New Zealand Health Practitioners Disciplinary Tribunal

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DECISION NO: 613/HP13/265P

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

-AND-

IN THE MATTER of a Charge laid pursuant to Section 91(1)(b) of the Act against **Mr Y** of XX, [ ]

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr D M Carden (Chair)

[Members]

Ms K Davies (Executive Officer)

Ms J Kennedy (Stenographer)

Hearing held at Wellington on 3 March 2014

APPEARANCES: [Counsel] for the Professional Conduct Committee

[Counsel] for the practitioner, Mr Y

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Introduction

1. Mr Y is a registered [ ] of XX. On 3 July 2013 he was convicted in the High Court of New Zealand, Wellington Registry, on three charges of sexual conduct with a dependent family member pursuant to section 131 of the Crimes Act 1961. He was sentenced to nine months home detention and ordered to pay reparation of $10,000.00. Those offences are each punishable by terms of imprisonment exceeding 3 months. A Professional Conduct Committee (the PCC) [ ] has laid a Charge pursuant to the Health Practitioners Competence Assurance Act 2003 (the HPCA Act) that those convictions separately or cumulatively reflect adversely on Mr Y's fitness to practise as a [ ]. The Charge was heard by the Tribunal.

2. The Charge read as follows:

> *"**TAKE NOTICE** that a Professional Conduct Committee ("the Committee") [ ] pursuant to section 71 of the Health Practitioners Competence Assurance Act 2003 ("the Act") has made a determination in accordance with section 83(3)(b) of the Act that a charge be brought against **Mr Y**, [ ] of XX, before the Health Practitioners Disciplinary Tribunal.*
>
> *Pursuant to section 91 of the Act the Committee has reason to believe that grounds exist entitling the New Zealand Health Practitioners Disciplinary Tribunal to exercise its powers under section 100 of the Act.*
>
> ***PARTICULARS OF CHARGE***
>
> *Pursuant to section 81(2) of the Act the Committee charges that:*
>
> *On 3 July 2013 **Mr Y** pleaded guilty to and was convicted of:*
>
> *(i) One representative charge of sexual conduct with a dependent family member under s131(3) of the Crimes Act 1961, being an offence punishable by a term of imprisonment not exceeding 3 years; and*
>
> *(ii) Two charges of sexual conduct with a dependent family member under s131(1) of the Crimes Act 1961 being offences punishable by a term of imprisonment not exceeding 7 years;*
>
> *and that these offences, either separately or cumulatively, reflect adversely on his fitness to practise as a [ ] under section 100(1)(c) of the Act."*

3. Mr Y admitted the Charge and he admitted that the convictions did reflect on his fitness to practise as a [ ]. There was produced to the hearing an Agreed Statement of Facts dated 3 March 2014 which was signed by Mr Y and read:

> *"**Charge***
>
> *1. The Professional Conduct Committee charges Mr Y under section 101(c) of the Health Practitioners Competence Assurance Act 2003 ("the Act") that he has been convicted of an offence that reflects adversely on his fitness to practise.*
>
> *2. The relevant convictions are one representative charge of sexual conduct with a dependent family member pursuant to section 131(3) of the Crimes Act 1961 and two charges of sexual conduct with a dependent family member pursuant to section 131(1) of the Crimes Act 1961. The agreed summary of facts for those charges is at Tab 2 in the Bundle of Documents.*
>
> *3. On 3 July 2013, Mr Y pleaded guilty to the three counts of sexual conduct with a dependent family member.*
>
> *4. On 19 July 2013 he was sentenced to nine months' home detention and ordered to pay reparation of $10,000 by Ronald Young J in the High Court at Wellington. The sentencing notes of Ronald Young J are at Tab 6 in the Bundle of Documents.*
>
> *5. The offending occurred while Mr Y was living in XX, but was outside of Mr Y's practice.*
>
> ***Professional background***
>
> *6. Mr Y qualified with XX*
>
> *7. On 1 July 2013, after negotiations with the Registrar at the XX, Mr Y became non-practising.*
>
> ***Admission***
>
> *I,* **Mr Y** *of XX, confirm and admit the agreed summary of facts and that I have been convicted of offences which reflect adversely on my fitness to practice."*

4. There was also produced an agreed bundle of documents on the following basis:

> *".. each document in the Bundle:*
>
> *(a) is what it purports to be on its face;*
> *(b) was signed by any purported signatory shown on its face;*
> *(c) was sent by any purported author to, and was received by, any purported addressee on its face;*

> *(d) was produced from the custody of the party indicated in the index;*
> *(e) is admissible evidence; and*
> *(f) is received into evidence as soon as referred to by a witness in evidence, or by counsel in submissions, but not otherwise*."

5. That Bundle comprised the registration information for Mr Y, the Caption Summary and Summary of Facts produced by NZ Police in the High Court proceeding, a medical report from Dr A B Marks, Consultant Psychiatrist, dated 17 June 2013, certain Victim Impact Statements, an email written by Mr Y to the victim/dependent family member, the Sentencing Notes of the High Court Judge dated 19 July 2013, and the Certificate of Conviction from the High Court dated 20 August 2013.

6. Although the Charge was admitted by Mr Y and he also admitted that the convictions reflected adversely on his fitness to practise, the matter is required to be considered separately by the Tribunal which must reach its own decision.

Background facts

7. The Summary of Facts produced by the NZ Police to the High Court indicated that the victim, the dependent family member, was then a 17 year old female exchange student from [ ]. Mr Y, then aged 53 years, was "host father" to the victim who resided at his address as part of her international student exchange. The victim spoke and understood limited English when she arrived in New Zealand and Mr Y read books to her on the couch at his home to help develop her understanding of English.

8. In early March 2012 Mr Y touched the victim's breast on the couch when reading stories to her initially from outside her clothing and then progressing to touching her under her clothing. Between May and June 2012 there was increased sexual activity between Mr Y and his victim which included sexual intercourse, oral sex and masturbation. Full details were given in the Police Summary of Facts.

9. On 25 June 2012 Mr Y and his wife told the victim she would be changing host families and moving out from their address. Mr Y told the hearing that the reason for this was because two of his own children were returning home and there was inadequate room for the victim to remain there].

10. On 6 July 2012, the date the victim moved from the address, there was further degrading sexual contact between Mr Y and his victim.

11. A complaint must have been made to the Police because Mr Y gave evidence that the first Mr Y's wife found out about the liaison was when the police called at their family home door. The charges were laid against Mr Y to which he pleaded guilty and of which he was convicted, one being, as noted, a representative charge.

