28 July 2015

EAG – Issues Paper Response
c/- Royal Australasian College of Surgeons
College of Surgeons' Gardens
250-290 Spring Street
EAST MELBOURNE VIC 3002

**By email: EAG@surgeons.org**

Avant Mutual Group Limited
ABN 58 123 154 898

Registered Office
Level 28 HSBC Centre
580 George Street Sydney NSW 2000

PO Box 746 Queen Victoria Building
Sydney NSW 1230

DX 11583 Sydney Downtown

www.avant.org.au

Telephone 02 9260 9000 Fax 02 9261 2921
Freecall 1800 128 268 Freefax 1800 228 268

**Expert Advisory Group Issues Paper on discrimination, bullying and sexual harassment**

Avant welcomes the opportunity to provide input into the Expert Advisory Group's (EAG) Issues Paper on discrimination, bullying and sexual harassment.

Our submissions on the Issues Paper are 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

Georgie Haysom
Head of Advocacy

Direct: (02) 9260 9185
Email: georgie.haysom@avant.org.au

**About Avant**

Avant Mutual Group Limited ("Avant") is Australia's largest medical defence organisation, and offers a range of insurance products and expert legal advice and assistance to over 64,000 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.

# Avant submissions on the RACS Expert Advisory Group Issues Paper on discrimination, bullying and sexual harassment

We provide the comments below based on our experience acting for members in discrimination, bullying and harassment complaints around Australia. At Avant we act for:

- complainants,
- practitioners who are alleged to have engaged in discrimination, bullying and harassment (and other inappropriate behaviours) ("respondents"), and
- employers (primarily practices employing staff).

We expect that all of our members are able to work in a safe, respectful and supportive workplace.

## Defining the problem

The problems of discrimination, bullying and harassment occur throughout the healthcare sector and persist despite the current regulatory framework being in place for almost 30 years. We believe that cultural rather than regulatory change is required.

The issues paper and background briefing paper focus on discrimination, bullying and harassment in the public hospital system, and emphasise the experience of the complainant. While we understand that this is the core of the problem that the EAG is seeking to address, we believe that the issues are broader and more complex:

- Harassment is not limited to sexual harassment, but extends to racial and other forms of harassment; discrimination is similarly not limited to sex discrimination.
- The terms "bullying" "harassment" and "discrimination" have particular definitions at law. We understand that the Royal Australasian College of Surgeons ("College") is also working to eradicate inappropriate behaviour that falls short of the legal definitions of these terms. We support initiatives aimed at preventing unlawful bullying, harassment and discrimination and other inappropriate behaviour.
- The issues paper and background briefing paper focus on the important issue of preventing senior doctors from bullying, harassing and discriminating against more junior doctors. However, the issues paper and background briefing paper do not consider the experience of the respondent to such allegations. We have acted for members in cases where a complaint is frivolous or vexatious or without substance, and where fair process has not been followed in investigating the complaint.

  Being the respondent to a complaint can be extremely stressful and this can have an adverse impact on patient care (see Bourne T et al. The impact of complaints procedures on the welfare, health and clinical practice of 7962 doctors in the UK: a cross-sectional survey. BMJ Open 2015; 5(1): 1-12.) It is important for a respondent to be treated fairly and impartially in these processes.

- There appears to be an assumption in the issues paper and background briefing paper that inappropriate behaviour is typically by senior doctors towards more junior doctors. This is not always the case in our experience. We have seen instances of inappropriate conduct by:
    - A group of senior doctors towards a more senior doctor
    - Nursing and hospital administration staff towards junior and senior doctors
    - Trainees towards their supervisor (for example vexatious allegations of bullying)
    - Senior trainees towards junior trainees and junior doctors.

**The Test**

In all workplaces there is a range of behaviour that may be regarded as inappropriate. Some inappropriate behaviour is unlawful and may give rise to a legal cause of action if it meets the relevant legal test. This includes unlawful discrimination, bullying and harassment.

Other inappropriate behaviour is not unlawful despite being inappropriate.

We have assisted members in complaints where the conduct complained of, while inappropriate, does not meet the legal test, so the claim of bullying, harassment or discrimination is not substantiated. In these cases:

- The consequences for the complainant can be that they feel that their complaint was swept under the carpet or not taken seriously
- The respondent can feel vindicated and can regard the outcome as confirmation that their behaviour was acceptable.

