Before the Building Practitioners Board
At Christchurch

BPB Complaint No. C2-01452

	Under the Building Act 2004 (the Act)
IN THE MATTER OF	A complaint to the Building Practitioners Board under section 315 of the Act
AGAINST	Hamish McLeish, Licensed Building Practitioner No. BP 117510

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 13 July 2016 in respect of Hamish McLeish, Licensed Building Practitioner (the Respondent).

[2] The complaint alleged the Respondent has, in relation to building work at [Omitted]:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 9 June 2012.

[4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).

[5] The following Board Members were present at the hearing:

Chris Preston	Chair (Presiding)	Layperson
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer
Dianne Johnston	Board Member	Registered Building Surveyor

[6] The matter was considered by the Board in Christchurch on 24 January 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[7] The following other persons were also present during the course of the hearing:

Gemma Lawson	Board Secretary
Elizabeth Nicholls	Board Secretary
Hamish McLeish	Respondent
[Omitted]	Complainant
[Omitted]	Complainant
Ron Pynenburg	Special Adviser to the Board
[Omitted]	Witness, Licensed Building Practitioner, Design Area of Practice 2 (by telephone)
[Omitted]	Witness, Engineer, Kirk Roberts

[8] No Board Member declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

[9] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

[10] On 26 September 2016 the Registrar prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.

[11] On 20 October 2016 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and

(c) has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

[12] The Board requested a Special Adviser be appointed to prepare a report in respect of a related complaint and for the report to be included in the documents for this matter. Ron Pynenburg's report dated 8 December 2016 was received and circulated to the Respondent and Complainant.

[13] The Board considered consolidation of a related hearing C2-01451 was appropriate. Consolidation requires the consent of both Respondents. Neither consented so the matters were to proceed as separate hearings.

[14] On 11 December 2016 a pre-hearing teleconference was convened by Chris Preston. The Respondent was present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

[15] On the day of the hearing and prior to it commencing the Respondent, the Respondent for C2-01451 and the Complainant for both matters agreed to the matters being consolidated. The hearing proceeded as a consolidated hearing with C2-01451.

Function of Disciplinary Action

[16] The common understanding of the purposes of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom[1].

[17] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[2]:

> *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[18] In *McLanahan and Tan v The New Zealand Registered Architects Board*[3] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[19] The same applies as regards the disciplinary provisions in the Building Act.

[20] It must also be noted that the Board has jurisdiction only with regard to "the conduct of a licensed building practitioner" and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

[21] The hearing commenced at 11.35 a.m.

[22] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

[23] The allegations related to the construction of foundations and subfloor framing by the Respondent for the relocation of an existing dwelling that had been transported from

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[1] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[2] [1992] 1 NZLR 720 at p 724
[3] [2016] HZHC 2276 at para 164

another site. The Complainant alleged that the Respondent had been negligent in respect of the foundation being out of square and being too large, the manner in which the subfloor was completed including notching of bearers, the use of galvanised fixings where stainless should have been used and in respect of not allowing adequate drainage cavities in flashings. The Complainant also alleged that these aspects of the building work completed did not comply with the building consent issued.

[24] There was also an allegation that the Respondent failed to provide a record of work on completion of restricted building work.

[25] A related complaint was made against [Omitted], a licensed building practitioner who completed the consented design for foundations and subfloor ("the Designer").

Evidence

[26] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority *is Z v Dental Complaints Assessment Committee*[4] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*
>
> *[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

[27] The Complainants owned a residential dwelling located in a red zone area of Christchurch. They wanted to move it to a new site. They contracted the work to Kings House Relocations and engaged the Designer to develop plans to obtain a building consent which was issued on 25 September 2014. The designer had a licensed building practitioner measure the building in its old location. The measurement was to the outside perimeter of the building.

[28] Kings, in turn, contracted the Respondent to carry out the construction of the foundations required at the new site. He was later contracted to also construct the subfloor framing. He set out and built the foundations to the dimensions shown on

[4] [2009] 1 NZLR 1

the consented plans. He did not measure the dimensions of the relocated dwelling which was on site or check it was square. He carried out the removal of subfloor bearers to allow the positioning of steel beams to be used for the lift.

[29] When the dwelling was moved onto the new foundation it was found that the foundation dimensions were some 90 mm larger than the subfloor of the dwelling and that the alignment was out.

[30] The dwelling was then positioned on the foundations in such a manner that the building was set back on the piles. Packers were installed to close the gap between the sub-frame and the outside of the piles. A flashing was to be designed and installed to weatherproof the junctions.

