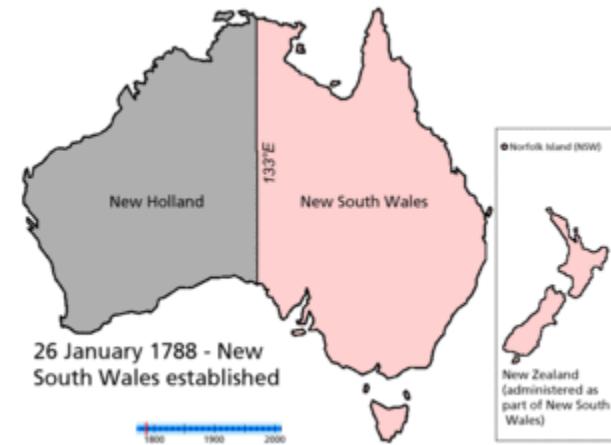


Regulation of health professions in Australia

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A brief history



- Indigenous Australians
- Penal colony – New South Wales
- Later colonies emerge – Tasmania, Queensland, Victoria, South Australia, Western Australia
- 19th century – growing independence
- Federation in 1901
- Constitutional monarchy



A brief history

- 6 states and 2 large territories
- Federal Govt has no overarching health power
- After WWII – a power introduced for “social insurance” but not on the grounds of “civil conscription” – medicine cannot be “nationalised”
- Growing Federal power due to increasing taxation after the war



Four federal functions

- Pharmaceutical benefits
- Funding for public hospital services and general practice
- Regulation of drugs and devices
- Funding for health research via the National Health and Medical Research Committee



Registration and Discipline

- *Health Practitioner Regulation National Law 2009*
- medical practitioners;
- nurses and midwives;
- pharmacists;
- physio-therapists;
- psychologists;
- osteopaths;
- chiropractors;
- optometrists; and
- dentists (including dental specialists, dental therapists, dental hygienists, oral health therapists and dental prosthetists);
- Aboriginal and Torres Strait Islander health practitioners;
- Chinese medicine practitioners;
- Medical radiation practitioners
- occupational therapists
- paramedics



Governance of the National Law

- Australian Health Practitioner Regulatory Authority (“AHPRA”).
- 15 National Boards
- State-based Boards
- Registration Committees, Immediate Action Committee, Notifications Assessment Committees, Health Committees, and Performance and Professional Standards Committees
- Function: Protect the public



NSW Position

- *Health Practitioner Regulation (Adoption of National Law) Act 2009 (NSW)*
- Co-regulatory model
- AHPRA and the National Boards based in New South Wales must refer all notifications to the New South Wales Health Care Complaints Commission (NSWHCCC) and various professional “Councils” for investigation
- The NSWHCCC and the Councils deal with all matters relating to conduct, professional performance, health and competence (fitness to practise) whereas the National Boards in New South Wales deal with accreditation and registration matters.



Notifications

- Any member of the public or health profession can make a voluntary notification to AHPRA about the conduct, health or performance of a health care practitioner or a student: s 144



Mandatory notifications

- Section 140 defines “notifiable conduct” to mean that the practitioner has:
- (a) practised the practitioner's profession while intoxicated by alcohol or drugs; or
- (b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or
- (c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or
- (d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.
- What about doctors treating doctors? *Health Practitioner Regulation National Law (WA) Act 2010 (WA), s 141(4)(da)*



Immunity

- Section 237 of the *National Law* provides protection from “civil, criminal and administrative liability, including defamation” for people making notifications in good faith. The *National Law* also states that making a notification is not a breach of professional etiquette or ethics, or a departure from accepted standards of professional conduct.
- *Lucire v Parmegiani* [2012] NSWCA 86



Self -reporting

- Must report when:
- charged with a crime punishable by imprisonment of more than 12 months
- Convicted with imprisonment
- Not covered by insurance
- Rights to practice have been withdrawn due to conduct, performance or health
- Medicare fraud
- Restriction on prescribing for drugs of addiction
- Suspended or cancelled registration in another country



Disciplinary proceedings

- The primary purpose of these proceedings is the protection of the public, not the punishment of wrongdoing: *Lee v Health Care Complaints Commission* [2012] NSWCA 30
- It is far more likely that an adverse finding will result in supervision, further education, a reprimand, or suspension from practice for a period of time or a fine.



Disciplinary proceedings

- In *King v Health Care Complaints Commission* [\[2011\] NSWCA 353](#), the Court of Appeal found that the Medical Tribunal had breached procedural fairness by ordering the deregistration of a medical practitioner without giving the practitioner the opportunity to bring evidence and make submissions on the most appropriate orders to make regarding the Tribunal's findings.
- This does not necessarily mean that there is always the need for two hearings (one for establishing the conduct complained of and one for determining the orders).
- In *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 at [25], Basten JA stated that the need for a separate hearing depends upon the nature of the complaint and the circumstances of the particular complaint under consideration.



Unsatisfactory professional conduct

- Section 139B
- (a) **Conduct significantly below reasonable standard**
Conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.
- (b) **Contravention of this Law or regulations**
A contravention by the practitioner (whether by act or omission) of a provision of this Law, or the regulations under this Law or under the NSW regulations, whether or not the practitioner has been prosecuted for or convicted of an offence in respect of the contravention.
- (c) **Contravention of conditions of registration or undertaking**
A contravention by the practitioner (whether by act or omission) of—
 - (i) a condition to which the practitioner's registration is subject; or
 - (ii) an undertaking given to a National Board.
- (d) **Failure to comply with decision or order of Committee or Tribunal**
A contravention by the practitioner (whether by act or omission) of a decision or order made by a Committee or Tribunal in relation to the practitioner.
- (e) **Contravention of requirement under [Health Care Complaints Act 1993](#)**
A contravention by the practitioner of section 34A(4) of the [Health Care Complaints Act 1993](#).



