BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

UNDER	the Social Workers Registration Act ("the Act")
IN THE MATTER	of a disciplinary charge laid against a social worker under Part 4 of the Act.
BETWEEN	**A PROFESSIONAL CONDUCT COMMITTEE** appointed under the Act **Applicant**
AND	**[Ms K]** of X, registered social worker **Practitioner**

DECISION – 20 September 2021

TRIBUNAL	Ms C Garvey, Ms S Hunt, Ms A McKenzie, Ms T Robinson, Mrs J Pearse, lay member
APPEARANCES	Ms K Kensington for the Professional Conduct Committee [Ms K] in person

1. [Ms K] is a registered social worker. She attained a Certificate in Social Work in or about [ ] and then completed a two-year Diploma in Social Work. [Ms K] commenced practice as a social worker in [ ]2007. She gained her registration with the Social Workers Registration Board on [ ] 2012.

2. A Professional Conduct Committee (PCC) laid a disciplinary charge on 9 December 2019 pursuant to section 72(3) of the Social Workers Registration Act 2003. The PCC amended the charge on 23 January 2020 to correct the names of the children in Particular 2. The charge was originally set down for hearing in Whangārei from 19-21 August 2020 but was adjourned due to the COVID-19 pandemic and associated restrictions. The hearing was rescheduled for 3-5 March 2021, but was again adjourned due to the COVID-19 pandemic and related travel restrictions. The hearing went ahead on 28-30 July 2021 in Whangārei. [Ms K] was self-represented.

The disciplinary charge

3. The charge is as follows:

> 1. *Between 4 January 2012 and 8 December 2015, [Ms K] accessed CYRAS records that related to her family members or other persons known to her as set out in the* ***attached*** *schedule.*[1]
> 2. *In December 2016, [Ms K] provided a confidential report to the Family Court as part of an application by Ms P, the daughter of [Ms K]'s partner, [Mr P], to have [Ms P]'s two children, [ ] and [ ], returned to [Ms P]'s care.*
> 3. *[Ms K]'s conduct breached principles 1, 4, 7 and 9 of the Code of Conduct issued by the Social Workers Registration Board pursuant to section 105 of the Act.*
>
> *This conduct considered individually and/or cumulatively constitutes:*

[1] The schedule to the charge is annexed to this decision.

(a) Professional misconduct pursuant to s 82(2)(a) or 82(2)(d) of the Act; or, in the alternative

(b) Conduct that is unbecoming of a social worker and reflects adversely on her fitness to practise as a social worker pursuant to s 82(1)(b) of the Act.

Jurisdiction

4. Particular 1 includes conduct occurring prior to [Ms K]'s registration. The Tribunal finds that it does not have jurisdiction to make a disciplinary finding in relation to conduct occurring entirely and exclusively prior to 22 November 2012.

5. Mandatory registration came into force on 27 February 2021. The Tribunal's jurisdiction over pre-registration conduct was the sole issue considered in *PCC v RSW X*.[2] where the background to the legislation, the principles of statutory interpretation and the wording of the Act itself were considered extensively. The Tribunal (differently constituted) held:

a. the Tribunal does not have jurisdiction to consider a charge that relates to conduct alleged to have been committed exclusively and entirely at a time when the social worker was not registered. This is with the exception of a charge laid in reliance on s 82(1)(c) as to a criminal conviction;

b. in cases where conduct is alleged to have occurred prior to registration and that conduct is carried forward into the period when the social worker is registered then such conduct may be within reach of the Tribunal's jurisdiction.

6. We accept those findings and the reasoning for them, and do not repeat that here.

[2] PCC v RSW X RSW9/D1/SWDT/2020, 1 December 2020

7. Particular 1 essentially alleges that [Ms K] acted wrongfully in accessing CYRAS records for family or persons known to her between 4 January 2012 and December 2015. CYRAS is an acronym for Care and Protection, Youth Justice, Residential and Adoption Services. CYRAS is the main electronic case management system used by Oranga Tamariki. It records a broad range of information including information collected, actions taken and other matters relevant to the management of a case.

8. Counsel for the PCC submitted that all instances where [Ms K] accessed CYRAS records of family members from 4 January 2012 are in the category of a continuing course of conduct over which the Tribunal has jurisdiction. Ms Kensington submitted that the conduct is "*continuing conduct, all incidents being of a similar nature, beginning in the year in which [Ms K] sought and obtained registration as a social worker and continuing into the period in which she became registered.*"

9. On 4 January 2012 [Ms K] was working at the [ ] office of Oranga Tamariki (then Child, Youth and Family Services). As a result of concerns about her partner's daughter, [Ms P] and [Ms P]'s newborn, [Ms K] entered a Report of Concern (ROC) directly into CYRAS. She attached a contact record relating to a family violence notification for [Ms P] and her partner. [Ms K] said that before entering the ROC she contacted Oranga Tamariki's National Contact Centre (NCC). She anticipated that her concerns would be documented by the NCC. [Ms K]'s evidence was that she called from her work desk and was asked by the NCC worker to document the ROC herself, due to the NCC being overloaded with work. [Ms K] also said that she consulted a more senior person based in [ ] about the ROC.

