreement to abide by the Tribunal's Practice Note No Three. Dr Mooney referred to the documents that she had reviewed in preparing her evidence and the basis for her opinion.

[79] Dr Mooney's evidence canvassed the referral of the Patient to Mr Chum, which included findings from documents relevant to the treatment that the Patient had earlier had; the circumstances surrounding the home visit by Mr Chum to the Patient; the subjective examination undertaken by Mr Chum, including Mr Chum's clinical notes and the Nijmegen Questionnaire form completed; the objective assessment completed by Mr Chum and the notes made; additional tests apparently not included in Mr Chum's examination; Mr Chum's treatment to the Patient's throat and neck area; questions of any necessity for removal of clothing and how this should have been dealt with; Mr Chum's treatment to the Patient's lower back, pelvis, hip and thigh; aspects of training required for the treatment being given; the request by Mr Chum to the Patient to massage near her clitoral region as described by the Patient; the statement by Mr Chum of treatment plans and goals; the post-treatment conversation and contact that Mr Chum had with the Patient; and comments on the accepted standard of care for a first consultation of

suspected breathing pattern dysfunction and/or muscle tension dysphonia. Dr Mooney then gave evidence about departures by Mr Chum from accepted standards of care by reference to professional guidelines.

[80] The Tribunal is very aware that many of the conclusions reached by Dr Mooney are conditional on an acceptance of the version of events as given by the Patient rather than as was indicated in earlier statements by Mr Chum. Many of her conclusions and expressions of opinion are predicated by the necessity for the Tribunal to have accepted the evidence of the Patient on the issues in question.

[81] In summary, the conclusions that Dr Mooney reached included:

- a) That she agreed with Mr Chum that the improvement in the Patient's voice from the treatment to her throat and neck area meant that muscle tension was playing a role in the Patient's symptoms which may have been linked to accessory muscle use.
- b) That, while acknowledging the interconnectivity between many muscles, she did not believe that Mr Chum had adequately assessed the areas he proceeded to treat in order to conclude that those muscles were having the impact he considered they were having or to warrant that treatment.
- c) That in any event such treatment ought not to have occurred at a first consultation.
- d) That there was no reference in Mr Chum's clinical notes to indicate any problem with the Patient's left hip flexor muscles; and that the abdominals did not appear to have been explored, either subjectively or objectively.
- e) That the muscles Mr Chum focused on would not have been impacted on reducing the Patient's abdominals tone and the question of accessory muscles use and contribution from the lumbar spine and associated muscles could have been appropriately explored in a subsequent session.
- f) That the request by Mr Chum of the Patient that she "*take everything off*" (which the Tribunal finds did occur) would represent a significant departure from accepted standards of care.

- g) That, if the Patient was already in a dressing gown (and the Tribunal does not accept that she was but rather prefers her evidence that she was already clothed in yoga pants, a sweater and a vest), Mr Chum ought to have been clear about what type of clothing she should change into.
- h) That, as soon as Mr Chum realised that the Patient was naked or otherwise inappropriately clothed for treatment, he ought to have suspended treatment and asked the Patient to remedy the situation by putting some clothes on or to have ceased the treatment altogether. The Tribunal notes that in Mr Chum's proposed statement he acknowledges that he should have suspended treatment (a view shared by Ms Clifton-Smith).
- i) That it was not acceptable for Mr Chum not to request the Patient to put some clothing on simply because he was worried she would become embarrassed.
- j) That the failure to suspend treatment and ask the Patient to put more clothing on and primarily the decision to proceed with the soft tissue massage treatment despite the Patient's lack of clothing represented a significant departure from accepted standards of care.
- k) That the muscles that ought to have been focussed on in order to decrease the identified abdominal tone and activity were the abdominals and these were not addressed.
- l) That, on the basis of the muscles Mr Chum had recorded as having been massaged, he would have had to massage the Patient's thigh (lateral and anterior) but there would have been no reason for Mr Chum to massage the Patient's inner thigh and/or the genital area.
- m) That the adductor muscles, which are those directly related to the groin area and near to the pubic bone, have not been noted by Mr Chum as having been assessed or treated; and that the typical treatment for the only muscle identified by Mr Chum which has an association with the inner thigh, the iliopsoas muscle, would have been stretching.
- n) That Mr Chum's examination findings were inadequate to justify treatment to the Patient's hip flexor and the lateral and anterior thigh as well as her pelvic region and that that treatment, in that context, was

a significant departure from accepted standards of care for a first consultation.

- o) That tension in the left the lumbar paraspinal may have justified treatment to those muscles but more investigation would have been expected on their direct impact on the Patient's breathing and voice related concerns.
- p) That the focus of the first consultation ought to have remained on the Patient's upper body.
- q) That any finding that Mr Chum massaged the Patient's inner thigh is a significant departure from accepted standards of care because there was no clinical justification for Mr Chum to massage the inner thigh based on his working diagnosis.
- r) That because the Patient described feeling uncomfortable at that point of the treatment and trying to grab a towel to keep covered, this would likely have increased any muscle or body tension.
- s) That, while the Patient was supine (on her back), Mr Chum would not have been able to massage her hip flexor, as he said he had, without accessing the anterior and lateral thigh and pelvis.
- t) That it would have been obvious to Mr Chum that the Patient was not wearing any lower underwear when she moved her position in light of the muscles he states that he massaged. Treatment ought to have ceased then.
- u) That, if it is found that the Patient's vagina was exposed, this would indicate she was not adequately draped and in moving or turning it was obvious she was not clothed.
- v) That the Patient's dignity ought to have been maintained and protected at all times; and inadequate draping in the circumstances represents a significant departure from accepted standards of care.
- w) That she could not identify a situation where it would ever be clinically appropriate to seek permission to massage near a Patient's clitoral region; and the request to massage in that area represents a significant departure from accepted standards of care.

- x) That the treatment plan and goals ought to have focused on the dominant muscle groups that affect voice and breathing rather than the secondary muscle groups.
- y) That no specific goals were set in terms of measurable outcomes; and a greater portion of Mr Chum's time ought to have been invested in education for the Patient in home exercise.

[82] With reference to the Professional Guidelines on accepted standards of care, Dr Mooney referred first to the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct (2011) (**the Code**). There are the following relevant principles:

- a) Principle 1 requiring respect for Patients/clients and their whanau and families; and respecting the dignity, privacy, bodily integrity, and mental wellbeing of Patients/clients.
- b) Principle 2 requiring that physiotherapists act to promote the health and wellbeing of the Patient/client while acknowledging, respecting and facilitating Patient/client autonomy; and the requirements to consider the health and wellbeing of the Patient/client as the first priority; not to exploit any Patient/client whether physically, sexually, emotionally, or financially (with specific reference to sexual contact of any kind being unacceptable).
- c) Principle 5 requiring practice in a safe, competent and accountable manner; and the requirement to make sound professional judgments within the scope of practice and level of expertise, provide services that are clinically justifiable; and incorporate safety and risk management strategies.

[83] Dr Mooney also referred to a Position Statement published in December 2012 by Physiotherapy New Zealand titled "*Clear Sexual Boundaries in the Patient – Physiotherapist Relationship. A Guide for Physiotherapists*" (**the Statement**). The submissions for the Director acknowledged that there was no evidence that Mr Chum belonged to that group or that he was legally bound by that statement, but that it provided appropriate guidelines within which any physiotherapist should work.

[84] Dr Mooney referred to the Patient/physiotherapist relationship as being one of confidence and trust, which can involve the sharing of private information

and physical contact, and she said that “*clearly understood boundaries are important*”. She referred to the inclusion in the statement that sexual impropriety is any behaviour such as gestures or expressions that are sexually demeaning to a Patient or which demonstrated a lack of respect for the Patient’s privacy including, but not exclusively, inappropriate disrobing or inadequate draping practices.

