



**NEW ZEALAND  
HEALTH PRACTITIONERS  
DISCIPLINARY TRIBUNAL**

TARAIPUINARA WHAKATIKA KAIMAHI HAUORA

Level 28, 2-6 Gilmer Terrace, Wellington 6011  
PO Box 10509, The Terrace, Wellington 6143, New Zealand  
Phone: 04-381 6816  
Email: gfraser@hpd.org.nz  
Website: www.hpd.org.nz

**HPDT No.** 990/Chiro18/421P

**UNDER** the Health Practitioners Competence Assurance Act  
2003 (the Act)

**IN THE MATTER** of a disciplinary Charge laid against a health practitioner  
under Part 4 of the Act

**BETWEEN** **A PROFESSIONAL CONDUCT COMMITTEE**  
**appointed by the CHIROPRACTIC BOARD OF**  
**NEW ZEALAND**

**Applicant**

**AND** **Dr DEAN JULIAN KENNY** of Auckland, registered  
chiropractor

**Practitioner**

**HEARING held at Auckland on 12 September 2018**

**TRIBUNAL:** Mr D M Carden (Chair)  
Dr E Hurtgen, Dr J Hawtin, Dr A Taare and Ms A Kinzett  
(Members)  
Ms G Fraser (Executive Officer)

**APPEARANCES:** Ms B Johns for the Professional Conduct Committee  
No appearance of or for the practitioner

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### **Introduction**

1. Dr Kenny is a registered chiropractor who had practised in Auckland. On 2 February 2018 he was convicted in the District Court at North Shore of an offence of dishonest use of a document in breach of section 228(1) of the Crimes Act 1961. This is an offence punishable by imprisonment for a term of seven years. The matter was investigated by a Professional Conduct Committee (PCC) of the Chiropractic Board of New Zealand (CBNZ) which laid a Charge under the Health Practitioners Competence Assurance Act 2003 (the HPCA Act) before the Tribunal. Dr Kenny had previously been convicted of the same offence on 15 October 2010 as a result of which the CBNZ required him to undergo a competence review.

### **The Charge and hearing**

2. The full text of the Charge is transcribed in the Schedule to this decision. The Tribunal heard the Charge in Auckland on 12 September 2018 and the PCC was represented by counsel. There was no appearance at the hearing by or on behalf of Dr Kenny. Evidence was presented to the Tribunal which satisfies it that appropriate notice of the Charge and in due course of the date and venue for the hearing was given to Dr Kenny. There was produced to the Tribunal during the course of the hearing the copy of an email which Dr Kenny had sent to the CBNZ on 17 July 2017 reading:

*“As of 17/7/2017 I have decided to revoke my non practicing Chiropractic License with the [CBNZ] and will not be associated in any shape or form with practicing Chiropractic and being called a chiropractor in New Zealand”.*

3. That email had been sent from the address for Dr Kenny which was shown in the records of the CBNZ; and it was to that same address that email communications from the Tribunal had been sent. Documents delivered to Dr Kenny at his residential address was signed for purportedly on his behalf (although the signature is ambiguous) but that address is the address shown in the records of the CBNZ.
4. The PCC relied on an affidavit from the Chair of the PCC which contained the evidence referred to below.

5. A charge can be brought against a practitioner before the Tribunal if the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise. The conviction concerned must be either for various stated offences or for an offence punishable by imprisonment for a term of 3 months or longer.
6. The Certified Copy of the Court Record for the District Court on which the PCC relied states that Dr Kenny was convicted on 2 February 2018 of an offence that:

*“...between 5 March 2016 and 31 July 2016 at Auckland, [he] dishonestly used a document with the intention to obtain a pecuniary advantage from the Accident Compensation Corporation, without claim of right”.*
7. The particulars in the Certified Copy referred to “4 ACC45 claim forms ... and 28 ACC47 tax invoice for services forms as listed in [attached schedules]”.
8. Dr Kenny pleaded guilty to the charge which was laid under section 228(1)(b) of the Crimes Act 1961, an offence which carries a maximum imprisonment term of 7 years. Dr Kenny was sentenced to community detention for 4 months and ordered to pay Reparation/Restitution of \$1,282.72.
9. The Sentencing Notes of the District Court Judge, Judge PA Cunningham, were produced to the Tribunal. The four ACC45 claims forms and some of the 28 ACC47 tax invoice for services forms referred to in the Certified Court record related to Dr Kenny’s having accompanied a rowing team from an Auckland secondary school to a rowing regatta in April 2016. He did this on a voluntary basis but was entitled to make claims for chiropractic work genuinely covered by ACC.
10. In the Summary of Facts to the Court on the basis of which Dr Kenny pleaded guilty it is recorded that the rowing coach would advise him of the injury for a particular contestant or fill out the appropriate ACC45 form. Dr Kenny acknowledged that he had not treated some of the clients referred to and said that he had treated certain clients two or three times a day but knew he would only get paid for one, saying that he “*felt he was entitled to be paid for the extra treatments*”.
11. In respect of the 28 ACC47 forms Dr Kenny was shown the first 12 of these and is recorded as having claimed:

*“...that he had undertaken two treatments on one day for these clients prior to going [to the regatta] and that he made the claims for false treatment dates as he would not otherwise have been paid for those”.*

12. Other excuses are recorded in the Summary of Facts but none dispute the offending by Dr Kenny.

**Conviction for qualifying offence**

13. The first consideration for the Tribunal is whether Dr Kenny has been convicted of an offence to which section 100(2) of the HPCA Act refers. This is clearly established by the Certified Copy of the Record. Dr Kenny was convicted of the offence under section 228(1)(b) of the Crimes Act 1961. This carries a maximum penalty of seven years’ imprisonment. That is a qualifying offence in respect of section 100 of the HPCA Act. This aspect of the Charge is found made out.