10. The PCC provided statements from ten witnesses, and of those six gave evidence at the hearing. The remaining evidence was taken as read by consent. The PCC's witnesses who attended the hearing were:

    a. [Ms S], registered social worker and Practice Leader for Oranga Tamariki,
    b. [Mr U], registered social worker at the Oranga Tamariki National Contact Centre,

c. [Ms E], registered social worker, Supervisor at Oranga Tamariki,
d. [Ms I] registered social worker, Regional Senior Advisor, and
e. [Mr C[], Practice Leader for Oranga Tamariki.

11. Statements were received and considered from [Ms L], Clinical Psychologist; [Ms D], registered social worker and Family Harm Specialist for Oranga Tamariki; [Ms N], registered social worker; [Ms O] Senior Human Resources Advisor for Oranga Tamariki and Stacey Muir, Chairperson of the PCC.

12. The events the subject of the charge were up to 9 years old by the time this matter was heard and understandably the recollection of all witnesses was impacted by this. The Oranga Tamariki witnesses who gave evidence in person all varied in their view as to whether and to what degree it was appropriate for an employee to enter an ROC in the circumstances described. For example, [Mr U] and [Mr C] who worked with [Ms K] at the relevant time felt this would never be justified. [Ms E] took the view that a social worker could make a report about *any* child at any time if there was concern.

13. We do not intend to make a general finding about this. In [Ms K]'s case, we are focused on jurisdiction and whether the ROC was part of a course of continuing conduct that extended beyond her registration. The evidence of [Ms S] on this matter was compelling. [Ms S] was a Practice Leader based in [ ] and responsible for the [ ] site in January 2012. While she could not recall whether [Ms K] discussed the ROC, [Ms S] acknowledged that this did not mean a conversation did not happen. When re-examined on whether [Ms K] had asked about entering the ROC and what her response would have been, [Ms S] stated without hesitation:

> "… we would have said for her to do that…it's her information so she's not-um putting that information into our system at that time, CYRAS, she would have just been sitting there typing it. And there wouldn't have been any other staff around probably at that time that would have had the time to sit

down with her …It's just putting data into CYRAS. She's not making any decisions, she's not doing anything. It would be no different than picking up the phone and contacting our National Contact Centre and telling them information over the phone, or telling another colleague, to sit beside them while they inputted the data."

14. After 4 January 2012 the next date in Schedule 1 is 15 November 2012. The length of time between January and November does not support a finding that there was a continuing course of conduct. The ROC was a distinct incident. There was also no evidence that [Ms K] had started the registration process with the Board in early January. She was not provisionally registered.

15. Even if we had found that we have jurisdiction, we would not in the circumstances have determined that [Ms K]'s conduct on 4 January 2012 met the disciplinary threshold.

16. However, we do consider that [Ms K]'s access to CYRAS on 15 November 2012 is relevant to Particular 1 and within the Tribunal's jurisdiction. This date is one week before [Ms K]'s registration was issued. [Ms K] must have been required to provide detailed evidence of her competency to a Board approved competency assessment provider in support of her application for registration. This process must have started well before 15 November.

17. [Ms K]'s access to the CYRAS records of family or persons known to her on 15 November 2012 marks the beginning of a course of conduct that extended to 14 February 2013. As discussed in more detail below, [Ms K]'s evidence is that her access to the records in later November and December was a direct result of the events of 15 November 2012.

The disciplinary test

18. The PCC alleges that [Ms K] is guilty of professional misconduct pursuant to s82(2)(a), in reliance on a breach of the Board's Code of Conduct, or by virtue of the alleged misconduct bringing discredit to the profession pursuant to s82(2)(d). In the alternative, the PCC pleads that [Ms K]'s conduct amounts to conduct unbecoming that reflects adversely on her fitness to practise pursuant to s82(1)(b).

19. The onus of proving the charge rests with the PCC. The burden of proof in disciplinary proceedings is the civil standard, that is, the balance of probabilities. The more serious the allegation, the stronger the evidence that may be required to prove it: *Z v Dental Complaints Assessment Committee.*[3]

20. The Tribunal adopts a two-step process when assessing professional misconduct[4]:

    a. the first step is to make an objective analysis of whether [Ms K]'s acts or omissions can be reasonably regarded by the Tribunal as constituting a breach of the Code of Conduct, or as conduct which brings discredit to the social work profession;

    b. the Tribunal is then required to be satisfied that those acts or omissions require a disciplinary sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers.

21. The Tribunal is required to assess whether there has been a departure that is significant enough to warrant sanction when [Ms K]'s conduct is measured against

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[3] SC 22/2007; [2008] NZSC 55.

[4] F v Medical Practitioners Disciplinary Tribunal [2005] 3 NZLR 774

the standards of "competent, ethical and responsible practitioners."[5] The Tribunal was mindful that the relevant standards are those that applied in 2012 and 2013, not 2021.

22. The PCC submitted that the threshold should not be overstated, given that the primary enquiry is whether there has been a breach of the Code. We accept the PCC's submissions as to the two-step test but record that we do not consider that every breach of the Code will necessarily warrant a disciplinary sanction.

