



AMA

**GUIDELINES ON PUBLIC COMMENT
BY HOSPITAL DOCTORS**

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Introduction

There is increasing pressure on the public hospital system in Australia and constant debate about the level and allocation of health care resources, leading to changing models of hospital management and medical practice. It follows that there is likely to be pressure on doctors working in public hospitals and other health care institutions to make clinical decisions on economic or other non-medical grounds rather than what is best for the patient. The World Medical Association has recognised this as an international issue, leading to the release in March 1999 of the WMA Statement on Professional Autonomy of the Physician.

The AMA maintains that all doctors have an obligation to speak out when they believe that the quality of patient care is compromised.

These guidelines are produced to assist hospital doctors who may find themselves in a situation that could create conflict between their employment or contractual obligations and the need to make public comment.

Issues for Public Comment

Usually the issue will be disagreement with, or lack of consultation by, hospital or health authorities on matters which affect the capacity of doctors to deliver best practice patient care or measures to prevent adverse health effects on the wider community. Doctors have obligations to patients, both individually and generally, and a primary role is to be the advocate for patients. Speaking out in these circumstances is wholly consistent with the traditional values and ethics of the medical profession, embodied in the *Hippocratic Oath*, expressed in modern form in the *Declaration of Geneva 1948* and supported by the AMA's current Code of Ethics and Statement of Values, in that it can help to:

- protect the integrity and independence of the doctor/patient relationship;
- promote and advance the public health;
- protect the professional independence of the medical profession;
- foster communication between the medical profession and the community.

In the public hospital and health system, policy and administrative decisions having significant effects may be made by public sector authorities without open debate and scrutiny. Where such decisions or proposals are seen to have an adverse effect on patient care or community health, doctors employed in public hospitals should contribute to public debate so that all the relevant issues are raised and considered before decisions are implemented. At times, it will be appropriate for doctors to initiate or further the debate with public comment on issues.

Technical comment through the mass media on a particular subject by a doctor who is a recognised expert in that field is a common occurrence and indeed often expected as part of the job. This would be so even where the doctor is contributing to public debate on an issue, rather than providing explanations of technical matters to increase public understanding and perhaps help the community deal with a current health problem. There is unlikely to be any difficulty unless the comment extends to criticism of the policy or administration of the hospital or health system by which the doctor is employed, or is so controversial that it is likely to spark a negative public reaction against the employing hospital or the state/territory health system. If either of those elements is present, doctors are advised to follow these guidelines.

On occasion the issue will be detected fraud, corruption or deliberate malpractice within the hospital or health system. In such cases, federal and state/territory governments usually have clear processes for reporting and subsequent investigation, accompanied in some jurisdictions by "whistleblower" legislation designed to protect employees who report fraud and malpractice in the public sector. The AMA advises members to follow the process laid down in the relevant jurisdiction. In the event that the formal process does not work, members are advised to contact their AMA Branch for advice.

Avenues for Public Comment

Depending on the situation, public comment may be made by hospital doctors in their capacity as representatives of the AMA, a doctors' registered union (such as the Australian Salaried Medical

Officers Federation - ASMOF) or a recognised clinical or craft association. Where, for example, the issue primarily relates to the income, conditions or well-being of doctors, with only an indirect link to patient care, it would be appropriate for a union or AMA industrial representative to make the public comment. Whatever the issue, it may be appropriate for a representative not working in the hospital or health system concerned to be the spokesperson. People making public comment should clearly identify themselves as representatives of organisations with an interest in the issue.

There are times when it is necessary for the spokesperson to be an organisation representative who is an employee or contractor of the hospital or health system concerned. In that case, it is even more important for spokespersons to identify themselves as representatives of organisations and to emphasize the collective interests involved.

Finally, the obligation on the medical profession to place patient care and community health ahead of other considerations will make it necessary at times for an individual doctor to speak out publicly on an issue.

Points to Consider

Any general statement encouraging doctors to speak out publicly on issues of concern has to be tempered by a consideration of the environment in which they do so. The public sector has changed substantially in the 1990s, with continuing resource limitations, leaner administration, a greater focus on measurable (often financial) results and more pressure on staff. Nowhere are these changes more evident than in the public hospital system. Sometimes these factors lead to a lack of consultation with stakeholders and to proposals which arguably do not give sufficient weight to health care outcomes. At the same time, many public hospital doctors are government employees and are subject to prohibitions on the disclosure of information and restrictions on the right to public comment. The same restrictions may well extend, as they do in NSW, to Visiting Medical Officers who provide services to hospitals under contract.

Even where there are no specific constraints on hospital doctors making public comment, there are reported instances of doctors feeling pressured to refrain from weighing into a public debate. It is worth noting also that fixed term employment contracts are now common in the public hospital sector, giving employing authorities scope for not renewing contracts on grounds other than performance. Obviously this will be so for other forms of contract. Given this environment, there are practical issues for hospital doctors to consider in deciding whether to make public comment.

The "Guidelines on Official Conduct of Commonwealth Public Servants" and the "Guidelines for Ethical Conduct of Public Employees in South Australia" are typical of the restrictions on public comment placed on government employees. These guidelines are separate from legislative prohibitions on the unauthorised disclosure or misuse of confidential information acquired by employees as part of their official duties (such as compromising national security, commercial speculation on the basis of information held only by government or taking advantage of another person through accessing official records on them). The restrictions on public comment arise from both the common law duty of fidelity to an employer and the particular responsibilities of public sector employees.

