BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2021/52

WĀHANGA *Under*	the Education Act 1989
MŌ TE TAKE *In the matter of*	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
I WAENGA I A *Between*	**COMPLAINTS ASSESSMENT COMMITTEE**
ME *And*	**ALVIN ROLFE** **Kaiurupare** *Respondent*
ME *And*	
MŌ TE TAKE *In the matter of*	an application for name suppression
I WAENGA I A *Between*	**ALVIN ROLFE** **Kaitono** *Applicant*
ME *And*	**COMPLAINTS ASSESSMENT COMMITTEE** **Kaiurupare** *Respondent*

DECISION OF TRIBUNAL ON NAME SUPPRESSION

17 OCTOBER 2022

HEARING:	on the papers
TRIBUNAL:	Theo Baker (Chair) Lyn Evans, Rose McInerny (Members)
REPRESENTATION:	Mr A Hope for the applicant teacher Mr L van der Lem for the CAC respondent

1. In a decision dated 22 May 2022 (**the stay decision**) the Tribunal stayed six out of seven particulars of a charge of serious misconduct laid under section 401 of the Education Act 1989 against Alvin Rolfe.

2. The CAC has confirmed by memorandum dated 29 June 2022 that it offers no evidence on the remaining particular (f) of the notice of the charge. Accordingly particular (f) the charge dated 3 November 2021 is now dismissed.

3. In this decision Mr Rolfe is referred to as the applicant.

4. The Tribunal had previously granted interim name suppression pending the outcome of the charge, and at the conclusion of the stay decision, submissions were invited on the question of final orders for non-publication of names.

5. The applicant has now applied for suppression of his name and that of his former wife, Valerie Rolfe, who had provided some affidavit evidence in support of the application for stay.

6. The CAC opposes the application.

7. The panel has met to deliberate and considered the following:

   (a) the applicant's affidavit sworn on 17 November 2021 in support of his application for interim suppression

   (b) the applicant's affidavit sworn on 22 June 2022 in support of his application for permanent suppression

   (c) Valerie Rolfe's affidavit sworn on 22 June 2022 in support of the applications for permanent suppression

   (d) Mr Hope's submissions in support of the applications

   (e) Ms Bishop's submissions in reply.

8. The grounds for Mr Rolfe's application are that publication would cause extreme harm to his:

   (a) health

   (b) financial situation,

(c) reputation and his ability to gain employment in the future.

Te kaitono – the applicant

9. [redacted].

10. [redacted]

11. [redacted]

12. [redacted].

13. Mr Hope referred to a previous decision of the Tribunal's: *CAC v Nick McMillan* NZTDT 2016 552, in which the Tribunal referred to High Court decisions relating to the Medical Practitioner's Act 1995 and considered the threshold test of whether it is "proper", which is the same as under the Lawyers and Conveyancers Act 2006. At paragraph 47 we said:

> That Tribunal has suggested that "proper" is arguably between "exceptional" and "desirable" but in any event the threshold is somewhat lower than that imposed in the Courts.

14. In *Canterbury Westland Standard Committee No. 2 v Eichelbaum* [2014]

NZLC DT 23, the Lawyers and Conveyancers Disciplinary Tribunal discussed the meaning of the word "proper" and placed it somewhere between "exceptional" and "desirable".

15. Mr Hope submitted that in simple terms "proper" is less than "exceptional". If exceptional is "unusual, outside the common run" then proper is less unusual and less outside the common run. The threshold is not high.

16. Mr Hope referred to *ABC v Complaints Assessment Committee* [2012] NZHC 1901; [2012] NZAR 856 where the High Court confirmed that the threshold test was significantly lower than the test generally used by the courts. The Court referred to *Director of Proceedings v I* [2004] NZAR, 635 which concluded that the "exceptional" test commonly used by the court can note something much less than commonplace" than desirable.

17. Mr Hope observed that pursuit of the remaining seventh particular would have had potential to lead to the identification of the applicant and his former wife. However, as noted above, the remaining particular is not being pursued and has been dismissed.

Te komiti – the CAC

18. The CAC opposes an order prohibiting publication of the applicant's name but is not opposed to his former wife having name suppression, acknowledging that publication of the applicant's name may lead to identification of his former wife.

19. The CAC helpfully provided details of applications for name suppression following a disciplinary charge being either dismissed or stayed by the Tribunal. The following examples were provided:

    (a) In *CAC v King*,[1] a charge of grabbing a child in an ECE setting and pulling him across the classroom and putting him out the door was dismissed. An application for final name suppression was made on the basis that the teacher had suffered acute stress during the proceedings and intended to remain working in ECE. The Tribunal declined name suppression, noting that stress was not a basis for an order and that no

[1] NZTDT 2019/21, 11 December 2020

expert evidence had been filed in support of any other consequence that the teacher asserted she would suffer. The Tribunal noted that when compared against the alleged conduct, "cases of alleged sexual misconduct carry a risk of much graver reputational harm".