[85] Dr Mooney then went through in detail, those aspects of the treatment given by Mr Chum to the Patient as contained in the material that she assessed (and this is consistent with what was given in evidence to the Tribunal) and that is referred to later in the context of the individual particulars.

Proposed Statement of Evidence from Ms Tania Jane Clifton-Smith

[86] As had been requested by Mr Chum the Tribunal has taken into account what Ms Clifton-Smith has stated in her signed (but not sworn) statement of 28 August 2019. It is emphasised, however, that Ms Clifton-Smith was not called to give that evidence in accordance with that statement or be available for cross-examination or questioning. Relevant parts of that statement were read to the Tribunal; but none of it was put in any proper way on behalf of Mr Chum to the expert called for the Director, Dr Sarah Mooney, for any rebuttal or other response.

[87] Furthermore, the Director objected to certain parts of that proposed evidence and would have pursued that objection in the context of evidence given had Ms Clifton-Smith been present. Those objections related to certain passages which were said to be outside Ms Clifton-Smith’s scope of expertise and other passages said to lack impartiality or give inadmissible opinion. There was no submission on Mr Chum’s behalf to the contrary, although the objection to that evidence had been presented some time before the hearing.

[88] The Tribunal accepts those objections. First Ms Clifton-Smith acknowledged in her statement that she is not an expert in traumatic brain injury but then in the statement of proposed evidence referred to ways in which such an injury can present and affect body systems. There are passages in the statement when Ms Clifton-Smith refers to previous observation of Mr Chum’s approach to treatment and comments on his level of competence. The statement refers to Mr Chum’s account in detail but no

consideration has been given to the facts as outlined by the Patient in her evidence, which had been provided to and received and reviewed by Ms Clifton-Smith.

[89] The Tribunal's Practice Note Number Three requires that the witness "*has an overriding duty to assist the Tribunal impartially on relevant matters within the expert's area of expertise*", that the expert "*is not an advocate for the party who engages the witness*" and that the witness "*state the facts and assumptions on which the opinions of the expert witness are based*".

[90] The failure by Ms Clifton-Smith to refer to the events as expected to be given in evidence by the Patient does indicate to the Tribunal an apparent lack of impartiality on her part.

[91] The third ground of objection refers to the inadmissible opinion expressed in her proposed statement of evidence by Ms Clifton-Smith first in the context of expressing facts which are at variance from how they were expressed by Mr Chum in his proposed statement and secondly by reaching a conclusion on facts as expressed by Mr Chum without reference to, or making mention of, the alternative version of facts in the proposed statement of evidence from the Patient.

[92] The Tribunal has approached the statement of Ms Clifton-Smith with caution given that it is not sworn and she was not called to give evidence, she was not cross-examined by the Director nor any opportunity for that, she was not questioned by the Tribunal nor opportunity for that, none of what she might have said in evidence was put to the Director's expert, and there are the objections to certain parts of her statement by the Director which are upheld by the Tribunal.

[93] In her proposed statement Ms Clifton-Smith has referred to the development of a breathing method by herself and another practitioner and written works that have been published. She referred to the treatment of breathing pattern disorders by this method, including a subjective and objective assessment and observation of breathing patterns, with reference also to the Nijmegen Questionnaire.

[94] With reference to the specific case the statement refers to the referral notes that Mr Chum had access to and to his clinical notes (with reference specifically to the Nijmegen Questionnaire, the subjective examination

undertaken, and the objective examination). The statement then proceeds to consider Mr Chum's treatment of the Patient's neck and throat areas (and there was objection on the ground of a lack of impartiality to parts of this) but the Tribunal need not consider that further as that appears to be non-contentious.

[95] In dealing with Mr Chum's treatment of the Patient's lower back and abdomen, Ms Clifton-Smith's statement first deals with the extent to which the Patient was clothed. Although there was objection to it, upheld by the Tribunal, Paragraph 95 of that statement of proposed evidence included:

"In my view, treatment of the lower back and abdomen should have been suspended as soon as Mr Chum became aware that [the Patient] may not have been wearing any underwear underneath her dressing gown [and that at] this point it would have been appropriate for Mr Chum to ask [the Patient] to put on some more clothing before proceeding with treatment".

[96] The statement then considered issues concerning the clinical rationale for treatment of lower back and thigh areas and included that there was clinical justification for treatment of the iliacus, iliopsoas and rector femoris given their relevance to efficient breathing, which were areas that Mr Chum said he had treated. As to myofascial release treatment the statement said that, whilst this was a different approach to that which Ms Clifton-Smith used, this did not mean that the chosen treatment approach was incorrect.

[97] The statement of proposed evidence referred then to questions concerning the conversation between Mr Chum and the Patient at the conclusion of the appointment.

[98] The statement concluded with expression of the view that there was a clear clinical rationale connecting the Patient's apical breathing and the reported voice dysfunction and that, to create a good breathing environment, the lower body must be considered. It said that there is a relationship between the lower body, including the lumbar spine, and breathing and that it is "*common practice at a first appointment for a Patient presenting with a [breathing pattern disorder] to address the lower body to facilitate an efficient breathing pattern*".

[99] There was the statement that "*the assessment and treatment that Mr Chum provided to [the Patient] was appropriate and clinically sound*" but with the

exception of the extent to which the Patient was clothed during treatment of her lower body areas.

- [100] Of importance to the Tribunal is that there is no reference in that proposed statement to issues concerning any departure from accepted standards of care by the provision of treatment by Mr Chum of the Patient for suspected muscle tension dysphonia and/or breathing pattern dysfunction in the context of those parts of the Patient's anatomy referred to in the sub-particulars of particular 2 of the Charge.

The Charge -discussion - general

- [101] The Charge is laid under section 100(1)(a) and (b) of the HPCA Act. These provide that orders can be made by the Tribunal if, after conducting a hearing, it finds that the practitioner has been guilty of professional misconduct because of any act or omission that amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time of the conduct or because of any act or omission that has brought or was likely to bring discredit to the profession in which the practitioner practised at the time of the conduct.
- [102] If negligence or malpractice is alleged that must be established as behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error or oversight or even carelessness.
- [103] Discredit to the profession involves a breach of an objective standard with the question to be asked being whether reasonable members of the public informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the profession in question was lowered by the behaviour of the practitioner.¹
- [104] In considering any charge of misconduct under the HPCA Act the Tribunal must, having found the acts or omissions in question which were misconduct or likely to bring discredit to the relevant professional, also consider whether the acts or omissions in question are of such severity as to warrant a

¹ *Collie v Nursing Council of New Zealand*; [2001] NZAR 74 at [28].

disciplinary sanction for the purpose of maintaining standards, protecting the public, or punishing the practitioner.²

- [105] The onus of proving the Charge lies on the Director. The standard is the balance of probabilities. The more serious the allegation, the higher the level of proof required.
- [106] Particular 1 of the Charge refers to breaches of professional boundaries in the context of the referral for review of the Patient's laryngeal and cervical muscle tension which might have been influencing voicing and swallowing and Mr Chum's attendance at the Patient's home. Particular 2 refers to the same referral for review and attendance at the Patient's home but specifically the treatment for suspected muscle tension dysphonia and/or breathing pattern dysfunction. It includes reference to soft tissue massage of various parts of the Patient's body.
- [107] There are questions of facts to be addressed and application of standards to determine whether misconduct has been made out as alleged. The individual particulars are dealt with separately below; but generally the Tribunal has concluded that it accepts the evidence of the witnesses for the Director both as to fact and as to expert opinion.
- [108] In particular, the Patient attended the hearing and gave evidence and was available to be cross-examined by Mr Chum (although this did not occur) and questioning by the Tribunal. She gave her evidence in a frank and careful manner; and considered questions carefully before answering them. She impressed the Tribunal with her consistency in responses and her candour and balance in giving evidence and answering questions. Her evidence is summarised above and need not be repeated other than that the Tribunal accepts that the evidence as she gave it is correct and credible.
- [109] By contrast Mr Chum did not give evidence nor even attend the hearing. He did not make himself available for cross-examination on the Statement and other evidence he referred to in his Memorandum and asked that the Tribunal take into account. None of what is in that statement was put in a proper fashion to the witnesses for the Director.