23. With regard to s82(2)(d) and the allegation of bringing discredit to the profession, the PCC referred to the requirement in the Code that a social worker is to avoid conduct that puts the reputation of the social work profession at risk or brings it into disrepute.

24. The PCC submitted that:

> "[28]…if the Tribunal forms the view that the conduct would be considered by members of the profession and the public to be unacceptable, or inappropriate, then it is conduct which puts at risk the individual's and/or the profession's reputation."

25. As for the alternative pleading of conduct unbecoming that reflects adversely on a social worker's fitness to practise, again this involves a two-step approach:

    a. an objective analysis of whether or not [Ms K]'s acts or omissions can be reasonably regarded as constituting conduct unbecoming of a social worker;

    b. the Tribunal must also then be satisfied that the acts or omissions reflect adversely on [Ms K]'s fitness to practise and require sanction for the

[5] B v Medical Council of New Zealand, HC Auckland, HC11/96, 8 July 1996 Elias J (noted as [2005] 3 NZLR 810

purposes of protecting the public and/or enhancing the professionalism of social workers.

26. As to the rider, it is not necessary to find that the social worker is not in fact unfit to practise.

27. As the Tribunal said in PCC v Moeke[6]:

> "[20] These approaches to the Tribunal's assessment of professional misconduct and 'conduct unbecoming' recognise that it cannot be that every departure from accepted professional standards or every unwise or immoral act by a social worker in his or her professional life should amount to professional misconduct for the purposes of section 82(1)(a), or 'conduct unbecoming' for the purposes of section 82(1)(b)."

Particular 1 – "*Between 4 January 2012 and 8 December 2015, [Ms K] accessed CYRAS records that related to her family members or other persons known to her.*"

28. Employees of Oranga Tamariki who use CYRAS are identified in the system by a unique code. With this code, access to CYRAS can be analysed using an electronic footprint that is created on each occasion that a record is opened. The footprint indicates when a record has been opened and if it has been edited. Generally, only the individual who makes an entry can edit it, but any person with access to CYRAS can make an entry. Every individual whose personal information is in CYRAS in relation to a case is also allocated a unique code. This means that the footprint shows by reference to these unique codes who has accessed CYRAS and whose records have been opened and/or edited.

[6] RSW11/D3/SWDT/2020

29. The CYRAS footprint relied upon in the charge was obtained in April 2018 following a complaint to Oranga Tamariki regarding the release of the report referred to in Particular 2. The complaint was made by [Ms R], who is the former wife of [Ms K]'s partner. Although the report was not obtained from CYRAS, the complaint led Oranga Tamariki to investigate [Ms K]'s access to confidential information relating to her family.

30. With the exception of the 2015 references, Schedule 1 sets out the dates and times on which [Ms K] accessed the records for her family or herself as a client when she was not allocated to those files as a social worker.

31. Dealing first with the three alleged incidents of inappropriate access to CYRAS in March, November and December 2015, these do not relate to [Ms K]'s family. After some exploration of the 2015 entries with [Ms K], Ms Kensington accepted that there was a legitimate explanation for these. [Ms K]'s explanation was as previously accepted by Oranga Tamariki, that she had attached her personal ID not her professional ID number to three clients in error. The PCC's primary witness on the CYRAS footprint, [Ms I], did not make this concession. No application to amend the charge was made but it is clear that these entries should not have been included.

32. At the time of the employment investigation in 2018, Ms I was a Regional Senior Advisor for Oranga Tamariki. [Ms I] obtained the CYRAS activity report. [Ms I] confirmed that the footprint shows the date and time at which a record is accessed but does not show the length of time it is kept open. It is possible to have more than one CYRAS record open at one time. [Ms I] confirmed that the only instances when [Ms K] edited the relevant CYRAS records were on 4 January 2012 and 15 November 2012.

33. [Ms I] explained that merely searching a person's name in CYRAS does not create a footprint. This only occurs when a record is opened. Once a file is open [Ms I] explained that each "click" of the mouse results in a footprint so that each item in the activity report represents a manual action within CYRAS. Multiple results occurring very close together may be explained by a reader moving quickly through (for example) a drop-down menu or from subject line to subject line to access the desired record. [Ms I] said:

> "I would surmise in our system you can literally go from subject line to subject line to subject line and you can read the file without actually opening it, and so you could easily be able to browse something, go to the next one, browse that, go to the next one, browse that, in quick succession."

34. Where an employee has a personal connection with an individual who is a client of Oranga Tamariki all witnesses including [Ms K] were unanimous that this presents a conflict of interest. It was also agreed that when the employee becomes aware of such a situation, they should ensure that this is brought to attention, whether this be to the supervisor, site manager or Practice Leader.