Unsatisfactory professional conduct

- **(f) Accepting benefit for referral or recommendation to health service provider**
Accepting from a health service provider (or from another person on behalf of the health service provider) a benefit as inducement, consideration or reward for—
 - (i) referring another person to the health service provider; or
 - (ii) recommending another person use any health service provided by the health service provider or consult with the health service provider in relation to a health matter.
- **(g) Accepting benefit for recommendation of health product**
Accepting from a person who supplies a health product (or from another person on behalf of the supplier) a benefit as inducement, consideration or reward for recommending that another person use the health product, but does not include accepting a benefit that consists of ordinary retail conduct.
- **(h) Offering a benefit for a referral or recommendation**
Offering or giving a person a benefit as inducement, consideration or reward for the person —
 - (i) referring another person to the registered health practitioner; or
 - (ii) recommending to another person that the person use a health service provided by the practitioner or consult the practitioner in relation to a health matter.



Unsatisfactory professional conduct

- **(i) Failure to disclose pecuniary interest in giving referral or recommendation**
Referring a person to, or recommending that a person use or consult—
 - (i) another health service provider; or
 - (ii) a health service; or
 - (iii) a health product;
- if the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of the interest to the person before or at the time of giving the referral or recommendation.
- **(j) Engaging in overservicing**
Engaging in overservicing.
- **(k) Supervision of assistants**
Permitting an assistant employed by the practitioner (in connection with the practitioner's professional practice) who is not a registered health practitioner to attend, treat or perform operations on patients in respect of matters requiring professional discretion or skill.
- **(l) Other improper or unethical conduct**
Any other improper or unethical conduct relating to the practice or purported practice of the practitioner's profession.



Professional misconduct

- (a) unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration; or
- (b) more than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration



Impairment

- Section s 3 :
- ...the person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect--
- (a) for a registered health practitioner or an applicant for registration in a health profession, the person's capacity to practise the profession; or
- (b) for a student, the student's capacity to undertake clinical training--
- (i) as part of the approved program of study in which the student is enrolled; or
- (ii) arranged by an education provider.



Healthcare complaints

- *Health Care Complaints Act 1993*
- Health services include wide range including education
- *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110



Unregistered practitioners

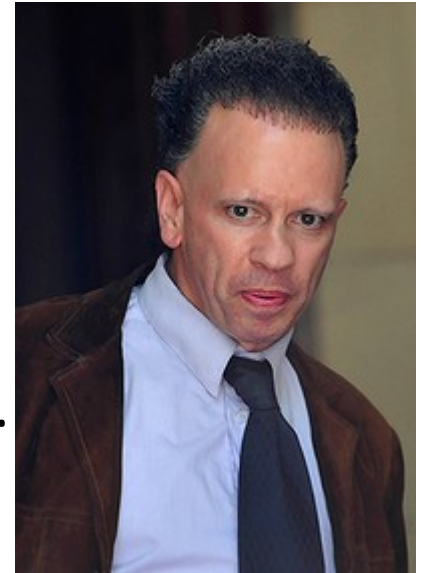
- *Code of Conduct for Unregistered Health Practitioners*
- Negative licensing
- Under *Health Care Complaints Act 1993 (NSW)*, s 41A the NSWHCCC can order an unregistered practitioner to act with conditions on their practice or may ban them from practising altogether, if they breach the Code and also pose a risk to the health or safety of members of the public.



Shalom v Health Services

Commissioner [2009] VSC 514

- Shalom, whose original name was Peter De Angelis but who called himself Thunder Eagle (amongst other things), claimed to be a shamanic healer who came from the Lakota Nation (a North American Indian people).
- Born in Victoria to Italian parents.
- Shaman-based healing services
- Had sex with clients
- One of the patients had noticed that others
- had been copied into an intimate text message.
- Two of the clients lodged a complaint



Shalom v Health Services

Commissioner [2009] VSC 514

- The Health Services Commissioner investigated
- Shalom denied that the Commissioner had any jurisdiction because he was not providing a “health service.”
- But complainants had gone to see the shaman for healing, he advertised his business as a healer and his registered business name stated that the nature of his business was “Educative and Healing”.
- Commissioner Wilson found that the shaman had breached professional boundaries, had made false claims about his culture and training qualifications as a shamanic healer and had used these false claims to mislead clients about his expertise.



Shalom v Health Services

Commissioner [2009] VSC 514

- Ordered to undergo a psychiatric assessment.
- Ordered that the plaintiff only practise in the field of Shamanic Education and Healing in accordance with the Practice Code of Ethics developed by the Australian Shamanic Practitioners Association.
- Ordered Shalom to revise his advertising material, so as to only make claims as to his cultural background and qualifications, which could be supported by documentary evidence.
- Non compliant



Shalom v Health Services

Commissioner [2009] VSC 514

- The Commissioner decided to exercise her power under the *Health Services (Conciliation and Review) Act 1987, s 11*, to report the shaman's conduct to the Minister of Health and to request the Minister to table the report in Parliament.
- Shalom sought an injunction.
- Kaye J denied the application, finding that Shalom was a health service provider, and that the Health Services Commissioner had acted fairly and reasonably in making the request to the Minister