² *PCC v Nuttall*; 8/Med04/03P.

[110] Significantly less weight, if any at all, can be given to his statement on matters of fact or his expression of opinions in his absence from the hearing. It is an important part of a Tribunal's assessment of evidence given by a witness that the witness attend to the extent that that is practicably possible and answer questions on evidence that he or she gives; and that did not occur in this case.

[111] Furthermore, the Tribunal accepts the submissions for the Director that regard must be had to:

- a) What Mr Chum did immediately following the consultation and particularly the email sent four days later on 6 May 2016.
- b) The evidence of the two persons to whom the Patient spoke shortly after the event, Mr Y and Ms T.
- c) The accounts given by Mr Chum first to the PBNZ in an email dated 11 June 2016 and secondly in an examination recorded in a transcript on 23 June 2016.
- d) The totality of Mr Chum's response to the Health and Disability Commissioner (HDC) by letter from his lawyers dated 12 August 2016.

There is also the following extract from an email sent on 1 June 2016 by Mr Chum to the PBNZ:

"I do accept that the allegations made here [referring to a complaint from the Patient dated 2 May 2016 essentially consistent with her evidence in this matter] are of a serious nature. I accept the complaint and register that the account of events that [the Patient] has included as containing factual information as to what happened on that date. There are aspects of my intervention on the 2nd of May that are not professional under my code of ethics as a medical practitioner".

[112] Those earlier accounts and statements contained concessions and acknowledgements by Mr Chum which are against his interest and so are more likely to be true such that his intervention may not have been appropriate and not in accordance with his usual practice. There are

inconsistencies in those earlier accounts as what is said now in his proposed statement of evidence. In answer to a question Mr Chum said³

“I, I didn’t ask her to be fully undressed, I, I, I asked her, I asked her to keep her bathrobe on. But I didn’t, I didn’t ask her to be fully undressed. I asked her to undress so that it was easier for me to, to assess her, her lower back and ribcage. I didn’t ask her to fully undress”.

In his proposed statement of evidence⁴, however, Mr Chum said that, after having moved the towel at one point this

“... exposed the left thigh from the knee to the hip joint. It was at this point that it became apparent to me that [the Patient] was not wearing any shorts underneath her dressing gown and that she was possibly not wearing any underwear”.

[113] Another instance was when Mr Chum referred to his first having become aware that the Patient was treating the events as having sexual overtones. The transcript of the PBNZ interview recorded⁵ that at the time he was packing up preparing to leave he

“ .. read that [the Patient] was feeling a bit uncomfortable [and that she] instigated a conversation which (I sort of) I guess took on that bit more of a sexual tone to it...”

In his proposed statement of evidence⁶ Mr Chum said:

“At the time that I wrote the email to [the Patient], it was not apparent to me that [the Patient] had interpreted the treatment and discussion following the treatment in a sexualised way”.

[114] There is also a question concerning the number of towels brought and used. Mr Chum’s unsworn statement⁷ said that he had three towels with him. He then said⁸ that he placed one towel over the plinth and a small towel on top of the pillow. Whether these were two towels of the three that he had brought

³ Bundle 26

⁴ Paragraph 129

⁵ Page 29

⁶ Paragraph 145

⁷ Paragraph 52

⁸ Paragraph 77

maybe unclear, but if they were, then he would not have had two remaining towels for covering the Patient as he described. The Patient's evidence only referred to coverage by one towel.

[115] The Tribunal may have misunderstood these apparent conflicts in Mr Chum's position, but they were not able to be questioned by any cross-examination or evidence nor any submission made or available to be made by Mr Chum and the Tribunal can only conclude that the submissions made by the Director about these inconsistencies affirms that Mr Chum's evidence cannot be accepted.

[116] Accordingly, in relation to the events of the day, the Tribunal prefers the evidence given by the Patient and discredits Mr Chum's version of events as contained in his proposed statement.

[117] As to the expert evidence concerning the breach of standards again the Tribunal is faced with direct evidence from Dr Mooney who was available to be cross-examined and did in fact answer questions from the Tribunal. Against that Mr Chum has tendered an unsworn statement from Ms Clifton-Smith but has not called her to give evidence or be cross-examined or questioned.

[118] The evidence from Dr Mooney covers all issues raised by the Charge and gives her clear and detailed explanation of her opinion on standards and whether there have been any breaches. She has been at pains to acknowledge that expressions of opinion depend on Tribunal findings on any disputed questions of fact.

[119] Conversely, even if the evidence of Ms Clifton-Smith had been given and taken into account, that deals with a lengthy explanation about the particular treatment method of which she was apparently an author. It might be said that gives her some reason to justify the treatment and to support someone who was using it and may not therefore be an unbiased witness. Any statement of opinion that she expressed appears to be based solely on acceptance of Mr Chum's version of events and discounting the version given by the Patient. That is the fundamental basis to the objection from the Director on lack of impartiality.

[120] On one critical issue, a question of continuation of treatment when Mr Chum became aware of inadequate clothing, the proposed statement (despite the

objection from the Director) is unfavourable to Mr Chum. She said that at that point (whenever this may have been) Mr Chum should have suspended treatment to the lower back and abdomen when he became aware that the Patient may not have been wearing any underwear underneath her dressing down.

[121] The proposed statement of evidence from Ms Clifton-Smith did not expressly address the specific particulars to which the Charge is addressed and only concludes with generalised comment on the rationale connecting the Patient's apical breathing and her reported voice dysfunction; with generalised comment about the relationship between the lower body, including the lumbar spine, and breathing.

[122] In her conclusion Ms Clifton-Smith again referred to the exception concerning clothing but expressed the opinion that the assessment and treatment that Mr Chum provided to the Patient was appropriate and clinically sound and that "*whole body treatment was appropriate*". Those generalised comments do not begin to address the very specific particulars in the Charge.

[123] There is no help from the other statements provided by Mr Chum and which the Tribunal has read.

[124] Accordingly, in relation to expert evidence and questions, the Tribunal prefers the evidence of Dr Mooney in all respects.

Particular 1: breach of professional boundaries

[125] This particular of the Charge expressly refers to the referral for the Patient's laryngeal and cervical muscle tension which may be influencing voicing and swallowing; and to the attendance at the Patient's home for that purpose. There are the six sub-particulars which are addressed now.

[126] In general terms, however, the Tribunal has taken into account the context in which these allegations are advanced as just stated.

Sub-particular (i): Advice to take clothing off

[127] The Tribunal accepts the evidence from the Patient that Mr Chum did ask her to take "*everything off*" using those words. Her evidence was that Mr Chum asked her "*to take all my clothes off*" and her question to him was "*you want*

me [to] take everything off?” She said that Mr Chum confirmed he did want her to take everything off and referred to a bath robe and the use of towels. That is affirmed by Mr Chum’s own account in his interview with the PBNZ when he said that he “suggested she get unchanged but keep her bath robe on her so that [he could, he could] assess her sort of ribcage, ... Yeah so she was undressed, underneath her bath robe”.

- [128] The evidence of Dr Mooney was that, given the clothing the Patient said she was already wearing, it is unclear why any removal of clothing was necessary. She also said that the request to take clothing off represented a significant departure from accepted standards.
- [129] The Tribunal finds this sub-particular made out as to its facts and as a breach of standards and it was malpractice on Mr Chum’s part and this conduct brings discredit to his profession. It separately warrants disciplinary sanction.

