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MIGA submission to the Senate's Community Affairs References Committee Inquiry into the Medical Complaints Process in Australia

MIGA appreciates the opportunity to make a submission to the Committee's inquiry into the Medical Complaints Process in Australia (**the Inquiry**).

Prior to the Senate's dissolution earlier this year, MIGA planned to make a submission to the then-Committee's inquiry into the same issues. Given the dissolution, no submission was lodged.

Although MIGA appreciates the Committee is not calling for submissions, it requests and appreciates the Committee giving consideration to this submission as part of the Inquiry.

An executive summary of MIGA's position is set out below, followed by a brief overview of its interest and work in the area of both bullying and harassment, and medical complaints, and subsequently its response to the Inquiry's terms of reference.

MIGA's position – executive summary

The terms of reference of the Inquiry are broad, addressing both issues of bullying and harassment in the Australian medical profession, and the Australian medical complaints system.

Separately, both these issues are complex. Taken together, this complexity is even more apparent.

It appears that the overarching issue for the Inquiry is that of bullying and harassment. It understands the Inquiry will focus on bullying and harassment, including where it may arise within the Australian medical complaints system.

It is imperative that the issue of bullying and harassment not be a 'lens' through which to examine the Australian medical complaints system more broadly. In its experience, issues of bullying and harassment are best dealt with in the workplace. That said, they can arise within the medical complaints system. How they can arise in relation to the issue of mandatory notifications warrants consideration. MIGA has not seen bullying and harassment more generally as a widespread or systemic problem for the Australian medical complaints system itself.

Instead, MIGA has seen bullying and harassment as significantly more likely to arise within 'local' contexts, such as a hospital or other health care facility, or a 'professional' context, amongst peers within a particular group.

Given this, the focus on dealing with issues of bullying and harassment needs to be at the local and professional levels, namely to:

- develop better, profession-wide understanding of what constitutes bullying and harassment in the health care context
- ensure a culture that views bullying and harassment as unacceptable in health care – this is only achieved through both commitment by a broad range of stakeholders, and targeted and effective education initiatives
- provide fair, through and consistent processes for dealing with issues of bullying and harassment when they arise, whether by hospitals, professional colleges or other similar bodies
- select the right people to implement these processes, who can ensure that their objectives are met and they are consistently followed at different times and in different contexts

Any issues relating to the Australian medical complaints system more generally, particularly how it does, or should, operate, should be considered within a much broader context, one which appears to be beyond the scope of this Inquiry.

MIGA's interest and work in the medical complaints system

MIGA is a medical defence organisation and indemnity insurer with a national footprint offering a range of insurance products and associated services to the health care profession across Australia.

It has represented the interests of the medical profession for more than 115 years.

Its members and policy holders include significant numbers of medical practitioners, health care companies, privately practising midwives and medical students working across a broad range of specialties and contexts in the Australian health care system.

MIGA's lawyers regularly advise and assist medical practitioners in responding to complaints and other issues involving the Medical Board of Australia (**the Board**), the Australian Health Practitioner Regulation Agency (**AHPRA**) and various state-based health complaint entities. Its lawyers also have experience in assisting members who are complaining of, or are alleged perpetrators of, bullying and harassment.

Its risk management and education program for its members and policy holders has a focus on both understanding and minimising the causes of patient complaints, and bullying and harassment in the health profession.

MIGA has recently contributed to the Queensland Parliamentary inquiry into the performance of the Queensland Health Ombudsman's functions, which focuses on the health complaints system in that jurisdiction.

MIGA's response to the inquiry's terms of reference

a. Prevalence of bullying and harassment in Australia's medical profession

Bullying and harassment are important issues for Australia's medical profession.

Over the last year or so, considerable work has been undertaken, particularly by the Royal Australasian College of Surgeons (**RACS**), into the nature and extent of this issue and ways in which to deal with it.

Bullying and harassment in the medical profession, and health care more broadly, are unacceptable.

