IN THE MEDICAL TRIBUNAL OF NEW SOUTH WALES

THE MEDICAL PRACTICE ACT 1992

DEPUTY CHAIRMAN: HIS HONOUR JUDGE J C McGUIRE

MEMBERS: DR K ILBERY

DR S SPRING

MS R KUSUMA

No. 40027/04 – DR LOUIS ALBERT WHITTON

REASONS FOR DETERMINATION

6TH DECEMBER, 2005

Nature of Complaint

Pursuant to the Medical Practice Act 1992 (the Act), the Tribunal is enquiring into a complaint of the Commissioner, Health Care Complaints Commission (the Complainant) into professional conduct of Dr Louis Albert Whitton.

The Commissioner complains that Dr Louis Albert Whitton (the practitioner), being a medical practitioner registered under the Act has been guilty of unsatisfactory professional conduct and/or professional misconduct within the meaning of Section 36 and Section 37 of the Act in that he:

(1) Has demonstrated a lack of adequate knowledge, judgment or care in the practice of medicine and/or

(2) Engaged in improper and unethical conduct relating to the practice of medicine.

Particulars

1) Between July 1999 and November 2001 the practitioner prescribed anabolic/androgenic steroids namely nandrolone decanoate (Deca Durabolin), methenolone acetate (Primobolan), mesterolone (Proviron), testosterone (Andriol, Sustan and Primoteston) fluoxymesterone (Halotestin) and human chorionic gonadotrophin (Profisi) to the patients and on the dates listed in Schedule A:
   a) in quantities and for a purpose or purposes not in accordance with recognised therapeutic standards of what is appropriate in the circumstances, contrary to clause 36 of the Poisons and Therapeutic Goods Regulation 1994;
   b) Without excising responsible medical judgment.
2) The practitioner failed to arrange for the patients listed in Schedule B to undergo appropriate tests to ascertain and monitor their testosterone levels and/or liver function, prior to and/or after the commencement of treatment with anabolic/androgenic steroids.
3) In about November 2001 the practitioner improperly destroyed his treatment records for fifteen patients for whom he had prescribed anabolic/androgenic steroids and prepared false and/or misleading patient records for the said fifteen patients.
4) The practitioner deliberately misled officers of the Pharmaceutical Services Branch of the Department of Health (the "PSB"" about his treatment of various patients during an interview conducted on 28 November 2001 in connection with an investigation by PSB into the practitioner's prescribing of anabolic/androgenic steroids.

Orders Sought

The Commissioner seeks, pursuant to Section 64 of the Act, a finding that the practitioner is guilty of unsatisfactory professional conduct and/or professional misconduct in relation to his dealings with the patient and an order that he be deregistered.

Unsatisfactory Professional Conduct

Section 36 of the Act sets out the matters which constitute unsatisfactory professional conduct. It relevantly provides:

Unsatisfactory professional *misconduct of a registered medical practitioner include inter alia:*

m) ***Other improper or unethical conduct***
Any other improper or unethical conduct relating to the practice or purported practice of medicine.

Professional Misconduct

Section 37 of the Act sets out the meaning of professional misconduct:

"Professional misconduct *of a registered medical practitioner means unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the Register."*

The obligations of medical practitioners is encapsulated by Priestly J A in **Richter v Walton**, an unreported decision of the 15th July, 1993.

> *"The degree of trust which patients necessarily give to their doctors may vary according to the condition which takes the patient to the doctor. Even in regard to the most commonplace medical matters, the trust a patient places in a doctor is considerable. In some cases, of which the present seems to be an example, the patient's trust cannot help but be almost absolute. The doctor's power in regard to the patient in such cases is also very great. I do not mean power in the abstract way but as a matter of fact; the extent of the power will vary according to the temperament of the patient, but the doctor with some patients and for limited periods, because of the relationship in which they are temporarily placed, is in a position to do whatever the doctor wants with the body of the patient. This is one of the reasons why doctors are subject to correspondingly great obligations and are expected to maintain high standards; all this being very much in the public interest."*

Onus and Standard of Proof

The standard of proof to be applied by the Tribunal is that referred to in **Rejfek v McElroy** (1995) 112 CLR 517 @ 521. That standard was applied in **Bannister v Walter** (1993) 30 NSWLR 699 where it was held that the requirement is that the Tribunal be *"comfortably satisfied on the balance of probabilities"*.

The Tribunal must have regard to the gravity and importance of the matters which it is deciding in accordance with the principles stated in **Briginshaw v Briginshaw** (1938) 60 CLR 336 @ 360 –363. At pages 361 and 362 Sir Owen Dixon stated:

"Except upon criminal issues to be proved by the Prosecution it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a state of mind that is obtained or established independently of the nature or consequent of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question, whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters "reasonable satisfaction" should not be proved by inexact proofs, indefinite testimony, or indirect inferences."

