

## Dunlop v Veterinary Practitioners Registration Board of Victoria (Review and Regulation) [2024] VCAT 594 (28 June 2024)

### Overview and key takeaways

This decision concerned the written decision and reasons of a disciplinary board, which VCAT ordered to be released, subject to some personal information being removed.

In releasing the document, VCAT considered that a provision in the *Veterinary Practice Act 1997* providing for disciplinary proceedings to be held in public meant that a secrecy provision that would otherwise have applied did not apply to the document, and therefore section 38 did not apply to exempt the document from release. This is important as many other disciplinary hearing bodies will be operating under similar provisions.

VCAT also considered that there is no expectation of confidence for parties in disciplinary proceedings, therefore section 35 did not apply. This indicates that many other disciplinary boards may not be able to rely on section 35 to exempt reasons for decision.

Finally, VCAT observed that an applicant need only indicate that they will accept edited copies of documents under section 25. It does not need to be a formal statement.

### The facts

The applicant requested access to a decision of the Agency dated 30 May 2022 in which the Agency had found that a practitioner had engaged in unprofessional conduct of a serious nature and imposed a suspension of six months. The Applicant is a journalist. The Agency refused to grant access under section 38 in accordance with section 77 of the *Veterinary Practice Act (VP Act)* (as in force at the relevant time). The applicant sought review at OVIC.

### OVIC's decision

OVIC affirmed the Agency's decision to refuse access, however finding that the document was exempt under section 31(1) of the Act.

The Applicant then applied to VCAT for review. At hearing, the Agency maintained its section 38 argument and also relied on sections 33 and 35 of the Act.

### Discussion

#### The VP Act

Section 77 of the VP Act (as in force at the relevant time) provided as follows:

(1) A person who is or has been a member of the Board, or a member of the staff of the Board must not, directly or indirectly, make a record of, disclose or communicate to any person information about the affairs of any person acquired in that capacity unless—

(a) it is necessary to do so for the purposes of, or in connection with, the performance of a function or the exercise of a power or duty under this or any other Act; or

(b) the person to whom the information relates gives written consent to the making of the record, disclosure or communication.

Both parties relied on various provisions of the VP Act to support their case, in particular, section 44 which sets out the requirements for hearings under the Act. Subsection (d) provides that proceedings under the Act are to be open to the public unless the panel determines that the proceedings should be closed.

The applicant submitted that the term ‘proceeding’ in sub(d) encompassed more than just the oral hearing, it also included the written decision and reasons for the decision. The Agency argued that the introductory words ‘formal hearing’ limit section 44 to just the oral hearing.

VCAT did not agree with the Agency’s interpretation. It found that if the Agency’s interpretation were correct, then the Board would have to make a determination at the time of the hearing, and the complainant’s name could only be published at the hearing, not before or after. Therefore ‘formal hearing’ was more likely to refer to the process of a formal hearing under the VP Act and the written decision and reasons would form part of the proceedings open to the public.

The Agency additionally argued that sections 51 (requiring the panel to give reasons within 28 days) and 52(4) (notification to the complainant) of the VP Act provided for the only methods by which determinations are provided to people outside the Board. VCAT found that these sections are not a complete statutory framework – they only provide for obligations to provide the reasons to specified persons involved in or affected by the matter.

Finally, the Agency argued that section 77 of the VP Act should be given a broad interpretation, applying to everything the Board does, including complaint handling processes and investigations. VCAT considered that this creates a conflict with section 44, which requires open proceedings. VCAT found that the more specific provision in section 44 prevails over the general section 77, meaning that section 77 only operates outside formal hearing proceedings.

## Section 38

VCAT considered section 38 of the Act in conjunction with section 77 of the VP Act. Given the Tribunal’s findings that written decisions are part of the formal hearing process and are required to be open to the public, VCAT found that section 77 did not apply to the document.

