TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Marley Iosefo Andrew Mackay

NZTDT 2018-69

The CAC has referred to the Disciplinary Tribunal (the Tribunal) a registered teacher, Marley Iosefo Andrew Mackay who was convicted under the Crimes Act for male assaults female. Mr Mackay was further charged by the CAC with failing to self-report the conviction.

Result: the Tribunal censured Mr Mackay and suspended his practicing certificate for a minimum of six months. He is required to undergo counselling and show his current and future employers this decision and the register was annotated. Non-publication orders have been made in relation to Mr Mackay's school and any personal residential details.

On 31 July 2019 the Tribunal released its decision following a hearing on the papers. On 30 June 2017, the respondent was convicted in the District Court of male assaults female. The victim is the ex-partner of Mr Mackay. During the assault she was hit, her hair was pulled, and pressure was applied to her neck. Mr Mackay said in explanation that he reacted poorly to seeing some "crude photos and messages" on his wife's phone.

The CAC submitted that Mr Mackay's conviction warrants an adverse finding, reflects adversely on his fitness to teach and brings the profession into disrepute. In addition, the CAC submitted that Mr Mackay's failure to report the conviction amounts to misconduct. In terms of penalty the CAC submitted that the seriousness of the offence warrants cancellation.

Mr Mackay acknowledged that he did not behave appropriately on that night. However, he submitted that he does not pose any risk to children or colleagues. Mr Mackay's current principal provided a letter confirming that he did not consider that the respondent was a risk to student safety and was not concerned about his ability to continue teaching.

The Tribunal was not convinced that Mr Mackay showed genuine remorse for his actions. A teacher's behaviour both inside and outside of the classroom must be of a standard that meets the trust and expectations that whānau have of them. Extreme violence of this nature is unacceptable conduct for a person in such a position of responsibility as a teacher. Violence of the degree inflicted on the victim in this case cannot be tolerated in society and certainly not by a teacher. The Tribunal resolved to send a clear message to the profession and the wider public that there will be severe consequences for this type of conduct.

The Tribunal ordered:

- Censure under s 404(1)(b) of the Act;
- Suspension of Mr Mackay's practising certificate for a minimum period of six months commencing within three months of the date this decision, and order further that the suspension shall remain in place (following the six months) until such time as Mr Mackay is able to demonstrate to the satisfaction of the Teaching Council that he has successfully completed a minimum of six sessions of anger management counselling and family violence counselling by a provider approved by the Teaching Council;
- Mr Mackay is to provide his current and future employer with a copy of the full decision for a period of two years from the date of this decision, with proof of disclosure to the Teaching Council;
- Annotation of the register of all the above for two years under s 404(1)(e) of the Act.

Mr Mackay and the Principal of his school sought non-publication orders on the grounds that publication will adversely affect the school and Mr Mackay's children. The Tribunal granted non-publication orders in relation to the school and any personal residential details out of consideration for Mr Mackay's children. The Tribunal did not grant name suppression for Mr Mackay.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/69

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**MARLEY IOSEFO ANDREW MACKAY** **Respondent**

DECISION OF THE TRIBUNAL

31 July 2019

HEARING:	Held on 6 March 2019 (on the papers)
TRIBUNAL:	Rachel Mullins (Deputy Chair) Maria Johnson and Nikki Parsons (members)
REPRESENTATION:	Mr Mark Shaw and Mr Dan Moore for the Complaints Assessment Committee Mr Mackay in person

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has referred to the Tribunal the Respondent's conviction on one charge of male assaults female on 27 January 2017.

2. Further, the CAC has charged the Respondent with failing to report the conviction to the Education Council (as it then was) as required pursuant to section 397(1) of the Education Act 1989 ("the Act").