The material before the Tribunal discloses that over a period of years the Practitioner prescribed anabolic steroids for a non therapeutic use to wit, body building. Although some patients proffered a history of muscle injury and/or impotence there can be little doubt that he well realised that their primary purpose in seeking steroids was for body building.

He admits to failing to ensure that some such patients took appropriate tests to ascertain their liver function and, although he did issue pathology forms for the purpose of undertaking liver function tests, he was well aware that some of them failed to do so.

Several patients attended on but one occasion however most returned for repeat prescriptions, which were issued, although Dr Whitton was aware that they had failed to undergo the pathology tests he had recommended.

It was his claim that whilst he understood that the drugs were prohibited to those engaging in professional sports, it was his understanding that they could be prescribed for non professional body builders, albeit that he was aware that this was not a widely accepted practice within the medical profession.

He maintained that he was unaware that steroid prescription was unethical or illegal and provided that certain procedures were followed, it would have been within acceptable limits of practice. Although he believed this to be on the fringe of prescribed practices as opposed to it being a departure from an acceptable standard of practice.

The Practitioner sought to explain his conduct in prescribing steroids by stating that none of his patients appeared as the type of person who would be involved in drug abuse and that they held responsible employment. Further, that part of his reasoning in prescribing the drugs was his understanding that patients could acquire anabolic steroids, which were designed as veterinary products, from other sources. He felt that it was preferable that drugs be prescribed, which were fit for human consumption. He also understood from discussions with one of his long-

standing steroid-using patients that steroids could be accessed, whether or not they were prescribed by a medical practitioner.

The Tribunal is completely sceptical as to his claim that he did not appreciate that steroid prescription was unethical or illegal. It is impossible to believe that he remained ignorant of the true position having regard to the wide publicity in the press and medical publications. He certainly sought no advice from fellow practitioners nor was he aware that other doctors were prescribing steroids, with the possible exception of Dr Tony Millar.

In any event, the Tribunal is completely satisfied that he well knew that such prescriptions, be they ethical or legal or otherwise, he had a clear duty to ensure that appropriate pathology testing be administered and that testosterone levels and liver function be monitored, and that correct dosages be prescribed.

Some of his patients who did undergo recommended pathology testing showed raised liver function and he advised them to cease using anabolic steroids.

It follows, as a matter of common sense, that those who didn't undergo appropriate testing could well have had liver function abnormalities which mandated the cessation of steroid use.

He sought no legitimate guidance as to the appropriate safe dosages and an alarming feature of his conduct is that he substantially relied upon the advice and information of a young body builder, as his source of knowledge concerning the drug.

By June, 2001 it had become apparent that the number of persons seeking steroids had greatly increased. He decided to stop prescribing and arranged for his receptionist to inform his patients accordingly.

Whilst some patients ceased to seek steroids, he in fact prescribed for some 10 patients between June and November, 2001 albeit on but one further occasion, save and except for a single patient to whom he issued prescriptions more than once.

To the practitioner's credit he substantially ceased prescribing steroids well prior to him receiving notice that he was under investigation.

He stated that upon being contacted by the Pharmaceutical Services Branch (PSB) he realised that his prescribing anabolic steroids for body building was a serious matter. Thereupon he set out to conceal the clinical indication for such prescriptions.

This involved an elaborate course of deceptive conduct. Original cards were destroyed or concealed from the PSB. Re-written medical records were provided with the intention of providing false histories including the presence of soft-tissue injury or impotence as the indication for steroids. In the course of re-writing records, references to body building was deleted.

His destruction and falsification of records involved a calculated and deliberate course of deception which he compounded by persistently lying to the PSB investigators in the course of a lengthy interview.

Despite his claim that he initially maintained accurate records, including histories referring to body building, this proved false in at least one instance.

Despite the Practitioner's claim that he was originally unaware that anabolic steroid prescription was either unethical or illegal and that it was acceptable if prescribed under controlled circumstances, clearly the drugs were being prescribed in many instances in what was well short of 'controlled circumstances'. This Tribunal holds no doubt that at all times he knew that his conduct was both illegal and unethical.

Further, that he fully appreciated the blatant impropriety in the destruction and falsification of patients' records and the calculated course of deception he embarked upon to deceive the PSB investigators.

This conduct is reflective of a consciousness of guilt in relation to the issuing of the subject prescriptions.

Dr Bunker, a Peer Reviewer, in commenting upon the Practitioner's conduct, stated "Dr Whitton exhibits a pattern of prescribing of androgenic steroids unlike that of any general practitioner that I know and for indications that I am unaware of, and that I think the majority of my peers would be unaware of".