[31] [Omitted], an engineer, reviewed the floor and remedial work and assessed that no further sub-floor timber was required. He noted that notching of bearers had taken place but accepted at the hearing that what appeared to be notched bearers was actually timber packing.

[32] The Respondent fixed the subfloor to the foundation. He used galvanised fixings in areas where the fixings were within 600mm of ground level. He acknowledged that stainless steel fixings were required but stated that he was unable to source any, having tried both Placemakers and Bunnings on the day. His intention was to leave the galvanised fixings in place and add stainless steel fixings at a later time. This work did not proceed due to a dispute between the Complainants and the main contractor.

[33] The Respondent, in his written response to the complaint stated:

> *To my knowledge consented plans are working drawings, and if the architect and surveyor are going to draw and set out something that is not relevant to what we are working on then maybe they should state this very clearly as we were advised by Lynda that the architect had come and measured this building.*

[34] The Special Adviser noted the following with regard to notations on the plans in his report:

> *6.1 Foundation plan dimensions*
>
> *6.1.1 The foundation plan is effectively not dimensioned, and this is as it should be. The house sub-floor framing, to which the new foundations must fit, exists and was present on site. The foundations must therefore be built to make the sub-floor framing, and that is achieved by the builder measuring the as-built structure on site and building the foundation to suit.*
>
> *6.2 Floor plan dimensions*
>
> *6.2.1 The floor plan is fully dimensioned, and this is neither necessary nor desirable. Dimensions should only be provided where the builder requires an instruction as to the set out or location of new building work.*
>
> *6.3 Contractor shall verify all dimensions on site*
>
> *6.3.1 For building work to existing buildings, it is standard industry practice to include a note on the drawings to the effect that "the Contractor*

shall verify all dimensions on site". I do not see such a note anywhere on the drawings.

6.3.2 However, the absence of such a note does not require or permit the contractor to solely rely on any dimensions provided. While dimensions are noted on the floor plan, as noted in 6.2.2 it is unclear thaw there represent. The required foundation dimensions will be different and there is not set adjustment that can be applied from floor plan to foundation layout dimensions. The Contractor has no usable reliable dimensions on the floor plan and must make their own site measurements for the set out of the foundations.

6.3.3 Even though the standard note has not been provided on these drawings, the net result is the same – the contractor will have to verify all dimensions on site if they are to build the new foundations to suit the existing subfloor of the relocated house.

[35] At the hearing the Special Adviser noted the importance of onsite measurements to confirm dimensions especially as regards the subfloor framing sizes. The Respondent reiterated his reliance on the plans.

[36] The Respondent did not provide a record of work for the restricted building work he carried out and stated at the hearing that he has still not completed one. The reason he gave for not having done so was that the work was not complete.

Boards Conclusion and Reasoning

Negligence

[37] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*[5]. Judge McElrea provided guidance on the interpretation of those terms:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
>
> *[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*
>
> *[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

[38] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[6] as regards the threshold for disciplinary matters:

> *[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by*

[5] Judge McElrea, DC Whangarei, CIV-2011-088-313

[6] [2001] NZAR 74

> *competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[39] The Board accepts that the subfloor bearers had not been notched. The matters that require consideration as regards negligence are the failure to measure the dwelling on site prior to constructing the foundations and the use of galvanised fixings where stainless steel were required.

[40] Dealing first with the fixings the Board accepts that the Respondent was aware that stainless steel fixings were required and that he took steps to try and obtain the same. Given time constraints and the need to make sure the building was fixed to the foundation it was reasonable to use galvanised provided they were to be replaced. The Board also accepts that the Respondent intended to return and remediate but was not able to do so as a result of a dispute between the Complainant and the main contractor. Given these factors the Board does not find the Respondent was negligent or incompetent with regard to the fixings.

[41] Turing to the failure to site measure the Board finds that the Respondent was negligent in not doing so prior to the carrying out the construction of the foundations. The failure to do so was contributed to by the Designer but the Board finds the evidence of the Special Adviser that measuring on site is accepted and good industry practice compelling. As such, notwithstanding the contribution by the Designer, the Board finds the causation of the issues that resulted from the failure to measure lie mainly with the Respondent.

[42] Given this finding and the evidence that site measurement is an accepted and good industry practice the Board finds that the Respondent has exhibited a serious lack of care judged by the standards reasonably expected of a licensed building practitioner and has accordingly been negligent (but not incompetent).