3. The matter was heard on the papers.

Ko te hātepe ture o tono nei – Procedural History

4. We had submissions from the CAC and an Agreed Summary of Facts ("ASoF"). A Pre-hearing Conference (PHC) was held on 15 November 2018 which was adjourned until 6 December 2018 to give the Respondent the opportunity to take advice and to communicate with the CAC with a view to reaching an agreement as to the ASoF.

5. The CAC filed submissions on 22 January 2019 including the ASoF, a copy of the Police Summary of Facts and the ruling of the District Court with respect to an application by the Respondent for a discharge without conviction. The Respondent also filed submissions along with a letter of support from the Principal of the school he is employed at.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

6. As noted above the evidence submitted was the ASoF, which included the Police Summary of Facts and the decision of Judge K B de Ridder on a section 106 Sentencing Act 2002 application for a discharge without conviction.

7. The ASoF is set out in full below.

> *1. The respondent, **MARLEY IOSEFO ANDREW MACKAY,** is a registered teacher at [redacted] The respondent obtained provisional registration on 26 August 2009, and received full registration in 2011.*
>
> *2. On 30 June 2017, the respondent was convicted in the District Court at [redacted] of male assaults female, contrary to section 194(b) of the Crimes Act 1961.*
>
> *3. The respondent pleaded guilty to a Summary of Facts **(annexed),** The Summary of Facts for this offending was as follows:*

CIRCUMSTANCES

On Friday the 27th of January at around 11.00pm the Defendant arrived at his home address of [redacted]

The Victim in this matter in this matter, [redacted] *was also present at the address and she is the Defendant's ex-partner.*

An argument started between Victim and the Defendant. He became angry and grabbed the Victim's cell phone.

The Victim asked the Defendant to give the phone back and he has responded by grabbing both of the Victim's arms and pushed her to the ground [sic].

The Defendant covered the Victim's mouth with his hand and tried to grab the cell phone.

Once the Defendant released his grip, the Victim said she was going to the neighbours.

As the Victim was on the phone, the Defendant has pulled her hair with force and grabbed the Victim's phone from her hands.

The Defendant ran to the bathroom and locked the door.

The Victim has found the Defendant in the ensuite bathroom, the Defendant opened the door and rushed at the Victim with his left forearm up against her chin, causing her head to tilt back.

The Victim's body was raised up off the ground and the Defendant forced her against a wall.

The Defendant moved back into the ensuite bathroom and locked the door. Continuing to apply pressure to the Victim's throat and neck area, holding her against the wall.

The Victim crawled onto the toilet and opened a window.

The Defendant has grabbed her and pulled her down. This caused her head to smash into the porcelain vanity unit.

The Defendant stepped back and the Victim has run out of the bathroom to her neighbour's house.

INJURIES TO VICTIM

As a result of the assault, the Victim has suffered:

- *Bruising to her chest area*
- *Pressure injuries to her eyes*
- *Cuts to her hands, lip and right calf*
- *Swelling to her neck and throat*
- *A swollen head*

DEFENDANT'S COMMENTS

In explanation the Defendant stated that he reacted poorly as he was hurt, but does not remember all the specifics of the assault.

The Defendant has not previously appeared before the Court.

4. *In relation to the male assaults female charge, the respondent applied to the Court to be discharged without conviction, which was declined. He was subsequently sentenced to nine months' supervision and 100 hours community work. The respondent's sentence of supervision also required him to undertake an alcohol and drug abuse addiction assessment, as well as other counselling directed by his probation officer.*

5. *Having regard to the respondent's compliance with community work and counselling, together with an assessment that he was of low risk of reoffending, Community Corrections applied to the Court to cancel the remainder of his supervision sentence. This application was granted by the Court on 13 November 2017.*

6. *The respondent did not report his conviction to the Teaching Council of Aotearoa New Zealand.*

7. *Contrary to what was noted in the Summary of Facts, the respondent has previously appeared before the Courts. Specifically, he has a previous conviction for driving with excess blood alcohol in 2011. Evidence of the respondent's previous conviction is* ***annexed.***