35. Where a personal connection exists, the Tribunal heard that the case file should be given a confidential classification within CYRAS, meaning there can be no deliberate or inadvertent access other than by the allocated social workers and the Site Manager. Only a supervisor or site manager at the site to which the file is allocated can make the file confidential. This is intended to protect both the subjects of the case file, and the social worker. It is not uncommon for an employee who is not allocated to the file to require access and in this situation the confidential designation is removed by the person who placed it (or whomever has authority to do so). The file should then be made confidential again as soon as practical after that authorised access has occurred. [Ms I] stated:

> "[24] However, a lot of our cases are made "un-confidential" because there are people that need to access them that cannot if they are made

confidential, for example our admin or legal team. Sometimes, our staff forget to make the cases "confidential" again after they have accessed them."

36. The confidential classification that all witnesses were clear ought to have been applied to the CYRAS records of [Ms K]'s family was not carefully enforced. For lengthy periods the files were not confidential. This includes the period 15 November 2012 to 14 February 2014. [Ms K] was only able to access the records referred to in Schedule 1 because they were not made confidential until 28 February 2013. [Ms I]'s evidence showed that the confidential designation was taken off for brief periods after 28 February and remained off from 31 October 2013 until 26 August 2016. [Ms K] did not access the records after 14 February 2013.

37. [Ms K] stated that in November 2012 she was asked to enter her home address details into CYRAS for the purposes of a Family Group Conference which she was to attend with her partner. She said this request was made either by the social worker for the children whose care was to be discussed at the conference, or the FGC Coordinator. [Ms K] stated that the Coordinator told her that she would also enter a case note to confirm the request had been made of [Ms K]. [Ms K] said that her subsequent access to the records in 2012 was to check if this entry had been made.

38. The CYRAS footprint shows 21 entries for 15 November, the first being at 2.36.52pm and the last at 4.09.36pm. [Ms K] entered her address as a case note at 2.55.59pm. [Ms I] identified that the records accessed were a range of case notes, FGC consultations, Family Group Conference referrals, a Care Protection Resource Panel Advice, a Family Whānau Agreement and a Family Group Conference invitation list. According to the analysis produced by [Ms I] these records were entered between 31 January and 15 November 2012, including

records in March, April, May, June and October 2012. There was some evidence that CYRAS records appear chronologically, with the inference [Ms K] ought not to have had any reason to access records pre-dating 15 November when her entry was made, and the FGC Coordinator's note would be entered on or after this date.

39. On 20 November 2012 [Ms K] accessed the CYRAS records of her partner's family on three occasions within the space of less than two minutes. [Ms K] stated that she would have been checking if the FGC Coordinator had yet left a note. The records accessed were two separate FGC consultation notes dated 15 November 2012.

40. On 22 November [Ms K] accessed the CYRAS records on 17 occasions over about 7 minutes. Again, [Ms K]'s explanation was that she was looking for the FGC Coordinator's note. Some of the records viewed pre-date 15 November. On 26 November [Ms K] briefly accessed the records over the course of one minute, and again on 30 November accessed a variety of records for a period of about three minutes. [Ms K] again accessed the CYRAS records of her partner's family on 3 and 5 December 2012 over similarly short periods of time. We bear in mind that the length of time the records were open is not known but the timing does appear to be consistent with 'clicking' through headings, and skim reading documents in the way that [Ms I] described could occur.

41. The date of the Family Group Conference was not confirmed but was presumed by the witnesses to be 15 November 2012. [Ms K] and her partner completed a caregiver application for two of her partner's grandchildren at the time of the conference. [Ms K] had regular contact with the social worker allocated to these children, [Mr U]. [Ms K] described unexplained delays in the caregiver application being processed and needing to make another application. She recalled discussing the caregiver application with a manager in Oranga Tamariki's regional office.

42. [Ms K] accessed the caregiver application and files of her partner's family on 30 January, 1, 4 and 14 February 2013. [Ms K] said that she was asked by a senior regional manager, [Mr Y], to look at the application file. Precisely what she was asked to look at [Ms K] could not recall, but she was adamant that the request was made, and it related to the delays with the application.

43. The PCC argued that [Ms K] was not asked or permitted to enter or search the relevant CYRAS records on any occasion. The PCC relied in part on the names [Ms K] gave during the employment process as persons who had given permission for her to access the CYRAS records, and that neither the name of the FGC coordinator or regional manager were said to be amongst these. [Ms K] disputed this. The documents included in the Agreed Bundle from the employment process were not determinative. The Tribunal took a cautious approach in relation to that material (which the Tribunal would not ordinarily expect to receive in an Agreed Bundle). It was entirely possible that it did not represent a complete copy of information given by [Ms K] or her representative to Oranga Tamariki.

44. The PCC submitted that even if requests were made of [Ms K] to access CYRAS she had the option of declining and it was incumbent on her not to access family records. We agree that [Ms K] did have options such as to spell her address over the telephone or send an email containing her address. It was also open to her to refuse to access the records.

45. The Tribunal accepts [Ms K]'s evidence as to two requests giving rise to a genuine belief that one-off access to the records was authorised. [Ms K] gave concessions freely as to her conduct and matters going against her, such as knowing that family records were confidential. She was open about her family's involvement with Oranga Tamariki, her concerns about this and she has consistently claimed to have been asked to access the records.

