HEALTH SERVICES COMMISSIONER

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Professor Ron Paterson
Chaperone Review
c/- National Health Practitioner Ombudsman
and Privacy Commissioner
GPO Box No 2630
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Via email: ChaperoneReview@nhpopc.gov.au

Dear Professor Paterson

Thank you for the opportunity to submit to the *Independent Review of Chaperones to Protect Patients*.

As you are aware, the Office of the Health Services Commissioner (OHSC) resolves complaints from consumers of health care about health services in Victoria. We achieve this through alternative dispute resolution approaches in the main but, occasionally, through investigation. Both the *Health Services (Conciliation and Review) Act 1987* (Vic) and the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) require the OHSC and the Australian Health Practitioner Regulation Agency (AHPRA) to consult on registered practitioner complaints. Where professional conduct issues are identified, the matter is transferred to AHPRA for management. In that context, we do not handle issues in relation to chaperone arrangements. However, we offer the following comments for your consideration.

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

Chaperone conditions are an important tool in the suite of possible measures to employ with practitioners who are impaired, acting unethically or are engaging in questionable conduct. Without this as a measure to be employed, the Tribunal would be faced with a decision which would require weighing up a practitioner's livelihood and suspending their registration on the one hand, with protection of the public on the other. This decision may not be straightforward where the evidence is equivocal. So having such a measure available is important. However, protection of the public is paramount. Employers of practitioners should have the option of placing the practitioner on paid leave and self-employed practitioners should consider this as one of the risks of running a business. Suspension of registration should only occur where the allegations are not frivolous, vexatious or trivial and where they are assessed as having some creditability

Whether the current arrangements are *effective* is a separate issue. As can be inferred in the current media around chaperone conditions, they are not as effective as they could be. The individuals performing the chaperone function must be sufficiently senior to be, and to be perceived to be, independent of the practitioner under conditions. So,

for example, a practice nurse or administrative officer employed by practitioner would be inappropriate and lacking in independence. A student practitioner also would be inappropriate as they lack the appropriate seniority and may by supervised by the practitioner or require an assessment of their competence at the conclusion of the clinical rotation. How this could be met in practice and who bears the cost would need further consideration.

Chaperones also need to be fully aware of their roles and responsibilities as chaperones. Whether this requires a formalised briefing and training or some other mechanism is unclear and would be a matter for the Medical Board of Australia or AHPRA.

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

In addition to the briefing/training issue, some consideration needs to be given to the type of information provided to patients. While the reputation of the practitioner is a consideration, it should not be considered to be of equal or greater value to a consumer's right to informed consent, particularly in highly intimate and personal situations. Consumers should be made fully aware that the practitioner they are seeing has chaperone conditions applied, for how long and that the chaperone will be present at all times. An additional qualifier could be made indicating the diagnostic and treatment approach of the practitioner is not under review if that is appropriate. Consumers could, alternatively, be directed to the register for further information, provided there was sufficient information on the register.

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

A response to this question requires a nuanced approach. For example, it would not be appropriate to continue chaperone conditions once a practitioner has been committed to stand trial. However, practitioners are entitled to a presumption of innocence. It would depend on the nature and severity of the claims being made against them. Were there compelling evidence of predatory behaviour and/or serious charges being laid, this may be sufficient to conclude that the risk to the public is too high.

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

No.

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

Continuing to have the potential for a chaperone system allows the registration boards to apply a nuanced and proportional response to concerns about a practitioner's conduct. Removing chaperone systems may have the perverse outcome that practitioners with conduct concerns will continue to practise unsupervised because of the high bar being set for sanctions. For this reason, we would not be in favour of abandoning chaperone systems.

The importance of prompt investigations, particularly in circumstances involving vulnerable patients, cannot be overstated. Prompt investigations are important both to

protect the public but also to ensure that the question over a practitioner's reputation is removed quickly if allegations are unsubstantiated.

Evidence suggests Victoria has the lowest rate of mandatory notification in the country. It is unclear why this is the case but some work may need to be undertaken to understand why and address those issues. Loyalty to the profession, as stated by Bismark, is considered an ethical value in medicine. This appears to be misguided, particularly where that value comes into conflict with protection of the public. There needs to be substantial support for practitioners who are struggling with these issues that is constructive and meaningful while also protective of the public.

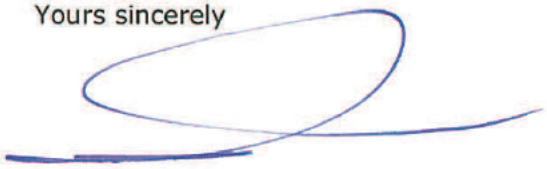
Registered practitioners hold a privileged place in society where consumers hold them in high regard and have a relationship of trust with them. Any violation of that trust damages the privileged position of the individual practitioner and the profession as a whole.

It is important the Medical Board of Australia and AHPRA are and are seen to be primarily acting in the best interests of the community through protecting the public and not perceived to be primarily concerned about the reputation of the individual practitioner at the expense of public protection. While they are competing values, they are not equivalent. If there is any uncertainty about which is the preferred value, protection of the public must always take primacy.

Thank you once again for the opportunity to contribute to the review.

Should you require any further information or wish to discuss this submission, please do not hesitate to contact me on [redacted] or via email on [redacted].

Yours sincerely



Dr Grant Davies
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