Wong v. Commonwealth

(2009) 236 CLR 573; [2009] HCA 3

Country: Australia
Region: Oceania
Year: 2009
Court: High Court
Health Topics: Health care and health services, Health systems and financing, Medical malpractice, Medicines
Human Rights: Right to favorable working conditions, Right to health, Right to social security, Right to work

Facts

Wong and Selim were “vocationally registered general practitioner(s)” within s 3F of the Health Insurance Act 1973 (Cth) (the Act). Both were found to have engaged in “inappropriate practice” by a Professional Services Review Committee (the Committee) established under Pt VAA (ss 80-106ZR) of the Act.

The effect of the Committee’s findings was to require repayment of earnings paid by the Federal Government’s Medicare scheme, and to prevent Wong and Selim from receiving Medicare benefits into the future.

Wong and Selim claimed that sections of the Act amounted to a form of civil conscription and therefore went beyond the legislative powers granted to the Commonwealth by s 51(xxiiiA).

The Constitution s 51(xxiiiA) grants the Commonwealth government power over:
“the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances”
Sections 10, 20 and 20A of the Act were provisions detailing entitlements to Medicare benefits, payments to persons incurring medical expenses in respect of professional service, and the assignment of Medicare benefits to practitioners. Provisions relating to professional conduct were detailed in part Pt VAA of the Act. These provisions, which required practitioners to accord with professional standards and be subject to review by a professional standards body in order to receive Medicare benefits, were added to the Act several years after its initial enactment.

Decision and Reasoning

The Court held that the contested provisions of the Act did not constitute civil conscription. It defined civil conscription as “the compulsory performance of a service or services,” which could include “practical as well as legal compulsion.”

In the Court’s opinion, there was a distinction between incidental compulsion to do something and compulsion to provide services to the Commonwealth. However, the Court noted that if the effect of a law was to establish compulsion in practice (e.g. economically), this would breach the Constitution. That is, it was necessary to distinguish between regulating the manner in which some of the incidents of medical practice were carried out, and compelling a medical practitioner to perform medical services.

However, neither practical nor legal compulsion was made out in this case. There was no legal compulsion because there was no obligation in the Act to provide services to the Commonwealth or to any particular person or employer.

There was also no practical or economic compulsion. Although the Act made a practitioner’s participation in the Medicare scheme conditional on the practitioner being subject to professional review, this review was restricted to the category of “inappropriate practice.” This standard was an objective one, and was determined by reference to professional standards that were similar to the ones that medical practitioners had been historically expected to follow. It was additionally narrowed by reference to both a reasonableness standard and to the provision of services.

Decision Excerpts

“A legislative scheme for the provision of medical services supported by appropriation of the Consolidated Revenue Fund established under s 81 of the Constitution, by requiring the professional activities of medical practitioners to conform to the norms derived from Allinson, does not conscript them. Those norms are calculated to ensure that the activities be professional rather than unprofessional in character.” Para. 65.

“The provisions of the Act which the appellants impugn do not compel the provider of "medical and dental services" to perform any service for or on behalf of a recipient, whether legally or practically, whether on behalf of the Commonwealth or (least of all) as its employee or agent. The scheme of the Act, and specifically the impugned provisions, carefully respect the individual and personal character of the relations between the healthcare professional, as the provider of services, and the individual patient, as recipient.” Para. 155.

“Even if the definition of inappropriate practice in s 82 is as broad in its application as has been asserted (and as noted earlier, it is not necessary to decide whether it is) the standard of conduct that is thus imposed is framed by reference to professional opinion. It is, therefore, not different in kind from the standard of professional conduct that, since Allinson’s Case, has been expected of medical practitioners in the conduct of their profession.” Para. 224.

“The practical compulsion to meet a prescribed standard of conduct when the practitioner does practise is not a form of civil conscription.” Para. 226.