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Health Insights

VCAT upholds use of immediate action power to suspend doctor over social media use

Meridian Lawyers recently published an article examining the power to take immediate action against health practitioners under section 156 of the National Law (if you missed it, that article can be read here). It considered a recent VCAT decision[1], wherein a doctor was suspended under section 156(1)(e), being the power to take immediate action in relation to a health practitioner if the National Board reasonably believes the action is otherwise in the public interest. The case was interesting because unlike many other cases considering the application of section 156(1)(e), the doctor had not been charged with a serious criminal offence. Rather, the decision to impose immediate action was triggered by evidence that the doctor had published offensive material on social media/internet forums (**Kok's case**).

On 10 August 2020, VCAT handed down another decision considering the application of section 156(1)(e), and which concerned very similar facts and circumstances. The case of *Ellis v Medical Board of Australia (Review and Regulation)* [2020] VCAT 862 (**Ellis' case**) is worth comment, because it provides a good demonstration of just how sharp the proverbial 'tiger's teeth' can be when it comes to responding to inappropriate social media use. It serves as a warning that the National Boards will, given the right circumstances, take swift and severe action against health practitioners whose use of social media is reasonably believed to present a risk to public health and safety, with potentially devastating results for their livelihood. Ellis' case also contains a number of helpful remarks about the application of the immediate action powers when it comes to social media use, including that it could trigger action under not only section 156(1)(e) but also section 156(1)(a) of the National Law.

Background facts

In November 2019 the practice manager of the clinic where Dr Ellis was working made a notification about him to AHPRA. The notification prompted an investigation into Dr Ellis' use of social media, and revealed material that he had posted to several Facebook pages, including his personal Facebook page and four Facebook pages of entities that he established or represented. On 20 May 2020 AHPRA issued a notice of proposed immediate action attaching extracts of Dr Ellis' social media posts dating from August 2017 to April 2020. The material included 56 posts with information and opinions about vaccines, chemotherapy, COVID-19 and other medical topics, and opinions about certain religious and other groups. Without going

[1] *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405

into detail about the posts themselves, as a summative comment it could be said that they were controversial, with the potential to be offensive and contrary to public health messaging (for example, one post from August 2017 stated that chemotherapy does not help breast and organ cancers[2]).

In response to the proposed immediate action, Dr Ellis offered an undertaking that he would close his social media accounts, and that he would not reopen the accounts or post on social media until finalisation of AHPRA's investigation. However, on 29 May 2020 the Medical Board of Australia (MBA) decided to suspend his registration. Dr Ellis appealed this decision to VCAT.

VCAT's decision

VCAT upheld the MBA's decision to suspend Dr Ellis, on the basis that it found it was able to form a reasonable belief under both sub-sections 156(1)(a) and 156(1)(e) of the National Law. For completeness, those sections read as follows:

156 Power to take immediate action

(1) 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—

> *(a) the National Board reasonably believes that—*
>
> > *(i) because of the registered health practitioner's conduct, performance or health, the practitioner poses a serious risk to persons; and*
> >
> > *(ii) it is necessary to take immediate action to protect public health or safety; (we will refer to this as the "Risk to Persons Power") or*
> >
> > *…*
>
> *(e) the National Board reasonably believes the action is otherwise in the public interest. (we will refer to this as the "Public Interest Power")*

It is worth noting here, that Kok's case only considered the application of section 156(1)(e), the Public Interest Power. This makes Ellis' case particularly interesting, because it highlights that a health practitioner's use of social media can not only trigger a reasonable belief that immediate action is required to protect the public interest, but also that the conduct poses a serious risk to persons. Further, a decision-maker is not precluded from considering the application of section 156(1)(e) even if the circumstances under section 156(1)(a) have been established[3].

VCAT separated Dr Ellis' social media posts into two groups – 'Medical Statements' and 'Social Statements'. For the purposes of considering whether it could form a reasonable belief that because of his conduct Dr Ellis poses a serious risk to persons (under section 156(1)(a)), the tribunal focused exclusively on the

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[2] *Ellis v Medical Board of Australia (Review and Regulation)* [2020] VCAT 862, at paragraph 71

[3] Ibid, at paragraph 101

'Medical Statements'. Based on the available evidence, it found that the tribunal held a reasonable belief that Dr Ellis had published material:

> *…that has no proper clinical basis or that is contrary to accepted medical practice or that is otherwise untrue or misleading….[his] commentary has had at least the potential to deter members of the public from obtaining vaccination for themselves or their children, or from having chemotherapy; to encourage them to rely on unproven protocols for the prevention or treatment of COVID-19; and to undermine their confidence in doctors, hospitals and pharmaceuticals. There were evidently thousands of persons who (wherever they were located) accessed the social media commentary. A proportion of them knew that the commentary was by a registered medical practitioner.*

Counsel for Dr Ellis made the submission that because he had given up using social media, VCAT could not reasonably believe that because of his (past) conduct in using social media he now poses a serious risk to persons, being the risk that he will use social media in a way that involves harm or potential harm. However, VCAT dismissed that submission on the basis that the nature of conduct, and the nature of the risk, need not be the same in order to form a reasonable belief as to the risk of harm to public health or safety[4]:

> *We have a reasonable belief that because of his conduct Dr Ellis poses a serious risk to persons. We see there as being more than one way in which he poses a serious risk to persons. The risk that he would now use social media inappropriately may be a relatively low risk. The misleading or otherwise unsatisfactory statements that Dr Ellis has made, however, contribute to the reasonable belief we have formed that he poses a serious risk to persons through the publication of information or opinion (that has no proper clinical basis or is contrary to accepted medical practice or is otherwise untrue or misleading), whether that is now via social media or by some alternative means.* ***But, over and above that, while Dr Ellis has asserted that the material he posted has "in no way whatsoever influenced [his] medical practice", we have a reasonable belief that because of his conduct he poses a serious risk to persons in the way he practises medicine[5]. …***
>
> ***The reasonable belief involves the straightforward proposition that people are more likely to act according to their views and opinions than contrary to them[6].*** *(Our emphasis)*

It is worth contrasting these comments with those made in Kok's case, remembering that in Kok VCAT only considered the application of section 156(1)(e), i.e. the Public Interest Power. This is perhaps because the social media posts in Kok were more akin to the 'Social Statements' in Ellis, as opposed to the 'Medical Statements', which formed the basis of the section 156(1)(a) analysis. Nevertheless, the tribunal in Kok also turned their mind to the question of whether the views expressed by Dr Kok online may have permeated and impacted upon his medical practice and treatment of patients[7]. It found that there was no evidence before them to show that Kok had compromised the best interests of patients, and specifically that:

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[4] Ibid, at paragraph 90
[5] Ibid, at paragraph 87
[6] Ibid, at paragraph 88
[7] *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405, at paragraph 78

> *It is possible that ultimately Dr Kok will be found to be an individual with strong views who is also first and foremost a committed health practitioner. It may be possible for two personas to live within the one body[8].*

The distinctly different views adopted by VCAT in each of Kok and Ellis' cases leaves us with the supposition that a tribunal will be less concerned about the direct influence of a health practitioner's private beliefs (albeit aired on social media) on their clinical practice (for the purposes of section 156(1)(a)) if the controversial beliefs concern social topics, as opposed to medical ones. However, the public perception of a practitioner who holds such social beliefs – i.e., 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"[9] - will still be highly relevant to the application of section 156(1)(e), the Public Interest Power.

As in Kok, VCAT found that it was necessary for immediate action to be taken against Dr Ellis under section 156(1)(e) to reassure the public that the regulatory system is safe and adequate to protect the public and the reputation of the medical profession[10]. It formed the necessary reasonable belief based on both the 'Medical Statements' and the 'Social Statements', and made reference to the Code of Conduct and Social Media Guidelines to identify the manner in which the posts were inappropriate. It is timely to mention here that the MBA has just released an advanced copy of its new Code of Conduct (to take effect in October this year), and which contains a new section on the important considerations for doctors who choose to make public comments:

> *While there are professional values that underpin good medical practice, all doctors have a right to have and express their personal views and values. However, the boundary between a doctor's personal and public profile can be blurred. As a doctor, you need to consider the effect of your public comments and your actions outside work, including online, related to medical and clinical issues, and how they reflect on your role as a doctor and on the reputation of the profession[11].*

Comments

Meridian Lawyers regularly assists health practitioners who find themselves under investigation for their social media use. In our experience, early-stage AHPRA inquiries can often be resolved by a demonstration of remorse, understanding about the practitioner's obligations and swift removal of any offending (or, in some cases all) content from social media.

However both Ellis' and Kok's cases demonstrate that depending on the circumstances and type of content posted by the practitioner, AHPRA and the National Boards can be far more proactive and forceful in their

[8] Ibid, at paragraph 79
[9] Ibid, at paragraph 88
[10] *Ellis v Medical Board of Australia (Review and Regulation)* [2020] VCAT 862, at paragraph 108
[11] *Good medical practice: a code of conduct for doctors in Australia*, October 2020

response. In both cases, nothing less than an immediate suspension pending investigation was deemed sufficient to mitigate the risks reasonably believed to be posed by the conduct of the practitioners.

In fact, even though Dr Ellis apologised for his inappropriate social media use, took steps to remove the material, offered undertakings to complete education and promised not to repeat the conduct, VCAT formed the view that he did not take full responsibility for his conduct and *"to a significant degree he obfuscated, minimised the seriousness of his conduct, or tried to distance himself from the commentary….the many unsatisfactory statements Dr Ellis made to the Board and to the Tribunal indicate that he lacks insight and genuine remorse. Dr Ellis' statements [contributed] to the reasonable belief [it] formed."*[12]

In addition, Ellis cements the precedent that social media posts, depending on the nature and type of comment, can trigger regulatory action under both the Risk to Persons power, as well as under the Public Interest Power, giving the National Boards an additional tool with which to proactively respond to practitioners whose use of social media is reasonably believed to present a risk to the public.

This article was written by Principal Kellie Dell'Oro and Associate Anna Martin. Please contact Kellie if you have any questions or require further information.

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[12] *Ellis v Medical Board of Australia (Review and Regulation)* [2020] VCAT 862, at paragraph 62