8. *This conviction was considered by the CAC in 2013. As it was the respondent's first conviction, it decided to take no further action.*

9. *The respondent provided a response via several emails to the CAC's investigator.*

10. *In summary, the respondent asserted that the assault occurred after the respondent read some "crude photos and messages" on his wife's phone involving a third party. The respondent said that he had been presented with some hurtful information, and had reacted poorly.*

11. *The respondent also stated that in his view the summary of facts was one sided and sounded worse than the incident actually was. The respondent denied that he had stopped the Victim from breathing at any point.*

Ngā Kōrero a te Kōmiti – CAC Submissions

Adverse finding

8. The CAC submits that the Respondent's conviction for male assaults female warrants an adverse finding.

9. The CAC alleges that the Respondent's conduct reflects adversely on his fitness to teach and brings the teaching profession into disrepute pursuant to sections 378(1)(a)(ii) and (iii) of the Act.

10. The CAC also alleges that the Respondent's conduct was a clear breach of the Teaching Council Code of Professional Responsibility and Standards for the Teaching Profession ("the Code").

11. In relation to the Respondent's failure to report, the CAC submits that this in and of itself amounts to misconduct pursuant to section 397(2) of the Act.

Penalty

12. As a starting point the CAC submits that the seriousness of the offence warrants cancellation of the respondent's registration. The aggravating factors being the prolonged nature of the violence against the victim, the fact that pressure was applied to her neck and that the respondent prevented her from leaving to get help.

13. The CAC also invites the Tribunal to consider the respondent's previous appearance before the Tribunal in 2011 in relation to a conviction for driving with excess blood alcohol.

14. Further the CAC notes the respondent's failure to report his conviction despite being aware of the requirement to do so.

Ngā kōrero a te Kaiurupare – Respondents' submissions

15. In response the respondent submits that he acted out of hurt and betrayal more than anger, having found some disturbing photos on his wife's phone of her with another man.

16. He acknowledges that he did not behave appropriately on that night. The respondent is of the view that there is no chance that he would be presented with the same sort of information in a working environment, so therefore does not pose any risk to children or colleagues.

17. As a result of his conviction the respondent was referred for a Drug and Alcohol Assessment, ordered to participate in Family Violence counselling, and was put on nine months supervision. He has also received counselling of his own instigation.

18. The respondent has been granted sole care of his three children and has made lifestyle changes to ensure that he stays mentally strong and well.

19. The respondent submits that the criminal matter and Family Court proceedings have cost him in excess of $100,000[1] and so any further penalty impacting on his ability to earn would cause significant hardship for the respondent and his children.

20. In support, the respondent's Principal provided a letter confirming that he did not consider that the respondent was a risk to student safety and was not concerned about his ability to continue teaching. However, the key points raised by the Principal were more about the inconvenience the school would face should the respondent be suspended.

21. We note however, that the letter was from the Principal and not the Board of Trustees as the employer. Our understanding is that the Board will reconsider its position following the decision from the Tribunal.

Te Ture - The Law

22. In cases of referral of convictions, the Tribunal needs to reach an adverse finding before it can exercise any of the powers available to it under s 404 of the Act.[2] The test that applies is whether the circumstances of the behaviour that resulted in the conviction reflect adversely on the fitness of the respondent to practice as a teacher.

23. The CAC submits further that the respondent's offending was a breach of the Education Council Code of Ethics for Certified Teachers ("the Code").[3] In particular, the CAC submits that the respondent's offending was a breach of the following:

> ***Commitment to the profession***
>
> *(a) Actively support policies and programmes which promote the equality of opportunity for all;*

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1 No evidence was presented to confirm this figure.

2 *CAC v Teacher* NZTDT 2005/1, 4 November 2005

3 As of June 2017, this was replaced by the Education Council Our Code, Our Standards: Code of Professional Responsibility and Standards for the Teaching Profession.