(b) In *CAC v Teacher* NZTDT 2019/59, the CAC charged that while on school camp a teacher had allowed a parent to enter his bedroom and lie down on his bed in the early hours of the morning. An allegation of pursuing inappropriate sexual contact had not been pursued at the hearing. The Tribunal found that the teacher's conduct did not constitute serious misconduct and so dismissed the charge. The order subsequently suppressing the teacher's name was granted without opposition.

(c) In *CAC v Edwards* NZTDT 2019/37, a charge of grabbing and kicking the bottom of a four year old child at an early childhood centre was dismissed. The teacher failed to file an application or evidence in support of a final non-publication order as directed, and accordingly the interim name suppression lapsed.

20. The CAC also assisted the Tribunal by providing some commentary and cases decided in the criminal courts.

21. *Adams on Criminal Law* commentary includes the following in relation to applications for non-publication orders under s 200 of the Criminal Procedure Act 2011:

> Acquittals in themselves are not a sufficient basis for an order. They can give rise to legitimate public interest, debate and scrutiny which the principles of open justice and freedom of expression foster … However, the grounds made out in Subs (2), particularly extreme or undue hardship, may be more readily made out following an acquittal. In this respect the circumstances leading to the acquittal ought to be taken into account in the overall evaluative exercise.

22. The CAC referred to the following cases involving applications under s 200 of the Criminal Procedure Act 2011:

(a) In *NN v R* [2016] NZHC 669, the applicant was acquitted on 12 charges

of indecent assault. The High Court noted that an acquittal was a relevant but not determinative factor to consider in the course of exercising the Court's discretion to make an order. A non-publication order was granted on the basis that publication of the applicant's name was likely to lead to the identification of the complainants and the applicant's son, and that this constituted a sufficient basis to depart from the presumption of open justice.

(b) In *M v R* [2013] NZCA 113, the applicant was acquitted on two charges of assault on a person in a family relationship. This was because the prosecution elected to call no evidence. The suppression order was granted after receipt of new evidence from a medical professional which established that the applicant was likely to suffer psychological difficulties if her name was published.

(c) In *R v Nightingale* [2019] NZHC 2575, a stay was granted due to the applicant's health by the time of the prosecution, delay and the unavailability of evidence at trial. His application for non-publication was not granted. Dobson J. noted:

> I would give material weight to the strongly expressed views of the complainants. Their fear of the defendant, and the complaints against him, have a continued impact on them. Despite not being determined because of the permanent stay, recognition of their complaints by the laying of charges has been a cathartic experience for them. The lack of resolution because of the stay would be exacerbated if the defendant avoided any publicity of the existence of the charges.

(d) His Honour also noted that the stayed decision would be clear that the defendant had not pleaded guilty and that by operation of the stay he was entitled to the presumption of innocence. A non-publication order was not granted.

23. The CAC also referred to a decision of the New Zealand Health Practitioners Disciplinary Tribunal, *Director of Proceedings v Dr H 653/Med14/281D*.[2] The

[2] The decision was later revoked on application from the media, on the basis on different information.

Tribunal dismissed a charge laid by the Director of Proceedings of the Health and Disability Commissioner's Office that the doctor had carried out an unnecessary genital examination, without the patient's informed consent and without offering the patient a chaperone. The majority favoured name suppression on the basis of the doctor's affidavit evidence that he would suffer a number of community and religious consequences if his name were published.

24. In response to the present application, the CAC submitted that:

(a) There was limited evidence before the Tribunal that the applicant's physical health would be adversely affected by publication [redacted]

(b) While acknowledging that where a sexual allegation has been made, "mud may stick" as noted in *CAC v King*,[3] the CAC submitted that the gravity of the sexual misconduct is relevant. In *Dr H*, there was an absence of consent in the alleged conduct which was performing unnecessary genital examinations, whereas in the present case, the applicant is accused of a consensual sexual intercourse with a student.

(c) [redacted]

(d) The Tribunal ought to have regard to the firmly held views of the complainant, Ms Valler, who had provided a statement, in which she said she was against permanent suppression of the applicant's name or any circumstances in the decision on stay. She said her reasons were two-fold.

i. First Ms Valler said that she had a personal interest in seeing him named. She is concerned that other students of his, future or past have the right to know he has been involved in a matter before the Tribunal. This is especially so if he still wishes to teach. Ms Valler went on to say that the Disciplinary Tribunal

[3] Above, note 10

has a responsibility to all students, "irrespective of any past errors by the Council in giving him successive registration. It seemed that this is what Ms Valler considered her personal interest.

ii. Secondly there is a more important wider public interest as well as the reputational matter for the Disciplinary Tribunal and Teaching Council as a whole. Ms Valler said that "it will look as though it is a blatant cover-up of decades of subsequent errors of teaching regulatory bodies in regards to this case. It would appear that the Tribunal is extremely non-transparent about what has happened and it looks to protect teachers irrespective of the allegations they face."

