

Independent review of chaperones to protect patients

Thank you for the opportunity to provide a submission in response to the independent review on the use of chaperones to protect patients (the review).

Established in 1925, MDA National is one of Australia's leading providers of medical defence and medico-legal advocacy services. With over 45,000 members and insureds, we work in close partnership with the medical profession on a wide range of issues which impact on medical practice. MDA National has significant expertise in managing the range of cases involving allegations of sexual misconduct against medical practitioners, including the imposition of chaperone conditions on the registration of medical practitioners.

Sexual misconduct by medical practitioners is abhorrent. It undermines the public trust and confidence in the medical profession and health regulators, and brings the medical profession into disrepute.

In accordance with the terms of reference, we note the review will consider whether, and if so in what circumstances, it is appropriate to impose a chaperone condition on the registration of a medical practitioner to protect patients while allegations of sexual misconduct are investigated.

MDA National supports the use of chaperone conditions. The current arrangements and protocols for chaperones could be strengthened to ensure the protection of the public.

In response to the Consultation questions:

Do you think chaperone conditions are an effective measure to protect patients, and why?

MDA National believes that chaperone conditions are an effective interim measure to protect patients while allegations of sexual misconduct are investigated. The chaperone system aims to protect the public through the imposition of appropriate restrictions on a medical practitioner's practice, while allowing the medical practitioner to continue to assess and manage patients pending the investigation and resolution of allegations of sexual misconduct.

The Medical Board of Australia defines sexual misconduct as including:

- sexual activity with a current or former patient, or a person who is closely related to a patient
- making sexual remarks, touching patients in a sexual way, or engaging in sexual behaviour in front of a patient¹.

In MDA National's experience, allegations of sexual misconduct can arise from a number of causes, including a misunderstanding, miscommunication, poor physical examination, boundary violations or sexual assault. In certain cases, the use of chaperone conditions pending the outcome of an investigation and/or hearing into an allegation of sexual misconduct is appropriate. The conditions provide flexibility in balancing the need to protect the public and to provide the medical practitioner with procedural fairness and the ability to practice, particularly where the investigation of an allegation of sexual misconduct will involve significant delay.

In cases involving a police investigation into an allegation of sexual misconduct, AHPRA will generally wait for the completion of the criminal investigation and/or prosecution before investigating the matter. This allows medical practitioners an unfettered ability to respond without prejudicing the

criminal investigation and, if criminal conduct is found proved, enables AHPRA to rely on the court findings. This can, and frequently does, add significant delays to the completion of the AHPRA investigation, often taking several years to reach completion. Because criminal matters may not be subject to a statute of limitations as to when criminal charges must be laid, there may be no time pressure on the police to complete their investigation, further delaying the AHPRA investigation. Unless the police formally confirm that they are no longer investigating the matter, the AHPRA investigation can remain on hold for long periods. Police investigations that are less supported by evidence can take longer to complete than allegations with better evidential support. Perversely, this results in significant delays for matters where it is less likely that criminal conduct will be found proved.

MDA National submits that if chaperone conditions were not available in this situation, then medical practitioners would be subjected to prolonged periods of being unable to practice, if suspension was the only option. This is inconsistent with the regulatory principles for the National Scheme that AHPRA use the minimum regulatory force appropriate to manage the risk posed by a medical practitioner's practice, to protect the public.

It is important to note that the existence of an allegation of sexual misconduct, including a criminal charge, does not of itself determine guilt. MDA National has advised medical practitioners in cases involving criminal charges, where interim chaperone conditions have been imposed based on an assessment of risk and the nature of the allegations, and the matter has proceeded to acquittal in the criminal court and no adverse finding being made in disciplinary proceedings.

In MDA National's experience, a large number of allegations of sexual misconduct arise out of miscommunication, misunderstanding or the careless practice of medicine. A small proportion of sexual misconduct cases involve malicious or vexatious allegations by a patient. A small proportion of sexual misconduct cases involve calculated and intentional sexual misconduct by a medical practitioner. It is clearly in this latter group where it is essential that patients are protected from further harm.

Currently there are a number of regulatory options available when considering the interim management of a medical practitioner during the investigation of a sexual misconduct notification. These include:

- suspension of medical registration
- medical registration restrictions, including patient groups (e.g. gender, age), types of examinations, procedures or assessments performed (e.g. intimate examinations), presence of a chaperone for all, or some patient consultations
- no medical registration restrictions.

This range of interim regulatory actions is appropriate for the wide range of notifications that AHPRA receives which involve sexual misconduct. Removal of chaperone conditions as an option would reduce the flexibility in managing these cases and create a situation where the available options are more likely to be disproportionate to the risk posed by the medical practitioner.

