

## Doctors under Threat – The Case of Dr Jereth Kok

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On 27 March 2020, the Victorian Civil and Administrative Tribunal handed down a decision in *Kok v Medical Board of Australia (Review and Regulation) [2020] VCAT 405*. It is an application by Dr Jereth Kok, a Victorian GP of 15 years' experience, to appeal the decision of the Medical Board in August 2019 to take immediate action under the *Health Practitioner Regulation National Law Act 2009* to suspend Dr Jereth because of his internet media posts.

This paper gives a brief overview of the case and an analysis of some of the reasoning of the Tribunal in upholding the decision of the Medical Board to suspend Dr Jereth and how they determined that this was in the “public interest”.

### Background

In March 2018 an anonymous person (not a patient) complained to the Medical Board about a Facebook post that Dr Jereth made that was allegedly in bad taste following the 2017 Flinders Street attack.

The Medical Board failed to notify Dr Jereth about the complaint as required by law but conducted an investigation unknown to him. Twelve months later, in March 2019, the Medical Board formally advising Dr Jereth of the complaint and set out four allegations with a requirement for him to explain. Dr Jereth responded within a month.<sup>1</sup>

Unknown to Dr Jereth, in May 2019, a second anonymous person (again not a patient) complained to the Medical Board that Dr Jereth had made offensive internet posts.

The Medical Board also failed to notify Dr Jereth of this second complaint. The Medical Board also failed to provide Dr Jereth with 3-monthly progress updates of their investigation as is required by law.

In late August 2019, on a Friday afternoon, Dr Jereth was hit with an avalanche of correspondence from the Medical Board.

- Firstly, the Medical Board withdrew three of their four original allegations.
- Secondly, the Medical Board advised of the second complaint and provided him with a copy.
- Thirdly, the Medical Board wrote Dr Kok to advise that before he was even aware of the complaint, the Medical Board had met and decided that it proposed to suspend Dr Jereth from practice using emergency powers. He had less than a week to prepare for a hearing before the Medical Board and less than two business days to prepare submissions on a complaint he had just received.
- The Medical Board provided Dr Kok with a document of 2000+ pages containing his complete internet posting history that the Medical Board had scoured in order to cherry pick around 30 posts from a ten-year period that it used to determine that it was in the public interest that he should be suspended.

Dr Jereth appeared before the Medical Board less than one week later on 22 August 2019. To the extent possible, he removed all of the identified posts from the internet and he undertook that he would undertake to maintain complete internet silence until the Medical Board investigation

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<sup>1</sup> Human Rights Law Alliance acted for Dr Jereth in relation to the original complaint. Dr Jereth's medical insurance company provided lawyers to assist with the second complaint and subsequent disciplinary and legal proceedings.

was complete. The Medical Board was not satisfied and suspended Dr Jereth immediately pending a full investigation and trial. He lost his job within less than a week of finding out that it was under threat.

On the advice of his medical defence insurer, and represented by their legal team, Dr Jereth appealed the Medical Board's decision to the Victorian Civil and Administrative Appeals Tribunal. On 28 February 2020, there was a hearing. On 27 March, the Tribunal published a decision rejecting that appeal. The Tribunal, consisting of a legal member and two doctors, decided that the Medical Board's use of emergency powers was appropriate – Dr Jereth must remain suspended.

Dr Jereth has been forced not to work for seven months awaiting the Tribunal Decision. Now he still can't work as a doctor. He is at the mercy of the timing of Medical Board's investigation and their stated intention to strike him off for good when the matter finally goes to trial.

## Analysis

The Medical Board suspended Dr Jereth under s156(1)(e) of the *Health Practitioner Regulation National Law* which allows the Medical Board to take immediate action against a doctor if the Medical Board reasonably believes that the action is in the public interest.<sup>2</sup>

In its decision, the Tribunal did not republish any of Dr Jereth's purportedly offensive internet posts. This itself is a concern as analysis can only rely on the Tribunal's observations about the posts rather. It presents a real issue of transparency of justice.