46. However, the Tribunal also finds that other than when she entered her address, and when she looked at the caregiver application on request, [Ms K] accessed confidential records without justification. By her own admission she was motivated by what she thought were the best interests of the children and would do what she felt was necessary in that regard. We find that on the balance of probabilities [Ms K]'s concerns about her step-grandchildren led her to view CYRAS files which she knew were confidential. [Ms K] allowed her personal interests to override her professional obligations to respect the privacy of Oranga Tamariki clients and to respect the confidentiality of CYRAS records.

47. Pursuant to s105 of the Social Workers Registration Act 2003 the Board may issue a Code of Conduct. Section 105 provides:

> (1) The Board must issue and maintain a code of conduct covering the minimum standards of integrity and conduct that-
>
> a. Apply to social workers; and
>
> b. Should apply generally in the social work profession.

48. The Board issued a Code of Conduct in 2008, and a further version in 2014. [Ms K] stated that she received no induction training when she started her employment with Oranga Tamariki and no specific training in the Code. Under cross-examination [Ms K] acknowledged that she was unfamiliar with the Code at the time. She said she now would expect herself to be familiar with it, but at the time was under intense pressure with no time to think about professional development.

49. We have considered the 2008 Code in relation to [Ms K]'s conduct in 2012 and 2013. [Ms K] worked in a high stress environment with a heavy workload, intermittent supervision and little time for professional development and reflection. [Ms S] confirmed the immense pressure on staff at the [ ] site. This was

also the case when [Ms K] first moved north to [ ]. However, as a registered social worker the minimum standards of ethical behaviour described in the Code did apply to [Ms K].

50. We find that [Ms K] acted in breach of Principle 1 in failing to avoid a conflict of interest when she accessed CYRAS for personal purposes and without consent. We also find a breach of Principle 3 which sets out the importance of respecting a client's right to privacy and the confidentiality of information provided in the course of the professional relationship.

51. On its own the fact that [Ms K] entered her address into the CYRAS records on 15 November 2012 in the circumstances described does not meet the threshold for disciplinary sanction. However, that entry was not the first of [Ms K]'s access to the records on that date. When considered as part of a course of conduct over the period 15 November 2012 to 14 February 2013 the threshold for discipline is met.

Particular 2 – "In December 2016, [Ms K] provided a confidential report to the Family Court as part of an application by [Ms P], the daughter of [Ms K]'s partner, [Mr P], to have [Ms P]'s two children, [ ] and [ ], returned to [Ms P]'s care."

52. On 2 July 2013 [Ms K] and her partner underwent a parenting assessment arranged by Oranga Tamariki's Specialist Services, which was carried out by [Ms L], clinical psychologist. [Ms L]'s report is dated 15 July 2013 and she emailed a copy of this to [Ms K] at her work address on 18 July. A copy of the report was also posted to [Ms K] and her partner. Particular 2 relates to [Ms K]'s decision in December 2016 to annex the report to an affidavit filed in the Family Court in support of a without notice application by [Ms P] for day-to-day care of two of her children. [Ms K]'s affidavit was sworn on 15 December 2016.

53. The parenting assessment was prepared for the purposes of assessing [Ms K] and [Mr P]'s ability and suitability to provide long term care for two of their grandchildren in 2013. The report states that it is to be read in conjunction with two other reports, one being an earlier report on [Ms K] and her partner and the other being a psychological report on the children's parents.

54. Importantly, the report relies on several sources of information including information obtained from the supervising social worker for the children and CYRAS records. [Ms K]'s evidence was that [Ms L] had access to the Child, Youth and Family records for all members of the family.

55. At the top of the first page there is a stamped bold-type statement:

> "This report is CONFIDENTIAL and should not be copied or released without the permission of Specialist Services. Caution should be used in relying on this information following the passage of time, or significant changes in the circumstances of children, young people or family involved."

56. [Ms K] and her partner were emphatic that as the report held their own personal information, they could use it as they saw fit. They minimised the extent to which the report contained information about others including [Mr P]'s ex-wife, [Ms R]. Both relied on permission from [Ms P] to use the report given it discussed [Ms P] and her children. They did not approach Specialist Services to discuss the release of the report or seek their permission to use it.

57. The content of [Ms K]'s affidavit was not the subject of the charge, but the affidavit was before the Tribunal. It contained the following statement:

> "During the CYF proceedings for [Ms P]'s two older children, we were going to be care-givers. During the course of those proceedings a psychological

assessment by specialist services was undertaken on our ability to be caregivers. This was due to the allegations and "mudslinging" of [Ms P]'s mother. Attached hereto and marked with a letter "A" is a copy of that assessment. I have authority to release this assessment as it was provided to us by Child, Youth and Family as it contains our personal information."

58. [Ms K]'s affidavit then goes on to discuss the children's maternal grandmother, [Ms R], in critical terms. While the formatting of the affidavit makes it appear that she is referring to [Ms L']s report in giving her opinion of [Ms R], [Ms K] clarified that she was referring to a psychological report about [Ms R] that was exhibited to [Ms P]'s affidavit filed in the same proceedings. This reinforced the Tribunal's impression that [Ms K] did use confidential information when she felt this would serve her purpose, when it clearly could not be considered her personal information[7].