We believe that it is important that steps be taken to prevent inappropriate behaviour in the workplace, whether or not it meets the relevant legal test for bullying, harassment and discrimination.

We also believe that there should be training and education about what constitutes inappropriate conduct, and what meets the legal test for bullying, harassment and discrimination.

Sometimes there is a fine line between appropriate and inappropriate behaviour in particular circumstances. Surgery is inherently stressful and the clinical situation can change rapidly. A leader is required. This needs to be recognised and differentiated from bullying. Poor communication is not necessarily bullying. Reasonable performance management is not bullying.

Codes of conduct need to clearly outline what behaviour is unacceptable and what behaviour is unlawful. Policies and procedures should clearly outline the processes for each. Those responsible for handling complaints of inappropriate conduct in the workplace should have a thorough understanding of the policies and apply the appropriate processes having regard to the facts of the case.

## Under-reporting and fear of reprisal

In our experience, the barriers to trainees making a complaint include:

- fear of retribution (eg the possibility of adverse term assessments or performance appraisals)
- gaining a reputation as a troublemaker
- possible impact on career progression
- impact of making a complaint on their own health and wellbeing (particularly their stress levels)
- perception that a complaint will be “swept under the carpet”
- concern that their peers will not support them in their complaint (bystanders not speaking up)
- perception that the organisation (College or employer) will believe the supervisor over the trainee (“the College looks after its own”)
- the possibility that their involvement will be required in process that may take weeks or months
- the likelihood that the trainee will interact with the respondent in different capacities throughout their career.

As a result, in some situations doctors decide that it is better not to complain, but to “ride it out” to minimise the potential impact of making a complaint.

## Culture – organisational and professional

One of the difficulties for the College is that complaints are generally dealt with through the doctor’s employing entity rather than by the College.

While the College has a responsibility for defining and setting the culture of the profession of surgery, surgery is delivered in hundreds of hospitals across Australia and often these are not part of the same organisation and culture differs greatly. The culture at some hospitals is better than others.

Policies and procedures for dealing with complaints are inconsistent in terms of the process to be followed, the implementation of those processes and in the outcomes.

While there is a general understanding of the law and acceptance that discrimination, bullying and harassment are unacceptable, this understanding is not reflected in practice.

In our experience, there are still many doctors who do not believe their behaviour is wrong or inappropriate. Others recognise that their behaviour is inappropriate but ignore it.

Others are horrified when the inappropriateness of their behaviour is brought to their attention and take steps to change.

Attitudes and misunderstandings are barriers to further improvements:

- there is a persisting view that inappropriate behaviour by superiors is the norm and dealing with it is part of the initiation process – “I went through it”, “that doesn’t apply to me”.
- inappropriate behaviour is often tolerated (“everyone knows that’s what he/she is like”) and/or exhibited by senior doctors.
- organisational structure, inconsistent hospital policies and procedures and lack of effective mechanisms to deal with inappropriate behaviour often reinforce and normalise inappropriate behaviour.
- fear of retribution and impact on career progression is a disincentive to report and perpetuates the culture.
- fear of being associated with a complainant seen as “a troublemaker” is a disincentive to bystanders.

**Gender inequity**

Gender inequity can be better addressed through:

- recognition that many trainees (male and female) are older when they are start specialist training programs than in previous generations and have carer responsibilities, not only for children but also for elderly parents.
- implementation of and support for flexible work arrangements for all trainees and senior doctors, whether male or female.
- encouraging a culture where flexible work arrangements are not regarded as a gender issue, but as an issue for all doctors.
- proactive steps to encourage more women into the training program (which will, in turn, encourage other women to join).

**Responding to inappropriate behaviour**

There is a need to ensure the right balance between eradicating inappropriate behaviour and subjecting doctors (whether respondents or complainants) to stressful complaints processes.

Doctors should be empowered to make a complaint about any inappropriate behaviour. However, we believe that different strategies and processes should be followed depending on the nature of the complaint, and the response should be proportionate to the seriousness of the conduct.

We have assisted respondents where the organisational response to a complaint has been heavy-handed and out of proportion to the behaviour (eg suspension for a single instance of an inappropriate comment to a colleague). A more effective approach in these circumstances would be education and awareness rather than a punitive, disciplinary approach.