> *(b) Advance the interests of the teaching profession through responsible ethical practice;*
>
> *(c) Contribute to the development of an open and reflective professional culture.*

24. The cases of *CAC v Teacher* NZTDT 2013/39 and *CAC v Teacher* NZTDT 2009/5 have been provided to us by the CAC on the basis that they involve similar factual scenarios. Both involved violence in a domestic situation.

25. In the case of *CAC v Teacher* NZTDT 2009/5 the respondent in that case was convicted of threatening to kill and male assaults female. The Tribunal found that the teacher's threats and violence were "*matters of the utmost seriousness*". The Tribunal also noted:

> "*...the fact that the teacher's actions may have taken place outside the school grounds and outside school hours and are not directly related to his or her role as a teacher, does not necessarily mean that they do not constitute misconduct or serious misconduct. In this case we are entirely satisfied the respondent's actions in threatening to kill his estranged wife and serious acts of violence do constitute actions in respect of which the Tribunal is entitled – and indeed obliged – to consider exercising its powers, precisely because they reflect on the respondent's fitness to be a teacher*".

26. In *CAC v Teacher* NZDT 2013/39 the respondent was convicted of assault with intent to injure, threatening behaviour and male assaults female. The sentencing Judge in that case noted the extent of the victim's injuries and the continuous slapping in the victim's head.

27. As the respondent was not registered, the only option available to the Tribunal was a censure. Whilst the Tribunal agreed with the District Court Judge that the incident was likely a one-off event, as a result of the respondent's addictions, the respondent was censured *"…in order to mark the seriousness with which the Tribunal regards any exhibition of violence on the part of a teacher…"*

28. With respect to the respondent's failure to report, ss 397(1) and (2) of the Act provide that:

> ***397 Mandatory Reporting of Convictions***
>
> *(1) Every holder of a practising certificate and every authorised person who is convicted of an offence punishable by imprisonment for 3 months or more must,*

within 7 days of conviction, report the conviction to the Teaching Council.

(2) Failure to report a conviction to the Teaching Council in accordance with subsection (1) is misconduct that may give rise to disciplinary proceedings.

29. In CAC v Bird NZDT 2017/17[4], the respondent in that case explained that he was not aware of the obligation to report under s 397(1) of the Act. The Tribunal in that case noted:

> *However, it is incumbent on members of the profession to be cognisant of the requirement that rests on every holder of a practising certificate who is convicted of an offence punishable by imprisonment for three months or more, to report the conviction to the Council within seven days*.

30. Failure to report, is misconduct in and of itself.[5]

Kōrerorero – Discussion

31. The Tribunal is of the view that this matter is one of extreme seriousness.

32. The injuries suffered by the victim, the respondent's wife were significant. It was a prolonged attack in which the victim tried to escape but was pulled back by the respondent. Further, as set out in the sentencing Judge's decision on the discharge without conviction application, there was a family violence callout on 14 June where it is alleged that the respondent assaulted his wife at this point as well, though nothing further seemed to come of that call out. This is not an isolated incident and shows a patterns of behaviour. We therefore approach the case against that background.

33. The respondent is inviting the Tribunal to accept as a mitigating factor the fact that there had been infidelity on the part of the respondent's wife and that he felt hurt and betrayed. The respondent acknowledges that his behaviour was unacceptable, but that he has taken steps via counselling, exercise and his faith to make lifestyle changes to stay mentally strong and ensure he would not react in the same way again.

34. He asks that we consider the considerable emotional and financial strain that he has already endured as a result of the assault conviction, breakdown of his marriage, the loss of his whānau unit, Family Court proceedings for the care of his children and being the sole income earner in his home.

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4 26 August 2017

5 Section 397(2) Education Act 1989

35. Even considering these factors, the Tribunal is not convinced that the respondent shows genuine remorse for his actions. In his response to the Tribunal, the respondent disputes the ASoF set out in the District Court decision which, in our view, shows his inability to be truly reflective.

