ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

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To the Medical Board of Australia

ACT Human Rights Commission's submission on the draft revised guidelines 'Sexual Boundaries in the Doctor-Patient Relationship'

The current guidelines 'Sexual boundaries: guidelines for doctors' came into effect on 28 October 2011. The Commission welcomes the current review of the guidelines to ensure that they are in line with current expectations of medical practitioners.

This review is an opportunity to further clarify what amounts to a breach of sexual boundaries and explain to practitioners that they could be in breach of other obligations including the *Sex Discrimination Act* 1984 (Cth), *Discrimination Act 1991* (ACT), *Fair Work Act 2009* (Cth), and criminal codes.

AHPRA responsibility to notify complaint handling bodies

At the beginning of section 3 of the Guidelines, it states that 'AHPRA will advise and support notifiers to report criminal behaviour to the police'. For people who have experience sexual harassment or assault, reporting to the police is not the only option available to them. The guidelines should explain that there are other options available to people who experience sexual misconduct, sexual harassment or assault from medical practitioners. The guidelines should also state that AHPRA will advise and support notifiers to make complaints of sexual harassment to relevant complaint handling bodies, including federal, state and territory human rights commissions and Fair Work Australia.

Definition of sexual harassment

We suggest that the definition of sexual harassment, including the list of examples on page 6, should be moved to the start of the guidelines to inform the reading of the guidelines.

Express mention of one off events

The draft guidelines place a focus on sexual relationships between patients and doctors. While this is a major area of concern, the guidelines should also make it clear that one off events including comments, touching or other expressions of sexually inappropriate behaviour could also amount to sexual or professional misconduct, and make doctors liable to other proceedings, including facing complaints of sexual harassment in discrimination law jurisdictions. The opening paragraph of section 3 should expressly state that one-off behaviours could be considered a breach of sexual boundaries.

Filming and recording of patients

We suggest adding to section 3.1 that taking photographs, filming or recording a patient unnecessarily or without their knowledge could amount to a breach of sexual boundaries.

UK Guidance

We note that guidance provided by the General Medical Council of the United Kingdom provides quite specific guidance for practitioners regarding what might constitute a breach of a sexual boundary. It may be helpful for the guidelines to be more explicit about some of the behaviours that can constitute sexual conduct. I note this would also provide guidance for patients and colleagues about the sorts of behaviours that could be considered to be inappropriate between a patient and a medical practitioner.

The UK Council for Healthcare Regulatory Excellence provides the following guidance for patients and carers:

> *Breaches of sexual boundaries do not just include criminal acts such as rape or sexual assault, but cover a range of behaviours including the use of sexual humour or innuendo, and making inappropriate comments about your body. It can include comments made in your presence, even if not about you.*[1]

The Council also provides the following guidance for medical practitioners:

> Examples of sexualised behaviour by healthcare professionals towards patients or their carers:
>
> - asking for or accepting a date
> - sexual humour during consultations or examinations
> - inappropriate sexual or demeaning comments, or asking clinically irrelevant questions, for example about their body or underwear, sexual performance or sexual orientation
> - requesting details of sexual orientation, history or preferences that are not necessary or relevant internal examination without gloves
> - asking for, or accepting an offer of, sex
> - watching a patient undress (unless a justified part of an examination)
> - unnecessary exposure of the patient's body
> - unplanned home visits with sexual intent
> - taking or keeping photographs of the patient or their family that are not clinically necessary
> - telling patients about their own sexual problems, preferences or fantasies, or disclosing other intimate personal details

[1] Council for Healthcare Regulatory Excellence, *Clear sexual boundaries between healthcare professionals and patients: Information for patients and carers,* http://docplayer.net/27478853-Clear-sexual-boundaries-between-healthcare-professionals-and-patients-information-for-patients-and-carers.html.

- clinically unjustified physical examinations
- intimate examinations carried out without the patient's explicit consent continuing with examination or treatment when consent has been refused or withdrawn
- any sexual act induced by the healthcare professional for their own sexual gratification the exchange of drugs or services for sexual favours
- exposure of parts of the healthcare professional's body to the patient grooming of patients for a sexual purpose exchanging sexual or intimate information by text, email, social media
- sexual assault.[2]

Greater focus on behaviour of medical practitioners rather than patients

The warning signs in Section 4 focus on the behaviour of the patient rather than the doctor. The first three dot points would provide clearer guidance if it included the patient or the doctor.

The Commission encourages the Board to include guidance to practitioners to help identify behaviour that could be in breach of sexual boundaries, both in themselves and by other practitioners. The Australian medical defence organisation MDA National provides its members with the following list of questions to help identify risky boundary behaviour:

Identifying risky boundary behaviour:[3]

- Is what I am doing part of accepted medical practice?
- Does what I am doing fit into any of the recognised high risk situations that I have learnt about?
- Is what I am doing solely in the interest of the patient?
- Is what I am doing self-serving?
- Is what I am doing exploiting the patient for my benefit?
- Is what I am doing gratuitous (not what the patient has asked for)?
- Is what I am doing secretive or covert? Would I be happy to share it with my spouse, partner, or colleagues?
- Am I revealing too much about myself or my family?
- Is what I am doing causing me stress, worry, or guilt?
- Has someone already commented on my behaviour or suggested I stop?

[2] Council for Healthcare Regulatory Excellence, *Clear sexual boundaries between healthcare professionals and patients: responsibility of healthcare professionals*, January 2008 www.professionalstandards.org.uk/docs/default-source/publications/policy-advice/sexual-boundaries-responsibilities-of-healthcare-professionals-2008.pdf?sfvrsn=8&sfvrsn=8, Appendix B.

[3] Riley G. *Managing boundaries*. Defence update. MDA National. Autumn 2013. Quoted in http://careers.bmj.com/careers/advice/Crossing_boundaries%3A_dealing_with_amorous_advances_by_doctors_and_patients.

Vicarious liability and responsibility of other medical practitioners

Section 9 should be expanded to include warning signs that practitioners should look out for in other practitioners conduct. Guidelines should make it clear that a whole practice could be liable for a sexual harassment claim if other members of the practice or an employer did not take sufficient steps to prevent it happening.

While section 9 covers reporting obligations with respect to professional conduct it does not provide any guidance for bystanders on steps they can take with respect to the practitioner and the patient if they observe behaviours that may be inappropriate.

Social media

The Commission welcomes the introduction of section 8 on social media. We encourage the Board to include in section 8 a statement that doctors must not use social media to disclose personal information of patients.

Examples of breaches that have been brought to the Commission's attention include grooming patients who have a mental illness or cognitive or other disability for sexual purposes, and we note with concern that particular patients can be more vulnerable and superficially assessed as less credible.

It is also important to note that community attitudes and legal obligations regarding sexual behaviours have changed over time but that does not excuse conduct of an inappropriate nature. We note that the Commonwealth *Sex Discrimination Act* made sexual harassment in the provision of goods and services, including health services, unlawful in 1984. Similar protections to those in the Commonwealth *Sex Discrimination Act* exist at a state and territory level. Given over 30 years has passed since that legislation was enacted we encourage the Board to ensure the guidance material draws on learnings from that jurisdiction in finalising these guidelines.

Yours sincerely

Karen Toohey
Health Services Commissioner