Te rure – the law

25. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public.[4]

26. Section 405(3) is subject to the following subsections (4) to (6) which provide:

> *(4) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.*
>
> *(5) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
>
> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
>
> *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*

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4 Section 405 was inserted into the Act on 1 July 2015 by section 40 of the Education Amendment Act 2015.

(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

27. Therefore if we are to make an order for non-publication, we must first have regard to:

- the interest of any person;
- the privacy of the complainant;
- the public interest.

28. Open justice forms a fundamental tenet of our legal system and "exists regardless of any need to protect the public",[5]

29. In a series of decisions under the Health Practitioners Competence Assurance Act 2003, the Health Practitioners Disciplinary Tribunal has summarised the open justice principles as follows:[6]

(a) Openness and transparency of the disciplinary process;

(b) Accountability of the disciplinary process;

(c) The public interest in knowing the name of a practitioner found guilty of a disciplinary offence;

(d) The importance of freedom of speech and the right enshrined in section 14 of the New Zealand Bill of Rights Act

(e) The extent to which other practitioners may be unfairly impugned if the application is granted.

30. There has been much discussion of the principle of open justice in the Courts and legal commentary. The principle of open justice has been described as a fundamental principle of common law and is manifested in three ways:

> [F]irst, proceedings are conducted in 'open court'; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of

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5 *CAC v MacMillan* NZTDT 2016/52, 23 January 2017

6 See for example 18/Med04/01D, 11/Nur05/06P

> the parties as well as the evidence given during the course of proceedings.[7]

31. In *Erceg v Erceg*[8] the Supreme Court said:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.
>
> [3] However it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.

32. The disciplinary process needs to be accountable so that members of the public and profession can have confidence in its processes.[9]

33. The public interest in publication of a teacher's name may include the need to protect the public. This is an important consideration where a profession is brought into close contact with the public. It should be known that based on a teacher's previous conduct, that teacher may pose a risk of harm. The public is entitled to know about conduct that reflects adversely on a person's fitness to teach.

34. Where a person argues that harm would be caused by publication of a name, the Tribunal must be satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply

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7 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12 (2013) 35 *Sydney Law Review* 674.

8 *Erceg v Erceg* [2016] NZSC 135.

9 *Director of Proceedings v Nursing Council* [1999] 3NZLR 360; *Beer v A Professional Conduct Committee* [2020] NZHC 2828 at [40]

means that there must be an "appreciable" or "real" risk.[10]

35. The Health Practitioners Disciplinary Tribunal has also referred to the public interest in knowing the identity of a (health) practitioner charged with a disciplinary offence includes the right to know about proceedings affecting a practitioner, but also the protection of the public and their right to make an informed choice.[11] This is relevant where a member of the public has a choice about the individual they consult. It may have less relevance in the education field but is not immaterial. It is expected that any disciplinary history will be made known to an employer in the recruitment process, but a school or early education centre should be able to make independent enquiries and rely on the information available of the Tribunal's decisions. Knowledge of a teacher's disciplinary history may affect the choices of a child, young person or their family about which place of learning to attend.

36. In the context of the Health Practitioners Disciplinary Tribunal, where the standard to be met is "desirable" rather than "proper", the High Court has said the statutory test for what is desirable is flexible:[12]

> Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases. Thus, the statutory test of what is "desirable" is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may include in favour of the private interests of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where the professional misconduct has been established.

37. We acknowledge the stress caused by disciplinary proceedings can adversely affect a teacher's mental wellbeing. As France J observed *in Dr X v Director of Proceedings*,[13] the "inevitable embarrassment" caused by publicity of disciplinary proceedings does not usually overcome the imperatives behind publication. France J considered that there must be something more

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10 See C*AC v Jenkinson* above, note 11 at [34]; CAC v Teacher NZTDT 2016/68, at [46]; *R v W* [1998] 1 NZLR 35 (CA).

11 *Nuttall* 8Med04/03 para [27], [28], referring to *Director of Proceedings v Nursing Council* [1999] 3NZLR 360

12 A v Director of Proceedings CIV-2005-409-2244, Christchurch 21 February 2006 at [42] (also known as T v Director of Proceedings and Tonga v Director of Proceedings)

13 Dr X v Director of Proceedings [2014] NZHC 1798 at [14]

"sufficiently compelling" than stress or embarrassment to justify suppression of a practitioner's identity.