36. Everyday hundreds of thousands of parents and whānau send their most precious taonga, their children, to school across Aotearoa to be cared for and nurtured by teachers. It is imperative that teachers take this privilege and responsibility incredibly seriously. Their behaviour both inside and outside of the classroom must be of a standard that meets the trust and expectations that whānau have of them. Extreme violence of this nature is unacceptable conduct for a person in such a position of responsibility as a teacher is.

37. Accordingly, we have no issue reaching an adverse finding in this case.

38. We also make a finding of misconduct in relation to the respondent's failure to report.

Kupu Whakatau – Decision

39. Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

> ***404 Powers of Disciplinary Tribunal***
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> *(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
>
> *(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):*
> *(b) censure the teacher:*
> *(c) impose conditions on the teacher's practising certificate or authority for a specified period:*
> *(d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
> *(e) annotate the register or the list of authorised persons in a specified manner:*
> *(f) impose a fine on the teacher not exceeding $3,000:*

> *(g) order that the teacher's registration or authority or practising certificate be cancelled:*
>
> *(h) require any party to the hearing to pay costs to any other party:*
>
> *(i) require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
>
> *(j) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
>
> *(2) Despite subsection (1), following a hearing that arises out of a report under section 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
>
> *(3) A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

40. In the recent decision of *CAC v Cook* NZDT 2018/50, the Tribunal spent some time reviewing the penalty principles. The Tribunal in *Cook* discussed the decision of His Honour Collins J in *Roberts v Professional Conduct Committee*[6] where he summarised the matters to be considered by the Health Practitioners Disciplinary Tribunal ("HPDT") when imposing a penalty under s 101 Health Practitioners Competence Assurance Act 2003 ("HPCA Act"). The Tribunal reviewed the principles that the Tribunal should turn its mind to when considering penalty following a finding entitling it to exercise its powers:

(a) Protecting the public;

(b) Setting standards for the profession;

(c) Punishment;

(d) Rehabilitation;

(e) Consistency;

(f) The range of sentencing options;

(g) Least restrictive; and

(h) Fair, reasonable and proportionate

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6 *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

41. We discuss each of these in turn below.

Protecting the public

42. As discussed in *CAC v Teacher S* NZTDT 2016-69,[7] the disciplinary functions of the Teaching Council and Tribunal are found in Part 32 of the Act and the purpose of the Teaching Council is set out in s 377 of the Act:

> *The purpose of the Teaching Council is to ensure safe and high-quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary and senior secondary in English medium and Māori medium settings through raising the status of the profession.*

43. As has been previously highlighted by the Tribunal, the protection of the public is achieved by holding teachers to account for their conduct, imposing rehabilitative penalties where appropriate and removing those unfit to teach from the profession. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such, that a finding of misconduct or serious misconduct is made.[8]

44. In the present case the respondent's conduct has been the subject of criminal proceedings and it can be expected that the protection of the public was considered by the sentencing judge. In the disciplinary cases involving health practitioners, it is the protection of the public who might be using the services of the professional that is emphasised. In disciplinary cases involving teachers, as set out in section 377 "users" of the service provided by teachers are the children and young people in our schools. An important part of the public protection consideration is to deter other teachers from engaging in similar conduct.

Setting standards for the profession

45. Setting standards for the profession is the role of the Teaching Council and the disciplinary bodies. It is not the function of the criminal courts. The respondent's conduct as a private citizen has been determined in the District Court it is for the Tribunal to now review his conduct as a teacher. Any penalty imposed pursuant to s 404 of the Act is done so following consideration of the expectation of the behaviour of teachers as

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7 14 June 2017

8 Above n 4 at [33]

professionals entrusted with the care and nurturing of our tamariki mokopuna.