12. The Agreed Bundle of Documents provided to the hearing included Victim Impact Reports from the victim and her father (on behalf of himself and his wife). The victim described herself as being "*really indignant and angry*" and that what Mr Y did "*was incredibly dirty, and I will never forget that. In my life in NZ, in which I was worried and felt alone, I trusted my host family*."

13. The Victim Impact Statement from the victim's father referred to a photograph having been sent by Mr Y which showed the victim's "*laughing face*" and the relief they felt when they received the photograph but the deception they considered there had been for what was described as Mr Y's "*ignoble crime.*"

14. The Bundle also included an apology sent by email from Mr Y to the victim via his counsel in the criminal trial in which he referred to having "*failed in [his] duty as a host father*". The email also included "*I have had to resign from work and I do not know if I will be able to work as a [ ] again.*"

15. The Sentencing Notes in the High Court included that the judge did not think that Mr Y's "*vulnerability to professional discipline*" was a matter to be taken into

account in sentencing and the prospect of professional discipline should not lessen a fair and appropriate punishment in the Court.

16. The Court accepted that Mr Y was "*deeply remorseful*" and took into account remarks made by Dr Marks.

17. The judge said[1]:

> *"What must be understood and stressed is the high level of vulnerability of this young woman. You were in the position of her father. You were there to look after her and support her in your family at a time when she was in a foreign country and in a foreign culture. She would inevitably have been isolated given her lack of fluent English. Her time here was, therefore, always going to be potentially stressful and difficult. It was of course commendable of you to try and help her with her English. But you did take advantage of her vulnerability, you did take advantage of her loneliness and isolation in developing a sexual relationship with her. You would have known that that was quite wrong and so the offending must be seen as a very serious abuse of power."*

18. The court expressed[2] the hope that Mr Y would *"recover from this both on a personal and professional level.*"

19. Mr Y was sentenced to 9 months home detention to be served at his home address and ordered to pay an emotional harm reparation sum, of $10,000.00. As required by section 201 of the Criminal Procedure Act 2011 an order for interim suppression of Mr Y's name was made.

20. Throughout the hearing there was no suggestion to the Tribunal by Mr Y that he should be excused in any way because of any consent on the part of the victim nor did he attempt to attribute any blame to her.

The PCC submission

21. Having outlined the principles concerning the onus and standard of proof and the grounds for discipline, submissions for the PCC outlined the relevant applicable provisions of the Crimes Act 1961, emphasising that consent was no defence to a charge under section 131 of that Act.

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1 Paragraph 18 – Sentencing Notes
2 Paragraph 22 – Sentencing Notes

22. Reference was made to other decisions of the Tribunal involving a health practitioner where, it was submitted, the inquiry into fitness to practise was not restricted to consideration of physical or mental fitness but rather whether the conviction impacted on wider standards of professional conduct and professional confidence in the particular area of practice.

23. It was submitted that decisions held that the phrase "*fitness to practise medicine*" include consideration of the ethical aspects of practice as well as those of a clinical nature.

24. It was further submitted that the threshold for discipline was crossed, namely that a conviction on the Charge was called for to maintain professional standards, protect the public and punish the practitioner.

25. Mr Y, through counsel, did not deny or defend the Charge in any respect and acknowledged, as he had done in writing, that the convictions reflected adversely on his fitness to practise as a [ ].

Charge – discussion

26. The Tribunal has emphasised in its decisions that the onus of proving a charge lies on the prosecution, in this case the PCC, and that the standard of proof is that of the balance of probabilities, the more serious the charge, the higher the standard.[3]

27. The HPCA Act provides that the Tribunal may impose the penalties anticipated by section 101 of the HPCA Act if, after conducting a hearing, it finds that the practitioner has been convicted of an offence (of one of several prescribed kinds including an offence punishable by imprisonment for a term of 3 months or longer) that reflects adversely on his or her fitness to practise.

28. The HPCA Act envisages that not all convictions for offences will reflect adversely on a practitioner's fitness to practise and that while fitness to practise bears some

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[3] *Z v Dental Complaints Assessment Committee*, [2009] 1 NZLR 1

relationship to competence and quality assurance, fitness to practise is not simply a reference to competence.[4] Fitness in the context of nursing was contrasted with competence in *Professional Conduct Committee v Martin.*[5]

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

29. It was said in the context of [ ]s discipline that the conduct would

> *"…need to be the kind that was inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine."*[6]

30. Relevant principles were recently summarised in the decision of the Tribunal in *Dr S G Sathe*[7]

> *"Many previous decisions of the High Court and the Tribunal have established the relevant principles, which are:*
>
> *a) It is not necessary that a relevant conviction conclusively demonstrates that the practitioner is unfit to practise, although there is a high threshold to be met – namely, the conviction must raise serious questions about whether a practitioner is fit to practise (PCC v Martin, High Court 27 February 2007, CIV 2006-485-1461, Gendall J, at [17]).*
>
> *b) A determination of "fitness to practise" does not relate solely to the practitioner's clinical ability or confidence:*
>
> - *It includes a consideration of whether the practitioner's conduct was immoral or unethical (Murdoch, 6/Phys06/45P).*
> - *It involves a consideration of character (Pellowe (137/Phar/07/74P)).*
> - *That the conviction is likely to bring discredit to the profession, this may well indicate that it reflects adversely on fitness to practice,[sic] although that is not in itself determinative (Pittwood, 84/Ost06/42P").*

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4 *Winefield* HPDT 60/Phar06/30P
5 Wellington HC CIV 2006-485-1461, 27 February 2007, Gendall J – paragraph 46
6 *Zauka* MPDT 03/103C quoted *CAC v Mantell* (Auckland, NP 4533/98, 7 May 1997 Doogue DCJ)
7 568/Den13/246P – paragraph 3

31. Taking those principles into account, the Tribunal is satisfied that the convictions entered against Mr Y do reflect adversely on his fitness to practise as a [ ].

32. The events on which the convictions were based involved Mr Y with another person who was significantly in a position of vulnerability and dependence. There was a significant age difference between the two persons. The environment was one in which there was complete trust by one in the other.

33. The Tribunal is mindful of the factors which the Court expressed in the Sentencing Notes.[8]

34. Although these events are not directly related to Mr Y's practice as a [ ], the breach of trust and the taking advantage of the vulnerability of the young woman are matters which impact upon his fitness to practise. Mr Y's [ ] involves [ ] women. This would include young women and others in a position of dependence or trust.

35. Mr Y has proven himself untrustworthy in his relationship with a young woman and has breached the confidence that was placed in him. This directly impacts on his fitness to practise as a [ ] that he performs.

36. Furthermore, the threshold of the requirement for discipline has been crossed, namely that there is the requirement to protect the public, maintain professional standards and for any further punishment (discussed below) for Mr Y.