Sub-particular (ii): Failure to ask for re-clothing

- [130] The Tribunal finds as a fact that Mr Chum did not ask the Patient to reclothe herself. Any disputed questions of fact between the evidence of the Patient and the unsworn statement from Mr Chum are decided in favour of the Patient’s version. In any event Mr Chum’s version as contained in his statement is inconsistent with what had been said before in his interview with the PBNZ.
- [131] The Tribunal accepts from the clear and unambiguous account given by the Patient that Mr Chum’s massaging her thighs, especially the inner thighs, would have revealed that she was not wearing underwear on her lower body, despite any attempts there may have been made to cover these with a towel or towels.
- [132] The evidence of Dr Mooney was that any massage in the areas indicated would have involved crossing the lower underwear line and it would have been obvious to Mr Chum that the Patient was not wearing any underwear on her lower body.
- [133] Even accepting Mr Chum’s account of events, the reason he gave for this was that he did not want to embarrass her. Dr Mooney said that Mr Chum ought to have been clear about clothing; that he ought to have suspended treatment

when he realised the extent of her undress (apparently conceded also by Ms Clifton-Smith); and that protection of the Patient's dignity was paramount. She said that it was not acceptable for Mr Chum not to do this on the grounds of possible embarrassment. This was, she said, a significant departure from accepted standards.

[134] The Tribunal accepts those facts and that opinion and finds that this sub-particular, the failure to ask the Patient to put some clothing back on when he realised she was naked is made out as malpractice and brought discredit to his profession. It separately warrants disciplinary sanction.

Sub-particular (iii) : Proceeding with massaging despite nakedness

[135] The Tribunal finds that, at the time that soft tissue massage to the thighs area was discussed between Mr Chum and the Patient, Mr Chum knew that the Patient was, apart from any bath robe or towelling cover, unclothed from the waist up and indeed unclothed below that point.

[136] Mr Chum's version is that from time to time he asked the Patient if she was "*comfortable*" with what he was proposing and she agreed that she was. That does not excuse Mr Chum in any way from his professional obligations.

[137] Dr Mooney said that the Patient's dignity ought to have been maintained and protected at all times and that the massaging of the Patient's inner thigh was a significant departure from accepted standards.

[138] The Tribunal finds this sub-particular made out as malpractice and as conduct bringing discredit to his profession separately warranting disciplinary sanction. Mr Chum knew the Patient was unclothed underneath any bathrobe or towelling cover; he should not have proceeded until she was adequately covered or clothed; but he proceeded to massage the areas referred to in the sub-particular despite that nakedness.

Sub-particular (iv): Failure adequately to drape during massage

[139] The Tribunal accepts the Director's submission that when the Patient was lying on her back and Mr Chum was massaging her thighs, including her inner thigh, the towel movement caused her to become exposed and that she would try to move the towel to cover herself up. The Tribunal further accepts

the Patient's evidence that she was concerned that, when Mr Chum moved the towel to gain access to her inner thigh, he could see her vagina.

[140] Any conflict in evidence between that of the Patient and that of Mr Chum (to the extent this has been given) is decided in favour of the Patient.

[141] Furthermore, Mr Chum's evidence regarding this is not consistent with his previous statement to the HDC. In that, Mr Chum said that, while the Patient was lying on her back, only her abdomen was exposed to apply treatment while all other areas remained covered. The Tribunal accepts that the towel had moved during the massage so as to expose the Patient's vagina and accepts Dr Mooney's opinion that the Patient was not adequately draped for treatment.

[142] The Tribunal finds this sub-particular made out as malpractice and conduct bringing discredit to his profession and separately warranting disciplinary sanction.

Sub-particular (v): Asking the Patient for massage to the clitoral region

[143] The Tribunal finds as a matter of fact that Mr Chum did ask the Patient if he could massage her clitoral region. She said that clearly in evidence and she said that she refused this. That apparently brought the consultation to an end. The Patient's evidence on this is affirmed by her subsequent act of text message to her friend, Mr Y, and discussion with her friend, Ms T.

[144] The Tribunal does not accept any denial Mr Chum gave concerning this request. First it does not accept Mr Chum's unsworn and untested statement on that point and secondly the assertion is inconsistent with what he had said to the PBNZ at the meeting on 23 June 2016 when he said that he had applied "*manual therapy pressure*" which he acknowledged could have been the groin area.

[145] Dr Mooney said that she could not identify a situation where it would ever be clinically appropriate to seek permission to massage a patient's clitoral region. She also said that this request represented a significant departure from accepted standards.

[146] The point is also made which the Tribunal accepts that, the absence of any follow-up discussion or advice for a home-based programme or homework

to assist on-going recovery is consistent with the consultation having been brought to an abrupt end by the exchanges that the Patient had said occurred.

[147] The Tribunal finds this sub-particular made out as malpractice and conduct bringing discredit to the physiotherapy profession and separately warrants disciplinary sanction.

Sub-particular (vi): Engagement in sexual conversation with Patient

[148] This sub-particular refers to a discussion that the Patient had with Mr Chum following the events referred to and when the consultation was to come to an end. The allegation is that that conversation was sexual in nature and/or referred to giving other patients orgasms.

[149] The Tribunal does not find this sub-particular made out on the facts. The evidence from the Patient was that after the treatment had stopped “*abruptly*”, Mr Chum “*went silent and was not engaging*” with her. She said she felt very confused and asked Mr Chum some questions namely “*if he had massaged other clients that way*” and “*if he gave this treatment to everyone*”. The Patient described her understanding of the meaning of the questions she was asking but her words were in that generalised way.

[150] She also gave evidence of Mr Chum’s response which included that Mr Chum said “*he would read the person and offer it on a client-by-client basis*” and that “*the whole body was connected, and that when there is tension in that region, it is helpful to have that release too*”. The Patient again gave her understanding of what she thought he meant by that but did not raise that at all with Mr Chum at the time.

[151] The Director in submissions asked that the Tribunal consider the events leading up to the conversation and that the Patient’s account was entirely consistent with the type of increasingly intimate areas which Mr Chum had been massaging before the request to massage the clitoral region. Reference was made to the tone of the email that Mr Chum had sent to the Patient shortly after the consultation.

[152] There is significant ambiguity in the exchanges that occurred between the Patient and Mr Chum at that time and the Tribunal is not satisfied on the balance of probabilities that there is adequate evidence that Mr Chum did

engage in a conversation of a sexual nature or refer to giving other patients orgasms.

[153] That sub-particular of the Charge is not made out.

Particular 2: Departure from professional standards

[154] This particular refers to the same events but in the context of whether the treatment provided departed from accepted standards of care. The particular again refers to the attendance by Mr Chum at the Patient's home and the referral for review for laryngeal and cervical muscle tension which may be influencing voicing and swallowing. It expressly alleges that Mr Chum provided treatment for suspected muscle tension dysphonia (**MTD**) and/or breathing pattern dysfunction (**BPD**) and it refers to the inclusion of soft tissue massage to the lower back and/or pelvic and/or upper thigh and/or inner thigh areas.

[155] The Tribunal has approached this particular in the context of findings already made on disputed questions of fact between the Patient and Mr Chum. It has taken into account the expert evidence on this given by Dr Mooney. The proposed statement of evidence from Ms Clifton-Smith has been read and is summarised above, but the Tribunal discounts this as evidence for Mr Chum on the basis mentioned above. The sub-particulars (i) and (iii) refer to the appropriateness "*at a first consultation*" and that means that questions of whether the treatment referred to in those sub-particulars might or might not have been appropriate at a later consultation need not be considered.

[156] Particular 2 alleges that in respect of the five sub-particulars referred to there has been malpractice and/or negligence and/or conduct bringing discredit to the profession separately or cumulatively warranting disciplinary sanction.

Sub-particular (i) - Soft tissue massage to lower areas inappropriate at first consultation for suspected MTD or BPD

[157] The clear evidence from Dr Mooney referred to the groups of muscles referenced by Mr Chum and discussed these. Her evidence was:

- a) That she agreed with the statement by Mr Chum to the HDC that the improvement in the Patient's voice from the treatment to her throat and

neck area meant muscle tension was playing a role in her symptoms which may have been linked to accessory muscle use.

