
***Submission to AHPRA: Recommendations to Improve
AHPRA's Complaints Process for Survivors of Sexual
Misconduct by Medical Practitioners***

Sexual Assault Support Service Inc. (SASS)

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Sexual
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Recommendations to improve AHPRA’s complaint process for survivors of sexual misconduct by medical practitioners

SASS submission

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About SASS

Sexual Assault Support Service (SASS) is a free and confidential service for people of all ages who have been affected by any form of sexual violence, including intimate partner sexual violence. We also provide counselling to children and young people who are displaying problem sexual behaviour (PSB) or sexually abusive behaviour (SAB), along with support and information for their family members and/or carers.

The range of support options available at SASS includes counselling, case management and advocacy. We also provide information and support to professionals, and deliver training workshops and community education activities in a range of settings including schools and colleges.

Introduction

SASS has prepared these recommendations for the Australian Health Practitioner Regulation Authority (AHPRA) on how AHPRA may improve its response to complaints of sexual misconduct by medical practitioners. SASS was prompted to prepare this submission after recently supporting someone through AHPRA’s complaint process for sexual misconduct. SASS is aware of at least four other SASS clients who have lodged complaints of sexual misconduct by medical practitioners to AHPRA over the last five years. The recommendations may apply to other health practitioners and Code of Conduct (Code) breaches.

The recommendations in this submission are informed by SASS’ experience of the tribunal process, feedback from SASS therapeutic specialists and senior practitioners, and feedback from a person with lived experience of AHPRA’s complaint process. It also reflects information provided by Susan Biggar, National Engagement Adviser, and John Shears, Legal Adviser with AHPRA at a meeting with SASS on 25 March 2021.

The focus of this submission is on how AHPRA can make its complaint processes, including investigative and tribunal processes, more trauma-informed and survivor-centred. As noted by the Substance Abuse and Mental Health Administration (SAMHSA, 2014), service systems intended to support individuals who have experienced trauma are often themselves trauma-inducing. SASS believes that changes to the complaints process for sexual misconduct are required if AHPRA is to avoid re-traumatising people who have already experienced harm. While those who make a complaint may not always be satisfied, they are more likely to accept the findings and find closure if they feel respected and heard through the complaints process.

This submission comprises two sections:

Background. This section identifies the relevant sections of the *Good medical practice: a code of conduct for doctors in Australia* (the Code) (Medical Board-AHPRA, 2020) for SASS' submission. It also briefly outlines the impact of sexual misconduct for survivors and principles of trauma-informed care which inform the recommendations.

Recommendations. This section outlines recommendations on how AHPRA may improve its investigative and tribunal processes to ensure that:

1. Survivors do not experience further harm if they decide to make a complaint; and
2. Survivors may progress their healing.

The following definitions apply throughout this paper:

Sexual misconduct. The Medical Board of Australia's (2018, p. 2) *Guidelines: Sexual boundaries in the doctor-patient relationship* states "sexual misconduct is an abuse of the doctor-patient relationship and can cause significant and lasting harm to patients". Sexual misconduct refers to behaviours which breach 'sexual boundaries' and which fall within a continuum of behaviours. This includes a medical practitioner "engaging or seeking to engage in a sexual relationship with a patient regardless of whether the doctor believes the patient consented to the sexual relationship (Medical Board of Australia, 2018, p. 3) through to sexualised behaviours, sexual harassment, and sexual assault.

Survivor - SASS refers to people making a complaint against a medical practitioner in relation to sexual misconduct as a survivor. While AHPRA uses the term 'notifier', SASS does not believe this adequately captures the impact of sexual misconduct upon a patient.

Trauma – an individual's response to an event or series of events which is "extremely upsetting, at least temporarily overwhelms the individual's resources and produces lasting psychological symptoms" (Briere, 2015, p. 10). Interpersonal trauma which involves an abuse of power or breach of trust in a relationship can have significant impacts upon a person's sense of self and self-worth (Kezelman & Stavropoulos, 2012).

Background

The Code of Conduct for Doctors in Australia

The Code (Medical Board-AHPRA, 2020) contains two sections relevant to SASS' submission:

- Section 4.1 *Working with Patients* in the Code of Conduct sets out the standards of professional conduct necessary from a medical practitioner to maintain a good doctor-patient relationship. This includes Section 4.2.6 (2020, p.8) which states the need for the medical practitioner to:

“Recognis[e]... there is a power imbalance in the doctor–patient relationship, and not exploit[] patients in any way, including physically, emotionally, sexually or financially.”

