

## Doctors who access child pornography

In November 2007 the New South Wales Court of Appeal upheld a decision of the Medical Tribunal (NSW) not to deregister an ophthalmologist who had been convicted of possession of child pornography. The tribunal decision raises a number of interesting questions about the behaviour expected of registered health practitioners, and the appropriate response to aberrant conduct. The New Zealand legislation and Health Practitioners Disciplinary Tribunal (HPDT) decisions indicate that a similar case here would result in a different outcome.

### **The NSW case — *Re Dr Richard Wingate*<sup>1</sup>**

Dr Wingate pleaded guilty to a criminal charge involving possession on his home computer of 66 images of boys apparently under 16, and in February 2005 a Magistrate fined him \$6,000, placed him on a good behaviour bond for three years, involving supervision by the Probation Service, and ordered him to pay court costs. The maximum penalty under the New South Wales Crimes Act was two years' imprisonment or \$11,000 or both.<sup>2</sup> As a result of this conviction Dr Wingate was to appear on the Child Protection Register for eight years and was a "prohibited person", meaning he may not work in a position involving direct provision of child health services.<sup>3</sup>

A further 10,000 images of child pornography were discovered on Dr Wingate's computers shortly before the police returned them in September 2005. No further criminal charges arose.

While the criminal matter was being processed, the NSW Medical Board appointed a panel to investigate risk to the public. The panel considered Dr Wingate was candid in his discussions, but the tribunal later found that he had misled the panel in a number of ways, including telling them the images involved only post-pubescent children (when in fact there were younger children), that the children were doing "child-like things" (when some were actually involved in sexual conduct), and failing to disclose to the panel that there were another 10,000 computer images that had not been the subject of a criminal charge.

The HCCC<sup>4</sup> laid a complaint against Dr Wingate before the Medical Tribunal. The prosecution tried three separate approaches available under the NSW Medical Practice

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<sup>1</sup> [2007] NSWMT 2

<sup>2</sup> The equivalent New Zealand conviction attracts a maximum prison term of five years or a fine of \$50,000. Films, Videos, and Publications Act 1993, s131A — possession of objectionable publications and involving knowledge

<sup>3</sup> Child Protection (Prohibited Employment) Act 1998 and Commission for Children and Young People Act 1998 (NSW)

<sup>4</sup> Health Care Complaints Commission in New South Wales. In New Zealand, because in this type of case there is no provision of health services to a patient, the Health and Disability Commissioner would refer it to the Medical Council which, under the Health Practitioners Competence Assurance Act (the Act), may form a Professional Conduct Committee to prosecute the matter. It would not be prosecuted by the Director of Proceedings

Act<sup>5</sup> to persuade the tribunal that Dr Wingate should be struck off the register, a penalty that of course was not open to the criminal court. The HCCC argued that:

1. possession of child pornography meant that Dr Wingate's knowledge, skill, judgement or care in the practice of medicine was significantly below standard or that he engaged in improper or unethical conduct relating to the practice of medicine (unsatisfactory professional conduct or professional misconduct);<sup>6</sup> or
2. he had been convicted of an offence, the circumstances of which rendered him unfit in the public interest to practise medicine; or
3. he was not of good character.

The tribunal found that possession of child pornography was not in any way related to Dr Wingate's practice of medicine, and so could not be unsatisfactory professional conduct or professional misconduct. It also found that the circumstances of the offence did not render him unfit to practise medicine. It relied on evidence of the low prospect of "hands-on" offending, the fact that internet downloading does not affect patients, and the prohibition on direct contact with children during employment imposed by other legislation, making him a "prohibited person". Therefore the HCCC had *not* proved that Dr Wingate was unfit to practise medicine (under appropriate restriction). Further, the tribunal balanced all the aggravating and mitigating features and decided that it had *not* been established that Dr Wingate was not of good character.

The tribunal responded to the complaint by reprimanding Dr Wingate, imposing some rehabilitative conditions on his practice, and ordering that he have a chaperone present when treating a patient under 18. The Court of Appeal dismissed HCCC's appeal,<sup>7</sup> except to vary the condition on Dr Wingate's practice, so that he may not treat people under 18 at all.