46. In *CAC v McMillan* NZTDT 2016/52,[9] we summarised the role of disciplinary proceedings against teachers as:

> *… to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.*

Punishment

47. As the Tribunal as noted previously, the superior courts have emphasised that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect.[10] We have said that where a practitioner has been convicted of a criminal offence, it is not the purpose of the Tribunal to punish the teacher a second time for the same offence.[11]

48. In *CAC v Cook* the Tribunal looked at the punitive nature of professional disciplinary proceedings and reviewed some contrasting decisions in that regard.[12]

> *In the present case, s 404(2) prohibits us from fining the respondent because this matter is a referral of conviction. This recognises that the "index" offence (the offence that has been dealt with in the court system) has already attracted a maximum penalty of at least 3 months' imprisonment, and that means that a financial penalty was a possible outcome.*
>
> *In a case that was decided before decided before the Supreme Court's leading decision of Z v Complaints Assessment Committee,[13] the High Court*

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9 23 January 2017, paragraph 23.

10 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

11 *CAC v Blumenthal* NZTDT 2017-38, 27 April at [18]

12 *CAC v Cook* NZDT 2018-50, 11 April 2019 at [46] – [48]

13 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA) in *CAC v Cook* NZDT 2018-50, 11 April 2019 at [47]

> *noted in a case under the Dental Act 1988[14] the punitive aspect of disciplinary proceedings under that Act was reflected in the fact that the Dentists Disciplinary Tribunal had the power under to fine and censure. Lang J further noted that "such penalties inevitably involve issues of deterrence. They are designed in part to deter both the offender and others."[15]*
>
> *In practice, even where the conduct referred to the Tribunal could not be the subject of any type of conviction in the criminal court, it is extremely rare for this Tribunal to impose a fine on a teacher. The censure has been used as a mark of disapproval by the Tribunal, in an effort to reflect the expectations of the public and the profession.*

49. Like *Cook,* as this is a case involving the referral of a conviction, it is not open for the Tribunal to fine the respondent. However we make the point that as a fine is a penalty available to the Tribunal under s 404 of the Act, as is censure, suspension and cancellation, whilst punishment and deterrence are not the primary focus of professional disciplinary proceedings, it was certainly the intention of the legislature that in the appropriate circumstances, punishment and deterrence could be the desired outcome.

Rehabilitation

50. In *Cook* the Tribunal referred to *Roberts*,[16] which discussed *B v B*[17] and Collins J noted that where a practitioner is truly capable of being rehabilitated into the profession then every effort should be made to encourage and support that. The Tribunal in *Cook* observed that:

> *A similar rationale applies to teachers. There is no merit in depleting the profession from experienced teachers where we consider rehabilitation is possible.*

Consistency

51. In considering penalty the Tribunal must do its best to be consistent in its approach and treat similar cases alike. However, each case turns on its own facts and while some

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14 *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818; 13 August 2007. This case was decided before the Supreme Court issued *Z v Dental Complaints Assessment Committee* in 2008 but was not referred to in that latter decision. The punitive aspects of the penalty provisions of the HPCA Act was further acknowledged by Collins J in *Roberts v Professional Conduct Committee* (Above note 3)

15 Above note 3 para [27]

16 Above, note 3

17 HC Auckland HC4/92, 6 April 1993, [1993] BCL 1093.

factual scenarios maybe similar, very rarely will two cases be identical.[18]

52. In *Patel v The Dentists Disciplinary Tribunal* [19] Randerson J expressed the importance of consistency in this way:

> *As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.*

53. In the present case the CAC has helpfully provided us with comparable cases to assist in our consideration of penalty.

The range of sentencing options

54. The Tribunal must measure the respondent's behaviour against the range of sentencing options available and try to ensure that the maximum penalties are reserved for those whose conduct warrants a severe consequence.

55. In the present case, given that it is a referral of a conviction the Tribunal has fewer sentencing options available to it given the removal of financial penalties in these circumstances.