Both the Commonwealth and South Australian guidelines acknowledge the right of public employees, as members of the community, to contribute to public debate on issues of community concern and state that there should be little restriction on their doing so. However, both state that public employees have particular responsibilities to ensure that they are able, and are seen to be able, to administer government policies fairly and impartially. There are some situations, according to the Commonwealth guidelines, which "might render public comment improper":

- where, though not speaking in an official capacity, a public employee may be seen by the audience to be speaking on behalf of their employing agency or the government;
- where a public employee is directly involved in the policy or program under discussion, public comment could be seen as compromising their ability to continue to do that work in an unbiased manner;

- where public comment, though outside the employee's own sphere of work, is so harsh or extreme in its criticism of the government or its policies that it indicates that the employee is incapable of working for the government in a professional, efficient and impartial manner;
- where public comment "amounting to strong criticism of departmental administration could cause serious disruption in the workplace" (the guidelines suggest use of internal complaint and grievance mechanisms or utilising the union);
- where public comments amount to gratuitous personal attacks.

While breaching the guidelines on public comment can lead to disciplinary action by the employer, underlying the guidelines is the notion that public employees are citizens who should be free to participate in community affairs with the minimum of restriction. There is also acknowledgment that robust public debate contributes to better programs. In many cases, it comes down to a judgement on whether the public interest would be better served by remaining silent and, in the eyes of some, helping to maintain public confidence in the health system, or ensuring that the public is well informed on issues affecting health and is thus better able to make its own decisions.

In general, the AMA takes the view that the public interest would be better served by ensuring that the public is well informed and that health and medical treatment issues are subject to open debate. Doctors are often well placed to inform the public on health and treatment matters on which others remain silent. They are encouraged to consider their professional obligation to be advocates for the health interests of their patients and the community.

AMA Principles for Public Comment

The restrictions on public sector employees suggest that public comment involving criticism of hospital administration, the health system or government policy should be made, where practicable, through a professional association or union. Taking collective action to advance and protect the interests of members is a primary role of these organisations. The AMA recommends that doctors make public comment through elected representatives of professional associations which have a legitimate role in weighing into the debate, such as the AMA, ASMOF, medical colleges or clinical and craft associations.

Where the spokesperson is an employee or contractor of the public hospital or health system concerned, they should:

- make it clear that they are speaking on behalf of the collective interests of the association and not in a personal capacity
- avoid using policy, financial or business information which is acquired through their job and which the employer could reasonably argue is confidential.

It goes without saying that individual patient information is always confidential.

Where, for whatever reason, a doctor feels obliged to comment publicly on an issue as an individual, they are advised to take pains to demonstrate that their action serves a wider professional or public interest and not just their own personal interests.

Rights of Employees

The obligation of employees to serve the interests of their employers - the duty of fidelity - arises largely from common law and is not codified. While no such general obligation exists for doctors working under independent contracts, there may be specific provisions on public comment contained in individual contracts. Also, in NSW for example, Visiting Medical Officers (VMOs) in hospitals are regarded as employees for a number of purposes and may be covered by that state's rules on public comment by state employees. In relation to public comment or related activity which an employer might see as adversely affecting their interests, there will continue to be debate about what is acceptable and what might reasonably draw disciplinary action or other sanctions from the employer. While the restrictions on public comment by public employees are expressed as guidelines, not legislation, by the respective governments, they can be used to determine whether an employee's action is improper and hence as the basis for disciplinary action. There is the potential for

inappropriate action by employers against doctors who make public comment about issues in the hospital or health system which they believe are affecting patient care or the health of the community.

Given the lack of clarity in this area, the AMA recommends inclusion in enterprise agreements and contracts of a clause acknowledging the right and obligation of doctors to speak out publicly on issues of patient welfare and community health without being adversely affected in their employment. It may be necessary, in order to gain an employer's agreement to such a clause, to include a proviso that doctors consider the reasonable interests of the employer before speaking out. A clause with wording along the following lines would be appropriate:

In recognition of the rights and interests of the public in the health service, doctors have the right to enter into public debate and dialogue over matters relevant to their professional expertise and experience. Where such matters relate directly to the employer, the doctor undertakes to advise the employer of any concerns and issues prior to entering into public debate and dialogue. In entering public debate and dialogue on such matters, doctors shall:

- *not breach patient or commercial confidentiality;*
- *give regard to the employer's relevant policy and their professional and ethical codes.*

Doctors who exercise their rights under this clause will not be adversely affected in their employment or contract service.

Privatisation and Co-location

In some states and territories there has been a trend towards privatisation of public hospitals and hospital management, including co-location of public and private hospitals where the same doctors provide services to both. In such situations there may be commercial imperatives which do not apply in a wholly public system.

There will be a need in these situations for greater sensitivity to commercial issues and the specific terms and conditions of doctors' employment or contracts may need to be checked for any specific obligations in this regard.

The AMA believes that it is crucial in all cases that the principle of clinical independence be maintained and that the obligation to be an advocate for patients, both individually and collectively, continues to hold in all circumstances.

AMA Code of Ethics

These guidelines are consistent with the AMA's Code of Ethics, which requires doctors to:

- *Strive to improve the standards and quality of medical services in the community (3.1);*
- *Accept a share of the profession's responsibility to society in matters relating to the health and safety of the public, health education and legislation affecting the health or well-being of the community.*

Consideration will be given to amending the Code to state formally doctors' obligation to place patient care and community health above other considerations.

Where members feel threatened by employer reaction to public comment made in accordance with these guidelines, or would like advice on a particular situation, they are advised to contact their AMA Branch.