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Health Insights

VCAT confirms COAG Ministerial Direction 2019-1 not binding on Tribunals

In January last year, the Council of Australian Governments (**COAG**) Health Council published a new Ministerial direction with the intention of requiring AHPRA and the National Boards to make public protection the paramount consideration when administering the National Law. Policy Direction 2019-1 seeks to provide clarity on the application of the third guiding principle of the Health Practitioner Regulation National Law, being that:

> *restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.*[1]

It requires that this guiding principle be applied in the context of a mandate to prioritise public protection, and specifies that when determining whether it is necessary for regulatory action to be taken, the National Boards and AHPRA must:

> *(a) take into account the potential impact of the practitioner's conduct on the public, including vulnerable people within the community such as children, the aged, those living with disability and people who are the potential targets of family and domestic violence; and*
>
> *(b) consider the extent to which deterring other practitioners from participating in similar conduct would support the protection of the public and engender confidence in the regulated profession.*[2]

Policy Direction 2019-1 also provides guidance on the prioritisation of considerations when determining whether a practitioner's conduct constitutes unprofessional conduct or professional misconduct, and also when determining the nature of the regulatory action that should be taken following findings of the same.

Both AHPRA and the National Boards must comply with a direction given to them by the Ministerial Council, as stipulated by section 11(6) of the National Law. However, the question of whether a responsible Tribunal is also bound by Policy Direction 2019-1 has been, until recently, less clear. The issue was raised but not decided in a number of cases in 2020: see *Ellis v Medical Board of Australia*[3] and *Vo v Medical Board of Australia*[4]. However in December last year, VCAT finally settled the matter[5] confirming that Policy Direction 2019-1 is not binding on a responsible Tribunal.[6] The reasons provided for this decision were based on legal analysis of both the National Law and the *Victorian Civil and Administrative Act 1998* (VIC).

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[1] Section 3(3)(c) of the Health Practitioner Regulation National Law
[2] COAG Health Council Policy Direction 2019-1, paragraph 2 (available at https://www.ahpra.gov.au/About-Ahpra/Ministerial-Directives-and-Communiques.aspx)
[3] [2020] VCAT 862
[4] [2020] VCAT 1072
[5] [2020] VCAT 1367
[6] Ibid, paragraph 61.

In essence, the Medical Board asserted that in a review application, the "Tribunal is re-exercising the Board's functions in its review jurisdiction[7]" and "must apply the same principles and policies as the decision maker.[8]" The Board asserted that the Tribunal is bound to apply the Policy Direction in circumstances where "the original decision-maker is bound to apply the policy when exercising its function and the Tribunal is required to re-exercise that same function on review[9]".

However, VCAT disagreed. It held that a hearing of an appeal against an immediate action is not a hearing de novo, and that "the powers exercised by the Tribunal on a hearing of an appeal under section 199 *include* the powers of the original decision-maker, but the Tribunal is doing more than 're-exercising' the functions of a National Board.[10]" Further, even if a Tribunal can be said to be 'standing in the shoes of the National Board' when exercising its appellate functions, "it does not follow that it is bound by a policy direction given by the Ministerial Council to a National Board under section 11, in the absence of a clear statement in the National Law that it should be bound[11]".

VCAT also turned to the reference to general deterrence in Policy Direction 2019-1 (set out at paragraph (b) above), and made the comment that in the case of an immediate action decision, "general deterrence is not and cannot be a relevant consideration"[12]. The reasons for this are set out in both *Ellis v Medical Board of Australia* and *Vo v Medical Board of Australia,* and arise from the fact that in the case of immediate action proceedings, no decision is made about whether the practitioner actually engaged in the conduct alleged. It is therefore inappropriate and misplaced to take into consideration whether or not other health practitioners need to be deterred from the alleged, but unproven, conduct.

In May 2020, Professor Ron Paterson delivered his review report to AHPRA considering the changes in regulatory practice since his independent review of the use of chaperones to protect patients in Australia[13]. In the review report, Professor Paterson endorsed Policy Direction 2019-1, stating that it was consistent with his call for:

> *…more guidance to Immediate Action Committees 'to ensure that they do not over-emphasise the use of "minimum regulatory force" or least restrictive intervention, without sufficient regard to the need for the intervention to be adequate to protect the public'.*[14]

In the wake of Professor Paterson's public endorsement for the application of Policy Direction 2019-1 to immediate action proceedings, this recent VCAT decision is important because it settles the question of whether Policy Direction 2019-1 is binding upon responsible Tribunals, and limits its applicability to decisions made by AHPRA and the National Boards. Further, it clarifies that even if the Direction "signals a clear intention that National Boards and AHPRA should place greater emphasis on community expectations and the need to maintain public confidence in regulated professions[15]", the objective of deterrence is not one which is applicable or appropriate in immediate action proceedings.

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[7] Ibid, paragraph 52.
[8] Ibid.
[9] Ibid.
[10] Ibid, paragraph 67.
[11] Ibid.
[12] Ibid, paragraph 68.
[13] *Three years on: changes in regulatory practice since 'Independent review of the use of chaperones to protect patients in Australia',* May 2020
[14] Ibid, page 14 – 15.
[15] *Ibid,* page 15.

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