- b) That, while she acknowledged the interconnectivity between many muscles (as had been outlined by Mr Chum in his statement to the HDC), she did not believe that Mr Chum had adequately assessed the areas that he proceeded to treat in order to conclude those muscles were having the impact he considered they were having or to warrant the treatment. In her opinion any such treatment ought not in any event to have occurred at a first consultation.
- c) That Mr Chum had not mentioned any reduced range of movement or any significant pain; that there was no reference in his notes to indicate any problem with the Patient's left hip flexor muscles; and that the abdominals did not appear to have been explored either subjectively or objectively.
- d) That the muscles indicated by Mr Chum are not the muscles that ought to have been the focus of treatment for a first consultation especially in the context of the express referral and Mr Chum's clinical examination findings.
- e) That the muscles that ought to have been focused on in order to decrease identified abdominal tone and activity are the abdominals. These are muscles attached to the ribs and have a direct impact on efficient diaphragm movement. Those muscles were not addressed by Mr Chum.
- f) That Mr Chum did treat the quadratus lumborum but that muscle has a secondary role to the abdominals.
- g) That on the basis of the muscles Mr Chum has recorded as having been massaged he would have had to massage the Patient's thigh (lateral and anterior) but there would be no reason for him to massage the Patient's inner thigh and/or the genital area.
- h) That there is no note by Mr Chum of having assessed or treated the adductor muscles directly related to the groin area and near the pubic bone. The only muscle identified by Mr Chum which has an association with the inner thigh is the iliopsoas muscle which lies deep

and unlikely to be effectively massaged; with typical treatment being stretching.

- i) That Mr Chum's examination findings were inadequate to justify treatment to the Patient's hip flexor and the lateral and anterior thigh as well as her pelvic region. Treatment of those areas in the context of the referral and Mr Chum's clinical examination was, in Dr Mooney's view, a significant departure from accepted standards of care. Dr Mooney did say that she would have expected more investigation to justify treatment of those muscles given the finding of tension in the left lumbar paraspinal; and that the focus for the first consultation ought to have remained on the Patient's upper body.
- j) That any massage by Mr Chum of the Patient's inner thigh is a significant departure from accepted standards of care because there was no clinical justification for him to do so on the basis of his working diagnosis of muscle tension dysphonia (MTD) with underlying breathing pattern dysfunction (BPD) or left lumbar spine dysfunction.

[158] The Tribunal does not accept the statements tendered by Mr Chum on this or other issues for the reasons mentioned.

[159] The Tribunal finds this particular made out as misconduct and conduct bringing the physiotherapy profession into discredit and separately warrants disciplinary sanction.

[160] This was a young woman whom Mr Chum was treating alone at her home on the specific terms of the referral mentioned. The question of breach of boundaries has been dealt with above but in those circumstances and on a first consultation there was no call for soft tissue massage to the areas mentioned in this sub-particular and that it was not an appropriate treatment option.

Sub-particular (ii) - Soft tissue massage to the inner thigh as appropriate treatment

[161] The extracts from Dr Mooney's evidence referred to above also apply to this sub-particular. While sub-particular (i) above refers to this type of massage to other areas in the context of a first consultation, this sub-particular refers to that massage to the inner thigh specifically for suspected MTD or BPD.

[162] It is clear from the evidence that that massage is not appropriate treatment for those suspected conditions and the Tribunal has no difficulty in finding that on the basis of Dr Mooney's evidence, effectively not answered by Mr Chum by evidence or even the statements submitted, it was malpractice and negligence on Mr Chum's part to undertake that soft tissue massage to the Patient's inner thigh for treatment of those conditions, MTD or BPD, and is conduct bringing discredit to his profession separately warranting disciplinary sanction.

Sub-particular (iii) – Focus on appropriate muscle groups at a first consultation for suspected MTD and BPD

[163] Dr Mooney's evidence expressly referred to this and she said that the muscle groups that Mr Chum had focused on as part of his decision to treat the Patient by way of myofascial release were not the dominant muscle groups that ought to have been focused on and treated at a first consultation and would not have achieved the stated purpose of reducing abdominals in order to free the diaphragm.

[164] Taking that expression of opinion, and those referred to earlier into account, the Tribunal concludes that this sub-particular is made out as malpractice and negligence on Mr Chum's part and as conduct bringing discredit to his profession separately warranting disciplinary sanction.

Sub-particular (iv) – Soft tissue massage despite vulnerability

[165] Dr Mooney also said that a physiotherapist ought to have been more cautious about providing soft tissue massage in the setting that Mr Chum was in. She made mention that he was treating a female patient recovering from a traumatic brain injury and suffering with fatigue and reduced concentration. He was in her home rather than in a formal clinical setting and they were alone with no chaperone present.

[166] There is, she said, vulnerability in any clinical setting between a physiotherapist and a patient and in these circumstances the Patient was particularly vulnerable. That evidence, clearly not controverted by any evidence or opinion to the contrary, is clear and is accepted by the Tribunal. It is a different issue from sub-particular (ii) which dealt specifically with

soft tissue massage to the inner thigh as an appropriate treatment for suspected MTD or BPD.

[167] The Tribunal finds that there has been malpractice or negligence on Mr Chum's part and conduct bringing discredit to his profession separately warranting disciplinary sanction.

Sub-particular (v) – Failure to discuss alternative treatment

[168] This sub-particular refers to the other options that would have been less invasive and/or would not have involved the removal of clothing and Mr Chum's alleged failure to discuss these with the Patient.

[169] In her evidence Dr Mooney said:

- a) That she noted there was no reference in the clinical notes to any discussion with the Patient regarding a home-based programme or homework for the Patient to assist with her on-going recovery.
- b) That the reality of working with a Patient who has recently suffered a traumatic brain injury, is fatigued, has just returned to university and still requires afternoon naps, with reduced concentration affect, should highlight that the session should have focused on the core aspects of assessment/treatment/homework rather than extensively exploring all aspects/potential contributors of a breathing pattern disorder.
- c) That the level of intervention by Mr Chum was not appropriate, she said, for a first consultation and particularly contraindicated for a Patient such as this one. Expressly, that there were alternative treatment options to soft tissue massage available to Mr Chum to achieve myofascial release that ought to have been discussed with the Patient and offered to her and which did not appear to have been considered here. She instanced home-based stretching incorporated with breathing exercises as part of a home programme to complete in her own time. This treatment approach would have been less invasive, she said, and would not have involved the Patient removing any clothing.

[170] The Tribunal accepts that evidence and the opinion expressed. This was an unsafe environment for Mr Chum to have undertaken the treatment that he did or carried out the massaging and manipulations that he did. Quite apart from boundary issues, the massaging was significantly invasive and Mr

Chum should have assessed other options for what he had been referred to the Patient for treatment, namely MTD and BPD.

[171] The Tribunal finds this sub-particular made out as malpractice and negligence on Mr Chum's part and as conduct bringing discredit to his profession separately warranting disciplinary sanction.

Conclusion on Charges

[172] The Tribunal finds the Charge made out; that particular 1 is made out as to each of its sub-particulars except sub-particular (vi) with each sub-particular separately warranting disciplinary sanction. Particular 2 is made out in respect of all of its sub-particulars all separately warranting disciplinary sanction.

[173] That decision having been announced to the hearing submissions were made by the Director on penalty.