- Section 10.2 *Professional Boundaries* identifies that medical practitioners are responsible for maintaining professional boundaries in the doctor-patient relationship. Section 10.2.2 (2020, p. 20) requires medical practitioners to:

“Never us[e] your professional position to establish or pursue a sexual, exploitative or other inappropriate relationship with anybody under your care. This includes those close to the patient ...”

Impact on survivors

The *Guidelines: Sexual Boundaries in the Doctor-Patient Relationship* (Medical Board of Australia, 2018, p. 2) recognises the significant impact of sexual misconduct for a survivor, stating “sexual misconduct is an abuse of the doctor-patient relationship... and can cause significant and lasting harm to patients.”

While Section 4.2.6 acknowledges the power imbalance in the doctor-patient relationship, this imbalance is magnified when a survivor is also experiencing emotional and/or psychological hardship. In these circumstances, sexual misconduct can more significantly impact a survivor than it may otherwise. It is for this reason that SASS contends complaints of sexual misconduct cannot be considered in isolation but must be situated within the context of a survivor's life.

Principles of trauma-informed care

Trauma-informed practice is relevant to all providers of human services including law services (Randall & Haskell, 2013, cited in Kezelman & Stavropoulos, 2016). How organisations such as AHPRA respond to complaints of sexual misconduct can make a significant difference to survivors, either by retraumatising survivors or by supporting them to heal.

The BlueKnot Foundation's (2012) *Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery* (Practice Guidelines) establishes guiding principles and questions for organisations to support their transition to providing trauma-informed care. The Practice Guidelines build on work by organisations such as SAMHSA, itself widely regarded to be a pioneer in trauma-informed care. Attachment A provides a brief overview of how the principles of trauma-informed care could apply to

AHPRA's complaint process. Attachment A is indicative only and is not intended to replace AHPRA referring to the Practice Guidelines in its own right.

The principles of trauma-informed care are:

1. Safety - establishing physical and emotional safety for survivors.
2. Trustworthiness - ensuring task clarity, consistency and interpersonal boundaries.
3. Choice - maximising choice and control for survivors regarding goals and actions.
4. Collaboration - maximising collaboration and sharing of power with survivors.
5. Empowerment - prioritising survivor empowerment.

Recommendations

SASS is concerned that the complaints process currently employed by AHPRA fails to adequately recognise and address the trauma experienced by survivors in relation to sexual misconduct. The recommendations set out below are therefore designed to support AHPRA's transition towards processes which are trauma-informed and centred on survivors' needs, something SASS considers fundamental if AHPRA is to avoid further re-traumatising of survivors and to support healing.

For this submission, the complaints process is inclusive of a survivor first contacting AHPRA about a sexual misconduct complaint, through to an investigation of the complaint, and the tribunal process.

Training

SASS understands AHPRA investigators receive training from the Victorian Police Sexual Offences and Child Abuse Investigation Team (SOCIT). While SASS acknowledges the benefit of this training for investigatory practice, SASS recommends AHPRA personnel involved with the complaints process also receive specialist training on trauma, including sexual trauma. It takes significant courage for survivors to come forward and for some, many years have elapsed before they are able to lodge a complaint. Many do so with a sense of shame and guilt. Unless the investigatory and tribunal process is trauma-informed, it risks re-traumatising and causing further harm for survivors.

SASS therefore recommends:

1. All personnel involved in the complaints process receive training on the impact of trauma on survivors, including sexual trauma.
2. Trauma training be run by agencies experienced in supporting survivors of sexual violence, such as CASA in Victoria, or SASS in Tasmania.

3. The voices of survivors and specialist agencies inform improvements to the complaints process, including AHPRA's proposed Notifier Support Service.
4. When seeking input/feedback from survivors, AHPRA clearly communicate:
 - a. the purpose of seeking feedback/ input from survivors;
 - b. how survivors may provide input/feedback and support available for survivors during and after this process;
 - c. how information provided by survivors is used, including potential limitations or constraints on its use (for example, limitations on change); and
 - d. people's right to privacy and how AHPRA will maintain confidentiality of the information they provide.

Support for survivors when making a notification

SASS notes AHPRA has approved development of a pilot Notifier Support Service to support survivors through the complaint process. SASS commends AHPRA for this initiative. SASS is concerned however that:

- The Notifier Support Service needs to be independent of the Medical Board. Independence of the support service is considered by SASS to be critical to engender trust and emotional/psychological safety for survivors.
- Unless the Notifier Support Service is implemented as part of a broader program of change, it is unlikely to result in meaningful change for survivors.