The Medical Board's specific allegations against Dr Jereth were that he had published comments on social media/internet forums:

- (a) *denigrating, demeaning and slurring medical practitioners who:*
  - (i) *provide termination of pregnancy services;*
  - (ii) *recognise and treat gender dysphoria in a manner that is in accordance with accepted medical practice; and*
  - (iii) *recognise that people who identify as transgender, are not suffering from a mental health condition.*
- (b) *sentiments of violence:*
  - (i) *endorsing / calling for violence and/or genocide toward racial and religious groups; and*
  - (ii) *endorsing calls for capital punishment for members of the profession who provide terminations of pregnancy services;*
- (c) *commentary expressing and encouraging views regarding LGBTIQI persons that:*
  - (i) *has no proper clinical basis and is contrary to accepted medical practice, and/or*
  - (ii) *is otherwise demeaning.*

In discussing Dr Jereth's posts, the Tribunal records that Dr Jereth rejects that he has made posts advocating violence and that many of his social media posts have been taken out of context or misinterpreted by the Board. The Tribunal observes that Dr Jereth is a prolific social media poster (2000+ pages of posts over 10 years), that he has clear conservative leanings and that often he engages in lengthy, articulate and considered discussion. They also recognised that many of the allegedly offensive posts were years apart and were peppered amongst many other posts. They then note that the selected quotes could cause offence to a range of members of the community including women seeking abortions, multiple races and members of the LGBTIQ+

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<sup>2</sup> The "public interest" test, under which Dr Jereth was suspended, was inserted into the *National Law* in 2018. Dr Jereth's case is the third case in which this new power has been exercised by the Medical Board. The previous two cases involved doctors who have been charged with serious crimes (slavery and rape respectively); neither of these previous cases ultimately resulted in suspension of the doctors.

communities. The Tribunal grants that social media postings are not always read or understood in their full context which is the danger of posting on social media. They note that there is a real potential for individuals who read these posts to take them personally.

In light of Dr Jereth's internet posts, the Tribunal decided that it was in the public interest to suspend Dr Jereth and upheld the decision of the Medical Board. The Tribunal decided that a suspension was appropriate because:

- Public confidence in the profession is undermined if someone sees a post by a doctor that infers that other doctors (e.g. those who perform abortions) are murderers.
- The reputation of the profession is potentially damaged by posts which on their face look to be racial slurs – an Asian doctor taking on a parody-Asian persona to make social commentary could be seen as racist.
- there was the potential for individuals to take posts personally that reference members of the LGBTQI+ community.
- Doctors are to be held to a higher standard which requires respect and compassion.

The Tribunal gave little weight to the fact that no patient had actually ever complained about Dr Jereth, that there was no evidence of differential treatment of anyone in his practice, and that no clinical issues had ever arisen in Dr Jereth's practice.

The Tribunal also did not consider that Medical Board had to pay consultants significant sums to scrape from the internet 2000+ pages of internet posting from which to select purportedly offensive quotes. There was no recognition that no member of the public would ever see the posts and so there is no realistic risk that a potential patient would ever see these allegedly offensive posts. So, it is hard to see how the Tribunal determined that there is a "real likelihood that the maintenance of the standards of the medical profession will be undermined" by such posts.

It is also hard to see how the Tribunal can conclude that "public confidence in the medical profession and the willingness of (some) members of the public to seek appropriate treatment will be significantly undermined" if Dr Jereth continues to practice. What member of the public will spend time and money zealously auditing Dr Jereth's internet history like the Medical Board has done?

When determining whether suspension was proportionate, the Tribunal rejected Dr Jereth's proposal that appropriate sanction was to prohibit his future posting on the internet. The Tribunal also wrongly observes that the offending posts remain online. Most if not all were removed by Dr Jereth. To voluntarily restrict one's own freedom of speech is a significant concession. Furthermore, if the true concern was public perception of the profession and a concern for patient care, then Dr Jereth's proposal seems to be comprehensive in addressing those concerns.

Despite the Tribunal finding that there is no evidence that Dr Jereth's opinions affect his medical practice, it was sufficient that the community *might* consider that someone posting those views could fail to give "respectful" and "appropriate" treatment. Despite no evidence that Dr Jereth had ever disrespected a fellow practitioner, the Tribunal thought it sufficient that his opinions *might* affect the way he treats other doctors. On the basis of speculation, the Tribunal removes a man from his job, destroys his career and removes his ability to support himself and his family.

## **Conclusion**

This Tribunal decision is concerning and should scare anyone in health services who comes within the regulation of the Medical Board of Australia. The Tribunal has upheld a very low bar for allowing the Medical Board to exercise vaguely worded powers to impose severe sanctions on a doctor prior to a completed investigation or full trial. So, the end result is that a doctor is suspended indefinitely without a full hearing, not for what he does, but for what he has said (or typed into a keyboard).

On analysis, the Tribunal's rationale for upholding the Medical Boards decision is problematic and doesn't stand up to scrutiny. There appear to be strong grounds on which to appeal this decision to the Supreme Court. The question is whether Dr Jereth has the fortitude and the mental and financial capacity to take an appeal given that he has been out of work for seven months and has no clear way of making an income going forward to support what will be costly court proceedings against a well-resourced Medical Board.