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Health Insights

Taking action against health practitioners in the "public interest" – two years on, how is the new immediate action power being applied in practice?

One of the most stressful circumstances a registered health practitioner can encounter, is when they receive a notice from their National Board stating that it intends to take immediate action against them under section 156 of the Health Practitioner Regulation National Law (**National Law**). The proposed immediate action can be very serious, ranging from a suspension through to an undertaking for the practitioner to do, or not do, certain things. As the name suggests, it takes effect almost immediately, allowing the practitioner mere days to formulate a response before the decision to implement the action is executed.

Section 156 of the National Law sets out the various circumstances in which the power to take immediate action may arise. Most commonly, the Board proposes to take immediate action because it reasonably believes that the registered health practitioner's conduct, performance or health has caused the practitioner to pose a serious risk to persons and it is necessary to take immediate action to protect public health or safety[1] (we will refer to this as the **Risk to Persons Ground**). However, there is another basis for taking immediate action, less frequently invoked, and that is the power to take immediate action because the National Board holds the reasonable belief that the action is "otherwise in the public interest":

> *A National Board may take immediate action in relation to a registered health practitioner or student registered in a health profession for which the Board is established if—*
>
> *…*
>
> *(e) the National Board reasonably believes the action is otherwise in the public interest.*
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> *Example of when action may be taken in the public interest—*
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> *A registered health practitioner is charged with a serious criminal offence, unrelated to the practitioner's practice, for which immediate action is required to be taken to maintain public confidence in the provision of services by health practitioners.*[2] (the **Public Interest Ground**)

In order to rely upon the Public Interest Ground, the power to take immediate action requires the National Board to hold a *reasonable belief* that the immediate action is otherwise in the public interest. However,

[1] Section 156(1)(a) Health Practitioner Regulation National Law
[2] Section 156(1)(e) Health Practitioner Regulation National Law

just as is the case with the use of the Risk to Persons Ground, the taking of immediate action does not require the underlying allegations to have been proven. The purpose of taking immediate action is to "put measures in place to protect against, or ameliorate, harm"[3] pending the outcome of an investigation into the underlying allegations. As such, it endures for the course of an investigation into the circumstances. Given the notorious length of some AHPRA investigations, the outcome of immediate action proceedings can therefore be devastating to a practitioner's livelihood.

The Public Interest Ground for taking immediate action did not come into effect until 2018, and has therefore been less explored by courts and tribunals than its public safety counterpart. Based on our experience, it is also less tested because in most instances the allegations which give rise to the need to take immediate action concern issues relating directly to either the health of the practitioner or their practice of the health profession, and entail a risk to persons which enlivens the Risk to Persons Ground instead. This distinction is what makes the Public Interest Ground somewhat controversial, because absent a risk to persons it can be difficult to pinpoint the public interest in taking immediate action against them.

In February this year, Dr Jereth Kok (a medical practitioner), appealed an immediate action decision by the Medical Board of Australia to suspend his registration on the basis of the Public Interest Ground.[4] The decision to impose immediate action was triggered by evidence that Dr Kok published comments on social media/internet forums which included, but were not limited to: posts denigrating medical practitioners who provide terminations of pregnancy services and who recognise that people who identify as transgender are not suffering from a mental health condition, posts endorsing/calling for violence and/or genocide toward racial and religious groups, and posts containing demeaning commentary regarding LGBQTI persons.[5]

Dr Kok's appeal was rejected by VCAT and the Board's decision to suspend his registration pending a formal investigation was upheld. The decision provides a useful analysis of the current principles used to determine whether or not particular conduct or circumstances will enliven the Public Interest Ground for taking immediate action against a health practitioner. It also refers to a number of recent decisions, both by VCAT and the Supreme Court of Victoria which have helped to expound the law in this area[6].

VCAT took the opportunity to emphasise that although section 156(1)(e) uses an example to demonstrate the circumstances in which it might be triggered (see above), the example forms part of the context in which the section is to be understood. It does not control the language of it[7] and does not confine a consideration of the public interest cases to those where a practitioner has been charged with a criminal offence.[8] The real emphasis of the example provided lies "in the ability of the regulator to take immediate action where required to *maintain public confidence in the provision of services by health practitioners."*[9]

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[3] *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532, Niall JA at [78].
[4] *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405
[5] Ibid, see paragraph [3] for further details about the alleged social media/internet posts.
[6] See *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532, *Farschi v Medical Board of Australia* (Review and Regulation) [2018] VCAT 1619
[7] *Kok v Medical Board of Australia (Review and Regulation* [2020] VCAT 405 at [24].
[8] Ibid, at [20].
[9] Ibid, at [27].