37. The Tribunal finds that the Charge is made out. This is in relation to each of the two Particulars in the Charge both separately and cumulatively. That was not contested at the hearing and the matter proceeded to penalty.

Penalty – the PCC submissions

38. Having outlined the general principles concerning penalty the PCC submitted that there were the following aggravating features:

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[8] Paragraph 17 above

38.1. That the convictions were extremely serious. Reference was made to extracts from judgements in the Court of Appeal[9] with the submission that these showed a *"strong and clear policy behind the legislative reform in 2005 which saw the amendment of [section] 131 - to protect young people involved in vulnerable positions, who may not fully comprehend the consequences of their actions if they are to consent to sexual relations with older people.*"

38.2. That the present case is a grave example of this type of conviction. Emphasis was placed on the "*prolonged and repetitive*" activity between Mr Y and his victim, commencing only six weeks after the victim's arrival and involving "*a degree of sexual grooming,*" with the last incident occurring in particularly degrading circumstances. The submissions referred to the fact that the sentence of home detention (imposed on Mr Y in this case) ranked just behind a sentence of imprisonment in the appropriate hierarchy.

38.3. That there was a significant age disparity between Mr Y (53) and his victim (17).

38.4. That the victim was particularly vulnerable, in a foreign country and a foreign culture, with limited English language skills and isolated from her family and friends.

38.5. That Mr Y was, or should have been, aware of this vulnerability, referring to the content of his letter of apology and its reference to his own children having been involved in exchange programmes.

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9 *R v H* [2008] NZCA 237; and *R v Johnson* [2010]NZCA 168

38.6. That the offending involved a significant breach of trust and authority, referring to the extracts from the Sentencing Notes and to the content of the Victim Impact Statement from the victim.

38.7. That the offending was deliberately and deceptively concealed from the victim's family with reference to the Victim Impact Statement from the victim's father mentioned above.

38.8. That having regard to Mr Y's scope of practice being [ ], the abuse of trust and power demonstrated a significant failure to exercise restraint in respect for the human body and personal autonomy. Specific reference was made to *Rae*[10] where a nurse was convicted of an offence involving behaviour of a sexual nature and the reference in the decision to that having reflected completely adversely on what was required of him professionally, namely restraint and self control.

39. The mitigating features referred to by the submissions for the PCC included:

39.1. That Mr Y had accepted responsibility for his actions, had pleaded guilty in the High Court, had co-operated with the PCC and apologised to the victim and her family immediately prior to sentencing.

39.2. That Mr Y had a "*long and distinguished career*" in his chosen area of expertise; and that this was his first conviction and his first appearance before the Tribunal.

39.3. That Mr Y had reportedly sought treatment for his stress conditions with a view to avoiding similar behaviour in the future.

39.4. That the psychiatrist, Dr Marks, did not consider there was any evidence of a pattern of predatory sexual behaviour nor that Mr Y suffered a disorder of sexual behaviour.

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[10] 471/Nur12/208P

40. It was submitted for the PCC that, while there were references in the psychiatric report from Dr Marks as to elevated workload, work frustrations and elevated stress both personally and professionally during the period of offending, factors taken into account by the High Court, those could not be regarded as mitigating factors. If Mr Y's mental state was claimed to have been brought about largely as a result of the workplace environment, it was submitted that that was no different from all [ ]s, particularly those in a senior position, who were exposed to extremely stressful situations. It was submitted that those practitioners have an ethical obligation to recognise that they are beginning to become affected by this stress and seek appropriate assistance.

41. Reference was then made to eight decisions of the Tribunal concerning health practitioners convicted of sexual offences outside of a clinical setting, all of which the Tribunal has taken into account. It was submitted that the most similar case was that of *Rae* where the offending had occurred within the victim's residence with the victim having been young and particularly vulnerable and there having been a significant breach of trust.

42. The PCC submitted that Mr Y's registration as a [ ] ought to be cancelled, emphasising the matters referred to above, and in particular that the victim was particularly vulnerable; that there was a significant breach of trust; that the offending was repetitive; that the offending involved the full range of sexual offending and was at times particularly degrading; and that the sexual offending was particularly grave, sexual intercourse having been completed on at least two occasions.

43. Also emphasised in the request for cancellation of registration was the scope of practice for Mr Y which required him to conduct [ ]

44. The Tribunal was urged to place little, if any, weight on alleged stress generated by Mr Y's practice environment which, it was said, he should have managed properly with identification of stress levels.

45. In addition to an order for cancellation the PCC sought that conditions be imposed pursuant to section 102 of the HPCA Act should Mr Y apply for registration in the future namely that he:

45.1. Establish to the satisfaction of the [ ] that he had attended appropriate courses as to:

45.1.1. Appropriate sexual behaviour towards all patients and the public generally.

45.1.2. Appropriate workload management and stress management.

45.2. That Mr Y engage in a "collegial relationship" (which was described as supervision) with an appropriate [ ] as approved by the [ ] including regular meetings to ensure adequate workload and stress management.

45.3. That Mr Y advise any future employer of the convictions, the findings of the Tribunal and the conditions to protect against future incident.

45.4. That for a period of three years following recommencement of practice, Mr Y not engage in any intimate examination of a patient without a chaperone being present throughout the examination, with the costs of the chaperone being borne by Mr Y.

46. The PCC also sought an order for censure. Reference was then made to costs and name suppression issues which are referred to below.

Penalty – the case for Mr Y

47. Mr Y gave evidence himself and evidence was also given by his wife; with both being cross-examined.

48. There was also submitted:

48.1. A report from the psychologist, Ms Mary Barnao, dated 13 February 2014.

48.2. A report from Mr A D Marks, psychiatrist, dated 27 February 2014.

48.3. A bundle of references from various persons. The Tribunal has taken these carefully into account.

49. In his evidence Mr Y:

49.1. Outlined his attempts to understand why he acted as he did.

49.2. Said that he was not financially supported by an indemnifier in relation to the hearing.

49.3. Said that he was continually taking steps to regain the trust of those who were important to him.

49.4. Referred to his apology and payment of $10,000.00 to the victim which he said he hoped would go "*some way towards her healing.*"

49.5. Referred to his professional ambitions and the stresses and strains he said his work had placed on his professional career, work and family.

49.6. Made reference to his father's death in February 2012 shortly after the victim had started living at the home.

49.7. Referred to the relationship which developed with the victim and his deep remorse.

49.8. Accepted that his offending raised questions about his understanding of sexual boundaries which he said he had discussed a lot with his psychologist and psychiatrist.

49.9. Referred to one of the "*most important steps*" for him as being developing and maintaining his relationship with his wife.

49.10. Acknowledged that it was imperative that he develop supports around him both presently and if he returned to work.