On the other hand, we have assisted members for whom the fear of reprisal and impact on their career is such that they decided not to complain. It may not be appropriate to deal with all instances of inappropriate behaviour through formal processes. Having a more informal approach for low-level inappropriate behaviour may assist complainants and respondents, and lead to cultural change.

We believe this can be achieved by:

- Recognising that there is a spectrum of inappropriate behaviours
- Taking an approach to managing a complaint about inappropriate behaviour that recognises that there is a spectrum of behaviour and that a "one-size fits all" approach is not appropriate:
    - allegations of unlawful behaviour should be dealt with swiftly and appropriately, while ensuring a fair process is followed in the investigation.
    - in one-off instances of low level inappropriate behaviour, appropriate management action (for example a manager speaking to a doctor about their behaviour, or directing a doctor to undergo code of conduct training or scenario-based training) can resolve an issue and change behaviour without the need for disciplinary action.

The Patient Advocacy Reporting System developed by Gerard Hickson and his team at Vanderbilt University to deal with disruptive behaviours may be a system that could be adopted in Australia to change behaviour. The system uses a tiered approach to accountability depending on the nature of the conduct.

See further:

Gerard Hickson: Changing Behaviour MJA Insight 12 August 2013; available at https://www.mja.com.au/insight/2013/30/gerald-hickson-changing-behaviour

Hickson G et al "Balancing systems and individual accountability in a safety culture" Chapter 1 in *From Front Office to Front Line: Essential Issues for Health Care Leaders* 2nd edition; available at http://www.avant.org.au/workarea/downloadasset.aspx?id=17179870211

Hickson G, Picthert J, Webb L, Gabbe S "A complementary approach to promoting professionalism: identifying, measuring, and addressing unprofessional behaviors" Acad Med 2007 Nov; 82(11): 1040-8

**Possible solutions**

1. Promoting cultural change – leadership from the top

   - This is a profession-wide issue, not just a RACS issue. We believe that RACS should work with the other Colleges to promote cultural change.
   - The College and employers (in particular hospitals) need to work together to encourage a culture where it is safe to complain, but also where fair and timely process is followed for the person against whom the complaint has been made.
   - Promote and reward appropriate behaviour – have "champions" at hospitals who model appropriate behaviours and can mentor and support others.
   - Senior members of the profession need to lead by example, model proper behaviour and call their colleagues on inappropriate behaviour.
   - Make it unacceptable to stand by and watch others being treated badly. Adopt the principle that "the standard you walk past is the standard you accept".
   - Implement a mentoring system by senior doctors who are not a trainee's supervisor.

2. Processes and procedures

   - Not require a formal complaint to be made before a concern is looked into. Have a mechanism for complaints to be dealt with informally in appropriate cases.
   - Organisations can encourage doctors to seek support and advice from their MDO or other appropriate body at an early stage. These organisations have resources available to support doctors (whether complainant or respondent) through the process.
   - Work with hospitals to have consistent policies and procedures for outlining what is and is not appropriate behaviour, and for dealing with complaints of discrimination, bullying and harassment – both legitimate complaints and vexatious complaints.
   - Take appropriate disciplinary action against proven unlawful and, in particular cases, inappropriate behaviour (but ensure fair process has been followed in doing so).
   - Ask trainees for feedback to the College in end of term reviews or at other suitable times about whether they have experienced or observed inappropriate behaviour and feedback on their supervisor's behaviour. Take appropriate action based on the information the College collects.
   - Employers need to have policies in place to manage bullying by others in the workplace against doctors (for example, from patients) and need to take steps to enforce those complaints.

3. Training and education

- Training should not be limited to trainees but should be offered more broadly to all doctors.
- Training needs to go beyond awareness training to scenario-based training so that doctors are not only aware of the concepts but of their application in practice, so that they can understand what is and is not appropriate behaviour, and what is unlawful discrimination, bullying and harassment. Scenario-based training would assist in clarifying the link between patient safety and appropriate behaviour.
- There is also a need for training in non-technical skills such as leadership, mentoring and resilience.
- There needs to be training of Fellows involved in investigating complaints to ensure that they understand the rules of natural justice and procedural fairness.

Avant Mutual Group

July 2015