HEALTH PRACTITIONERS AND THE REGULATION OF SEXUAL MISCONDUCT IN THE NOUGHTIES AND BEYOND......

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The annual report of the Australian Health Practitioner Regulation Agency (AHPRA) for 2010/11 year includes detailed national data in relation to notifications about the conduct and performance of registered health practitioners. One of the key changes which has come about with the national scheme regulating health professionals is the requirement that there be mandatory notification of certain conduct. Such conduct includes, among other matters, sexual misconduct in connection with the practice of the profession.

The data in the national report includes the grounds for the mandatory notifications made in that year. While only 29 out of the total of 428 mandatory notifications are described as being in respect of sexual misconduct, the annual report also notes that mandatory notifications represent only 8% of all notifications received by AHPRA. Other notifications (made by patients, members of the public, other health complaints entities, employers, and many other sources) may well also relate to matters involving sexual misconduct.

The annual report identifies a breakdown of notifications by profession and by “issue category” which for the year 2010/11 included a category of “professional conduct”. It is not clear whether this encompasses conduct which may be categorised as relating to boundary violations or sexual misconduct. Professional conduct is a fairly broad category and it will be interesting to see if new issue categories being brought in for 2011/12 will provide a further breakdown to identify the prevalence of notifications (that is, not just mandatory notifications) which relate to allegations of sexual misconduct.

There are a number of recent decisions dealing with complaints against registered health practitioners for alleged sexual misconduct which show that this area, as with most other aspects of day-to-day life, is not immune from the advances of technology and social media. With social media and technology changing the way relationships are established and conducted, it is hardly surprising that new technologies can be relevant to a disciplinary body’s consideration of what constitutes sexual misconduct. Furthermore, a trail of comments,
profiles and date stamped electronic exchanges bring a new dimension to the treatment of evidence in an arena which in days of old was often a “he said/she said” credibility battle based on an assessment of oral evidence, in circumstances where any relationship that did ever exist had ultimately gone bad.

In Queensland, 2 recent separate matters involved allegations of improper conduct by nurses who were found to have initiated relationships with patients via Facebook friendships (Nursing and Midwifery Board of Australia v Brennan [2011] QCAT 328; Nursing and Midwifery Board of Australia v Ascot [2011] QCAT 266). Perhaps a natural caution and attention to the context and boundaries of the practitioner/patient relationship is eroded by interposing technology in the relationship.

The ease of initiating contact by way of social media rather than in a face to face personal setting is also illustrated by an optometry patient lodging a complaint about an improper relationship with her optometrist by informing the optometrist’s co-worker via Facebook (HCCC v Ford [2012] NSWOPT 1).

Allegations of sexual misconduct can be difficult to prove, as it is not often that letters or the contents of telephone calls are available. In the past telephone records could provide evidence of a call being made, but not the content of such a call. New technology and social media platforms can leave a much larger footprint which the participants may not retain control over.

The matter of HCCC v Whyte (no 1) [2012] NSWPST 2 related to a variety of complaints which included allegations of professional boundary violations in the form of an improper social and sexual relationship between a psychologist and his client. The practitioner denied that the social relationship included a sexual element, and submitted that the complaint involved an element of ‘lashing out’ by a therapy patient.

The tribunal ultimately found that a sexual relationship had occurred. While the decision is very detailed, and many factors were taken into account, the technology trail was given significant attention.

Contact between the client and practitioner was made over the RSVP online dating site, and in addition to obtaining details of email accounts used to establish profiles, the disciplinary body called oral evidence from the customer support manager of the dating website. Details as to the content of the practitioner’s online profile were put into evidence (including ‘...THROW ME ONE OF YOUR FABULOUS KISSES AND YOU WON’T BE DISAPPOINTED!’), and those details were found by the tribunal to have been of a romantic nature, and indicative of the search for a partner (as distinct from a platonic friendship). The disciplinary body also submitted that the practitioner stating his age as younger than his true age was also supportive of such a finding.

SMS records also provided details of at least one side of the text messages exchanged between the two, and they lead the tribunal to the conclusion that “there was at least a sexualised relationship at the time”.

Extracts from the client’s Facebook page were also relied upon to show that the relationship was of a sexual nature. The extracts appear to be records of online exchanges between the
client and others (that is, not the practitioner) where she has informed those others of the nature of her relationship. While such a record may only be evidence of what the client said about the relationship, rather than evidence of the nature of the relationship itself, it is relevant to note that in the days before such forms of communication, there would not ordinarily be a record of what may otherwise be coffee shop gossip between friends.

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