Penalty : The Director's Position

[174] The submissions for the Director:

- a) Referred to a number of conditions already in place in respect of Mr Chum's scope of practice, some having been imposed on an interim basis on 24 June 2016 and some ordered by the Tribunal on 23 May 2017 as a consequence of a Charge against Mr Chum for breach of one of the interim conditions, namely that he not treat female patients. Those conditions variously included that Mr Chum was not to assess or treat or monitor female patients; various aspects of supervision and oversight; reporting and undertaking a course in ethics and professional responsibilities.
- b) That there should be an order for cancellation of Mr Chum's registration with conditions imposed under section 102(1) of the HPCA Act.
- c) That conditions should be ordered on Mr Chum's practice following re-registration (should he ever apply for this having had his present registration cancelled) and referred to Mr Chum's not treating or assessing female patients and supervision with reporting. It was submitted that the Tribunal had jurisdiction to impose those conditions

under section 101(1) of the HPCA Act even if an order for cancellation of registration were made and in addition to any conditions imposed under section 102(1).

- d) That, if cancellation were not ordered, there should be a comprehensive suite of conditions for a period of three years.
- e) That there be orders for censure and costs.
- f) That the proven conduct was serious especially because there were multiple opportunities for Mr Chum to have elected to stop his progressively invasive massaging of the Patient.
- g) That the aggravating features included that the conduct occurred in the complainant's home without a chaperone where she was entitled to feel safe; that the Patient was recovering from a traumatic brain injury and therefore particularly vulnerable; and that the inherent power imbalance between Mr Chum as physiotherapist and his Patient was used to achieve inappropriate skin-to-skin contact to intimate areas of the Patient's body under the guise of legitimate treatment.

[175] The Director conceded in mitigation that at the time of the complaint this appeared to be the first complaint that had been made to the PBNZ or to the HDC concerning Mr Chum. Other decisions were referred to and are mentioned below. The submission was made that this case differed from others in that conditions on Mr Chum's practice had already been put in place by the PBNZ but the Tribunal had found that Mr Chum "*knowingly, flagrantly and deliberately*" breached one of those conditions, namely that he not treat female patients and this occurred on 20 separate occasions. Mr Chum had not, so far as it was known, undertaken any course on ethics or professional boundaries and has not provided any insight into his prospects of rehabilitation, continuing to deny the facts and any breach of standards.

[176] As noted above, Mr Chum did not appear or make any submission on any question of penalty but his Memorandum did refer (in an unsworn form) to his present personal circumstances.

[177] This Memorandum included:

- a) That Mr Chum had stopped working at the Clinic soon after the PBNZ restricted his practice to male patients only.

- b) That he had lost confidence in himself both as a practitioner and as a person.
- c) That he continued strongly to deny the Patient's version of events but did not know how to express the denial in an acceptable way.
- d) That there was a particularly difficult period of time both professionally and as a person for him some three years ago.
- e) That he has not applied to renew his Annual Practising Certificate now for two years and the company in which he was involved "*is to be removed*" from the register.
- f) That he has not made a decision on whether he will resume practice as a physiotherapist assuming it is open for him to do so.
- g) Giving details of his personal and financial circumstances including for his wife and three dependent children, that he has very little equity in the home and no cash assets or ability to extend borrowing, with fine and costs debts and legal expenses still outstanding.
- h) Referring to the counselling he has had.

Penalty – discussion

[178] The available penalties for the Tribunal are:⁹

- a) That registration be cancelled.
- b) That registration be suspended for a period not exceeding 3 years.
- c) 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.
- d) Censure.
- e) 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 or her – not the case here).
- f) Costs.

⁹ Section 101 of the HPCA Act

[179] The principles behind penalty orders of the Tribunal as clearly set out on the basis of authorities¹⁰ are:

- a) What penalty most appropriately protects the public.
- b) The important role of setting professional standards.
- c) A punitive function (although this is not the principal purpose behind in the order but may be a secondary consequence).
- d) Rehabilitation of the health professional.
- e) That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances.
- f) Assessing the health practitioner's behaviour against the spectrum of sentencing options that are available and trying to ensure that the maximum penalties are reserved for the worst offenders.
- g) An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.
- h) Whether the penalty proposed is fair, reasonable and proportionate in the circumstances presented.

[180] In *A v Professional Conduct Committee*¹¹ the High Court said that four points could be expressly and a fifth by implication from the authorities namely:

“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.”

[181] The Court went on:¹²

“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 interests of the individual doctor’,

¹⁰ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Katamat v PCC* [2012] NZHC 1633 at paragraph 49 and *Joseph v PCC*; [2013] NZHC 1131 at [65] – [66]; *Singh v Director of Proceedings*, [2014] NZHC 2848 (esp. paragraphs [56] – [60] and [66])

¹¹ *A v Professional Conduct Committee* [2008] NZHC 1387 at [81]

¹² At [82]

that is not absolute – ‘the existence of the public interest in not ending the career of a competent doctor will play a part.’

[182] The Tribunal is also mindful of the remarks of Randerson J in *Patel v Dentists Disciplinary Tribunal*¹³. 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”¹⁴.

[183] 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 from a professional register has 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.

¹³ Auckland HC; AP77/02; 8/10/02;

¹⁴ Paragraph 32

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”

[184] In considering penalty orders to be made the Tribunal has taken careful note of the circumstances of the offending. This was a young woman in her own home and vulnerable because of the traumatic injuries she had sustained. There was the express referral for treatment by Mr Chum of the voicing and swallowing conditions and that was why he was there. The evidence is clear that he exceeded the boundaries in a significant way. He took advantage of the situation and the vulnerability of this young woman which went way outside the reasons he had been referred there and the appropriate treatment that she needed at that time.

[185] This was the first consultation in a potentially compromising situation and Mr Chum should have approached this carefully. Instead, he not only exceeded the boundaries but took advantage of the opportunity that was open to him to deal with the Patient in the way that he did. She trusted him and

the advice that he was giving as to what was needed and as to what he proposed to do. He took advantage of the trust and has caused the Patient significant distress. This could potentially have compromised her timely recovery.

[186] Mr Chum's behaviour on the day in question became increasingly more concerning and the Tribunal interprets that he was testing the boundaries as the events unfolded to see how far he could go in his predatory conduct.

[187] When he realised that the Patient was not accepting the advances he ended the treatment abruptly and left quickly. He then took steps trying to cover his tracks. He telephoned the Patient and he sent the email mentioned. He has tried to use the breathing method techniques that he had learnt as an excuse for his behaviour and to cover his tracks. Even had Mr Chum been adhering to that method, this did not warrant what he did.

[188] Mr Chum has aggravated the situation significantly by failing to comply with the condition imposed by the PBNZ when the complaint had been received by it, that he not treat female patients; and he proceeded to do so in respect of 20 other women. While that breach of the condition has already been dealt with by the Tribunal in the orders that it has already made on the Charge of breach of that condition, it is a factor that the Tribunal takes into account in the context of any rehabilitation for Mr Chum and any other orders that the Tribunal should now make.

[189] Likewise, it appears that he has not complied with the order for payment of costs that the Tribunal had then made or the payment of the fine ordered. Although the requirement and condition for completion of a course in ethics and professional responsibilities was imposed by the Tribunal when Mr Chum resumed practice as a physiotherapist and this has not yet occurred, it is apparent that Mr Chum has not taken any steps towards completion of any such course to date and that is relevant to the question also of rehabilitation.

[190] The submissions for the Director recorded that an apology had been sent on Mr Chum's behalf in late 2018. This was sent by the lawyers previously acting for Mr Chum and not an apology personally from him. Apparently in that letter Mr Chum apologised not for his conduct but for the fact that the Patient had misconstrued this. This too is relevant to rehabilitation.

[191] Mr Chum has demonstrated no remorse for his behaviour towards the Patient and has been trying to disguise his wrongdoing.

[192] The Tribunal has considered the other cases referred to it by the Director. Regard must be had to these to achieve some consistency, but each case is different on its facts.

*Director of Proceedings v R*¹⁵. This was a case of a nurse having a sexual relationship with a patient and his registration was cancelled with conditions put in place before he could re-register.