SASS therefore recommends:

5. AHPRA consider sourcing a Notifier Support Service from a body independent of AHPRA. Supports to be provided by such a service could include (but not be limited to):
 - a. explaining the complaints process for survivors if they wish to make a complaint and their rights within that process;
 - b. identifying survivor goals, that is, what the survivor is seeking from the process and needs in order to heal from their experiences;
 - c. coordinating referrals and ensuring warm referrals/handover to other agencies including Victims of Crime, legal representation, and specialist counselling services such as SASS to support the achievement of these goals;
 - d. supporting survivors to record a victim impact statement or similar for use in a tribunal hearing or in other processes which may be pursued such as mediation;
 - e. advocating for the rights of survivors through the complaints process; and
 - f. supporting continuous improvement of the complaints process to support healing and improve outcomes for survivors.

6. If AHPRA decides the Notifier Support Service should sit within AHPRA, that:
 - a. the service operates independently of the Medical Board with clear lines of governance which ensures its independence; and
 - b. it be adequately resourced to deliver the supports articulated (but not limited to) in Recommendation 5.
7. The Notifier Support Service be implemented as part of a broader program of change for AHPRA in how it responds to complaints of sexual misconduct.

Investigating the context of sexual misconduct

Sexual misconduct by a medical practitioner can significantly impact a survivor and their family, especially if the survivor is socially isolated and/or has poor mental health and wellbeing.

SASS understands that the focus of the investigation and tribunal hearing is on the alleged breach of the Code. While this focus may help illuminate the nature, magnitude and extent of the breach, it risks overlooking:

- The context in which the breach occurred, and specifically whether the medical practitioner took advantage of particular vulnerabilities the survivor may have been experiencing at the time; and
- The consequences of the breach for the survivor and their family/support network.

SASS also understands while that the impact of the breach upon a survivor may be considered by the Tribunal, “it is well established that the purpose of such proceedings is the protection of the public” (see *Tasmanian Board of the Medical Board of Australia v Dr Ian Visagie*; Tasmanian Health Practitioners Tribunal, 2013). It is SASS’ position that the interests of the survivor and the protection of the public are not mutually exclusive; the option to impose sanctions for sexual misconduct exists because of its potential to seriously impact the health and wellbeing of the survivor and the broader community (Medical Board of Australia, 2012). It is therefore not sufficient for an investigation or tribunal process to consider a breach of the Code in isolation from the context in which it occurred and AHPRA has a responsibility to ensure the Tribunal is informed about how the medical practitioner’s sexual misconduct has impacted the survivor and their family.

SASS therefore recommends:

8. When AHPRA investigates a complaint that it also seeks information on:
 - a. The context within which the alleged breach of sexual boundaries occurred from the perspective of the survivor; and
 - b. How the alleged breach has impacted the survivor since that breach occurred.

Determining whether there is a matter to answer

SASS understands the Medical Board in Tasmania comprises 12 members: nine medical practitioners and three community members. SASS also understands that it is the Medical Board's responsibility to assess matters and determine whether there is a 'reasonable belief' that professional misconduct occurred. If this is found to be the case, then the Medical Board is obliged to refer the complaint to the AHPRA Tribunal.

While SASS is assured of the professionalism of the Medical Board, there is potential for survivors and the broader community to perceive a conflict of interest when Medical Boards decide whether matters concerning other medical practitioners proceed to the AHPRA Tribunal. Increasing awareness of sexual assault and abuse in the community and media reporting – for example the ABC article "[Alleged rape by doctor detailed in child's letter, as Launceston hospital's response under spotlight](#)" (Baker, 7 April 2021) can also focus attention on complaints processes and decision-making structures. Implementing a decision-making process which is independent of the Medical Board may protect the Medical Board's reputation and integrity as well as the confidence of those seeking to lodge a complaint.

SASS therefore recommends:

9. AHPRA consider alternative processes for determining whether matters proceed to the Tribunal. This could include the use of an independent legal service with input from AHPRA and the Notifier Support Service.

The tribunal process

Providing an opportunity for the survivor to speak

SASS understands that the tribunal process considers 'statements of fact' gathered from the medical practitioner and survivor during the investigation process. Letters of support from referees for the medical practitioner are also sourced during the investigation stage and provided to the tribunal prior to the hearing. Letters of support may also be read to the Tribunal Chair if received after the conclusion of the investigation process. There is however no opportunity so far as SASS is aware for a survivor to make a victim impact statement if the breach is uncontested. SASS notes that a victim impact statement is a standard part of legal justice processes and is considered vital in providing survivors with an opportunity to have their views formally noted.

While the impact of a breach upon a survivor may be broadly discernible through statements of fact, SASS regards allowing a medical practitioner to table letters of personal and professional letters of support in the absence of the survivor's testimony or victim impact statement as highly problematic. Denying a survivor an opportunity to speak to how the medical practitioner's actions have impacted their life effectively renders them invisible. It conveys to the survivor that their life and wellbeing is not as important as that of the medical practitioner, and it reinforces for the survivor the imbalance of power between themselves and the practitioner.