59. Ms Kensington cross-examined [Ms K] about the length of time between the writing of the report in July 2013 and the filing of her affidavit in December 2016. [Ms K] did not consider this problematic as she said her situation had not changed. However, she acknowledged that in her practice if presented with a potentially outdated report she would make further enquiries to ascertain whether it was still relevant.

60. When asked about the confidentiality statement on the report [Ms K] explained her understanding that this was included to avoid the misuse of reports by agencies other than Oranga Tamariki, such as the Police, and to protect young persons named in such reports. She also suggested she did not read the statement.

61. The cautionary statement at the top of the report speaks for itself. It is intended to protect the author and report's subjects by ensuring that the report is used for

[7] The Tribunal did not have, or require, the psychological report that [Ms K] referred to.

its intended purpose. It reflects that the report's contents may no longer be correct if a significant period of time has elapsed since it was prepared.

62. Care is required when using mixed information that is confidential in nature. By [Ms K]'s own admission, [Ms L] had access to what she described as "generations" of family records. The report indisputably contains information about people other than [Ms K] and [Mr P] and some of that information had the potential to cause harm or distress.

63. The Board issued a revised Code of Conduct in March 2016. As with previous versions, the 2016 Code primarily relates to professional conduct but acknowledges the possibility that conduct within a social worker's personal life may reflect upon their professionalism. The Preamble to the Code states that in addition to an expectation of "exemplary standards" in their practice:

> "Because they are in positions of trust and confidence they must also have high standards in their personal lives. We expect that every social worker will understand and adhere to this Code."

64. Principle 1.1 sets out the expectation that a social worker will "act honestly and ethically in all personal and professional behaviour." Principle 7 refers to the importance of maintaining a client's confidentiality and privacy. In this Particular, [Ms K] did not use information gathered in her professional role, however Principle 7 sets a high standard for social workers to be aware of the importance of privacy and confidentiality of information collected in the course of social work.

65. Finally, Principle 9 provides that a social worker should maintain public trust and confidence in the social work profession. This creates an expectation that social workers will "maintain a high standard of professional and personal behaviour,

avoid activities, work or non-work that may in any way bring the social work profession into disrepute."

66. The Tribunal finds that in attaching [Ms L]'s parenting assessment to her affidavit in circumstances where she ought to have carefully reflected on whether this was appropriate and consulted Specialist Services, [Ms K] acted in breach of the Code.

67. When considered cumulatively with Particular 1 the Tribunal finds that this warrants disciplinary sanction.

Penalty

68. Having found the charge proved the Tribunal is required to consider whether a penalty ought to be imposed. The penalties available to the Tribunal are set out in section 83 of the Act.

69. The well-established principles for penalty in disciplinary proceedings are set out in *Roberts v Professional Conduct Committee*[8] and applied by this Tribunal. These are, in summary:

    a. the Tribunal should impose the penalty most appropriate to protect the public. In part this may be achieved by deterring other practitioners from behaving in a similar way;

    b. the Tribunal has an important role in the setting of professional standards;

    c. the penalties imposed may have a punitive function, notably censure and fine, but the setting of standards and protection of the public are the most important factors;

[8] CIV 2012-404-003916; [2012] NZHC 3354 at [44] – [55]

d. the Tribunal's penalty should, where appropriate, take into account the rehabilitation of the practitioner;

e. the penalty should be comparable to those given in similar circumstances. Each case does require careful assessment of its own facts and circumstances;

f. the Tribunal should reserve maximum penalties for the worst offenders;

g. the penalty imposed should be the least restrictive that can reasonably be imposed in the circumstances;

h. the penalty should be fair, reasonable and proportionate.

70. The Tribunal has considered the aggravating and mitigating factors relevant to [Ms K]. A significant portion of the evidence related to the work environment [Ms K] was practising in, particularly in 2012 and 2013 but also in 2016. The scales are tipped strongly on the side of mitigation.

71. The main aggravating factor is [Ms K]'s knowledge in 2012 and 2013 that CYRAS records belonging to family and those with whom she had a personal connection were confidential. By 2016, [Ms K] had undertaken further training and supervision, and described a much greater capacity for self-reflection. Despite this, [Ms K] did not exercise the awareness and care that her professionalism required with regard to the use of the confidential report in Family Court proceedings.

72. [Ms K] acknowledged difficulty in separating being a social worker from her response to situations in her personal life. She is also adamant that her subsequent

experience and growth as a practitioner would allow her to avoid similar situations arising if she returns to practice. The Tribunal accepts that but also notes that some of [Ms K]'s evidence displayed a lack of circumspection when discussing others.

73. In terms of mitigating factors [Ms K] did not deny her actions. Despite being unrepresented and the complexity of much of the PCC evidence related to CYRAS she participated in all aspects of the proceedings including attending the hearing, giving evidence, cross examining witnesses on salient matters and making brief submissions. [Ms K] was entitled to defend the charge and it is relevant to penalty that the Tribunal did not find the whole of the charge made out.