The Tribunal stated it may also be in the public interest to take immediate action to "ensure the standards of the medical profession are maintained[10]" and cited *Leow,* wherein Niall JA said that in some cases "it may be necessary to take action to reassure the public that the regulatory system is safe and adequate to protect the public and the reputation of the profession as a whole.[11]"

Importantly, it highlighted that the concept of "public interest" is not a one-sided one. It requires a balancing of competing interests, including:

- the public interest in members of health professions, in whom training and expenditure has been made, being able to practise,
- the public interest in ensuring that the regulatory system responds proportionately and fairly when allegations are made; and
- the public interest in ensuring that immediate action is only taken when it is necessary to do so.[12]

Turning to Dr Kok's particular circumstances, it is worth noting firstly that Dr Kok conceded that he made the social media posts attributed to him, and that some of the posts had the potential to cause offence. The Tribunal acknowledged that his comments online were often months (if not years) apart and that they form a small part of the totality of the posts that he had made online. It was unlikely that the posts which formed the subject of the immediate action proceedings had ever been read by someone in the public sphere in the collated way that the Tribunal had read them.

However, on balance, the Tribunal concluded that the public confidence in the provision of services by medical practitioners and the maintenance of the standards of the medical profession are undermined if a practising medical practitioner broadcasts views of the kind broadcasted by Dr Kok. While acknowledging the right to self-expression and that taking immediate action under the Public Interest Ground is not designed to "discourage legitimate public debate in relation to differing medical perspectives or to prevent medical practitioners from using social media to engage in such debate"[13], the Tribunal stated that as a member of the medical profession Dr Kok also has obligations to his profession and to those served by the medical profession[14] which must be respected:

He is by virtue of his profession required to abide by a Code of Conduct which requires respect and compassion. He has obligations to his profession which he must take seriously. He does not simply drop his profession each time he enters the playground of social media engagement. A registered medical practitioner cannot go online and shout to all who care to read his posts (or have the misfortune of coming across his posts) without care as to the potential consequences of his actions.[15]

The Tribunal was of the view that some of the posts went further than simply having the *potential* to offend and although it was not known whether they were triggered by personal interactions with patients or other

[10] Ibid, at [36].
[11] *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532 at [81].
[12] Ibid, at [37] to [41].
[13] Ibid, at [57].
[14] Ibid at [58].
[15] Ibid, at [66].

health professions or were purely academic, the potential for the posts to be taken personally was very real. The Tribunal said that it is not to the point whether or not the posts have actually been read by the public because any patient who might read them and consider the types of views expressed by Dr Kok on matters "very personal to their own situation could reasonably question whether their own care or the care of others like themselves will be compromised[16]".

We have grave concerns about whether the community would accept that any medical practitioner could switch, as though he were a light, from airing disrespectful views online to providing respectful and appropriate treatment for those who fall within a class he denigrates online.[17]

The Tribunal found that Dr Kok's conduct warranted the taking of immediate action under the Public Interest Ground, and that it was appropriate to suspend his registration. In its view, nothing short of a suspension would preserve public confidence in the provision of services by the medical profession in this instance.

Dr Kok's case provides welcome insight into the principles and considerations employed by tribunals when evaluating whether the taking of immediate action in the public interest is warranted. It also makes clear that a practitioner does not need to have been charged with a serious criminal offence to trigger the use of the power. The Tribunal made mention of this, noting that there may be many situations as yet not even contemplated where it would be appropriate to impose conditions on a practitioner's registration in accordance with the Public Interest Ground[18]. It is therefore important to stay alert to this emerging area of the National Law and the potential impact it will have for registered health practitioners in the future.

Meridian Lawyers regularly assists practitioners regarding immediate action proceedings and AHPRA investigations. This article was written by Principal, Kellie Dell'Oro and Associate, Anna Martin. Please contact us if you have any questions or for further information.

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[16] Ibid, at [68].
[17] Ibid, at [88].
[18] Ibid, at [33].