Alternatively, VCAT found that the exception in section 77(1)(a) would apply as providing reasons for a decision is necessary for the purposes of, or in connection with, the performance of a function or exercise of a power under the VP Act.

VCAT was not satisfied that the Agency had shown that the section 38 exemption applied.

## Section 31

VCAT considered the exemption under 31(1)(a), which OVIC had found exempted the document in full. The Agency submitted that:

- Practitioners would be less likely to be candid and frank in agreeing to allegations and facts before or during a hearing;
- This would prejudice the ability of the Agency to conduct the complaint handling process as they could not narrow issues, and would make hearings more formal;
- Disclosure would delay the managing of complaints;
- Legal advisors might advise practitioners not to engage with the Agency; and
- The public may misunderstand the role of the Agency.

VCAT considered that in other disciplinary jurisdictions parties regularly reach agreed statements of facts, findings and determinations. VCAT could not reach a determination that disclosure would cause a practitioner to be less likely to engage with the Board, it appeared equally likely that the practitioner would engage, or this would have no effect at all.

Section 31 was not upheld.

## Section 33

VCAT then turned to section 33. The Agency submitted:

- Disclosure might deter future complainants from coming forward;
- It would be unreasonable to further expose the practitioner to subsequent adverse comment;
- The document would be disseminated widely by the applicant

VCAT considered there were relevant factors for and against disclosure. The Tribunal made the following observations:

- The nature of the document is a formal outcome of a public process under the VP Act. There is no provision for the complainant to consent to the publishing or broadcasting of her identity, although she could consent to the publication or broadcasting of a report of the formal hearing. In this case she had not;
- The Applicant was seeking the document as part of his job as a journalist;
- Under section 44 it is strongly implied that the decision and reasons for decision are required to be public;
- Disclosure would not be reasonably likely to endanger the life or physical safety of any person.

VCAT found that section 33 did not apply to the name of the practitioner, panel members, a senior employee of the Board or an employee of the Board on the record for the hearing, however it did

apply to the name of the complainant and the name and role of the administrative employee on the first page of the document.

## Section 25

VCAT considered whether the document could be released with deletions. VCAT was satisfied that only a small amount of information was exempt and so it could make the necessary deletions to make the document not an exempt document. VCAT was then satisfied that section 25 does not require a formal statement of intent to accept edited documents, given that the Applicant anticipated that there might be issues with the release of personal information, which satisfied the Tribunal that the applicant wished to have access to the document with deletions.

## Section 35

The Tribunal finally considered section 35. The Agency submitted that VCAT should conclude that the information was provided in confidence based on the following considerations:

- The sensitive nature of the information provided by the complainant and the practitioner during the complaint;
- The information was provided during a complaint handling process which culminated in a formal hearing;
- There is a comprehensive statutory framework which protects information about the complainant and about any person's affairs, subject to limited disclosure;
- Parties to hearings expect that limited information is disclosed.

VCAT firstly said that they were not provided with any direct evidence as to how information is obtained by the Agency. VCAT also found that there was no evidence that the information had been provided in confidence. VCAT considered the parties would have been aware that the information could have been used in a formal hearing open to the public.

VCAT then considered whether disclosure would be contrary to the public interest. The Agency submitted that:

- Complainants and practitioners might be less open and candid;
- Practitioners would be less willing to provide information or agree to allegation or facts;
- Complainants might be less inclined to make professional conduct complaints;
- Disclosure would impair the agency's ability to obtain similar information in the future.

VCAT was not satisfied that disclosure would inhibit the Agency's ability to obtain information in future. The Tribunal found that complainants have protection from publication and broadcasting under the VP Act. Importantly, VCAT considered that practitioners would still likely engage with the Agency and its processes as a practitioner who does not would likely be subject to a more serious determination as they may be found to have a lack of remorse and insight.

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VCAT was not satisfied that the document was exempt under section 35.

## Orders

VCAT ordered the document to be released, with the personal affairs information referred to above redacted.