Least restrictive

56. The notion that the Tribunal should consider the least restrictive penalty is usually discussed in the context of cancellation or suspension. Given that the CAC are proposing suspension of the respondent's practising certificate the following from *Patel v Dentists Disciplinary Tribunal* [20] is relevant:

> *[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practice against the need for removal and its consequences to the individual: Dad v General Dental Council [2002] 1 WLR 1538. As the Privy Council further observed at 1543:*
>
> > *Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his*

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18 Above note 14 at [48]
19 *Patel v The Dentists Disciplinary Tribunal* HC AK AP 77/02 8 October 2002.
20 Above, note 28

> *name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.*
>
> *[31] I respectfully adopt the observations of the Privy Council and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case.*

Fair, reasonable and proportionate

57. The Tribunal must turn its mind to whether to a proposed penalty is fair, reasonable and proportionate in the relevant factual circumstances and as noted above is consistent with similar cases.

Our decision on penalty

58. We note that the respondent has previously appeared before the Tribunal in 2011 in relation to a conviction for driving with excess blood alcohol. The respondent also failed to report this present conviction to the Teaching Council as required. The CAC correctly submits that this on its own amounts to misconduct.

59. We do not accept the comment from the Principal of the respondent's school that the respondent *"did not submit a report because he believed that the Principal's mandatory report was sufficient to meet reporting expectations"*. Section 397 of the Act is very clear that it is the responsibility of the *"holder of a practising certificate"* to report the conviction to the Teaching Council.

60. As already discussed above this was a prolonged violent attack on a woman who was held by her throat and prevented from leaving to get help. This all occurred while the respondent's children were in the house. Further, this was not an isolated incident, the Police were called to another family violence incident where it was alleged that the respondent again assaulted his wife. For reasons unknown to the Tribunal, nothing further came of this incident.

61. These aggravating factors need to be weighed against the respondent's rehabilitative efforts in terms of self-initiated counselling and the reduced sentence of supervision following the outcome of his drug and alcohol assessment and Family Violence Counselling.

62. Given the standing of teachers in society, due to the critical role they play in the lives of our tamariki mokopuna, it is imperative on the Tribunal to uphold the standards of the profession and maintain public faith and confidence in the process and in our teachers, should a teacher's conduct depart from those standards. Violence is never acceptable. Violence of the degree inflicted on the victim in this case cannot be tolerated in society and certainly not by a teacher. The Tribunal must send a clear message to the profession and the wider public that there will be severe consequences for this type of conduct.

63. In light of the above, the Tribunal orders as follows:

(a) Censure under s 404(1)(b) of the Act;

(b) Suspension of the Respondent's practising certificate for a minimum period of six months commencing within three months of the date this decision, and order further that the suspension shall remain in place (following the six months) until such time as the respondent is able to demonstrate to the satisfaction of the Teaching Council that he has successfully completed a minimum of six sessions of anger management counselling and family violence counselling by a provider approved by the Teaching Council;

(c) The respondent is to provide his current and future employer with a copy of the full decision for a period of two years from the date of this decision, with proof of disclosure to the Teaching Council;

(d) Annotation of the register of all the above for two years under s 404(1)(e) of the Act.

He Rāhui tuku panui – Non-publication

64. The respondent has sought name suppression, the main ground being advanced is that publication may have an adverse effect on the respondent's tamariki. The respondent submits that his tamariki are not aware of any of the details about the incident subject to these proceedings and publication of his name would be upsetting for them.

65. Further it is submitted by the respondent that the public interest will be served by knowing that the Tribunal has properly dealt with the substantive matter, and that the naming of the

respondent and the subsequent impact on his children needs to be weighed carefully by the Tribunal.

66. The respondent's Principal has also sought non-publication of the name of the school and the respondent. The Principal submits that identification of the respondent will lead to identification of the school and the respondent's tamariki, which will likely adversely impact on them especially given the challenges that have already faced with their parent's separation and the respondent's conviction for assault of their mother.

