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Dear Medical Board of Australia

The Australian Medical Association (AMA) would like to make the following ‘general comments’ and ‘specific comments’ on the public consultation paper on the draft revised document, *Good Medical Practice: A Code of Conduct for Doctors in Australia (June 2018)*.

General Comments

Consultation process

We have significant concerns regarding the limited timeframe for this particular public consultation. While the Medical Board of Australia (the Board) states it is ‘not proposing significant changes to the current code’, the profession itself considers any changes, even seemingly minor changes, are important and require sufficient time for consideration, deliberation, consultation and response. Further, it is of the utmost importance and necessity that the Board ensures all doctors are aware of these public consultations, and have sufficient time to respond, as they are the ones legally subject to the provisions of the Board’s codes and guidelines. This point cannot be stressed enough.

Format of the Code

AMA members have raised particular concerns in relation to the format of the Code in that it contains a combination of clear, explicit statements intermingled with vague, ambiguous ‘motherhood’ statements. The clear, explicit statements provide doctors with sufficient guidance to meet the expected standards of ethical and professional conduct but the more ambiguous statements do not, making it extremely difficult and distressing for doctors who are then unsure how to fulfill their obligations under the Code.

As outlined on page 2 of the public consultation document under Background:

Both the current and draft revised code describe what is expected of all doctors registered to practice medicine in Australia. They set out the principles that characterise

good medical practice and make explicit the standards of ethical and professional conduct expected of doctors by their professional peers and the community.

Unfortunately, many of the statements in the Code are so vague they do not provide doctors with sufficient guidance on how to meet the expected 'standard', potentially creating confusion for doctors and undermining good medical practice. Examples from the public consultation draft include (but are not limited to):

-) 3.4.1 *Treating your patients with respect at all times.*
-) 4.2.2 *Treating each patient as an individual.*
-) 5.4.5 *Doing or saying **something** about discrimination, bullying or sexual harassment by others when you see it and reporting it when appropriate (emphasis added, what is meant by 'something?').*

While the intent of these sorts of statements is unobjectionable on the surface, the statements themselves (and the wider sections in which they are found) do not give doctors sufficient guidance as to what is actually expected of them in a clear, operational sense. While this issue may not seem particularly important to some, it is extremely important to the medical profession when, in accordance with the Board's own words (page 2 of the public consultation draft):

An approved registration standard, code or guideline is admissible in proceedings under the National Law or the law of a co-regulatory jurisdiction regarding a medical practitioner as evidence of what constitutes appropriate professional conduct or practice of the profession.

As such, it is confusing and disconcerting for doctors who are concerned with meeting their obligations (and thus avoiding punitive action taken against them) if there are statements in the Code that are ambiguous and do not provide sufficient guidance on how to meet an expected standard. For the Code to help doctors fulfill their obligations, each standard must be clear, explicit and operational.

As a related matter, one of the uses of the Code is listed as (page 6):

To assist the Medical Board of Australia in its role of protecting the public, by setting and maintaining standards of medical practice against which a doctor's professional conduct can be evaluated. If your professional conduct varies significantly from this standard, you should be prepared to explain and justify your decisions and actions. Serious or repeated failure to meet these standards may have consequences for your medical registration.

The AMA believes it is important for doctors to clearly understand how the Code is actually used and interpreted to assess whether a doctor's behaviour constitutes (or does not constitute) appropriate professional conduct or practice. While a breach of the Code may seem obvious where a doctor's conduct is 'way outside' the standard of expected behaviour or practice, a breach of the Code is not so obvious when a doctor's conduct is

‘just outside’ the expected standard, particularly where the provisions are ambiguous. In such circumstances, what ‘metrics’ are actually used to measure a doctor’s performance or practice and how does the Board ensure the Code is interpreted objectively by those authorised to conduct investigations so that outcomes are consistent and not subjective? This is particularly problematic when non-medical investigators who themselves may be unfamiliar with the nature of health care use the Code as an administrative tool to assess a doctor’s behaviour when deciding whether a particular complaint warrants further investigation.

Specific Comments

In addition to the comments raised above, we would like to draw the Board’s attention to a few specific issues in the draft, revised public consultation document. Each comment is provided under the relevant sub-heading.

