

# Minter Ellison Health News

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14 July 2010

## Health reform developments

The Department of Health and Ageing (DOHA) has released a new publication summarising the Government's health reform program entitled *A National Health and Hospitals Network for Australia's Future – Delivering the Reforms*.

[Click here for publication](#)

DOHA has invited submissions on setting the boundaries of the geographic area to be covered by each Local Hospital Network and Medicare Local.

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## Case law

### NSW

#### ***Rastogi v Nolan***

Dr Anoop Rastogi, a Sydney GP and plastic surgeon with a public profile from his appearances on breakfast TV, was found to have been defamed in blog postings made by a dissatisfied breast augmentation patient. The patient uploaded accusations that the surgeon had engaged in false and misleading promotional activities. She disrupted a function held to launch Dr Rastogi's book "Breast Art" until she was removed by police.

The patient was ordered to pay the surgeon damages of \$65,000 and interest of \$2,500, and an injunction was granted to prevent the patient from making public statements about the plastic surgeon, other than through correct legal channels such as the NSW Health Care Complaints Commission.

[Click here for decision](#)

#### ***OV & OW v Members of the Board of the Wesley Mission Council***

The matter concerned the Wesley Mission not allowing homosexual partners to participate in a foster parenting program it conducted in 2003. The Wesley Mission is an organisation of the Uniting Church, representing the Methodist tradition. Its stated reason for excluding homosexual partners from foster care was that the Methodist

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tradition includes a specific belief that "monogamous heterosexual partnership within marriage is both the norm and the ideal".

Two men who were excluded complained to the NSW Anti-Discrimination Board under the *Anti-Discrimination Act 1977* (NSW).

Section 56(d) of that Act provides "nothing in this Act affects ... any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion".

The matter was referred to the Equal Opportunity Division of the Administrative Decisions Tribunal (ADT), which held that the word "religion" as used in the legislation means only the broadly-defined religion of which the religious organisation is part, and that "religion" does not encompass beliefs unique to a sub-group or specific denomination. Consequently, the ADT found that the relevant doctrines and "religious susceptibilities" for consideration in this case were those of "Christianity" and not those of the Methodist tradition within the Uniting Church. The ADT did not find that an opposition to the provision of foster care by homosexual partners is a feature of the Christian religion, so it ordered the Wesley Mission to change its eligibility policy to comply with anti-discrimination law.

The Appeal Panel of the ADT disagreed with the use of a non-specific definition of "religion", and ruled that the matter be returned to the ADT to be determined by reference to the specific beliefs of the Wesley Mission rather than the beliefs of Christianity.

The men appealed to the NSW Court of Appeal. Their appeal was dismissed unanimously. The Court held that what is required is an examination of the specific doctrines of the religion that the religious body was established to propagate, rather than the broad tenets of the religion in the abstract. The majority judgment commented that the past participle "established" should be interpreted as referring to the present doctrines of the religious body as they have evolved since the body was first established, rather than involving historical study.


Now that the NSW Court of Appeal has determined the interpretation of the statute, the matter has been remitted to the ADT for reconsideration.

[Click here for decision](#)

### ***HCCC v Dene & Donnelly***

A psychologist undertaking the practical therapy component of a graduate course at a NSW university and her academic supervisor, a registered psychologist who lectured in ethics at the university, decided not to report a patient's admission that he was subjecting his 10 year old daughter to sexual abuse. Instead, they decided to involve the victim in joint therapy sessions with her abuser, purportedly to take "the first steps in healing the abuse" and to "assist father to maintain safe behaviours with [his] daughter".

The father was receiving counselling in relation to coping with his wife's multiple sclerosis when he first mentioned that he abused one of his two daughters in October 2003. The focus of his counselling shifted to his refraining from abuse, and his 10 year old daughter was invited to attend counselling with him from September 2004. Over this protracted period of counselling, it became clear that the abusive father had



dishonestly misrepresented the scale and extent of his abuse. The evidence before the NSW Psychologists Tribunal was that the two psychologists formed the view that they should report the abuse some months prior to finally doing so in August 2005. It was determined that the psychologists had utterly failed to appreciate the risk to the children represented by their abusive father, failed to adhere to the disclosure provisions of the NSW Psychology Board Code of Conduct, and contravened the mandatory disclosure law (which in NSW is contained in the *Children and Young Persons (Care and Protection) Act 1998*). Not only did the psychologists decide not to report the abuse when they should have, but after ultimately deciding to do so, they delayed for a period of months.

The Tribunal cancelled the psychologists' names from the Register, and ordered that they be ineligible to work in a healthcare profession or apply for re-registration for three years.

