

5 October 2016



Professor Ron Paterson
Chaperone Review
c/o National Health Practitioner Ombudsman
and Privacy Commissioner
GPO Box No 2630
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Dear Professor Paterson

Independent review of chaperones to protect patients

Avant welcomes the opportunity to provide input into this review.

Our submission in response to the consultation questions is attached.

Please contact me on the details below if you require any further information or clarification of the matters raised in this letter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Georgie", with a long horizontal flourish extending to the right.

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About Avant

Avant Mutual Group Limited ("Avant") is Australia's leading medical defence organisation. It is a mutual organisation, owed by its members, and offers a range of insurance products and expert legal advice and assistance to over 68,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals and practices, as well as private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

Our members have access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, and provide extensive risk advisory and education services to our members with the aim of reducing medico-legal risk and promoting good medical practice and patient safety.



Avant submission

Independent review of chaperones to protect patients

Avant Mutual Group Limited (“Avant”) is Australia’s leading medical defence organisation. It is a mutual organisation, owned by its members, and offers a range of insurance products and expert legal advice and assistance to over 68,000 medical and allied health practitioners and students in Australia.

Avant provides members with assistance with disciplinary matters. These disciplinary matters may involve the imposition, voluntarily or otherwise, of chaperoning restrictions. Avant advises members about chaperoning conditions and plans, chaperoning approval and monitoring during their currency, both under the chaperone system in NSW and the Australian Health and Practitioner Regulation Agency (AHPRA) chaperone system that applies in the rest of Australia.

Patient safety is at the heart of medical regulation in Australia. Registration of health practitioners, including the imposition of registration conditions where appropriate, is an important aspect of ensuring patient safety and maintaining the confidence of both the public and the profession in the regulatory system. The imposition of conditions needs to be proportionate and fair to both patients and doctors.

Avant’s position is that the chaperone system should remain, and that chaperone conditions are an effective measure to use in appropriate cases to protect the public.

Responses to Consultation questions

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

In our experience, chaperone conditions are an effective measure to protect patients.

It is important to acknowledge that chaperoning conditions are generally imposed on health practitioners within a healthcare setting as an interim protective measure. Chaperoning conditions are imposed rarely: only a very small number of medical practitioners are subject to chaperoning restrictions. Of Australia’s 106,857 medical practitioners, currently 47 (0.04%) have chaperoning restrictions.¹ In the period 20 October 2014 to date, a review of the AHPRA summaries of court and tribunal

¹ Medical Board of Australia Media release *Independent review on chaperoning* 10 August 2016. Available at <http://www.medicalboard.gov.au/News/2016-08-10-Independent-review-on-chaperoning.aspx>. Accessed 6/9/16.

decisions refers to 44 decisions concerning medical practitioners. Of this number, seven matters involved the imposition of a chaperoning condition (or voluntary undertaking) which was breached in one of the matters.

While the circumstances leading to this review are serious, there is little evidence to support the conclusion that chaperoning is not effective in ensuring patient safety or that chaperoning conditions should no longer be part of the regulatory “toolkit”.

Both AHPRA and the NSW Medical Council have rigorous protocols and policies which set out the significant obligations upon the medical practitioner and the chaperone. Medical practitioners with chaperone conditions are subject to significant reporting requirements. In our experience, chaperone conditions are closely monitored by the AHPRA and the NSW Medical Council. Breaches of chaperone conditions are rare and tend to be administrative breaches, such as not filling in the chaperone log correctly.

In our experience, the chaperoning system sufficiently balances the regulator’s obligation to protect the public with the practitioner’s right to the presumption of innocence. The following case study illustrates this point.

Case study – Dr L²

After offering a voluntary undertaking not to perform intimate examinations unless in the presence of a chaperone, the Medical Board decided that the proposed undertaking was not broad enough, and imposed a condition (by way of immediate action) that Dr L not consult with any male patients unless in the presence of a chaperone.

The condition was imposed after a male patient alleged that during the course of a workers’ compensation (WC) assessment of his right arm, the doctor undertook an intimate examination of his genitals. Dr L denied any sexual intent or impropriety. The patient complained to the police and the police decided there was no basis for a criminal charge.