67. In response the CAC invites the Tribunal to consider the similar fact case of *CAC v Glazier*[21] where the Tribunal noted:[22]

> *We also observe that the respondent's criminal offending is a matter of public record, as was not granted permanent name suppression in the District Court. As such, any order for suppression made by this Tribunal would be of limited efficacy.*

68. Further the CAC submits that there is no evidence before the Tribunal that the potential harm to the respondent's tamariki would be anything more than "ordinary". Neither has the respondent produced evidence of any particular vulnerabilities his tamariki may have that would increase the impact on them should the respondent's name be published.

69. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) further provides:

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

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21 *CAC v Glazier* NZTDT 2018/59

22 Above note 21 at [39]

70. Therefore, in deciding whether to make an order prohibiting publication, the Tribunal must consider the interests of various affected parties, as well as the public interest. If we think it is proper to do so, we may make such an order.

71. In *M v Police* (1991) 8 CRNZ 14 Fisher J discusses the importance of open justice:

> *In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offence.*[23]

72. The presumption in favour of open justice is again articulated by the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 at 546:

> *… the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public"…The basic value of freedom to receive and impart information has been re-emphasised by s 14 of the New Zealand Bill of Rights Act 1990.*

73. The principle of open justice therefore exists regardless of any need to protect the public. The nature of s 405 of the Act is consistent with s 95(2)(d) of the Health Practitioners Disciplinary Act 2003, which was considered in *Dr A v Director of Proceedings*[24] by Panckhurst J, who said:

> *The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable to do order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.*

74. In *Director of Proceedings v I*,[25] Frater J found that any differences between the Courts and medical disciplinary processes (under the Medical Practitioners Act 1995) were ones

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23 *M v Police* (1991) 8 CRNZ 14, p15

24 High Court, Christchurch, CIV 2005-409-002244, 21 February 2006, Panckhurst J.

25 [2004] NZAR 635,

of emphasis and degree. The most significant difference was the threshold to be reached before the balance was tipped in favour of name suppression. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal (and its successor, the Health Practitioners Disciplinary Tribunal), is whether suppression is "desirable".

75. In this jurisdiction, the threshold of whether it is "proper", is the same as under the Lawyers and Conveyancers Act 2006. The New Zealand Lawyers and Conveyancers Disciplinary Tribunal ("NZLCDT") 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.[26]

76. We agree with the NZLCDT that "proper" sits somewhere between "exceptional" as is the case in the courts and "desirable" as is required in the HPDT.

77. We note that the respondent was not granted name suppression in the District Court when convicted, as was the case in *Glazier,*[27] and therefore the details of the assault are already in public domain.

78. We have considered the interests of the respondent's tamariki and school as well as the public interest. We have considerable sympathy for the respondent's tamariki. They have been through an incredibly challenging time in the past few years, none of which is their fault.

79. We had some difficulty marrying up the submission made by the respondent that the children are not aware of the details of the assault, with the comment made by the respondent's Principal where he states:

> *"These children have had to manage the trauma of their parent's divorce, and the conviction of their father for assaulting their mother"*.

80. These two statements appear contradict one another.

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26 *Canterbury Westland Standards Committee No.2 v Eichelbaum* [2014] NZLCDT 23. See also *CAC v Finch* NZTDT 2016-1, 27 September 2016 and *CAC v Teacher S* NZTDT 2016-69, 14 June 2017

27 *CAC v Glazier* NZTDT 2018/59

81. The grounds advanced by respondent and the Principal do not persuade us that the principle of open justice is displaced with respect to the respondent and we do not think it is proper to order non-publication of the respondent's name. However out of consideration for his tamariki we order non-publication of the name of the respondent's employer, and any personal residential details set out in the ASoF set out in full at paragraph 7.

Utu Whakaea – Costs

82. As this is a referral of a conviction under s 397 of the Act the Tribunal has no jurisdiction to make any award of costs.

Rachel Mullins
Deputy Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.

2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.

3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).