

## Health Insights

### Extended powers of HCC include investigating complaints incidental to the provision of health services

#### The facts

BG, a myotherapist and a 'general health service provider' for the purposes of the *Health Complaints Act 2016* (Vic) (**the Act**), engaged in a series of messages with (DB) on Instagram and Snapchat. DB was studying a Diploma of Remedial Massage. It was apparent from BG's Instagram profile he was a myotherapist. The evidence before the Court indicated during the text message exchange, BG offered to set up time to teach DB remedial massage techniques and that DB was interested in this offer as she was a young and newly qualifying therapist.

The evidence before the Court showed BG's text messages to BD became increasingly flirtatious and unprofessional, including use of sexual innuendo.

Following the exchange, DB made a complaint to the Health Complaints Commissioner (**HCC**) about BG. She complained she felt BG had used his position as a myotherapist to entice her to meet him for inappropriate purposes and that he had breached an interim prohibition order, which she later discovered, prohibiting BG from advertising, offering or providing massage therapy services to female members of the public.

The Commissioner decided to investigate the complaint under section 45 of the *Act* and notified BG the complaint raised concerns about 'whether the general health services you offered to her complied with the Code and the potential risks that other persons may be exposed to if your services and processes are not Code compliant'.<sup>1</sup>

The Commissioner's initial view was clause 1 of the Code (providing services in a safe and ethical manner) and clause 13 of the Code (sexual misconduct) were relevant to the complaint. The Commissioner also considered the complaint appeared to indicate BG was in breach of the interim prohibition order.

BG commenced proceedings in the Supreme Court of Victoria seeking a declaration that the Commissioner did not have the power to investigate the matters raised by DB.

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<sup>1</sup> [2021] VSC 232 [27].

## The issue

The Commissioner's power to conduct an investigation under section 45 of the *Act*, into the matters raised by DB, requires a 'complaint' to exist.<sup>2</sup> The relevant definition of 'complaint' in section 5(2)(b) involves a health service provider 'providing or failing to provide' a general health service.<sup>3</sup>

The key issue was whether BG provided or failed to provide DB a general health service.

### ***BG's arguments***

BG submitted his social media interactions with DB did not involve 'providing or failing to provide' a general health service. He argued he did not 'provide' DB a health service by offering to assist her with remedial massage techniques because their arrangements were vague and imprecise and they never in fact met.

He further argued he did not 'fail' to provide DB a service as the words 'failing to provide' refer to where a service provider is under an obligation to provide a service and fails to do so, which BG contended he was never under an obligation to do and which never eventuated.

BG also contended even if he had provided or failed to provide some service or offering to DB, it could not be characterised as a 'health service' or 'general health service' under the *Act*. He argued while myotherapy was a general health service, the complaint did not concern a 'health service' or 'an activity performed in relation to a person that is intended or claimed (expressly or otherwise)' to maintain or improve her health, or to diagnose, prevent or treat any illness, injury or disability.<sup>4</sup> It was argued the complaint was not about the provision of or failure to provide 'health education services'.<sup>5</sup>

Finally, BG argued section 5 of the *Act* should be interpreted strictly, not broadly, because it should be characterised as a penal provision.

### ***The Commissioner's arguments***

The Commissioner argued the complaint was about 'providing or failing to provide a general health service' under section 5(2)(b) of the *Act* for two reasons:

1. Conduct in providing or failing to provide a general health service is not confined to the specific moment the service is provided, but extends to things incidental to the provision of the service; and
2. The words 'failing to provide' do not require the service provider to be under any obligation to provide the services, or that the service be provided in exchange for payment.

The Commissioner argued the complaint does concern a 'general health service', contending the messages to DB included an offer to provide remedial massage which of itself was an offer of a general health service. He also offered to teach massage techniques, arrange vocational employment and allow her to learn by

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<sup>2</sup> Health Complaints Act 2016 (Vic) ('*Health Complaints Act*') ss 45, 3(1) – definition of 'complaint'.

<sup>3</sup> *Ibid* s 5(2)(b).

<sup>4</sup> *Ibid* s 3(1) – definition of 'health service'.