49.11. Referred to the changes of lifestyle that had occurred while he has been on home detention.

49.12. Said that he knew he "*must continue to work hard to earn again the trust [he had] lost by [his] actions.*"

49.13. Acknowledged that if he were "*not forced to stop work and take a long hard look at [his] life that the outcome could have been much worse.*"

50. Ms T, wife of Mr Y, also gave evidence. She spoke warmly of the good work that Mr Y had done in his professional career and read from a selection of cards that had been received confirming this. She referred to the "*devastating impact*" the events had had on her family including the financial stress and the fact that they were in receipt of an unemployment benefit. She referred to other impacts on the family life for herself and her children, expressing the hope that her husband would be allowed "*at the end of his sentence, to get back to doing what he does best.*"

51. There were three professional reports produced to the Tribunal, two from Mr A D Marks, psychiatrist, one having been written in June 2013 for the purpose of the court proceeding and the other more recently in February 2014 for present purposes; and a report was from Ms Mary Barnao psychologist dated 13 February 2014. The Tribunal has taken these reports carefully into account. Particularly the Tribunal has noted the extracts highlighted in counsel's submissions.

52. In his first report dated 17 June 2013 Dr Marks spoke of Mr Y as having been a "*[ ] at risk*" but said that he had not yet become an " *[ ]*." The first report elaborated at length on the stresses that Mr Y was facing including an extreme loyalty and duty to his patients and colleagues which Dr Marks said was a well recognised major cause of a [ ] becoming an "*[ ]*." Dr Marks expressed the opinion that the serious impairment of judgment shown in continuing as he was doing at work had changed. He said that in Mr Y's stressed state he was also showing other impairment of

judgment which seriously contributed to the alleged offending. In his conclusions Dr Marks spoke about the "*serious impairment of judgment*" in the approach to work and similarly in the alleged offending. He referred to arrangements for therapy with a clinical psychologist, Ms Barnao, which he said would lead to re-offending being "*very unlikely in the future.*"

53. In submissions on Mr Y's behalf counsel referred to the fact that the Sentencing Notes in the High Court referred to the clinical responsibilities placed on Mr Y and the family and that the Court accepted that the factors described by Dr Marks would have "*played a part*" in Mr Y's offending.

54. In his second report dated 27 February 2014 Dr Marks referred to a telephone interview he had had with Mr Y in which Mr Y expressed "*guilt, self recrimination, regret and appropriate reactions.*" He said there was no evidence of imminent risk through depression and suicide. He reviewed Mr Y's lifestyle during the period of home detention and referred to other personal matters and support from Mr Y's friends. Dr Marks "*found no evidence that [Mr Y] warrants a psychiatric diagnosis*" and said he had not learned anything new which would give him cause for concern or which contradicted his earlier report. Dr Marks' conclusions included that he found no evidence that Mr Y was medically unfit to continue to practise medicine and also said:

> "*I consider that Mr Y is immensely unlikely to be involved in similar behaviour in the future. This will be reinforced by the changes that he is making which I have discussed and he is keen to continue his therapy with Ms Mary Barnao. This therapy is proving effective and remains important.*"

55. Ms Barnao referred to her first having met Mr Y on 16 July 2013 and having seen him on a 2 - 3 weekly basis since then. Her discussion of the psychological formulation and treatment plan included that resignation was not an option for him

"*as he believed there would be no one else to care for his patients*." Her report included:

> *"Although he had some awareness that his actions were both reckless and morally wrong when he embarked on a sexual relationship with the [ ] exchange student, they lacked any real reflection. It was as if he felt compelled to provoke a crisis that would provide him with a way out of an untenable situation that he felt unable to resolve himself.*"

56. Ms Barnao referred to a series of intervention goals which had been developed, the overall objective of which was to promote healthy professional and personal functioning and to reduce the risk of future re-offending. She said Mr Y now had a good understanding of the reasons why he came to offend and the rationale for his treatment plan. She concluded that in her opinion:

> "*… further work is required on all of the treatment targets outlined above. Change is expected to take time since it will entail addressing some longstanding patterns of psychological, emotional and interpersonal functioning.*"

Ms Barneo recommended that Mr Y allow himself time to complete the therapeutic work and referred to Mr Y's expressed intention of continuing with the psychological therapy beyond the Tribunal hearing.

57. The Tribunal has also taken careful note of the bundle of references provided by counsel for Mr Y.

58. The submissions on behalf of Mr Y:

58.1. Referred to the principles of sentencing and relevant cases.

58.2. Emphasised the importance of parity with other professionals with reference to specific Tribunal decisions.

58.3. Referred to Mr Y's exchanges and dealings with his former employer with copies of undertakings given to the NZ Police and Registrar of the [ ].

58.4. Referred to Mr Y's having assumed a "*non-practising*" status on 1 July 2013 and formal resignation from employment on 18 July 2013.

58.5. Submitted that Mr Y's contribution to [ ] has been "*immense*" with reference to his CV and references provided; and with reference to the Sentencing Notes and their referral to Mr Y's professional career as having been of "*high standard*" and that he is "*well regarded and influential in his area of practice.*"

58.6. Referred to the psychiatrist's and psychologist's reports mentioned.

58.7. Expressed Mr Y's deep remorse for his action and the harm and distress caused to the victim, a factor noted by the Sentencing Judge as having been identified in the pre-sentence report and acknowledged by the Court in those Sentencing Notes.

58.8. Submitted that the Sentencing Notes, in their reference to the probation report, referred to there having been a low likelihood of re-offending but the requirement that Mr Y should continue to manage stress.

58.9. Referred to the extracts from the reports from Dr Marks and Ms Barnao on the unlikelihood of repeat offending.

58.10. Highlighted the acknowledgement by Mr Y of the high level of vulnerability of the victim and the very serious abuse of power as described by the Court.

58.11. Emphasised the "*devastating consequences*" that Mr Y's actions had had on the victim and her family and also on his own family, wife and four children, he having lost his job and been unable to work since 1 July 2013 until completion of his home detention on 18 April 2014.

58.12. Produced some financial detail from a chartered accountant.

58.13. Submitted that the sentence imposed by the High Court was significant and reflected issues of deterrence and denunciation, with specific reference to

the fact that the potential for professional discipline was not a factor the Court had taken into account.

58.14. Submitted that suspension and cancellation can be considered only when the nature or gravity of the offence indicates unfitness to practise and rehabilitation is unlikely.

58.15. Emphasised that the focus should be on the protection of the public and rehabilitation of Mr Y with the submission that removal or on-going suspension would not be appropriate.

58.16. Submitted that the public interest lay in Mr Y's career not being terminated but that he be allowed to rehabilitate himself.

