

Medical Practitioners and Voluntary Euthanasia

Nitschke v Medical Board of Australia [2015] NTSC 39

Key Points

- In making a complaint to the Medical Board of Australia (**the Board**), a medical practitioner's conduct must be clearly identified and the practitioner must be afforded procedural fairness.
- In making a complaint to the Board, while a medical practitioner's conduct is relevant, it is the practitioner that must pose a serious risk to persons.

Background

On 3 July 2014, the ABC's television program 7:30 aired a story about Dr Philip Nitschke, the appellant, and his communications with Nigel Brayley. Dr Nitschke was a director of Exit International (a voluntary euthanasia organisation). Dr Nitschke met Mr Brayley at a workshop following which they corresponded by email. Mr Brayley informed Dr Nitschke that he was 45 years old, that he was not terminally ill, that he had been suffering for about nine months, that he intended to take his own life in within two weeks, and that he will cc Dr Nitschke into his "final statement". Dr Nitschke replied stating, "Thank you very much for your information, and I will be interested in your final statement". As planned, Mr Brayley committed suicide by consuming the lethal substance called Nembutal.

This ABC story caught the attention of various concerned medical practitioners and associated organisations and consequently six complaints were lodged against Dr Nitschke to the Board. The Board suspended Dr Nitschke's registration as a medical practitioner under section 156 of the *Health Practitioner Regulation National Law (the National Law)*. Dr Nitschke appealed the decision to the Health Professional Review Tribunal (**the Tribunal**) but his appeal was unsuccessful.

Dr Nitschke appealed the Tribunal's decision to the Supreme Court of the Northern Territory on four grounds. The successful grounds of appeal were:

- Ground 1: That the Tribunal misconstrued the Code of Conduct for Doctors in Australia (**the Code**) in holding that it imposed an obligation on Dr Nitschke to promote or protect the health of Mr Brayley and to assess, treat or refer Mr Brayley in circumstances where Mr Brayley was not a patient of Dr Nitschke;
- Ground 2.1: That in making the decision, the Tribunal denied Dr Nitschke procedural fairness by expanding the conduct the subject of the application without giving Dr Nitschke a reasonable opportunity to respond in circumstances where the Board had deliberately confined its case; and
- Ground 4: The Tribunal erred in the construction of the Code by holding that advocacy regarding suicide and providing information to persons who might choose to end their own life was in breach of the Code.

The Law

All Australian medical practitioners are registered and accredited under, and governed by, the National Law. The provision under consideration in the present case was section 156(1) of the National Law which states that:

“A National Board may take immediate action in relation to a registered health practitioner or student registered by the Board 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.”*

The principle relating to procedural fairness is set out in *Chief Executive Officer Department for Child Protection v Hardingham*:¹

“It is a fundamental rule of the common law doctrine of natural justice that where an administrative decision may deprive a person of some right relating to his livelihood, he is entitled to know the case sought to be made against him and to be given an opportunity to reply to it.”

Clause 1.4 of the Code states that “doctors have a responsibility to protect and promote the health of individuals and the community”.

Conclusion

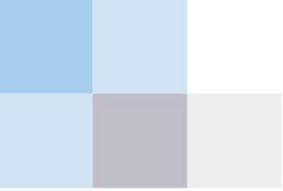
Ground 1 of the appeal

In relation to Ground 1 of the appeal, Dr Nitschke argued that section 156(1) can only apply to conduct which is connected with professional practice. Otherwise taking immediate action against the registered practitioner would achieve no protective purpose. The court disagreed. While conduct is relevant, it is the practitioner that must pose a serious risk to persons. For example, a practitioner who is accused of sexual misconduct unrelated to professional practice poses a serious risk to his or her patients. While the court considered that the word “conduct” must not be read down to have some connection with medical practice, it still must be capable of being professional misconduct or unprofessional conduct in order to be regulated by the National Law.

The court also found that section 156(1) applies to a registered medical practitioner irrespective of his or her relationship or capacity when they engage in the conduct which is later found to be professional misconduct or unprofessional conduct.

Dr Nitschke argued that the conduct the Board relies upon in making its decision needs to be clearly identified to ensure that it falls within the Board or Tribunal’s jurisdiction, and to ensure that Dr Nitschke is accorded procedural fairness. In the present case, the conduct complained of was Dr Nitschke’s “general advocacy” of voluntary euthanasia and his email communications with Mr Brayley, though the Board’s case before the Tribunal was confined to the latter conduct. Dr Nitschke submitted that, in reaching its decision, the Tribunal had referred to conduct outside the focus of the

¹ [2011] WASCA 262 at [62]



appeal. In particular, the Tribunal made references to Dr Nitschke assisting people with smuggling lethal substances into Australia. The court therefore found that the Tribunal erred in law for taking into account irrelevant facts. Otherwise, if it was entitled to take into account these facts, then Dr Nitschke was denied procedural fairness in not being given an opportunity to respond to them.

Ground 2.1 of the appeal

As a general rule, the conduct needs to be clearly identified and the medical practitioner needs to have an opportunity to respond before the Tribunal makes a decision on the matter. In the present case, a variety of factors put Dr Nitschke in a position of uncertainty as to the case being made against him. In particular, the Board abandoned its reliance on his “general advocacy” of voluntary euthanasia and, further, the Tribunal ultimately took into consideration conduct relating to the smuggling of lethal substances which was outside the scope of the appeal. When Dr Nitschke did attempt to tender articles about rational suicides, they were refused as irrelevant to the issues under consideration. Therefore, the court found that Dr Nitschke was not afforded an opportunity to respond to the case put against him and was denied procedural fairness.

Ground 4 of the appeal

In relation to Ground 4, the Board relied on clause 1.4 of the Code. It was not in dispute that the Code applied to the relationship between Dr Nitschke and Mr Brayley despite it not being a doctor-patient relationship. Dr Nitschke argued that clause 1.4 is too ambiguous to impose any specific obligations on him in these particular factual circumstances. The court agreed with Dr Nitschke. Clause 1.4 does not impose any duty at all, and to impose professional obligations on medical practitioners by virtue of clause 1.4 would have unwanted repercussions. The court found that the Board’s interpretation of clause 1.4 would defeat the purpose of having the Code at all, as we would only need that one clause. The court concluded that the Tribunal misconstrued the Code in asserting that clause 1.4 imposed a duty on Dr Nitschke. This was an error of law.

Lessons Learnt

This case highlights a number of important points for complaints made to the Board:

- While a medical practitioner’s conduct is relevant, it is the practitioner that must pose a serious risk to persons. Nevertheless, the conduct still must be capable of being professional misconduct or unprofessional conduct in order to be regulated by the National Law;
- A medical practitioner’s conduct which is under review needs to be clearly identified and the practitioner needs to be afforded procedural fairness. That is, he or she needs to be given an opportunity to respond to the case made against them;
- Whilst voluntary euthanasia is a controversial topic and it was controversial for Dr Nitschke to publicly put forward his opinion on the topic, it must be remembered that clause 3.12.4 of the Code states that good medical practice includes “understanding that you do not have a duty to try to prolong life at all costs”. Certainly, clause 1.4 does not impose a boundless duty on medical practitioners to help all people in all circumstances.



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