Contrary to a Building Consent

[43] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[44] In *Tan v Auckland Council*[7] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[45] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process

[7] [2015] NZHC 3299 [18 December 2015]

Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[46] In this instance, however, the Board accepts that the changes to siting were, as regards the building consent, minor and were accepted as being compliant with the building code by an engineer. In terms of the changes to the subfloor fixings the Board has already noted its acceptance of the Respondent's explanation in this regards. Accordingly the Board does not find that there has been any disciplinary offending in respect of the building consent.

Record of Work

[47] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[8].

[48] Failing to provide a record of work is a ground for discipline under s 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[49] The Board discussed issues with regard to records of work in its decision C2-01170[9] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[50] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.

[51] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in s 88(1) simply states "on completion of the restricted building work …".

[52] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where completion for the purposes of the Act and the provision of a record of work arises before the intended work has been completed.

[53] This is what occurred in the present case. The contractual engagement by the main contractor came to an end and so did the Respondent's engagement. It would or should have been clear to him that he would not be able to return and carry out any further work and as such should then have provided a record of work. One has still not been provided and no good reason under s 317(1)(da)(ii) of the Act has been given other than non-completion.

[54] Given the above the Board finds that the disciplinary offence has been committed.

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[8] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[9] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Board Decision

[55] The Board has decided that the Respondent has not carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[56] The Board also finds that the Respondent has:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and

(b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and should be disciplined.

Disciplinary Penalties

[57] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act[i].

[58] The Board's Complaints Procedures allow the Board either to set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.

[59] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration.

[60] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on, the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are further matters which the Board should take into consideration.

[61] As stated earlier the purposes of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct.

[62] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[10] has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

> *[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.*
>
> *[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of*

[10] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

> *punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[63] In *Lochhead v Ministry of Business Innovation and Employment*[11], an appeal from a decision of the Board, the court, in respect of penalty noted:

> *[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*
>
> *[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

[64] The Board has found that two disciplinary offences have been committed and this needs to be recognised in the disciplinary penalty. The Board considers the negligence offence is a more serious matter than the record of work offence but with regard to both, the level of offending is at the mid to lower end of the scale. The Board does note, however, the significant impact the offending has had on the Complainant and has taken this into account.

[65] Given the above the Board considers a fine is an appropriate penalty. A combined fine of $2,000 being $1,500 for the negligence matter and an additional $500 for the record of work matter is, subject to further submissions being received and considered, ordered.

Costs

[66] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[67] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee* [12] included the following:

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[11] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

[12] HC, Wellington, AP23/94, 14 September 1995

> *"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."*

[68] The judgment in *Macdonald v Professional Conduct Committee*[13] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[14] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[69] In *Collie v Nursing Council of New Zealand*[15] where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.*

[70] The Respondent was cooperative and agreed to consolidation of the hearing with a related matter. Given this the order for costs will be reduced. The sum of $1,500 is considered to be an appropriate sum for the Respondent to contribute toward the costs and expenses of, and incidental to, the inquiry by the Board. This is significantly less than the 50% of actual guideline as to costs provided by the courts.

Publication of Name

[71] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act.

[72] The Board is also able, under s 318(5) of the Act, to order publication over and above the public register:

> *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

[73] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[74] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[16]. The Criminal Procedure Act 2011 sets out

[13] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[14] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[15] [2001] NZAR 74
[16] Section 14

grounds for suppression within the criminal jurisdiction[17]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[18]. In *N v Professional Conduct Committee of Medical Council*[19] the High Court pointed to the following factors:

> *The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*
>
> - *issues around the identity of other persons such as family and employers;*
> - *identity of persons involved and their privacy and the impact of publication on them; and*
> - *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[75] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest[20]. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[76] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

[77] For the reasons set out above, the Board directs that:

Penalty:	**Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $2,000.**
Costs:	**Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of $1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.** **In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the register and him being named in this decision.**

Submissions on Penalty Costs and Publication

[78] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **18th April 2017.**

[79] If no submissions are received then this decision will become final.

[80] If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

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[17] Refer ss 200 and 202 of the Criminal Procedure Act

[18] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

[19] ibid

[20] Kewene v Professional Conduct Committee of the Dental Council - [2013] NZAR 1055

Right of Appeal

[81] The right to appeal Board decisions is provided for in s 330(2) of the Act[ii].

Signed and dated this 24TH day of March 2017.

Chris Preston
Presiding Member

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[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may
- *(a) do both of the following things:*
  - *(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
  - *(ii) order that the person may not apply to be relicensed before the expiry of a specified period:*
- *(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
- *(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
- *(d) order that the person be censured:*
- *(e) order that the person undertake training specified in the order:*
- *(f) order that the person pay a fine not exceeding $10,000.*

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—
- *(b) to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.