[Click here for decision](#)

### **HCCC v Allen**

A doctor signed a statement to be provided to the NSW Medical Board at the request of a doctor who was under investigation. The statement was written by the doctor under investigation, and the doctor who signed it became concerned about the truth of the statement and the circumstances in which it was signed only after it had already been submitted to the Board. The NSW Medical Tribunal determined that although the doctor who signed the statement had not knowingly misled the Board, it was reckless and unethical for him to have signed the statement without checking its accuracy. The Tribunal ordered that an official reprimand be recorded, but allowed him to retain his registration.

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## **New Zealand**

### **Health and Disability Commissioner: Gynaecologist Dr B, General Practitioners Dr C and Dr D, a medical centre and a District Health Board**

The Health and Disability Commissioner released a report concerning the treatment provided to a patient, Mrs A, who suffered recurrent episodes of postcoital bleeding. Mrs A saw Dr C in April 2007, but he did not take a cervical smear test, noting that Mrs A's previous smear test had a clear result. Dr C ordered an x-ray and an ultrasound scan. Medical advice provided to the Commissioner confirmed this to be the appropriate treatment.

Mrs A later saw Dr D at the medical centre. Dr D took a bacterial test and prescribed antibiotics. Dr D did not order a cervical smear test for Mrs A due to an infection. The bacterial test was clear and the ultrasound found no sign of a swab. Dr C referred Mrs A to Dr B.

In June 2007, Dr B conducted a physical examination of Mrs A, but did not take a cervical smear or conduct a colposcopy. Four months later, Mrs A requested a cervical smear but was declined. Mrs A finally had a smear taken in February 2008, which was returned with abnormal results. Mrs A was diagnosed with Stage 3B cervical cancer, and died in 2009.



The Commissioner found that Dr C and Dr D had provided care "consistent with expected standards". Despite some criticisms in relation to the delay in referral to a specialist and the failure to follow up after identifying the need for a smear, the Commissioner found that Dr C and Dr D did not breach the Code of Health and Disability Services Consumers' Rights (the Code).

The medical centre and the DHB were found not to have breached the Code either. Again, the Commissioner found that the care provided was appropriate in the circumstances.

Dr B was found to have breached Right 4(1) the Code in failing to adequately advise Mrs A and her referring GP about follow-up. The Commissioner expressed doubt as to whether Dr B's management of Mrs A was reasonable, and noted that a smear was "a simple and obvious precaution to take". However, the Commissioner accepted that "the tragic outcome for Mrs A must not colour the assessment of the adequacy of [Dr B's] actions at the time," and concluded that Dr B had not breached the Code in his management of Mrs A.

[Click here for decision](#)

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## News

### Aged care

#### **Australian Government penalises NSW Nursing Home**

The Australian Government has imposed sanctions on Fairfield Nursing Home Holdings Pty Ltd, the approved provider of Fairfield Nursing Home in NSW.

[Click here for press release](#)

### General Health

#### **Doctor faces trial on assault charges**

The former doctor Graeme Reeves will stand trial accused of sexually assaulting a string of female patients in Sydney's northern suburbs and on the NSW south coast.

[Click here for story](#)

### Hospitals

#### **WA enticed to sign on to health reform**

The PM will offer Western Australia a special deal to win Liberal Premier Colin Barnett's backing for Kevin Rudd's \$50bn health reform plan.

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**Fears health reform plans "being rushed through"**

The Federal Government's release of a detailed plan to deliver health reform has triggered criticism from health groups that the complex changes are in danger of being rushed through with little input from consumers.

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**Emergency department plan claimed to risk lives**

Patients' lives reportedly could be at risk if a Federal Government plan to halve waiting times in emergency departments goes ahead, according to Victorian doctors.

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## New Zealand

**Doctor struck off over drug charges**

A doctor alleged to have a gang association and a reputation for supplying anabolic steroids to body builders has been struck off the register on charges relating to irregular prescribing.

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**Laboratory charges for private patients scrapped**

The Government has decided to put an end to some District Health Boards charging private patients for laboratory tests.

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**Newborn given drug in error**

Senior Waikato midwives have publicised an alleged drug mix-up involving a mother and newborn baby under the care of a "relatively new" graduate midwife.

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**Hospital assaults going unreported**

Hospital staff are not reporting an increasing number of assaults because of an ingrained acceptance of patient violence, workers and unions say.

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**Health standards body ratifies online standard**

After three years of trials and discussion, the Health Information Standards Organisation has formally ratified an online forms architecture technical specification to fast-track interoperability for the health sector.

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