He stated "I think most GPs are unfamiliar with the detail of the Poisons and Therapeutic Goods Regulation. I think however that most of my peers would be familiar with the broad principles that certain substances such as narcotic drugs and androgenic steroids have controls and limits on their use. Drugs should be prescribed in ways which concord with

their therapeutic indications as indicated in the PBS schedule and universally used references such as MIMS".

Dr Bunker opined "If Dr Whitton falsified or fabricated his prescribing records this would attract my severe criticism and that of my peers. Medical records should be an accurate summary of the consultation and falsification implies an awareness of the inappropriateness of what occurred in the consultation".

When questioned as to whether he was aware of other medical practitioners who prescribed steroids for body building indication, he stated that he was not. Further, that in the early 1990s the profession concluded that prescribing androgenic steroids for body building as a harm minimisation goal, was inappropriate

He refuted the suggestion that there was a division in the medical profession as to the desirability for prescribing steroids as a method of harm minimisation. As far as he was aware, the only view supporting this proposition came from Dr Tony Millar. It had always been his opinion that body building was an inappropriate purpose for the prescription of anabolic steroids.

He stated that there was no information that doctors would have access to which would enable them to make a judgment about the safety of any dose and that the drugs shouldn't be prescribed at all.

He further stated that there was a wide variety of literature available on the question of anabolic steroids prescription and usage.

Dr Bunker, whilst stating that he could understand the Practitioner's actions in altering his records in a state of anxiety of panic, he could not approve or condone this conduct.

Dr Walsh, a general practitioner, was called on behalf of the Practitioner. He stated that "On the basis of the practitioner having reasonable grounds to have limited awareness that his activities were illegal and had spontaneously reformed his behaviour some months prior to being made aware of the investigation, his inappropriate prescribing practices would attract the moderate criticism of his peers in my opinion".

However, when it was put to Dr Walsh that, contrary to his belief, that only two more patients were prescribed drugs after the practitioner took firm action after June, 2001 to cease prescribing, that if, in fact, ten patients were prescribed after June, he would be more critical of the practitioner's conduct.

Dr Walsh noted that the Practitioner had frankly admitted his errors and made no attempt to justify his actions by using spurious ethical arguments. He believed that Dr Whitton demonstrated both insight and genuine contrition.

A matter which stands to Dr Whitton's credit, is his actions in volunteering the falsification of his records at a point where the investigators were unaware of his actions. He, in effect, supplied the information which grounded Particulars 3 and 4 to the complaint.

Apart from his initial deceptions, he made substantial written admissions in response to allegations raised by the HCCC. He made a further

statement on 10th October, 2005 in which he corrected or amended previous answers supplied and enlarged upon his admissions.

While some facets of his evidence before this Tribunal raise scepticism, Dr Whitton did not seek to resile from the thrust of his admissions as to the misconduct alleged in the complaint and particulars.

At the commencement of this hearing Mr Lynch, Counsel for the Practitioner, announced that he did not contest that his conduct constituted:

(a) Unsatisfactory professional conduct;
(b) Professional Misconduct.

As a result there has been a substantial minimisation of the expense involved in the proceedings.

Placed before the Tribunal were a number of highly supportive character references. The authors included professional persons, patients and fellow practitioners.

There were numerous expressions of respect and regard and of his high reputation in the community, both professionally and personally.

His fellow practitioners praised his professionalism and their regard for him as a medical practitioner.

Many of the authors who were well acquainted with the Practitioner over many years, spoke of his high integrity and excellent moral standards.

Most relevantly, they referred to his shame, regret, remorse and contrition for his actions.

As a result of discussions with his legal representative, the Practitioner consulted with Dr Jonathon Phillips, psychiatrist, in August last. Apparently he was advised to seek assistance with regard to gaining an insight into his actions, as well as counselling.

He has seen Dr Phillips on some five occasions for counselling. He did not display any diagnosable psychiatric disorder. Dr Phillips has been principally engaged in assisting him as to why he acted in the manner which brings him before the Tribunal.

Dr Phillips felt that he had a genuine wish to understand his past illegal prescribing practices and to ensure that this will never recur.

He stated "It is important to also note that Dr Whitton has considerable insight into the inappropriateness and illegality of his prescriptions of anabolic steroids and related agents and is ashamed of his actions and associated activities including the falsification of a number of patients' files and misleading the Pharmaceutical Services Branch. He exhibits substantial contrition currently in relation to these activities and contrition is likely to grow in the course of his therapy."

He went on to say "I do not believe he will pose a danger to his patients or to the community generally".

Dr Phillips suggested that the Practitioner continue with psychiatric counselling.

He was unable to attend for cross examination and accordingly his opinions were not tested. The Tribunal however believes that even if Ms Eastman had been able to put matters to him, which concerned the HCCC, that there would have been no material difference in the views he expressed.