Three months after the condition was imposed (as Dr L then had no reason to be concerned about criminal charges), Dr L provided a detailed response to AHPRA in which Dr L acknowledged that there were significant issues with the patient’s command of English and with hindsight the patient may not have understood all aspects of the treatment (although Dr L firmly believed the patient did understand at the time of examination).

Dr L acknowledged that the consultation proceeded beyond the usual ambit of the WC injury. That was because on inquiry the patient complained of lower back pain. As the patient (a refugee) had not undergone a substantive medical check-up

² Identity has been changed to protect privacy.

for 2 years, Dr L conducted an initial assessment of the back pain. Once he had excluded mechanical problems, Dr L investigated possible urinary, bowel and/or sexually transmitted illnesses as the cause. It was only after the patient indicated episodes of urethral discharge, that Dr L sought and, he believed, obtained the patient's consent to a genital examination. Dr L found no abnormality on examination.

AHPRA investigated the patient's complaint. Dr L was subject to chaperone restrictions throughout the period of the investigation, including a 6 month delay in notification of the Medical Board's decision at the conclusion of the investigation process. The matter ended up being resolved with education and mentoring conditions, and the chaperone conditions that had been in place for almost two years (at a significant personal financial cost to Dr L) were lifted.

Dr L has children. Had he been suspended and unable to work this would have had a devastating effect on him and his family in circumstances where allegations of sexual misconduct were ultimately not pursued. That effect would have only been exacerbated had the police decided to pursue criminal charges, because, even if not proven, the AHPRA investigation would have presumably remained on hold pending conclusion of the criminal processes.

As well as cases involving miscommunication or misunderstanding (for example due to cultural differences, communication difficulties etc), we have assisted our members in a range of other cases where there is an allegation of sexual misconduct. Sexual misconduct is defined broadly in the Medical Board of Australia's sexual boundaries guidelines and includes engaging in sexual activity with a current or former patient or close relative of a current patient, touching patients or clients in a sexual way, engaging in sexual behaviour in front of a patient, as well as making sexual remarks.³

The range of boundary violations is wide, and can occur both within the context of a medical consultation and outside it, in a social setting. Sometimes boundary violations constitute criminal sexual assault, but they can also include less serious matters such as putting an arm around a patient or hugging or kissing a patient on the cheek.

Allegations of sexual misconduct must always be taken seriously, but the circumstances in which misconduct is alleged to have occurred are not always black and white but can be grey. While in many cases the allegations are proven, in other cases they are not. We have assisted members in matters where the patient makes serious allegations against the practitioner with mal-intent or in an attempt to

³ Medical Board of Australia *Sexual boundaries: guidelines for doctors* Available at <http://www.medicalboard.gov.au/Codes-Guidelines-Policies.aspx> Accessed 6/9/16

manipulate the practitioner. Chaperoning conditions can be protective of the practitioner in these circumstances.

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

We have already pointed out that both AHPRA and the NSW Medical Council have rigorous protocols and policies which set out the obligations upon the medical practitioner and the chaperone, including requirements for informing patients appropriately. Compliance is monitored closely through provision of chaperone logs, comparison with Medicare data and spot checks, both in person and by telephone. In our experience, compliance breaches are noted and acted upon quickly by the regulators.

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

This should be determined on a case by case basis applying the regulatory principles that underpin the National scheme.

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

There are various regulatory measures that can be used to protect patients while allegations of sexual misconduct are being investigated. The measure chosen should be determined on a case by case basis, depending on the nature of the case and in accordance with the regulatory principles that underpin the National scheme. Other regulatory measures include:

1. the imposition of restrictions upon the types of patients that can be seen by a practitioner. This could only ever apply as an interim measure. In a recent decision, a disciplinary tribunal held that the imposition of a restriction upon a medical practitioner limiting the types of patients who can be cared for can be overly restrictive. In that case, the availability of chaperoning provided sufficient protection for patients.⁴
2. the imposition of education conditions such as requiring the completion of a face-to-face education course on boundary transgressions and ethics.
3. suspension of a medical practitioner under immediate action powers. This is the most serious action that the Medical Board can take. It is only warranted in circumstances where there is a serious concern about an immediate risk to the public and that risk is so great that the doctor should not continue to

⁴ *Helmy v Medical Board of Australia* 92016) ACAT 97

practise during the investigation. This needs to be determined on a case by case basis.

