

Development of Public Interest Ground in immediate action – some observations from recent cases

More than two years since its introduction, some common themes are starting to emerge across jurisdictions in how tribunals are interpreting the National Boards' power to take immediate action when it is 'otherwise in the public interest' (Public Interest Ground) under section 156(1)(e) of the Health Practitioner Regulation National Law (National Law).

Legislative changes in August 2018 included the introduction of the Public Interest Ground to compliment the existing grounds of when immediate action may be taken - because of a practitioner's 'conduct, performance or health' they pose a serious risk to persons and it is necessary to take the action to protect public health or safety (Original Grounds).

The Public Interest Ground may be seen as a "catch all" provision for circumstances where the requirements of the Original Grounds may not be satisfied. The tribunals have referred to the new provision as an additional and alternative source of power. Given that the Original Grounds appear to capture the majority of bases on which immediate action may be taken, the Public Interest Ground is enlivened less frequently.

Section 156(1)(e) sets out the following example of when the Public Interest Ground may be used:

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.

This example does not in any way limit the circumstances in which the Public Interest Ground may be utilised.

Recent cases

Several decisions have been handed down recently that will provide practitioners with an idea of the circumstances in which a National Board may seek to use the Public Interest Ground and the subsequent views of these decisions taken by tribunals in review proceedings. The cases illustrate specific factual scenarios where the Public Interest Ground has been considered.

Vo v Medical Board of Australia (Review and Regulation) [2020] VCAT 1072 (24 September 2020)

A GP charged with sexually assaulting a patient 19 years ago, after previously being deregistered for two years in 2014 for sexual misconduct with two other patients in 2008 and 2011, sought review of the board's decision to suspend his registration after the board was notified of the historical conduct in January 2020. The tribunal set aside the decision of the board, noting, among other observations, that the allegations did not involve the practitioner reoffending after being sanctioned for the 2008 and 2011 conduct and that the practitioner has returned to practice (after being re-registered by the board) only after careful consideration, strong evidence of rehabilitation and the fact that he had not reoffended since being re-registered.

Kok v Medical Board of Australia (Review and Regulation)
[2020] VCAT 405 (27 March 2020)

The practitioner published comments on social media/internet forums which, among other things, demeaned medical practitioners who provided termination for pregnancy services, endorsed violence toward racial groups and expressed views regarding LGBTQI persons that was demeaning. The board suspended the practitioner's registration. The practitioner sought review of the board's decision, but the board's decision was confirmed by the tribunal.

Cheema v Medical Board of Australia [2020] SACAT 40 (12 June 2020) (***Cheema***)

A GP charged with aggravated indecent assault allegedly committed against a patient during a home visit consultation sought review of a decision by the board to suspend his registration. While finding that the Public Interest Ground was satisfied, the tribunal set aside the board's decision and imposed conditions prohibiting contact with female patients and limiting consultations with male patients to telehealth.

Ellis v Medical Board of Australia (Review and Regulation)
[2020] VCAT 862 (10 August 2020)

A GP who made a number of controversial statements on social media relating to vaccines, chemotherapy, COVID-19 and certain religious and other groups over 2 ½ years sought review of a decision by the board to suspend his registration. The tribunal confirmed the board's decision.

Consideration of what is in the public interest

The cases cited above usefully explore what factors ought to be taken into account when considering the Public Interest Ground.

Some of the cases cited above refer to Niall JA's observations in *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532 (Liang Joo Leow) in which His Honour stated that:

- 'there are also cases where 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' [at 81]; and
- 'it is in the public interest to take immediate action in order to address the question of public confidence. The relevant public confidence to which the example is directed is confidence in the provision of services by health practitioners ...' [at 82].

In *Cheema*, the tribunal referred to the decision of *Farshchi v Chinese Medicine Board of Australia* (Review and Regulation) [2018] VCAT 1617, noting the position that 'public interest is not a one-sided construct:

- The public interest includes maintenance of a regulatory system which responds in a fair and proportionate manner when allegations are made.
- There is a public interest in members of health professions, in whom training and expenditure has been made, being able to practise.
- There is a public interest in proportionality, particularly where a matter is unlikely to finalise quickly.

The tribunal went on to say in Cheema:

'Public confidence in the profession relies upon:

- *A public perception that most practitioners in the profession practise with appropriate skill, integrity, and compassion; and*
- *A public perception that those practitioners who do not meet these standards are appropriately regulated in the public interest' [at 54].*

Summary

As stated by the tribunal in *Liang Joo Leow*, *'the meaning of public interest is informed by the example'*. While there are no set criteria by which boards nor tribunals will guide themselves, there are broad considerations that will inform the decision-making process when considering whether immediate action is *'otherwise in the public interest'*. These include protecting the reputation of the profession, considering whether the risk alleged to be posed by the practitioner is current and giving the public confidence in the provision of services by health practitioners.

Do you have any questions?

We would be pleased to hear from you if you have any questions or require further information on this topic.



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