58.17. Submitted that penalties short of removal or suspension would protect the public, maintain standards, operate as a deterrent and rehabilitate.

58.18. Emphasised the "*considerable insight*" that Mr Y had demonstrated in the admission of the Charge and the initiation and continuation of steps to achieve full rehabilitation.

58.19. Submitted that Mr Y did not pose any threat to the public and there was no risk of re-offending.

58.20. Submitted that professional standards can be maintained without the need for removal or suspension and that there should not be a striking off or suspension simply to punish Mr Y.

58.21. Submitted that as the sentence of home detention ran until 18 April 2014 and Mr Y was effectively out of practice for the period from 1 July 2013 to that date, having regard to other decisions of the Tribunal, that that period would be equivalent to the appropriate period of any suspension.

58.22. Submitted that censure would be appropriate together with certain conditions which are referred to below.

58.23. Dealt with questions of costs and name suppression also referred to below.

Penalty - discussion

59. The penalties that the Tribunal can impose on the practitioner under section 101 of the Health Practitioners Competence Assurance Act 2003 are:

59.1. That registration be cancelled.

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

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

59.4. Censure.

59.5. A fine of up to $30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him (which does apply here)).

59.6. Costs.

60. The functions of disciplinary proceedings have been canvassed by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand.*[11] In determining penalty the Tribunal is required to take into account the following factors:[12]

60.1. What penalty most appropriately protects the public, a factor identified as the principal purpose of the HPCA Act in section 3, namely:

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

60.2. The important role of setting professional standards.

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[11] [2012] NZHC 3354,Wellington HC, CIV -2012-404-3916, 12 December 2012,Collins J: also affirmed in *Katamat v PCC* [2012] NZHC 1633 at paragraph 49 and *Joseph v PCC* [2013] NZHC 1131 at paragraph 65 - 66

[12] *Roberts* supra at Paragraphs 44 - 51

60.3. A punitive function but this is

> " … *often viewed as a by-product of the penalties imposed by the Tribunal and that protecting the public and setting professional standards are the most important factors for the Tribunal to bear in mind when setting a penalty.*"

60.4. Rehabilitation of the health professional. The Court recorded that:

> *"A reason why rehabilitation may be an important consideration is that health professionals and society as a whole make considerable investments in the training and development of health practitioners. Where appropriate, the Tribunal should endeavour to ensure that these investments are not permanently lost, provided of course the practitioner is truly capable of being rehabilitated and reintegrated into the profession."*

60.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances. The Court recognised that each case would require a careful assessment of its own facts and circumstances and that rarely would two cases be identical. The emphasis was that the Tribunal should try to ensure a degree of equity between health professionals who appear before the Tribunal and stressed that, in cases involving sexual misconduct,

> "*there is no logical reason why different categories of health professional should be treated differently.*"

60.6. 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.

60.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.

60.8. Whether the penalty proposed is:

> "… *fair, reasonable and proportionate in the circumstances presented…*"

61. The court referred to the penalty imposition as involving a "*finely balanced judgment*" and not being a "*formulaic exercise.*"

62. In *A v Professional Conduct Committee*[13] the High Court, having considered the range of sanctions available to the Tribunal, cited with approval the decision in *Taylor v The General Medical Council*[14] and said that four points could be expressly and a fifth impliedly derived 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."*

63. The Court went on:[15]

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

64. The Tribunal considers that the facts which gave rise to the convictions on which the Charge against Mr Y is based are significant and distressing. A young vulnerable woman coming to New Zealand from a different culture entrusted herself to the care and protection of Mr Y and his family. She and her parents trusted Mr Y to care for and nurture her.

65. Mr Y made a significant breach of that trust. He took advantage of her youth and naivety to his own satisfaction and gratification. The circumstances of his offending, as noted in the Summary of Facts before the Court, indicate that the

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[13] [2008] NZHC 1387, Auckland HC, CIV 2008 - 404 –2927, 5 September 2008, Keane J para 81
[14] [1990] 2 All ER 263
[15] Paragraph 82

sexual offending was over a significant period of time and involved different and demeaning acts, including the particularly degrading events on the last day when the victim left.

66. The fact that that occurred and the facts of the events as outlined in the Agreed Statement of Facts all reflect, as noted above, on Mr Y's fitness to practise.

67. It is not, however, for the Tribunal to punish Mr Y for his behaviour. That is a matter which has already been dealt with by the court process and it is not for the Tribunal to second-guess whether the penalty imposed by the Court was the appropriate one or not.

68. The function for the Tribunal is to determine how to deal with the Charge that has been brought against Mr Y before the Tribunal in the context of protecting the public and maintaining professional standards.

69. Regard must be had to those factors identified in the *Roberts* case, which includes rehabilitation.

70. Mr Y co-operated with the Police throughout in their enquiries and pleaded guilty to the charge before the Court. That was a matter which was taken into account in the sentencing. It saved the victim from any further degradation or embarrassment in having to give evidence about matters which had occurred.

71. Likewise, Mr Y has not taken any steps in the inquiry into the matter by the PCC or proceeding before the Tribunal to deny the events that occurred or his own culpability in the matter; or to place any blame whatsoever on the victim for the events as they unfolded. That must be to his credit.

72. Mr Y has undertaken medical assistance and treatment. That is by consultation with the psychiatrist and in therapy with a psychologist. The reports from those two persons indicate that the process has been undertaken voluntarily and

conscientiously by Mr Y and that he is benefitting from the therapy that he has undertaken. That too must be to his credit.

73. The expression *[ ]*" was not adequately explained to the Tribunal. Apparently that is a reference to a professional in the health professions who, because of stress and pressure, demonstrates impaired judgment such that the professional acts in a way which is inappropriate. Although the Tribunal is only charged with competence assurance in the health practitioners' area, it finds it difficult to understand that there could be any distinction between a health professional who is suffering from stress and pressure from other professionals. That stress and pressure may go to explain the behaviour, but it does not excuse it.

74. Mr Y is serving out his court imposed sentence of home detention. That has been an opportunity for him to reflect significantly on his priorities in life and how the consequences of his actions have impacted on others. It has deprived him of the opportunity to do the work for which he was trained and specialised and in which he was apparently significantly competent.

75. Mr Y has had to do a significant amount of "*damage repair*" work with his wife and family. The Tribunal heard evidence from his wife which indicated that there was support from her. The 27 February 2014 report from Dr Marks said that Mr Y had described his four children as "*remaining positive towards him, assisting him in various ways with what he and his wife have been going through and of not turning against their father*." Mr Y will have to make his own reconciliations with family members. Those are burdens which he must bear.