74. Overwhelmingly the evidence was that at the relevant times [Ms K] was working in exceptionally difficult and pressured circumstances with very heavy caseloads including highly complex cases. [Ms K] described experiencing trauma as a consequence of the nature of her work and her workload. She stated that access to supervision was inconsistent, particularly while she was working in [ ]. [Ms S] agreed that for [Ms K] and others at the [ ] site at the relevant time, supervision was "ad hoc" and the social workers were working in a "pressure cooker." [Ms S] estimated that [Ms K] had a caseload of 70 children across a huge geographical area.

75. [Ms K] said, and the PCC witnesses agreed, that she was a hardworking social worker, was passionate and focused on helping children and worked very long hours above and beyond what was strictly required of her.

76. As above, the Tribunal has accepted that in relation to two instances of access to confidential CYRAS records [Ms K] believed that she had the authority to access these. The Tribunal also acknowledges [Ms K]'s reliance on a legal advisor when exhibiting [Ms L]'s parenting assessment to her affidavit.

77. Undoubtedly [Ms K] was committed to her work with Oranga Tamariki. The impact of losing her job following an employment investigation into the matters in this charge, and these unfortunately extended disciplinary proceedings, has been profound. [Ms K]'s evidence included the following:

> "[78]. I have found it incredibly difficult to talk about what happened [as] all I ever wanted to do was work for Oranga Tamariki and create better lifelong outcomes for children and their families. I never wanted to do any other job. Even whilst working at Oranga Tamariki there was often conversations about the future [but] I never thought I would leave.
>
> [79] I poured my heart and soul into my job, gave up a lot for that job, to me this was [not] just any job this was my passion this was my life, all I wanted to do even on the really hard days, the stress everything, this is all I wanted. I believe I was a very good social worker and I empowered people to make change.
>
> [80.] I have been financially ruined by the loss of my job I no longer have a credit rating … I have not practiced [sic] since I lost my job it broke me; I still feel broken by this. I have never denied what I did and have many times said I would never do it again as seen by the CYRAS footprint no incidences had occurred for several years and there was rationale for why they did in the first place."

78. The PCC submitted that the appropriate penalty was censure, conditions on [Ms K]'s practice and, but for the passage of time, suspension. Counsel referred to several professional disciplinary cases involving access of confidential records. The most apt is this Tribunal's decision in RSW X[9] in which the social worker undertook work on files for family members and accessed the CYRAS records of a number of

[9] RSW5/D2/SWDT/2016

family members over the period of 3 years. On some occasions RSW X had the permission of her supervisors but largely acted in breach of confidence and in breach of her obligations under the Code of Conduct. The Tribunal imposed censure, conditions and a fine.

79. The Tribunal concurs that censure and tailored conditions are appropriate. We do not find this is a case in which suspension is necessary for the protection of the public or the maintenance of professional standards. [Ms K] has already spent an extended period of time away from social work practice. The more serious penalties should be reserved for the more serious cases and imposed where none of the available penalties are sufficient for the primary purpose of protecting the public.

80. The Tribunal has considered the conditions that are appropriate for the purposes of protecting the public, setting and maintaining professional standards and assisting [Ms K] with rehabilitation should she return to social work practice. Conditions should reflect the areas of concern that led to the disciplinary finding. In this case we intend to set out conditions that focus on assuring appropriate supervision and supporting [Ms K] with regard to professional boundaries and confidentiality.

81. The Tribunal considers that conditions which ensure that [Ms K] receives regular professional supervision in addition to supervision of her casework, and that includes a focus on the maintenance of professional boundaries and confidentiality, is appropriate. Such supervision should also include reflection on the Code of Conduct and professional ethics. The Tribunal encourages [Ms K], if she intends to return to social work, to also consider availing herself of the relevant training that may be freely available to her (as to other members of the profession) through such bodies as the Aotearoa New Zealand Association of Social Workers.

Costs

82. At the close of the hearing [Ms K] was provided with an opportunity to provide the Tribunal with a declaration of her financial means and submissions in relation to costs. Counsel provided submissions in reply on 10 September and the Tribunal reconvened by teleconference on 15 September to consider what if any costs order was appropriate.

83. Costs are discretionary. The guiding principles of costs in professional disciplinary proceedings are well-established and we adopt the following[10]:

    a. The profession should not be expected to bear the full weight of costs in a disciplinary proceeding.

    b. Those who are found guilty of a professional disciplinary charge and are found guilty should make a proper contribution towards costs.

    c. The Tribunal should take into account the social worker's means, if evidence of this is available.

    d. Social workers have a right to defend themselves and should not be deterred from doing so by the risks of a costs order.

    e. In reliance on *Cooray v PPC*[11] which this Tribunal has followed previously, the starting point is 50% of reasonable costs with a discretion to adjust depending on the circumstances of each case.

[10] Vatsyayann v Professional Conduct Committee [2012] NZHC 1138
[11] Cooray v Preliminary Proceedings Committee AP23/94, 14 September 1995, Doogue J

84. The PCC's costs in this case were $18,102.76 for the investigation and $27,731.70, a total of $45,834.46. The Tribunal's costs were $31,004. While other cases have been considered, the variation in hearing length, nature and complexity of proceedings and the financial circumstances of those appearing before the Tribunal has led to a wide range of orders.