### **What would happen in New Zealand?**

Of the various grounds for discipline under the New Zealand Health Practitioners Competence Assurance Act (HPCA Act), the most likely would be either that possession of child pornography amounts to professional misconduct because it is likely to bring discredit on the profession<sup>8</sup> or the criminal conviction reflects adversely on fitness to practise.<sup>9</sup>

### **Likely to bring discredit to the profession**

A disciplinary charge alleging discredit to the profession does not require that a criminal conviction is first entered. The HPDT may decide whether the conduct alleged has been proved (irrespective of a criminal conviction); whether it has brought or was likely to bring discredit to the profession; and whether it requires a disciplinary sanction.

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<sup>5</sup> s 64 Medical Practice Act 1992 sets out the circumstances in which the Tribunal may suspend or deregister

<sup>6</sup> ss 36 and 37 Medical Practice Act 1992 (NSW)

<sup>7</sup> *HCCC v Wingate* [2007] NSWCA 326

<sup>8</sup> s 100 (1)(b)

<sup>9</sup> s 100 (1)(c)

In July 2005 the HPDT considered a nurse's admission of possession of objectionable material, which included video recordings containing footage of sexual acts involving children, and printouts showing humans involved in sexual acts with animals.<sup>10</sup> The HPDT noted that unlike allegations of negligence or malpractice,<sup>11</sup> conduct likely to bring discredit to the profession does not need to be associated with the discharge of professional responsibilities. The HPDT referred to a High Court decision<sup>12</sup> under the former Nurses Act 1977, in which Justice Gendall had said that in deciding whether conduct was likely to bring discredit to the profession, the question was:

“... whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the nursing profession was lowered by the behaviour of the nurse concerned.”

A Department of Internal Affairs Inspector gave evidence of the nature of the objectionable material. The HPDT found that it was “highly offensive, degrading and injurious to children”. It said that it was “totally unacceptable for any health professional” to possess such items and that it was “utterly repugnant for a nurse to have in their possession material depicting sex with children” and that the nurse's conduct completely offended fundamental objectives of nursing. Therefore his actions brought or were likely to bring discredit to the nursing profession. His registration was cancelled.

#### **Conviction of an offence that reflects adversely on fitness to practise**

The HPDT may also impose a disciplinary penalty where a practitioner has been convicted of a criminal offence that “reflects adversely on his or her fitness to practise”, and that is punishable by imprisonment for a term of three months or more.<sup>13</sup> Unlike the New South Wales legislation, the conviction is not limited to one under a named act. The HPDT has not yet considered any convictions in relation to medical practitioners, but has disciplined other registered practitioners as a result of court convictions. The offences range from theft of morphine and drink driving<sup>14</sup> to attempted murder<sup>15</sup> and unlawful sexual connection.<sup>16</sup>

While some convictions, such as a pharmacist's fraudulent claims for subsidies and forgery of signatures on prescriptions,<sup>17</sup> quite clearly reflect adversely on fitness to practise, the HPDT has found that the term is not limited to the practitioner's ability to perform required functions. It has decided that a nurse's conviction for dishonest use of a colleague's credit card was covered on the basis that “members of the public are entitled to expect to be able to have trust and confidence in the honesty of all members of the nursing profession”.<sup>18</sup>

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<sup>10</sup> Nur05/06P

<sup>11</sup> Covered under s 100(1)(a) of the Act

<sup>12</sup> *Collie v Nursing Council of New Zealand* [2000] NZAR

<sup>13</sup> HPCA Act s 100(2)(b)

<sup>14</sup> Nur06/38P

<sup>15</sup> Nur05/19P

<sup>16</sup> Nur07/53P

<sup>17</sup> Phar06/30P

<sup>18</sup> Nur05/13P

The HPDT, and the Medical Practitioners Disciplinary Tribunal before it, have been mindful of a 1992 High Court decision<sup>19</sup> where the role of professional disciplinary charges was described as:

“... to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public, and the profession itself, against persons unfit to practise; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.”

### **Conclusion**

Compared with the NSW legislation, the HPCA Act has a wider scope to discipline a registered health practitioner for possession of objectionable material. Furthermore, the disciplinary body is likely to be less tolerant of such conduct amongst members of the profession.

**Theo Baker**  
**Director of Proceedings**

*NZ Doctor*, 26 March 2008

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<sup>19</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, at 724