76. The aggravating features which the Tribunal has taken into account are those which have been outlined in the submissions by the PCC referred to above; namely that the convictions were serious; that the present case is a grave example of the type of convictions; the age disparity between Mr Y and his victim; the vulnerability of the

victim; the awareness that Mr Y had, or should have had, of this vulnerability; that the offending involved a significant breach of trust and authority; that the offending was deliberately and deceptively concealed from the family ; and the scope of practice in which Mr Y has been involved.

77. The mitigating factors are those set out also in the submissions referred to above and further alluded to in this decision, namely Mr Y's acceptance of responsibility for his actions, his "*long and distinguished career*", the treatment he has sought for his stress condition, and the apparent absence of any pattern of predatory sexual behaviour.

78. The Tribunal does not regard the stress and pressure under which Mr Y was working as being a significantly mitigating factor because this must be common to many health professionals if not other professionals.

79. The Tribunal has considered carefully the importance to the public and the profession of Mr Y's continued involvement in it and the contribution he can make to that health profession. It has considered carefully the necessity for rehabilitating him and the best way that this can be done.

80. It is important that the Tribunal take into account other decisions involving similar facts in relation to all health professionals; but at the same time each case is different and must be decided on its own facts.

81. Both counsel referred the Tribunal to various decisions that had been made concerning health professionals in the context of convictions following inappropriate sexual activity. Several of these[16] can be distinguished, while noted, on the basis that the penalty imposed by the court was more severe than has been imposed on Mr Y and so reflected the court's view of the severity of the matter.

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[16] *Vautier* 291/Med09/140P; *Makaea* 102/Nur07/53P; *BoydMPDT* 311/05/125C and *Prokter MPDT*59/98/21C

82. Three cases referred to were in the context of wrongful use of the Internet and available images.

82.1. *Dr Dunkley*[17] had been convicted on six charges of possession objectionable material (including sexual abuse images of girls between the ages of 12 and 14 years) and was sentenced to 160 hours community work with intensive supervision for 18 months. The Tribunal suspended him for a further 3 1/2 months taking into account the 5 1/2 months he had already voluntarily suspended himself. He was censured and conditions were placed on his practice.

82.2. *Dr Joseph*[18] was convicted of six charges of possessing objectionable material and sentenced to 300 hours community work with 12 months supervision. He was censured, suspended by the Tribunal for 12 months and conditions were placed on his practice (and this was affirmed on appeal.[19])

82.3. *Dr Y*[20] was convicted of 25 charges of possession of objectionable material involving child abuse images and 1 charge of distributing an objectionable publication. He was sentenced to 4 months home detention. He was censured, suspended by the Tribunal for a period of 9 months and conditions were placed on his practice. The Tribunal took into account that he had already voluntarily given up his practising certificate for a period of 9 ½ months.

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17 368/Med11/175P
18 506/Med12/228P
19 *Joseph v PCC* [2013]NZHC1131
20 321/Med10/149P

83. Other cases to be noted are:

83.1. *Curry*[21] where a nurse was convicted of two charges of sexual grooming. The decision does not record the penalty in the court but does record the judge's reference to "*complete absence of remorse.*" He was censured and his registration was cancelled.

83.2. *Mr E*[22] had been convicted of indecent assault on a victim with whom he had previously lived together in a domestic relationship. The penalty imposed by the court is not referred to in the decision but the fact that Mr E had been suspended already effectively for 2 years was. He was censured, suspended for a further period of 2 years and conditions were placed on his practice.

83.3. *Rae*[23] This is the case most relied on by the PCC. Mr Rae, a nurse, had been convicted on one charge of indecent assault on a female aged 12 to 16 years and had been imprisoned for 12 months with special conditions for further 6 months. He had previously been convicted in relation to sexual offending against an adult female. He was censured, his registration was cancelled and conditions were placed on his practice on re-registration.

84. Having taken all those cases and factors into account the Tribunal has decided that this is not a case where there should be an order removing Mr Y's name from the register.

85. The Tribunal could only order this if it were satisfied that no other order would appropriately protect the public or maintain professional standards or otherwise achieve the objectives of the disciplinary process. In all circumstances that prevail there are other ways in which this can be achieved without removal of Mr Y's name

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[21] 386/Nur11/174P
[22] 245/Nur09/116P
[23] 471/Nur12/208P

from the register. To remove his name from the register would be out of proportion in all the circumstances.

86. Conversely, however, this is not a case where there should not be suspension. This is not to punish Mr Y in addition to the penalty he has already received from the court process. It is to express to him, to the [ ] profession and to the public that behaviour of this kind is simply not acceptable from a [ ] and that the public need protection and standards need to be maintained by Mr Y's taking the suspension period in which to take appropriate therapy; to reflect on the events which have occurred, the impact on the victim and her family, the impact on his own family, the impact on the [ ] profession, and what he needs to do to restructure his professional practice so that there is no risk of any repetition on the one hand and no risk of his breach of standards on the other.

87. The medical reports make it clear that, and Mr Y's submissions to the Court and to the Tribunal rely on the thesis that, it was the stress and pressure that Mr Y was under that were contributing factors to his behaviour.

88. Mr Y needs to learn how to manage stress and strain of that kind so that his judgement is not impaired in the future both as to his dealings in a professional capacity and in his private life. Any therapy that he undertakes and the clinical psychological assessment which the Tribunal has directed should be made must take that factor into account.

89. The period of time which the Tribunal considers is appropriate for such a suspension is 18 months.

90. The Tribunal takes into account, however, that Mr Y has not been practising since 1 July 2013 and has had the period since then, particularly during his home detention period, to reflect on the matters mentioned and to make adjustments to his lifestyle

and his priorities. He has referred in detail to what changes he has made in that regard. The Tribunal takes those into account.

91. The decision is therefore that the period of suspension of 18 months should run from 1 July 2013 – which means that half of it will be concurrent with the period of home detention but there will be a period thereafter.

92. The order of the Tribunal is therefore that Mr Y be suspended until and including 31 December 2014.

93. As noted, the Tribunal has power to order that Mr Y, after commencing practice following that period of suspension for a period not exceeding 3 years, practise his profession only in accordance with conditions as to employment, supervision or otherwise as specified.

94. Various conditions have been suggested by counsel for Mr Y which the Tribunal considers are appropriate. In addition, the submissions for the PCC included suggested conditions that could apply pursuant to section 102 of the HPCA Act after cancellation of registration should Mr Y apply for registration in the future; and the Tribunal has taken those into account too.

95. The first condition relates to ongoing clinical psychological treatment. Counsel for Mr Y submitted that this should be for 2 years and by Ms Barneo with the regularity and nature to be determined by her. The PCC (in the context of conditions under section 102 of the HPCA Act) suggested that there needed to be attendance at appropriate courses as to appropriate sexual behaviour and appropriate workload and stress management.