85. In determining costs in this case, the Tribunal has considered several factors. First, in relation to the prosecution the charge was not proved in its entirety. A significant portion of the hearing covered [Ms K]'s entry of the Report of Concern and circumstances surrounding that. The Tribunal did not have jurisdiction over [Ms K]'s conduct in January 2012, when she was unregistered. The evidence of the witness most closely connected to that event (Ms S) was such that even if the Tribunal had jurisdiction, that aspect of the charge would not have been made out. Preparation and hearing time was also spent addressing the 2015 CYRAS entries that were included in Schedule 1 to the charge. The Tribunal is of the view that those entries should not have been included in the charge.

86. The passing of time and the lack of contemporaneous records other than the CYRAS footprint meant it was difficult for the witnesses to be specific in their recollection. Some of the PCC witnesses could not directly comment on the key issue in contention, as they were not the persons identified by [Ms K] as giving her authority to access the CYRAS records of those close to her, or their involvement with [Ms K] was not during the periods relevant to the disputed matters in the charge (Ms E, Ms D, Mr C). In addition, very similar fact evidence was called from the social worker witnesses at not-insignificant cost.

87. With regard to [Ms K], she was entitled to defend the charge. [Ms K] was to the point with her cross examination and any submissions made. However, [Ms K]'s evidence and that of [Mr P] was extensive and to some extent not relevant to the charge (though no objection was made by counsel).

88. [Ms K]'s difficult financial position was referred to in her evidence, and she provided a declaration of her financial means after the hearing. [Ms K] has not worked as a social worker since leaving Oranga Tamariki in August 2018. The Tribunal understands [Ms K] to be keen to resume social work but that she was unwilling to do so pending resolution of these proceedings. The COVID-19 pandemic has meant two adjournments of this matter were necessary and prolonged the resolution of this matter well beyond what would have been accepted.

89. We are satisfied on the evidence [Ms K] has very limited capacity to meet any costs order and order a contribution well below what we would otherwise have done had her financial situation been improved. [Ms K] will be required to pay $2,500. Although minimal in terms of the costs incurred from [Ms K]'s perspective we acknowledge this will be significant. The profession is in this case bearing the significant brunt of the costs that have been incurred. Pursuant to section 87(2) of the Act, costs are recoverable by the Board as a debt due and it is a matter for the Board and the social worker to enter into any arrangements regarding the payment of costs.

Non-publication of name and identifying particulars

90. The starting point is that hearings of the Tribunal are to be public. Section 79 affords the Tribunal the ability to make non-publication orders either in response to an application, or of its own volition. This can include in relation to any report or account of any part of a hearing, documents produced at the hearing, and the name or particulars of the affairs of any person. In making an order the Tribunal is required to have regard to the interests of any person including the privacy of the complainant, and to the public interest. The Tribunal may make an order if it is satisfied that it is desirable to do so taking these interests into account.

91. Up until the hearing, non-publication orders were in place for [Ms K]'s family members identified in the charge. At the conclusion of the hearing Ms Kensington advised that the PCC was not opposed to permanent orders being made in relation to [Ms K] also, for the purpose of protecting the privacy of her partner and his family. [Ms K] confirmed that she is in favour of her name and identifying particulars being suppressed.

92. Several of [Ms K]'s family and the family of her partner are identified in the evidence before the Tribunal. This includes young children. With the exception of [Ms K]'s partner, these people did not give (and were not required to give) evidence. Much of the evidence before the Tribunal is of a private and sensitive nature and relates to a specific group of people within [Ms K]'s family circle, rather than her social work clients or members of the general public. A significant amount of time has also passed since the matters the subject of the charge, and while it will not always be the case for historical conduct, the Tribunal considers that there is no overriding public interest in publishing [Ms K]'s name in relation to these matters. [Ms K] has not been the subject of any other disciplinary proceedings before this Tribunal.

93. We consider that the areas of concern the charge raises can be addressed with conditions, and without the need for [Ms K]'s name to be published to protect the public. An order suppressing [Ms K] and identifying particulars is desirable having regard to the interests of the public, and [Ms K]'s interests.

94. There will also be a permanent order suppressing the name of the complainant and the names and identifying particulars of members of [Ms K] and her partner's family who were identified in the evidence before the Tribunal.

Orders

95. Accordingly, the Tribunal makes orders as follows:

a. [Ms K] is censured.

b. [Ms K] is subject to the following conditions:

i. [Ms K] must notify any prospective employer with whom she is to be employed as a social worker of the outcome of these disciplinary proceedings.

ii. For a period of 12 months commencing on her return to social work practice, [Ms K] is to undertake monthly supervision in addition to her work-required supervision, and which is to include maintenance of professional boundaries, confidentiality, professional ethics and the Board's Code of Conduct.

c. The name and identifying particulars of [Ms K], her partner, and her partner's family are suppressed.

d. [Ms K] is to pay costs in the sum of $2,500.

DATED at Auckland this 20th day of September 2021

Catherine Garvey
Deputy Chairperson
Social Workers Complaints and Disciplinary Tribunal