IMMEDIATE ACTION AGAINST HEALTH PRACTIITIONERS

Where notifications are made against practitioners, particularly mandatory notifications, Boards make decisions as to immediate action. Recent cases in Queensland in QCAT have been influential in deciding how to deal with the matters on appeal. Every state has different legislation, but the generalities apply.

STATUTORY FRAMEWORK [1]

1. The relevant legislation in Queensland is the *Health Practitioner Regulation National Law Act 2009* (Qld) (the National Law).
2. An important objective of the National Law is to provide for the protection of the public: s 3(2)(a); *Bernadt v Medical Board of Australia* [2].
3. S 156(1) of the National Law provides that a national respondent may take immediate action in relation to a registered health practitioner or student registered by the respondent 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;…
4. In the circumstances the adverse impact of the immediate action in the circumstances of the Applicant is an important consideration, but protection of the public is regarded as paramount: *MLNO v Medical Board of Australia* [3]. It is settled that the considerations under s 156 are not the same as the considerations in substantive disciplinary proceedings.

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[1] Parts of this article Statutory Framework were derived from the presentation "*Health Practitioner Disciplinary Proceedings in QCAT – Appeals of Immediate Action Decisions of the Board*", K Mellifont QC BAQ1329 23/11/13

[2] [2013] WASCA 259, 50.

[3] [2012] VCAT 123 at [5] cited in *Pearse v Medical Board of Australia* [2013] QCAT 392 at [19]

5. The Board's decision is characterised as an appellable decision, pursuant to s 199 (1)(d) of the national law.

6. Section 9 of the National Law provides that the reference in s 199 to an appeal against the Respondent's decision is taken to be a reference to a review of the Respondent's decision, as provided under the QCAT Act (2009) (Qld).

7. The Tribunal is not conducting an appeal in the strict sense, rather, it is a review by way of a fresh hearing on the merits:

> "*Although s 199(e) of the national law provides that a person subject to a decision to impose conditions on his or her registration may appeal against that decision to QCAT, it being the appropriate, responsible Tribunal under s 199(1) of the national law, and s 398C(1)(b) of the disciplinary proceedings Act, the nature of the appeal is governed by s 9 of the Health Practitioner Regulation National Law 2009 (Qld). S 9 provides that a reference in a national law to an appeal to QCAT as the responsible Tribunal is a reference to a review of the decision as provided under the QCAT Act. Part 1, Division 3, of the QCAT Act governs the Tribunal's review jurisdiction. S 20(2) provides the Tribunal is required to hear and decide a review of a reviewable decision by way of a fresh hearing on the merits". Pearse* [4] .

8. The Tribunal's function is to produce the correct and preferable decision and, in so doing, can confirm the Respondent's decision or set it aside, or substitute its own decision, or return it for reconsideration by the Respondent with directions it considers appropriate: *Pearse* [5] at [25] citing *Attudawage v The Medical Board of Australia.* [6]

9. The hearing is a full hearing *de novo*; and, so, the Tribunal is able to consider evidence of matters which have occurred after the decision was made. It is a

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4 *Pearse v Medical Board of Australia* [2013] QCAT 392

5 Ibid at [24]

6 [2011] QCAT 452

new determination of the rights of the registrant applying the law and evidence at the time of rehearing: *Pearse.*[7]

10. The decision does not entail a detailed factual inquiry, but, rather, action on an urgent basis because of a need to protect the public: *Chiappaolone v The Medical Board of Australia*[8]; and *Liddell v Medical Board of Australia*[9].

11. The Tribunal must believe and have reasonable grounds for believing the matters specified in 156 (1)(a)(b): *Bernadt* [10]

12. Section 156A of the National Law says the National Respondent Board must reasonably believe that:-

    a. because of the registered health practitioner's conduct, performance or health, the practitioner poses a serious risk to persons; and

    b. it is necessary to take immediate action to protect public health or safety.

    Newnes JA in *Bernadt*[11], said

> *"The Tribunal was not required to make findings as to whether, in fact, the Appellant posed a serious risk to persons or whether immediate action was, in fact, necessary to protect public health. The question was whether the Tribunal held a reasonable belief as to those matters, not whether those matters were the fact…*
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> *A reasonable belief requires existence of facts which are sufficient to induce the belief in a reasonable person."*

PROCEDURE

13. In *WD v Medical Board of Australia*, [12] the Tribunal set out the approach for 'immediate action' cases.

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7 *Pearse v Medical Board of Australia* [2013] QCAT 392 [36]- [37]
8 [2012] QCAT 568 [6-10]
9 [2012] SAT 120 [19]
10 [2013] WASCA 259 [63]
11 Ibid [171] and [173]
12 [2013] QCAT 614 at [8]

1. an immediate action order does not entail a detailed enquiry;
2. it requires action on an urgent basis because of the need to protect public health and safety;
3. the taking of immediate action does not require proof of the conduct; but rather whether there is a reasonable belief that the registrant poses a serious risk;
4. an immediate action order might be based on material that would not conventionally be considered as strictly evidentiary in nature, for example, complaints and allegations;
5. the mere fact and seriousness of the charges, supported by the untested statements of witnesses, in a particular case, might well be sufficient to create the necessary reasonable belief as to the existence of risk;
6. the material available should be carefully scrutinised in order to determine the weight to be attached to it;
7. a complaint that is trivial or misconceived on its face will clearly not be given weight;
8. the nature of the allegations will be highly relevant to the issue of whether the order is justified.

14. Also the conditions imposed have to be assessed.

15. "The conditions imposed ought to address the relevant risks specifically and otherwise be the least onerous possible." *Shapinher v Psychology Board of Australia* [13]

16. "Whilst the protection of the public is and must remain the paramount consideration, the impact of the immediate action on a health practitioner

[13] [2013] QCAT 593 at [23]

cannot be underestimated" *MLNO v Medical Board of Australia*. [14]

Did the conditions imposed address the relevant risks specifically and otherwise be the least onerous possible ?

17. In a recent case, *Chaudhry v Medical Board of Australia (No. 2)* [2014] QCAT 288 these matters were considered and the case law reinforced. In that matter a particularly long period had passed since the notification was made.

18. At [16] the Tribunal found "The primary issue for the Tribunal is whether, on the evidence before it, the Tribunal believes that Dr Chaudhry, because of his conduct or performance, poses a serious risk to persons. In WD v Medical Board of Australia [2013] QCAT 614 at [8], the Tribunal summarised the approach to be taken in determining the issues which arise in an immediate action matter. That summary must be considered and applied in any particular matter, according to its own circumstances."

19. [17] "In a matter such as this, where over a year has passed since the immediate action was taken and the review was heard, the observations made in earlier cases as to the evidentiary quality of material upon which an order might be made are much less relevant than in circumstances in which a board or the Tribunal is being called upon to decide whether immediate action should be taken on short notice, or on an urgent basis."

20. Overall, it seems that Tribunals or Appellate Courts which review these immediate action cases look to whether the conditions imposed address the relevant risks specifically and otherwise be the least onerous possible, and that

[14] [2012] VCAT 1613 at [5]

the passage of time changes the emphasis and the decision is then viewed through a *de novo* prism with all of the evidence that has been presented since the action was taken. Conduct by practitioners since the notification can have influence at the review.[15]

21. Health Practitioners who have conditions imposed on their practice that appear onerous or unnecessary for the protection of the public have clear case law as to the reasonableness of conditions and indeed the need for the immediate action. Each state has a different appeal jurisdiction, but the National Law is reasonably contiguous in this regard.

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[15] *Pearse* at [38]-[39] *supra*