96. The Tribunal is of the view that the condition as suggested on behalf of Mr Y (which indicates his consent to this) is the appropriate one and that there should be a 2 year period during which Mr Y undergoes clinical psychological treatment at his own cost with Ms Barneo with the regularity and nature of such treatment being

determined by her; with Ms Barnao reporting three monthly to the [ ] on the treatment being given to Mr Y and his response to it. That treatment, and the reporting thereon, should include reference to appropriate sexual behaviour and appropriate workload and stress management.

97. Submissions by counsel for Mr Y were that Mr Y must undertake at his own cost a psychological assessment as directed and approved by the [ ] before resuming practice. That proposed condition is appropriate but also there must be a satisfactory response to the treatment by Mr Y as determined by the [ ]. The [] should ensure that in its assessment of the outcome of the psychological assessment, the issues of appropriate sexual behaviour and appropriate workload and stress management have been addressed.

98. Both counsel suggested advice to any future employer of the convictions and the finding of the Tribunal and conditions for provision of a copy of the decision and that is appropriate.

99. Both counsel's submissions referred to the presence of a chaperone. The Tribunal was assured that this is virtually standard practice now in the scope of practice for Mr Y. The Tribunal can only order this for a period of 3 years and the condition ordered is for that period, but the expectation is that this will continue thereafter. The condition proposed by counsel for Mr Y was in more general terms ("*examines or physically treats*") while those for the PCC were "*intimate examination*" and the Tribunal is of the view that the more general expression should prevail.

100. Both submissions referred to supervision and the Tribunal is of the view that this should be in place for a period of 2 years after re-commencement of practice; with that supervision being by a clinical psychologist [ ] chosen or approved by the [ ] at periods and with the regularity and reporting as fixed by the [ ]; that the cost be met by Mr Y; and that the focus of that supervision be those matters to which this

decision refers, namely appropriate sexual behaviour and appropriate workload and stress management.

101. Finally the Tribunal accepts the suggested condition that on completion of the clinical psychological treatment and other rehabilitative steps undertaken in the course of the treatment by Mr Y he provide at his own cost to the [ ] a psychological assessment.

102. The Tribunal is also of the view that the circumstances call for an order for censure. This is an expression by the Tribunal of the disquiet that it considers about the circumstances of the Charge and the convictions that had been entered and reflects the Tribunal's disapproval.

Costs

103. The PCC sought an order for costs and the Tribunal was advised that the approximate costs for the PCC amounted to some $9,914.00 excluding GST and that the approximate costs for the HPDT amounted to some $17,533.00 excluding GST, a total of $27,447.00.

104. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*[24] there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion. If Mr Y does not pay or contribute to the cost of this proceeding to any extent, those costs, or that deficiency, must be met by other members of the profession. As was said in *O'Connor v Preliminary Proceedings Committee* [25]

> *"It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the*

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[24] Wellington HC, AP 23/94, 14 September 1995, Doogue J
[25] Wellington HC,AP 280/89, 23 August 1990, Jeffries J

professional members as a whole the legislature empowered the different bodies to impose orders for costs."

105. In other cases the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:

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

105.2. Co-operation of the practitioner.

105.3. The attendance of the practitioner at the hearing.

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

105.5. Costs not paid by the practitioner would fall on the profession as a whole.

106. The Tribunal must take means and financial circumstances into account. There was relatively little information given concerning this, but a certificate from the chartered accountant acting for Mr Y and his wife confirmed Mr Y's cessation of employment and that neither had had any material source of income since then; that a private company owned by them was effectively a "*non-trading shell company*" with no assets; that neither had interests in Family or other Trusts and their only asset was the family home and insurance policy. Counsel advised that the security afforded over the home allowed a maximum credit of $350,000.00 of which $262,000.00 had been drawn, leaving a balance available of $87,787.00.

107. The Tribunal is of the view that, having regard to the circumstances of the case and all the information that was placed before it, the proper contribution to order against Mr Y is $7,000.00. This sum represents approximately 25% of the costs involved. These costs are to be divided equally between the PCC and the Tribunal.

Suppression of name

108. As Mr Y was convicted of offences against section 131 of the Crimes Act 1961, section 201 of the Criminal Procedure Act 2011 applies. The purpose of that section

is stated as being "*to protect the complainant."*[26] It provides the "*no person may publish the name, address, or occupation of a person accused or convicted of an offence [including under section 131 of the Crimes Act 1961] unless the court, by order, permits the publication.*" There is an obligatory requirement for the court to make an order permitting publication in certain circumstances if the complainant is aged 18 years or older and applies to the court for such an order and the court is satisfied that the complainant understands the nature and effect of her decision in so applying (and there is no other order prohibiting publication). Apparently no such application has yet been made to the court and for that reason the order of the court for suppression of name of sub- section (2) was made "*in the interim.*" It is possible that the complainant/victim may in due course make an application under section 201(4) of the Criminal Procedure Act 2001. That would be made to the High Court and would be processed then.

109. Both counsel acknowledged that those provisions applied to the process before, and the order of, the Tribunal in this matter.

110. Before the hearing there had been an application by the PCC which was consented to by counsel on behalf of Mr Y for an interim order under section 95 of the HPCA Act preventing the publication and identifying details of both Mr Y, his employer District Health Board, and his scope of practice; and that order had been made by consent until further order of the Tribunal.

111. The approach for the PCC was that there could be publication of the fact of conviction of Mr Y for an offence (and naming him) and then the outcome of the Tribunal hearing.

112. The approach by counsel on behalf of Mr Y was that any publication of his name considered together with previous media coverage would immediately lead to

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[26] Sub-section (2)

identification of the young student victim involved. A press report from July 2013 was produced which was said to be "*of itself ... arguably a breach of section 201*"; with the submission that, if Mr Y's name were to be published, it would inevitably lead to the identification of the person described in the article as the "*female student living with his family*" whose "*English was poor*."

113. There were members of the press present at the hearing and they were invited to make submissions on the matter. Their approach was that because there had earlier been an order suppressing the name and identifying details and scope of practice for Mr Y but no order concerning the convictions against him, there had already been by then publication in the media of details of the Tribunal hearing such that, if Mr Y's name were then to be made available for publication, it would be patently apparent that the earlier report concerning the conviction and details would relate to him.

114. The Tribunal is faced with the fact that there has already been publicity given to the court conviction and sentence but with suppression of name and identifying details required by section 201 of the Criminal Procedure Act and further that there has already been media publicity of the Tribunal hearing concerning the conviction against this health practitioner, the penalty imposed on him by the Court and the Charges laid before the Tribunal.