In MIGA's role as an insurer, advisor and educator of its members and policy holders, it deals with issues of bullying and harassment in the medical profession, particularly when:

- advising medical practitioners and midwives who have been the subject of alleged bullying and harassment, or had accusations of bullying and harassment made against them

- advising healthcare organisations dealing with allegations of bullying and harassment bought by one health professional against another in their organisation

These experiences suggest:

- the need for cultural change within parts of the health profession and some health care organisations as the key strategy in eliminating bullying and harassment

- the importance of education for medical practitioners, other health professionals and health care organisations in what constitutes bullying and harassment and how to appropriately deal with it, both in individual cases and more generally

- the significant differences in how complaints of bullying and harassment are handled by various people and organisations, even when the same policies or guidelines are involved

On the issue of cultural change, MIGA endorses the lead of the RACS in dealing with bullying and harassment issues, and the willingness of both AHPRA and the Board to work with the RACS and the profession more generally in dealing with these issues.

The steps identified by those entities as necessary are thoughtful and considered, but complex. They will take significant time and require the involvement of many stakeholders, including medical defence organisations such as MIGA.

Change in this area is best driven by the professional colleges and associations, given their primacy in training health professionals and ensuring their ongoing compliance with their professional obligations. In doing so, they will need to work hand in hand with those responsible for health care workplaces, particularly entities operating public and private hospitals, and other health care organisations.

In the field of education, MIGA has been focusing on the issue of bullying and harassment over recent months and into next year.

It has written to members and policy holders about this issue (see for instance an article by Cheryl McDonald, National Manager – Claims & Legal Services in a recent MIGA Bulletin entitled "Bullying in the Workplace").[1]

As part of its educational program, MIGA is running conferences focusing on bullying and harassment in the medical profession. These are taking place in various Australian states for our members, policy holders and other health professionals. They feature a variety of expert speakers via panel discussion to explore these issues, particularly what constitute bullying and harassment, where it can arise, and what can be done about it.[2]

Turning to differences in bullying and harassment policies and their implementation across Australia, considerable work will need to be undertaken on:

- working towards a nationally consistent understanding throughout the health profession as to what constitutes bullying and harassment and how it is dealt with – ideally this would be based on national standards, driven by the professional colleges and associations, with input from regulatory authorities such as AHPRA and the Board, government organisations such as public hospitals, medical defence organisations such as MIGA and private hospital organisations

- ensuring that those who implement and are responsible for bullying and harassment policies are appropriately trained in what those policies require, ensuring consistency and fairness in how they are applied – at present, we find considerable variation between various contexts in how complaints are handled, even under similar regimes

- educating professionals as to what their bullying and harassment policies are in different contexts (ie public hospitals, private health care organisations), and how to utilise them

b. Any barriers, whether real or perceived, to health professionals and students reporting bullying and harassment and whether there is anything preventing medical practitioners from reporting bullying and harassment

In MIGA's experience, there are a variety of barriers to medical practitioners reporting bullying and harassment.

Practitioners can be concerned that they will jeopardise their careers by making a complaint, particularly their progress through a training program, or that such behaviour is merely part of the experience, particularly in training.

Other recurring concerns are:

- perceptions that the process of making a complaint will take a significant emotional toll

- pessimism about what can be achieved even if a complaint is accepted

- fear of repercussions

- misunderstandings about the relevant complaints process

[1] Accessible at http://www.miga.com.au/Bulletin/BulletinDetails.aspx?p=82&id=1244&i=77&c=
[2] For more information, see www.miga.com.au/library/Risk_Management_Program_Conference_Flyer.pdf

- reservations about the personalities involved in the complaints process, particularly if they work with either the complainant and / or the alleged protagonist

These underlying issues reinforce the need for cultural change, together with both consistency in and independence of complaint processes.

There is a need for appropriate support mechanisms both for persons who make complaints, and those who are the subject of them.

In MIGA's experience, there is often little in the way of supports to those involved in such a process, particularly in a public hospital setting, unless the practitioners involved have developed their own informal, private support network, or sought private counsel or medical support.