2.1 Professional values and qualities of doctors

In this section, the second sentence of the second paragraph says:

They must be honest, ethical and trustworthy and comply with relevant laws.

It is important that the Code not coerce doctors into complying with relevant laws that are inconsistent with professionally accepted standards of medical ethics in Australia. For example, in 2016, despite the possibility of imprisonment, several doctors spoke publicly about conditions in immigration detention regardless of provisions in the *Border Force Act* that threatened whistleblowers with up to two years’ imprisonment (the Act has now been amended to remove this provision against health professionals). Ironically, many doctors considered the Act not only conflicted with their ethical duties but their duties under the Board’s Code of Conduct to make the care of the patient the doctor’s primary concern.

The fourth paragraph of Section 2.1 states the following:

Community trust in the medical profession is essential. Every doctor has a responsibility to behave ethically to justify this trust. The boundary between a doctor’s personal and public profile can be blurred. As a doctor, you need to acknowledge and consider the effect of your comments and actions outside work, including online, on your professional standing and on the reputation of the profession.

The intention of this statement is unclear and may be considered by some doctors to be a significant overreach of the Board’s authority. It could be interpreted as trying to control what doctors say in the public arena by stifling doctors’ right to publicly express both personal and professional opinions while also undermining doctors’ contribution to the diversity of public opinion, debate and discourse. It would be unprecedented for a regulatory authority’s Code of Conduct to attempt to control a doctor’s public expression

of opinion in a context which may not impact on the standard or quality of direct patient care or the wider health system nor reflect a lack of medical professionalism.

The rest of this paragraph states:

If making public comment, you should acknowledge the profession's generally accepted views and indicate when your personal opinion differs. Behaviour which could undermine community trust in the profession is at odds with good medical practice and may be considered unprofessional.

Just because a doctor does not hold 'the profession's generally accepted views' on a particular social matter does not indicate a lack of medical professionalism or substandard medical practice. For example, many doctors do not personally agree with abortion, contraception or voluntary assisted dying.

We do consider the specific situation where a doctor publicly presents an opinion on a medical issue which is contrary to the generally held opinion of the profession as relevant to protecting the public and appropriate for inclusion in the Code. The AMA's *Code of Ethics 2016* states the following which may be useful:

When providing scientific information to the public, recognise a responsibility to give the generally held opinions of the profession in a form that is readily understood. When presenting any personal opinion which is contrary to the generally held opinion of the profession, indicate that this is the case.

4.8 Culturally safe and respectful practice

It is important to recognise that a practice that is 'culturally safe' is not necessarily 'medically safe' or generally accepted medical practice in Australia as exemplified by female genital circumcision or abortion based on sex-selection for non-medical purposes. This should be acknowledged in the Code.

10.12 Conflicts of interest

The AMA's *Guidelines for Doctors on Managing Conflicts of Interest in Medicine 2018* recognises that doctors will often face uncertainty as to whether they have an actual or perceived conflict of interest and, if so, what actions, if any, need to be taken in response. The doctor should either seek the advice of, or delegate the decision to, an independent party to determine if a conflict of interest exists. This issue is particularly relevant in the clinical setting where there is a distinct power imbalance in the doctor-patient relationship and the patient is not in a position to make a judgement on whether or not their doctor has a conflict of interest. Simply disclosing a potential conflict to patients is not enough because patients are not in a position to be the independent party.

Concluding Comments

I would like to reiterate how important it is that the Medical Board of Australia supports doctors by providing clear, explicit guidance on how to meet the standards set out in the Code of Conduct. Improving the Code in this way not only enhances doctors' ability to abide by the Code and facilitate good medical practice but reduces the (at times extremely significant) stress and anxiety experienced by doctors who are unsure of how to meet their obligations. Further, it will provide greater information and clarity for patients and the wider public as to what constitutes appropriate professional conduct or practice that they can expect from the medical profession.

If you would like to discuss the AMA's comments on the public consultation paper *Good Medical Practice: A Code of Conduct for Doctors in Australia (June 2018)*, I would be happy to meet with you. Alternatively, please contact [REDACTED] AMA Ethics Manager, on [REDACTED] or [REDACTED].

Sincerely

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Dr Tony Bartone
President

3 August 2018