115. Relevant are sections 95 and 98 of the HPCA Act. Section 95 includes:

> "***95 Hearings to be public unless Tribunal otherwise orders***
> *(1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.*
>
> *(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:*
>
> ...

> *(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person*."

116. Section 98 of the HPCA Act relates to prohibition of publication of names of **complainants** in sexual cases which does not strictly apply in this case because there has not been a complaint investigated by the PCC which has led to a Charge; but rather the conviction in the court which has had that effect. That section prohibits publication of any particulars likely to lead to the identification of the complainant and has provisions similar to those in section 201 of the Criminal Procedure Act concerning an application by the complainant for an order permitting publication (although the age limit in that event is 16 years or older).

117. It was submitted on behalf of Mr Y that, quite apart from the effect of the operation of section 201 of the Criminal Procedure Act mentioned above, there should be an order under section 95 of the HPCA Act prohibiting publication of his name and identifying details for these reasons:

117.1. That this would have a serious impact on his rehabilitation (with reference to *B v B*[27] and *Anderson v PCC*[28] and the proportionality principle referred to in the *J v Director of Proceeding*[29]*).*

117.2. The impact that publication would have on Mr Y's wife and his son which was said "*would be extreme and of itself would justify a permanent suppression order being made."*

118. The Tribunal has considered these various statutory provisions and submissions and decided first that it has effectively no option but to apply in this Tribunal the order that has been made in the interim in the High Court by virtue of the operation of section 201 of the Criminal Procedure Act 2011. If there were now publication of the name of Mr Y or identifying details in respect of him or his scope of practice or

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[27] Auckland HC, HC 4/92, 6 April 1993, Blanchard J
[28] Wellington HC, CIV 2008-485-1646,14 November 2008, Gendall J
[29] Auckland HC, CIV 2006 –404-2188,17 October 2006, Baragwanath J

his employer this would effectively amount to publication of his name or occupation which would be a direct breach of section 201. To try to follow the course suggested by the PCC (and opposed by the press) of publicising his name and the conviction details in the Tribunal only, without reference to the offence for which he was convicted in the Court would, in combination with publicity already given, serve to identify Mr Y and then, by implication, the victim for whose protection section 201 was enacted.

119. Should the victim at any time in the future make an application to the High Court under section 201(4) of the Criminal Procedure Act to have Mr Y identified in that Court, then that will be for the Court to determine. That is for the future; and if that does occur and an order is made permitting publication, then that may impact on the position before the Tribunal.

120. The Tribunal does not consider that the impact on Mr Y's wife or his son (being the one child of the family referred to in submissions) of itself merits an order under section 95 of the HPCA Act. No evidence was advanced to support the submission that their interests justified an order under section 95. The Tribunal normally has evidence concerning the position of those persons, any health issues there may be, and any other matters specifically justifying the conclusion that it was desirable in the interests of either of those persons, weighed against the public interest, for there to be an order accordingly.

121. As to rehabilitation of Mr Y, that is a matter for the future. Until an application were made by the victim under section 201 of the Criminal Procedure Act (if any application is ever made) Mr Y will have the protection that the order of the Court and the current order of the Tribunal and forwards so far as his rehabilitation is concerned. If the application and an order permitting publication by the Court were

made in the future, then the circumstances would need to be considered by the Tribunal in the light of the then circumstances.

122. Accordingly, the conclusion is that there should be an interim order under section 95 of the HPCA Act prohibiting the publication of the name or any particulars of the affairs, including the address and occupation (as required by section 201 of the Criminal Procedure Act) of Mr Y; but that order is an interim order and is open for reconsideration if ever there is an order of the High Court made under section 201 of the Criminal Procedure Act permitting publication of the name, address or occupation of Mr Y.

123. So far as the victim herself is concerned she has the protection of the provisions of section 201 of the Criminal Procedure Act 2011 affording suppression of her name. The Tribunal made an interim order pursuant to section 95 of the HPCA Act. It is appropriate, for the sake of completeness, that a final order be made.

Result and orders

124. Mr Y is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.

125. The Tribunal orders, pursuant to section 101(1)(b) of the Health Practitioners Competence Assurance Act 2003, that the registration of Mr Y as a health practitioner be suspended until and including 31 December 2014.

126. The Tribunal orders pursuant to section 101(1)(c) of the Health Practitioners Competence Assurance Act 2003 that after Mr Y commences practice following the date of this decision, he practise his profession only in accordance with the following conditions, namely:

126.1. That he will have commenced and will continue at his own cost for a period of 2 years clinical psychological treatment with Ms Barneo with the regularity and nature of such treatment being determined by her; with Ms

Barnao reporting three monthly to the [ ] on the treatment being given to Mr Y and his response to it. That treatment, and the reporting thereon, should include reference to appropriate sexual behaviour and appropriate workload and stress management.

126.2. That Mr Y will before then have undertaken at his own cost a psychological assessment as directed and approved by the [ ] and that a satisfactory response is indicated to the treatment of Mr Y as determined by the [ ].

126.3. That for a period of 2 years after re-commencement of practice Mr Y have such supervision at his cost by a clinical psychologist/medical practitioner as is approved by the [ ] at periods with the regularity and reporting on such supervision as is fixed by the [ ].

126.4. That for a period of 3 years Mr Y advise any future employer of the Court convictions and the finding of the Tribunal and provide of a copy of this decision.

126.5. That for a period of 3 years whenever Mr Y examines or physically treats a female patient he is to have a chaperone present who must remain throughout the examination or treatment.

126.6. That on completion of the clinical psychological treatment and other rehabilitative steps undertaken in the course of the treatment by Mr Y he provide at his own cost to the [ ] a psychological assessment.

127. Pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003 the Tribunal orders Mr Y to pay a contribution towards the costs and expenses of the investigation, inquiry and prosecution of the Charge and the hearing in the sum of $7,000.00 to be divided equally between the PCC and the Tribunal.

128. The Tribunal orders pursuant to section 95 of the Health Practitioners Competence Assurance Act 2003:

128.1. Interim suppression of the names and identifying details of Mr Y, including his address and occupation and scope of practice, on the basis that this is a consequential order following the order of the High Court pursuant to section 201 of the Criminal Procedure Act 2011; but that, if ever the High Court permits the publication of the name, address or occupation of Mr Y, the PCC may apply to the Tribunal for reconsideration of this issue.

128.2. Permanent suppression of the name and identifying details of the victim.

129. The Tribunal directs that a copy of this decision and a summary of it be published on the Tribunal's website pursuant to section 157 of the HPCA Act. This publication is, however, to expressly exclude reference to Mr Y, his address or occupation.

Dated at Auckland this 10th day of April 2014

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David M. Carden

Chairperson

Health Practitioners Disciplinary Tribunal