SASS therefore recommends:

10. The Notifier Support Service provide survivors information on their options, and if requested, support them to prepare a victim impact statement or similar.
11. Survivors be given the option at a tribunal hearing to provide testimony or have read on their behalf their victim impact statement and be supported in this process.
12. That a survivor should not be subject to cross-examination when the breach is uncontested or that if they are, then the same scrutiny apply to the medical practitioner.

SASS understands that if a medical practitioner contests the breach, a survivor may testify and be cross-examined by the medical practitioner's legal representative. While the decision to testify or not should reside with the survivor, doing so without adequate support may cause further harm to a survivor.

SASS therefore recommends:

13. In the event of a contested breach where a survivor may testify and potentially be cross-examined that AHPRA's legal representative safeguard the legal interests of the survivor.
14. The Notifier Support Service advise the survivor on the tribunal process and their options, including the potential to be cross-examined.
15. The survivor decide whether they testify or have read out their victim impact statement unless there are strong reasons to suggest doing so will cause further harm to the survivor and/or their family.

Remorse as a factor in determining sanctions

The precedent *Medical Board vs Holten* outlines the factors considered in determining a sanction as:

- The nature and seriousness of the conduct and the risk of harm if it were engaged in by others.
- The need for specific and/or general deterrence
- The degree of insight that the practitioner has into his or her offending conduct.
- The degree of remorse.
- Evidence of character and contribution to the community.
- Any history of offending.
- Evidence of rehabilitation.
- Whether there has been any delay between the start of the investigation until the completion of the Tribunal hearing

While all factors are important, the degree of remorse is a factor likely to be particularly sensitive for a survivor. In SASS' experience of AHPRA tribunal processes, 'remorse' has been assessed through the medical practitioner's comments, for example, to colleagues and to AHPRA. There was no consideration of whether

remorse had been communicated to the survivor. The absence of such consideration rendered the survivor invisible and situated outside of the process despite being the wronged party. The manner in which remorse was considered within the tribunal process raised for the survivor questions about the authenticity of the medical practitioner's remorse.

SASS therefore recommends:

16. AHPRA investigate how the concept of remorse by a medical practitioner can be made meaningful for survivors.
17. Consideration of the degree of remorse takes into account whether the medical practitioner has made a genuine attempt to communicate remorse to the survivor and their family.

The use of language in Tribunal proceedings and Determinations

Language is a powerful medium for communication and the wording and terminology used during Tribunal proceedings and written in the Determination can either empower or retraumatise survivors. While SASS recognises that AHPRA seeks to identify 'statements of fact', these facts are agreed between AHPRA and the medical practitioner's legal team and not directly with the survivor. If AHPRA is going to provide 'statements of fact' as part of the proceedings then a survivor should have input to these facts.

It is also critical that tribunal personnel including the Tribunal Chair be mindful of the potential for language to cause further harm and use language that acknowledges the impact on the survivor.

SASS therefore recommends:

18. AHPRA provide the survivor with the 'statements of fact' so that the survivor has the opportunity to confirm or contest these facts.
19. The survivor be supported through this process by the Notifier Support Service.
20. AHPRA support those chairing the Tribunal and writing a Determination to be cognisant of their use of language to minimise the risk of further harm.

Attachment A

Overview: Example Application of Principles of Trauma-Informed Care to AHPRA's Complaint Process

1. **Safety** – establishing physical and emotional safety for survivors. This could include AHPRA considering how survivors are welcomed and oriented to the complaints process and Notifier Support Service, ensuring they receive clear information and the steps involved, their rights and responsibilities.
2. **Trustworthiness** – ensuring task clarity, consistency and interpersonal boundaries. This could include AHPRA clarifying the purpose of the complaints process and ensuring survivors understand the service they receive, what will occur, by whom, under what circumstances and with what goals. It may also include considering how AHPRA handles dilemmas which can arise when providing advice and support to medical practitioners as well as survivors.
3. **Choice** – maximising choice and control for survivors: goals and actions. This could include AHPRA identifying how the complaints process gives survivors choice about the options before them and the support available to achieve their goals.
4. **Collaboration** – maximising collaboration and sharing of power with survivors. This could include AHPRA identifying how the complaints process generally, and Notifier Support Service in particular, maximises collaboration and power sharing with survivors, for example, how survivors are supported to identify their goals and provided support to achieve them; how the service works with survivors throughout the process or the role survivors have within the complaints process?
5. **Empowerment** – prioritising empowerment for survivors. This may include AHPRA ensuring its services empower and give voice to survivor goals and embed survivor voices in service design and improvement.

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