38. The more serious the offending, the greater the stress to the family, but at the same time, the public interest factors may also have greater weight. Where the established conduct has an unethical and/or sexual component there is an added embarrassment and humiliation for a practitioner's family if their name is associated with it, and yet there may be strong public interest factors in publication. That includes flushing out any unknown similar complaints.

Korero - Discussion

39. In summary, the starting point is open justice. There is no general presumption that because a charge has been stayed, or not upheld, there will be non-publication of a respondent's name. The Tribunal must undertake the usual balancing exercise of public and personal interests, taking into account the fact that there has been no adverse finding as one factor.

40. Dealing first with the application for suppression of Mrs Rolfe's name. There is no reason why a person who has provided evidence to support a teacher's application to stay a charge is automatically entitled to name suppression, and it is not understood that is the applicant's submission.

41. [redacted]

42. [redacted]

43. [redacted]

44. Turning to Mr Rolfe's application, the Tribunal does not consider the his health

issues sufficient to tip the balance in favour of non-publication. No independent expert opinion has been provided on the likely impact of publication on his health and so the Tribunal has been unable to assess the risk or degree of harm that might be caused by publication. [redacted] His health concerns do not outweigh the general public interest factors in publication.

45. It is understood that the reputational damage and financial hardship grounds have some overlap. [redacted]

46. The financial hardship argument also has little merit. [redacted]

47. The reputational damage is therefore to him as a retired teacher.

48. The personal interests advanced in this case have at the most, very little bearing on our decision. The question is whether the interests of a person charged with conduct for which a CAC has assessed there is a prima facie case, but has successfully challenged the procedural fairness of continuing to a hearing outweigh the public interest in open justice. Where a charge is struck out because of a lack of a case to answer, the case for suppression may be stronger. When the grounds for stay arise from health issues, those same factors may also be relevant for name suppression. Where a charge has been upheld, the public interest factors have more weight. As noted above, the High Court has said, “the probability must be that public interest considerations will require that the name of the practitioner be published in the

preponderance of cases."[14]

49. In this case, no finding of serious misconduct has been made. By analogy with the criminal court, there has been no conviction. A not guilty verdict in a criminal case means that the evidence has not established the prosecution's case beyond a reasonable doubt. As is often said, it does not equate to "innocent". However, that distinction probably has little relevance to the public.

50. As noted above, a not guilty verdict is not determinative of the question of name suppression. In the case of *NN v R*, cited by the CAC, the accused was granted name suppression to avoid identification of the complainant. That consideration does not apply here. She is not concerned about identification.

51. A factor which weighs heavily in favour of publication of the applicant's name in the present case is the position of the complainant. The Tribunal considers that both grounds advanced by Ms Valler fall under the four of the five open justice factors outlined above at paragraph 30. That is, the importance of

    (a) Openness and transparency of the disciplinary process

    (b) Accountability of the disciplinary process

    (c) The importance of freedom of speech and the right enshrined in section 14 of the New Zealand Bill of Rights Act

    (d) The extent to which other practitioners may be unfairly impugned if the application is granted

52. There is a further public interest factor. That is what is sometimes referred to as the "flushing out principle". Publication of the name of a person accused of certain misconduct may give other potential complainants the courage to come forward. That is in not to say that there are any other such people or that the Tribunal has a view on it. However, in this case, where there have been three possible complainants, it is a public interest factor that the Tribunal is duty-bound to put into the mix. It is not the sole reason for publication.

53. In conclusion, the Tribunal has considered the personal interests of the applicant and his former wife and the public interest factors including those

[14] Above, note 12

outlined by the CAC and Ms Valler and has not decided it is desirable to order non-publication of the name of the applicant or his former wife. We have exercised our discretion not to grant the orders sought under section 95.

54. We make orders suppressing the following details:

(a) The applicant's evidence in support of his application, including his health and financial information.

(b) The evidence in support of Valerie Rolfe's application.

(c) The names of the complainants [redacted],[15] [redacted] and [redacted].

55. The complainant Ms Valler does not seek non-publication.

Theo Baker
Chair

Addendum

The decision issued on 17 October 2022 omitted to record that there had also been an application for name suppression from the school, Morrinsville College. Given the names of Mr Rolfe and Ms Valler are not suppressed, it is difficult to make effective non-publication orders for the school. For the same public interest reasons non-publication has been declined for Mr and Mrs Rolfe, it is declined for the school. The Tribunal records that at the time the complaint was made in 1997, Morrinsville

[15] [redacted] name was omitted by error from decision issued on 17 October 2022. Added to the decision on 10 November 2022.

College acted responsibly and appropriately. It commenced an investigation, and when Mr Rolfe resigned, referred the matter to the Teachers Registration Board. There was nothing more the College ought to have done.