If chaperone conditions are appropriate in some circumstances, what steps do you think need to be taken to ensure patients are protected and adequately informed?

MDA National supports the AHPRA Chaperone Protocol (November 2015) which requires that prior to any contact with the class of patients named in the restriction, the medical practitioner or an appropriate staff member should inform the patient of the necessity for a chaperone to be present

and directly observe any contact between the medical practitioner and the patient. The patient must be offered the use of a chaperone of their choice, an AHPRA approved chaperone or an appointment with another practitioner. The AHPRA Chaperone Protocol also requires a sign in the patient waiting area setting out the requirement for the presence and direct observation of a chaperone. There are also specific requirements with respect to the chaperone and the maintenance of a chaperone log. MDA National supports all of these requirements in maintaining public protection and ensuring adequately informed patients.

To further strengthen the AHPRA Chaperone Protocol, consideration could be given to:

- including in the practice sign a reference to the conditions on the medical practitioner's registration. In cases of serial predatory behaviour by a medical practitioner, this may alert any other patients who were subject to similar behaviour and encourage them to report
- informing the AHPRA approved chaperone of the nature of the sexual misconduct allegations that have resulted in the imposition of chaperone conditions. AHPRA could provide this information directly to the chaperone
- ensuring there are not any conflicts of interest for the chaperone, such as where they are a direct employee of the medical practitioner
- informing the medical practitioner of their obligations, including that any inadvertent or careless contravention of chaperone conditions undermines their protective function, and any deliberate contravention of chaperone conditions will result in escalation of the regulatory conditions
- strengthening AHPRA's auditing of compliance with chaperone conditions, such as the use of 'secret shopper' patients.

In what circumstances do you think chaperone conditions are not appropriate, and why?

Each case involving an allegation of sexual misconduct needs to be assessed individually on a case-by-case basis. In some cases, chaperone conditions may be insufficient to protect the public, such as when the conditions have been deliberately breached by the medical practitioner. In other cases, the nature of the sexual misconduct allegation may mean that chaperone conditions are not necessary, such as where it is apparent that the notification has arisen from a misunderstanding or miscommunication about a physical examination.

It would be useful for AHPRA, the Medical Board of Australia and the Medical Council of NSW to have consistent and documented processes as to when to impose chaperone conditions as an interim measure, when the conditions should be reviewed and when the conditions are no longer appropriate.

Can you suggest an alternative regulatory measure to protect patients while allegations of sexual misconduct are investigated?

As outlined above, there is currently a range of regulatory measures that can be imposed when an allegation of sexual misconduct is made, pending the outcome of an investigation or hearing. It may be appropriate for AHPRA and the Medical Council of NSW to consider using a term other than 'chaperone' when this condition is imposed on medical registration. This could prevent any confusion between medical practitioners who elect to use chaperones for some or all patients, and those medical practitioners who have had the chaperone condition imposed.

Do you have any general comments for the review to consider?

MDA National submits that any potential change to the regulatory framework should be based on relevant information and data.

Other jurisdictions, such as the UKⁱ and New Zealandⁱⁱ, use chaperones as interim order conditions to protect the public while allegations of sexual misconduct are investigated. Discussion with these jurisdictions may identify aspects of their processes and protocols that could further strengthen the AHPRA Chaperone Protocol.

A review of the outcome of AHPRA's sexual misconduct notifications, both where there has and has not been a chaperone condition imposed, would be valuable. This information will enable AHPRA and the Medical Board of Australia to better understand the effectiveness of the current chaperone conditions, any risks and to consider what changes, if any, should be made.

It is MDA National's view that to require medical practitioners to cease practice or to undertake non-clinical duties until sexual misconduct allegations have been investigated and concluded, as has been suggested in the media^{iv}, would be unfair and a disproportionate response to the risks.

If you have any questions in relation to this submission, or require any further information, please contact:

Dr Sara Bird
Manager, Medico-legal and Advisory Services
MDA National

Telephone: [REDACTED]
e-mail: [REDACTED]

ⁱ Medical Board of Australia. Sexual Boundaries: Guidelines for doctors. 28 October 2011. Available at: <http://www.medicalboard.gov.au/Codes-Guidelines-Policies.aspx>

ⁱⁱ http://www.gmc-uk.org/DC4344_IOT_Conditions_Bank_25416202.pdf

ⁱⁱⁱ <https://www.mcnz.org.nz/assets/News-and-Publications/Statements/When-another-person-is-present-during-a-consultation.pdf>

^{iv} <http://www.australiandoctor.com.au/news/latest-news/calls-to-abolish-failing-medical-chaperone-model>