The Practitioner expressed a willingness to remain under the care of Dr Phillips for such period as he deemed necessary. He further agreed to subject himself to a monitoring regime.

There is no suggestion that the Practitioner has engaged in any inappropriate prescribing or any deceptive practices since the end of the year 2001.

Since that time he has actively engaged in seeking continuing medical education including reading relevant literature and attending seminars. He has participated in a number of patient surveys and an accreditation course titled "Australian General Practitioners Accreditation Liaison". This involves rigorous interviews and inspections by surveyors who make criticisms and recommendations.

The Practitioner charged the patients, the subject of the complaint, a fee of $36 being the same fee rendered to his other patients. There is no suggestion that there was any significant financial gain from his inappropriate practices.

The primary function of the Tribunal is to make orders which are best suited for the protection of the community. A principal consideration in

the exercise of this power is the maintenance of the standards of the medical profession and maintaining the confidence of the community in the profession.

A further consideration is making orders which will deter other practitioners from similar behaviour. It must be seen by the community and the profession that the Tribunal will make orders designed to protect, to maintain standards and to give a clear indication to the profession that the conduct giving rise to such orders is unacceptable in a medical practitioner.

It is not the function of this Tribunal to meet professional misconduct with punishment, however, medical practitioners will see that protective orders will have immediate and far-reaching consequences.

The Tribunal well recognises that the Practitioner was only able to act as he did in prescribing steroids and in failing to exercise appropriate medical judgment because he held a privileged and trusted position as a doctor. A trust which he grossly betrayed.

Clearly his conduct was serious and attracted the severe criticism and disapproval of Dr Bunker, peer reviewer.

His misconduct was not simply a one-off act of inappropriate prescriptions and failures to properly test and monitor his patients. He dealt with some 49 patients and issued some 160 prescriptions. Plainly, this was very serious misconduct, however of even greater concern to the Tribunal was the calculated and deliberate deceit and deception involved in destroying and altering records and lying to the investigator.

It is basic to proper medical practice in the interests of the welfare of patients that appropriate and accurate records be made and maintained.

The HCCC submitted that the only appropriate order in the circumstances was the de-registration of the practitioner and the removal of his name from the register.

After carefully considering this submission, the Tribunal declines to make such order.

The Tribunal is comfortably satisfied that all of the particulars of the complaint have been proven and that independently of the Practitioner's admission of professional misconduct, that his unsatisfactory professional conduct was of such a sufficiently serious nature as to constitute professional misconduct.

In determining what orders should follow, the Tribunal has had regard to the following matters:

a) His decision to cease his inappropriate conduct prior to his detection;
b) His confession as to his misconduct with regard to his medical records and lies;
c) That his inappropriate prescribing and treatment appear to be explicable by foolishness and stupidity, rather than cupidity;
d) The efforts that he has made to rehabilitate himself;

e) The fact that some four years have passed since his offending conduct and that there is no suggestion of any repetition or similar misconduct;

f) His willingness to continue counselling;

g) The Tribunal's belief that on the evidence available to it, the Practitioner is unlikely to re-offend;

h) The Tribunal is satisfied that he has demonstrated remorse and contrition and substantial insight into his behaviour.

However so serious were his acts of misconduct that the Tribunal considers it appropriate to include in its orders the imposition of a fine approaching the maximum available.

The order of the Tribunal are:

1. That the Practitioner be reprimanded;
2. That the Practitioner be fined $25,000;
3. That the following conditions be imposed on his registration:
   a) Dr Whitton is to continue to attend for psychotherapy by a psychiatrist of his choice, and approved by the Medical Board, at his own cost, at a frequency to be determined by the treating psychiatrist. Dr Whitton is to authorise the treating psychiatrist to inform the Board of failure to attend for treatment, termination of treatment or if there is a significant change in health status (including a significant temporary change).
   b) The Treating psychiatrist is to notify the Board when the Applicant is no longer required to attend psychotherapy.
   c) Dr Whitton is to notify the Board of the name and professional address of a registered medical practitioner who has agreed to act as his professional mentor within fourteen days of the Tribunal's decision, for the Board's approval.

d) The nature and frequency of the contact between Dr Whitton and the Mentor is to be determined by the Mentor in accordance with the Board's Guidelines for Mentors. The mentor is to be provided with a copy of the Guidelines for Mentors, a copy of this decision.
e) Dr Whitton is to authorise the mentor to notify the Board when the Mentor is of the view that professional mentoring is no longer required.

4) Pursuant to Section 93 of the Medical Practices Act, the appropriate review body is the Medical Board.

5) The Practitioner pay the costs of the HCCC of and incidental to the hearing of the complaint.

_(Signed)________________ _(Signed)___________________

JUDGE J C McGUIRE DR K ILBERY

_(Signed)_________________ __(Signed)________________

DR S SPRING MS R KUSUMA