*Director of Proceedings v Kurth*¹⁶. Again this was a case of a nurse having a relationship of a patient but not of a sexual nature. His registration was ordered cancelled with conditions on practice on re-registration. The decision included:

“...the Tribunal is concerned that Mr Kurth did not take the opportunity to appear before the Tribunal. The Tribunal is therefore left with serious reservations about Mr Kurth’s ability or willingness to be rehabilitated as he has not been willing to engage in the disciplinary process before this Tribunal.”

*Director of Proceedings v McMillan*¹⁷. This was a case of a nurse who made statements of a personal nature to his patient and texted her while she was in hospital. After the patient was discharged from hospital he maintained contact with her which increased in its intimacy until there was a sexual relationship. Registration of the nurse was ordered cancelled with conditions on his practice prior to and on re- registration.

*Director of Proceedings v Derry*¹⁸. This case involved a physiotherapist who engaged in an inappropriate conversation and then unnecessarily exposed his patient’s breasts. Conditions were ordered on his practice for a period of 12 months with a fine of \$5,000.00, censure and costs. The Director submitted there were differences in that case in that first the physiotherapist

¹⁵ Nur16/349D

¹⁶ 651/Nur14/285D

¹⁷ 634/Nur14/274D

¹⁸ 143/Phys07/79 D

immediately admitted his conduct, secondly he attended before the Tribunal and accepted the charge that his conduct amounted to professional misconduct; and thirdly he had undertaken steps to address the issues behind his behaviour.

*Director of Proceedings v Samiyullah*¹⁹. This case involved a postgraduate physiotherapy student who inappropriately touched a female patient while treating her. The student admitted his actions and that these constituted misconduct. There was no registration that enabled cancellation but the student was fined \$2,000.00 and censured. There was an indication of conditions that ought to be imposed should the student seek to be registered as a physiotherapist the New Zealand.

*PCC v Singleton*²⁰. In that case a physiotherapist breached professional boundaries by what he said to his patient, kissing and touching her including her breasts, or commenting on her breasts, and arranging to meet her privately. He sent inappropriate text messages and offered counselling. This physiotherapist's registration was cancelled, he was censured and it was ordered that he would have to satisfy the PBNZ that he had undertaken an appropriate course in ethics and boundary management should he ever seek re-registration.

*PCC v Chand*²¹. The nurse in this case attempted to kiss a colleague, made inappropriate advances towards two patients, telephoned a patient at home, and inappropriately hugged one of the patients. He accessed clinical records to obtain the phone number of the patient. The practitioner was found to have shown no insight into his behaviour and, because there were said to be serious boundary issues, his registration was cancelled.

[193] One of the factors for the Tribunal in considering what orders should be made is the statement from Mr Chum himself that he has not made a decision on whether or not he wishes to resume practice as a physiotherapist. He has said

¹⁹ 169/Phys08/90D

²⁰ 373/Phys10/158P

²¹ 106 and 109/Nur06/49P

in his statement that he lost confidence in himself both as a practitioner and as a person. He has not applied to renew his Practising Certificate since 2017. His statement said that the company for which he worked was to be removed from the register with accounts finalised “*to the end of 2017*” (and that may mean the financial year ended 31 March 2017).

[194] That means that if the Tribunal were to consider an order for suspension, this may be a meaningless and nugatory order of no practical effect. Any order for suspension by the Tribunal must have some consequence of significance for a practitioner. Otherwise, it is meaningless.

[195] Accordingly, the Tribunal has concluded that it cannot consider an order for suspension instead of any order for cancellation of registration. Any remaining orders, for conditions on practice, censure or fine, or any of them together would be disproportionate to the offending by the practitioner and would not address the underlying issues of his offending in an adequate way. This would be a disproportionate result.

[196] So far as conditions are concerned, again these cannot be seriously considered in the context of Mr Chum’s stated uncertainty about whether he will practise. There is the added concern that there have been conditions already imposed on Mr Chum’s practice which have not been met. First there were the conditions imposed by the PBNZ which Mr Chum did not comply with and had to be the subject of a charge before the Tribunal and orders. Secondly there were following the charge the orders of the Tribunal for payment of fines, payment of costs, and, so far as it is relevant currently, attendance at an appropriate course. While the last was dependent on Mr Chum’s return to practice, which has apparently not occurred since then, there is no evidence that Mr Chum has addressed any such course to any extent in the meantime.

[197] The Tribunal concludes that conditions imposed on Mr Chum’s practice would not in themselves be practicable or appropriate. The end result of that is that there is no alternative for the Tribunal but to order cancellation of Mr Chum’s registration and this is ordered below.

[198] The Director sought conditions to be imposed on Mr Chum should he ever apply for re-registration is a physiotherapist. Section 102(1) of the HPCA Act as it applied when the Charge was laid provided:

“When making an order that the registration of a health practitioner be cancelled, the Tribunal may impose 1 or more conditions that he or she must satisfy before he or she may apply for registration again”.

- [199] Unlike section 100(1) referring to conditions while a practitioner is on the register, which run **from** commencement of practice following the imposition of conditions, conditions under section 102 are those which must be met **before** the application for re-registration is made by the practitioner. There is general discretion as to the conditions which can be considered with the examples given in subsection (2).
- [200] The Tribunal considers that the following conditions should be imposed under that section and now so orders. The first order sought by the Director was that Mr Chum may not apply for re-registration *“for a significant period of time”*. That submission anticipates the application of the amendment to section 102 enacted on 12 April 2019. The Tribunal’s view is, however, that that amendment cannot apply in this case, the Charge having been laid before that date. There was no argument on this subject but that is the approach taken in this case by the Tribunal.
- [201] The next condition as sought by the Director is that Mr Chum must undertake such courses in ethics and professional boundaries at his expense as are directed and approved by the PBNZ. This is effectively a repeat of the condition ordered by the Tribunal on 14 June 2017 in the context of breach of earlier conditions noted above. That condition, as required by section 101(1)(c) could only run from when Mr Chum resumed practice as a physiotherapist. The current condition imposed by the Tribunal is one which must be satisfied before Mr Chum applies for re-registration, if he ever does.
- [202] The Tribunal requires as a condition of any such application that Mr Chum shall have paid in full the outstanding fine and all costs orders imposed on him.
- [203] There may be further conditions that PBNZ considers should then apply to Mr Chum’s future practice as a physiotherapist. This is a matter for the future and it is a matter for the PBNZ. The submissions for the Director suggested that conditions could relate to treatment or assessment of female patients; supervision with regular reporting; working only as an employed

physiotherapist at premises approved by the PBNZ; and a requirement for advice to future employers of the Tribunal's two decisions.

[204] The Tribunal cannot consider now the appropriateness of any such conditions in the future when the future is uncertain concerning Mr Chum's practice as a physiotherapist or his wish to apply for re-registration. Any condition that the Tribunal can order under section 102 is one that must be satisfied before the application for re-registration is made and the conditions to which the Director's submissions referred are rather of an on-going nature.

[205] The Tribunal imposes a condition that before Mr Chum apply for registration he undertake to the PBNZ that he will comply with any conditions imposed by it on his future practice as a physiotherapist.

[206] The Tribunal considers that these conditions should be ordered in the event that Mr Chum ever apply for re-registration and they are ordered below.

[207] The Tribunal orders censure as a mark of its significant disquiet about the facts and events that have led to this Charge being brought.

Costs

[208] The Director sought an order for costs against Mr Chum. The relevant provisions from section 101 of the HPCA Act read:

... [T]he Tribunal may:

(f) order that the health practitioner pay part or all of the costs and expenses of and incidental to any or all of the following:

(i) any investigation made by the Health and Disability Commissioner under the Health and Disability Commissioner Act 1994 in relation to the subject matter of the charge:

(ii) ...:

(iii) the prosecution of the charge by the Director of Proceedings ..., as the case may be:

(iv) the hearing by the Tribunal.