**Reflection adversely on fitness to practise**

14. The Tribunal is required to assess whether the conviction in question does reflect adversely on the practitioner’s fitness to practise. Attention was drawn by counsel for the PCC to principles from previous decisions including that the determination of fitness does not relate solely to the practitioner’s clinical ability or competence; and that, if the conviction is likely to bring discredit to the profession, this may well indicate that the conviction reflects adversely on fitness to practise but is not in itself conclusive.
15. The attention of the Tribunal was drawn to other cases which the Tribunal has noted including:

*Pellowe,<sup>1</sup>* where a pharmacist had been convicted on charges for over-claiming against HealthPAC the sum of approximately \$200,000.00 and had been sentenced by the court to 12 months’ home detention. The Tribunal said:

*“Practise as a pharmacist carries with it the right to obtain money from the government on trust – by stating what is being claimed is a valid claim.”*

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<sup>1</sup> 137/Phar07/74P

The Tribunal found that this practice did reflect “*very adversely indeed*” upon the practitioner’s fitness to practise in the widest possible sense. The Tribunal ordered cancellation of his registration.

*Chiew*,<sup>2</sup> where a pharmacist had been convicted of 130 charges relating to fraudulent claims to HealthPAC with total reparation needed of \$220,000.00. He had been sentenced in the court to 1 year’s home detention and 300 hours of community work. He was suspended by the Tribunal for nine months; the Tribunal having referred to the offences as “*very serious ones relating to Mr Chiew’s work as a pharmacist*”.

*Bain*,<sup>3</sup> involving a nurse who had stolen, over a five week period, cash on 10 different occasions and an item of jewellery from a safe in her employer’s office. The Tribunal described her conduct as “*undoubtedly serious*” with multiple breaches of trust in the workplace and in respect of vulnerable persons. The Tribunal ordered cancellation of her registration.

16. The PCC emphasised the principle that a breach of trust may reflect more adversely on fitness to practise than cases not involving that breach of trust as the public can legitimately expect practitioners to be honest. Reference was made to *Condon*,<sup>4</sup> a case where a nurse took a work colleague’s credit card and used it dishonestly. The Tribunal referred to the principle that “*members of the public are entitled to expect to be able to trust and have confidence in the honesty of all members of the nursing profession*”.
17. The submissions for the PCC emphasised that the offence was of “*significant dishonesty,...*” involving dishonest use of a document. Although reference is made to forgery and apparently the facts did include that a number of the ACC documents in question were signed by Dr Kenny in a manner which indicated forgery, this was not a charge brought against him and the Tribunal disregards that to the extent of any such reference; except to the extent that completing the document wrongly did form part of the background to the offence for which Dr Kenny was convicted.
18. The PCC emphasised that there was \$2,282.72 of public monies initially involved (although this was reduced because of payments that had been made

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<sup>2</sup> 180/Phar08/95P

<sup>3</sup> 387/Nur11/176P

<sup>4</sup> 23/Nur05/13P

and other credits to the reparation order of \$1,282.72). While the Charges refer to the 52 individual clients involved, in respect of many of them there were multiple attendances and forms completed. In respect of the 28 patients involved in the ACC47 tax invoice aspect they were in fact 79 treatments for which Dr Kenny claimed he had provided treatment. The PCC emphasised the District Court Judge's comments on sentencing that Dr Kenny's behaviour involved planning and premeditation and fortunately had been brought to an end early because of the ACC investigation.

19. The Tribunal has no hesitation in finding that this second aspect of the Charge is made out, namely that the conviction reflects adversely on Dr Kenny's fitness to practise as a chiropractor.
20. The offending involved his privilege of trust from the ACC entitling him to payment when the necessary forms were completed by him. The ACC scheme operates on a trust-based system and could not function effectively unless health practitioners who are entitled to claim monies did so only in a way and on occasions when they are entitled to do so. The system would likely grind to a halt unless the ACC could trust practitioners to act in the correct manner and claim monies only where entitled. These were public funds that were involved. The sums in question total \$2,282.72.
21. Dr Kenny's dishonesty and breach of trust occurred in the very environment in which he was practising as a chiropractor. He jeopardised the interests of the different clients in question by claiming for funds and for treatment purportedly having been given to them when in fact it had not. This could well have altered the situation so far as any understanding of their medical condition or their entitlements may later have been concerned.
22. His offending failed to take into account or comply with the provisions of the Code of Ethics of the CBNZ, including in particular at paragraph 2.1.1.4:

*"A chiropractor should ensure that all conduct in the practice of chiropractic is beyond reproach and that no advantage is taken of a patient, including exploitation of a sexual, physical, emotional, financial nature or for personal gain".*

And at paragraph 2.1.8

*"A chiropractor is legally required to be fair and honest when reporting to and claiming from third party payers. Such reports and*