<sup>5</sup> *Ibid*.

observing in a clinical context. Reading the messages as a whole, it was argued there was ‘a series of offers or invitations to provide teaching and other practical opportunities...’ which amounted to an offer to provide health education services to DB.<sup>6</sup>

The Commissioner also submitted the *Act* has a protective purpose contrary to BG’s argument, and that its provisions should be construed to give effect to that purpose. As such, it was argued ‘health education services’ should be interpreted broadly to encompass both formal and informal arrangements for imparting knowledge. It was argued conduct ‘in providing or failing to provide a general health service’ should be interpreted broadly as extending to matters incidental to the provision of the relevant health service, and having regard to the fundamental protective purpose of the legislation.

## The Court’s findings

Richards J held the Commissioner had the requisite power to investigate DB’s complaint under section 45 of the *Act*, finding that Section 5 of the *Act*, including the words ‘in providing or failing to provide a general health service’, extend to matters incidental to the provision of a health service.<sup>7</sup>

It was held the *Act* clearly has a protective purpose as its fundamental objective and that it should be interpreted beneficially, to give the fullest effect of the purpose of establishing processes for dealing with complaints about provision of health service that is unreasonable or inconsistent with the health service principles.

The Court observed the protective purpose of the *Act* will be more fully achieved if the words ‘in providing or failing to provide’ extend to matters incidental to the provision of an actual health service itself, which would include “*advertising or offering the service, answering inquiries and discussing when and where the services might be provided.*”<sup>8</sup> This is true even if no appointment is made and the health service is not ultimately provided.

It was further observed that ‘health education services’ should be interpreted as including both formal and informal means of imparting knowledge. “*An informal teaching or work experience arrangement is a ‘health education service’, just as much as teaching a class of fee-paying university students.*”<sup>9</sup>

## Application to the facts

Richards J rejected BG’s attempts to minimise conduct as no more than a flirtatious exchange of private messages on social media. The complaint was substantial and was about an offer to teach massage and provide experience to a student, followed by a number of crude sexual comments. DB’s letter of complaint concerned the conduct of BG ‘in providing or failing to provide’ a health service, in offering and seeking to make arrangements to massage DB and to teach her remedial massage techniques and skills.

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<sup>6</sup> [2021] VSC 232 (n 1) [35].

<sup>7</sup> *Health Complaints Act* (n 2) s 5(2)(b).

<sup>8</sup> [2021] VSC 232 (n 1) [50].

<sup>9</sup> *Ibid* [51].

It was held DB's complaint is a complaint within section 5(2)(b) of the *Act*.

Richards J went further to state DB's complaint may also be a complaint under section 5(2)(a) of the *Act*, or section 5(1)(c) concerning an unreasonable failure to act consistently with health service principles that a person seeking a health service is to be treated with respect, dignity and consideration.

BG's application failed. The Court determined the Commissioner has jurisdiction to investigate BD's complaint.

## Implications

The Court's judgment confirms the HCC's expanded powers following introduction of the *Act* in 2016. Reference is made in the judgment to the Explanatory Memorandum of the *Act*, and its stated protective purpose.

Health practitioners should be aware of the Commissioner's expanded powers relating to regulation of a general health service, including practitioners already regulated by AHPRA under the National Law who also provide a general health service to patients. In particular, practitioners should be aware of the power to investigate complaints regarding conduct incidental to the provision of a health service, as this case demonstrates.

The Court's judgment clarifies what practitioners may consider a 'blurred line' between conduct directly related to provision of a core health service, in the pure or literal sense of treating a patient, and the regulator's expanded powers to investigate and take disciplinary action regarding complaints or conduct incidental to the provision of a health service, or related to being a health service provider where sufficient connection exists. Such conduct may include advertising and provision of health education services, whether formal or informal.

General health providers (which include, for example, dental technicians, massage therapists, speech pathologists, counsellors and psychotherapists, homeopaths and reiki therapists)<sup>10</sup> should be aware of the Commissioner's expanded powers to investigate matters incidental to the provision of a health service. The power to investigate is not confined to complaints about actual treatment of patients (whether a health service was or was not ultimately provided). It includes the power to investigate conduct such as advertising or offering the service, answering inquiries and discussing when and where the services might be provided, and standards of professional communication. This is the case even if no appointment is made and an actual health service is not ultimately performed.

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<sup>10</sup> Second Reading Speech for the *Health Complaints Bill 2016* (Assembly Daily Extract, 10 February 2016 at page 100).

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