[209] The principles applicable to costs are these. The normal approach for the Tribunal based on the authorities²² is to start with a 50% contribution. That, however, is a starting point and other factors may be taken into account to increase or reduce that proportion. Those factors include that the hearing

²² Including *Cooray v Preliminary Proceedings Committee*; Wellington HC: AP 23/94; 14/9/95; *Doogue J*; and *Vatsyayann v PCC* [2012] NZHC 1138

was able to proceed on an agreed statement of facts, any co-operation from, or attendance at the hearing by, the practitioner, the known means of the practitioner, and consistency with the level of costs in previous decisions. The balance of costs of the prosecution after the orders for costs must be met by the profession itself.

[210] The Director's costs were estimated by her to include disbursements and total \$105,424.14 exclusive of GST. That is a significantly high number as is acknowledged by the Director's submissions. The Tribunal has been provided with a schedule of how that amount is calculated and time that has been spent by the Director or on her behalf. It has considered the disbursements said to have been incurred including expert costs for Dr Mooney.

[211] This case has been protracted because of questions raised by or on behalf of Mr Chum or on his behalf concerning the constitution of the Tribunal and other issues arising. The case has had to be prepared for the Director on the basis that it would be fully defended by Mr Chum on the issues raised by the statements of proposed evidence filed by him; and it was not until 28 June 2019, one working day before the hearing was due to commence that Mr Chum, by his Memorandum dated some weeks earlier on 4 June 2109, advised he would not be attending. Despite that non-attendance and despite having been advised on behalf of the Tribunal that he could attend on his own behalf and advice concerning the weight that may be given to signed statements in his absence and without those proposed witnesses being called, Mr Chum's denial of the Charge continued and has had to be dealt with by the Director and by the Tribunal both at the hearing and in this decision.

[212] An estimate of the costs of the Tribunal was supplied and these totalled \$53,688.00. There was also a cost of \$2,500.00 approximately incurred in respect of cancellation of an earlier hearing date. The Tribunal concludes that these estimates of costs are reasonable in the circumstances and they total some \$159,112.00.

[213] Mr Chum supplied detail of his financial circumstances in his unsworn statement and the Tribunal has taken this into account. These are referred to above. The conclusion of the Tribunal is that the only basis on which there could be any consideration for any reduction from a 50% contribution to

costs orders are the financial means as Mr Chum has set them out in his statement. This is an unsworn statement and not open to challenge by cross-examination or testing.

[214] The Tribunal concludes in all the circumstances that the appropriate amount to order is approximately 25% of the total, that is the sum of \$40,000.00, and this is ordered below.

Name suppression issues

[215] There had been an order for interim name suppression of Mr Chum: but he was not present to pursue this at the hearing and it was then withdrawn. A submission by Stuff Limited, a news medium, was that the interim order should be discharged and any application for permanent suppression dismissed. An order for permanent suppression of the name of the Patient was made at the hearing and this is now affirmed. [].

Result and orders

[216] The Charge against Mr Chum is found to be made out in the two particulars of the Charge and sub-particulars (except particular 1 (vi)) as breach of boundaries and departure from accepted standards of care separately and cumulatively found to be malpractice and negligence and conduct that brings discredit to the physiotherapy profession.

[217] Mr Chum is censured.

[218] There is an order cancelling Mr Chum's registration as a physiotherapist forthwith.

[219] The Tribunal orders pursuant to section 102 of the HPCA Act that Mr Chum must satisfy the following conditions before he may apply for re-registration:

- a) That he must have undertaken at his expense and established to the satisfaction of the PBNZ that he has completed such course in ethics and professional responsibilities and boundaries as is directed and approved by the PBNZ.
- b) That Mr Chum is to satisfy the PBNZ that he has paid all outstanding fines and costs in respect of the orders of the Tribunal against him dated 14 June 2017 on file 895/Phys17/379P and the costs order in this decision.

- c) That he will have provided to the PBNZ in a form directed and approved by it an undertaking to comply with such conditions as are imposed by the PBNZ on Mr Chum's future practice as a physiotherapist.

[220] Mr Chum is ordered and directed to pay the sum of \$26,666.00 to the Director towards her costs and those of the HDC and the further sum of \$13,334.00 to the Tribunal towards its costs, a total of \$40,000.00.

[221] The Tribunal confirms its decisions earlier that the name suppression order for Mr Chum earlier made is discharged; and that there are permanent orders for non-publication of the name and identifying details of the Patient involved in the Charge; [].

[222] Pursuant to section 157 of the HPCA Act the Tribunal directs the Executive Officer:

- a) To publish this decision, and a summary, on the Tribunal's website;
- b) To request the PBNZ to publish either a summary of, or a reference to, the Tribunal's decision in its next available publication to members, in either case including a reference to the Tribunal's website so as to enable interested parties to access the decision.

DATED at Auckland this 5th day of August 2019



.....
David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal

SCHEDULE

TAKE NOTICE that pursuant to sections 91 and 100(1)(a) and 100(1)(b) of the Health Practitioners Competence Assurance Act 2003, the Director of Proceedings has reason to believe that a ground exists entitling the Tribunal to exercise its powers against you and charges that on 2 May 2016, whilst caring for your patient [the Patient] you, being a physiotherapist, acted in such a way that amounted to professional misconduct.

IN PARTICULAR:

1. On 2 May 2016, in response to a referral you received from Laura Ferguson Trust Canterbury to review [the Patient]' "laryngeal and cervical muscle tension which may be influencing voicing and swallowing", you attended [the Patient]' home and while there you breached professional boundaries during your assessment and/or treatment of [the Patient] when you:
 - (i) Advised [the Patient] to take "everything off" with reference to her clothing; and/or
 - (ii) Failed to ask [the Patient] to put some clothing back on when you realised she was naked; and/or
 - (iii) Proceeded to massage [the Patient]' lower back and/or pelvic and/or upper thigh and/or inner thigh areas despite her nakedness; and/or
 - (iv) Failed to adequately drape [the Patient]' body during your massage of her lower back and/or pelvic and/or upper thigh and/or inner thigh areas; and/or
 - (v) Asked [the Patient] if you could massage her clitoral area and/or clitoral region; and/or
 - (vi) Engaged in a conversation with [the Patient] which was sexual in nature and/or referred to giving other patients orgasms.

AND/OR

2. On 2 May 2016, in response to a referral you received from Laura Ferguson Trust Canterbury to review [the Patient]' "laryngeal and cervical muscle tension which

may be influencing voicing and swallowing”, you attended [the Patient]’ home and provided treatment for suspected muscle tension dysphonia (MTD) and/or breathing pattern dysfunction (BPD) which included soft tissue massage to [the Patient]’ lower back and/or pelvic and/or upper thigh and/or inner thigh areas. By providing this form of treatment to these muscle groups and/or areas, you departed from accepted standards of care in that:

- (i) Soft tissue massage to the lower back and/or pelvic and/or upper thigh areas was not an appropriate treatment option for suspected MTD and/or BPD at a first consultation; and/or
- (ii) Soft tissue massage to the inner thigh is not an appropriate treatment option for suspected MTD and/or BPD; and/or
- (iii) These muscle groups and/or areas are not the dominant muscle groups and/or areas that should be focused on and/or treated at a first consultation for suspected MTD and/or BPD; and/or
- (iv) You provided soft tissue massage to these muscle groups and/or areas despite [the Patient]’ vulnerability in that she was naked and/or you were alone with her in her home and/or you were not in a clinical setting and/or when you knew [the Patient] was suffering from a traumatic brain injury and/or fatigue; and/or
- (v) You failed to discuss and/or offer alternative treatment options to soft tissue massage that would have been less invasive and/or would not have involved removal of clothing.

The conduct alleged in the above particulars separately and/or cumulatively amounts to professional misconduct. The conduct is alleged to amount to malpractice and/or negligence and/or conduct that brings discredit to the physiotherapy profession under s100(1)(a) and s100(1)(b).