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

Avant supports AHPRA and the Medical Board of Australia's objective to ensure the protection of patients. Chaperoning is intended to *ensure patient safety*; it is not intended as a punitive measure. It is an interim protective measure designed to be imposed pending a final determination by a regulatory authority, a tribunal or court. This is consistent with AHPRA's regulatory principles that state:

*When we take action about practitioners, we use the minimum regulatory force appropriate to manage the risk posed by their practice, to protect the public. Our actions are designed to protect the public and not to punish practitioners.*⁵

To adopt a blanket position, as has been suggested in the media, that all practitioners who are the subject of allegations of sexual misconduct be suspended in all cases would be grossly unfair, disproportionate and contrary to the regulatory principles under which AHPRA and the Medical Board operate.

In the interests of the public and the health practitioner, AHPRA should ensure that investigations are conducted as quickly as possible (and preferably within six months). Chaperone restrictions can then be imposed as they are intended, namely as an interim measure for the shortest time necessary rather than becoming the status quo for unduly long periods of time such as two, three or even four years. Chaperoning conditions which operate for overly lengthy periods are, in effect, equivalent to a penalty. In one case, a doctor was subject to chaperoning conditions for over four years for a complaint which was subsequently dismissed by the NSW Medical Tribunal following withdrawal of related criminal charges by the Director of Public Prosecutions.⁶

In addition, as a general matter, chaperoning also has other benefits for the community beyond patient safety:

- It ensures continuity of care and accessibility to care for patients. This is particularly important in areas where accessibility is challenging.
- Investigations into alleged incidents can be lengthy and many have taken a number of years. Chaperoning reduces detriments upon practitioners and ultimately the community they serve such as a loss of medical skills, financial and personal losses, reputational losses and family stresses.

⁵ Australian Health Practitioner Regulation Agency *Regulatory principles for the National Scheme* Available at <http://www.ahpra.gov.au/about-ahpra/regulatory-principles.aspx>. Accessed 6/9/16.

⁶ Health Care Complaints Commission v Dr Nguyen [2013] NSWMT 18 (19 November 2013)

- Voluntary “chaperoning” is increasingly being seen as part of good medical practice⁷, particularly when performing intimate examinations. Many medical practitioners⁸ and patients⁹ prefer to have a chaperone present – not necessarily because any concerns have been raised, but as a way of proactively protecting themselves from an allegation of a boundary transgression.
- As mentioned previously, chaperoning affords a medical practitioner the subject of an investigation into an alleged incident, the ability to practise, consistent with the *presumption of innocence* until a conclusive determination is made.

Avant believes that the current chaperone system should remain. The use of chaperones should be available to regulators as one of the possible measures to be used in appropriate cases to protect the public. The requirements in the current chaperone policy, together with ongoing, stringent monitoring of practitioners with chaperone conditions, are sufficient to protect the public.

Avant contact details

Should you have any further queries in relation to this submission, please contact:

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⁷ Australian Medical Association: *Patient Examination Guidelines- 1996. Revised 2012*; Royal Australian College of General Practitioners: *RACGP position on the use of chaperones in general practice*. Medical Board of Australia: *Sexual Boundaries : guidelines for doctors* 28 October 2011.

⁸ Newton DC, et al. “Australian sexual health practitioners’ use of chaperones for genital examinations: a survey of attitudes and practice.” *Sexual Health* 2007; 4: 95–97.

⁹ Sinha, S et al. “Patients’ Attitude Towards the Use of a Chaperone in Breast Examination.” *Annals of The Royal College of Surgeons of England* 91.1 (2009): 46–49.