MIGA has a particular focus on the health of medical practitioners through its Doctors' Well-being Program.[3]

In particular, it has developed a Practitioners' Support Service, providing its members and policy holders with access to both:

- independent professional medical advice
- peers who can share experiences and provide confidential guidance and support

c. The roles of the Medical Board of Australia, AHPRA and other relevant organisations in managing investigations into the professional conduct (including allegations of bullying and harassment), performance or health of a registered medical practitioner or student. Are the complaints and investigation processes of the relevant medical boards, nursing and midwifery boards, and AHPRA able to be used vexatiously for bullying or harassment, particularly by other medical professionals?

On a daily basis, MIGA's lawyers advise its members and policy holders on matters involving AHPRA, the Board and other state and territory health profession boards and councils relating to performance, health and conduct issues.

MIGA understands the overarching issue for the Inquiry to be bullying and harassment in the medical profession. Accordingly, its submissions on this term of reference are directed to the operation of the *Health Practitioner Regulation National Law* (**the National Law**) within this discrete issue.

As set out above, it is imperative that the 'lens' of bullying and harassment is not used to analyse broader issues relating to the complaint management and investigatory powers of bodies such as AHPRA, the Board and other state and territory health profession boards and councils.

In MIGA's experience, the medical complaints process is rarely used to determine issues arising from bullying and harassment.

MIGA submits caution should be exercised in the medical complaints process moving into the space to determine bullying and harassment allegations.

[3] For more information, see www.miga.com.au/content.aspx?p=209

When they do occur, which is rarely, issues involving bullying and harassment within the National Law context arise in the following areas:

- complaints against a health professional by a patient or another health professional of bullying and harassment

- complaints or other notifications made for a certain or stated purpose, such as a mandatory notification under Part 8 Division 2 of the National Law in the context of performance posing a danger to patients, but with an element of bullying and harassment

Complaints which are directly about bullying and harassment issues made by patients are generally dealt with either under the National Law, or state or territory-based medical complaints mechanisms (such as the *Health Ombudsman Act 2013* (Qld)).

By contrast, complaints made by one health professional against another relating to bullying and harassment are usually made to a public or private hospital, or other health care organisation. Less commonly they are made to a professional college or association, or to the Board, AHPRA or another state or territory board or council.

Complaints made by patients against health professionals of bullying and harassment should be dealt with under the National Law, as they relate to broader patient care and treatment issues which the National Law regulates. However, professional colleges and associations have an important role in identifying the standards and behaviours which should be met by health professionals in dealing with patients and avoiding potential issues of bullying and harassment.

On the issue of complaints or notifications which have elements of bullying and harassment within the mandatory notification context, MIGA has reservations about whether existing frameworks are sufficiently equipped to deal with these issues, and whether they are able to ensure that those issues do not affect the proper assessment of complaints and notifications.

The National Law provides a structure which focuses on the merits of a complaint or notification and any necessary action to protect the public. However, it is the Law's operation which can leave it open to being used unnecessarily, and even vexatiously, including for the purposes of bullying and harassment. On occasion, MIGA does see these problems occurring.

A principal example includes use of the requirement of mandatory notification of a "*significant departure from accepted professional standards*" under Section 140 of the National Law to criticise aspects of another professional's practice they do not agree with, even when they are seen as a valid method of practice by other respectable peers. This issue is explored further below.

d. The operation of the National Law, particularly as it relates to the complaints handling process. Whether the legal framework under which the relevant medical boards and AHPRA operate have appropriate safeguards against being used vexatiously for bullying and harassment

It is not so much an issue of whether the legal framework of the National Law has appropriate safeguards to prevent the vexatious use for bullying and harassment, but rather these problems relate more to:

- professional culture and expertise

- experience and perspectives of those involved in the complaints handling process

As set out above, issues of bullying and harassment within the medical profession which involve the National Law are most likely to arise through the mandatory notification regime under Part 8 Division 2 of the National Law.

Under Section 140 of the National Law, one of the ground for mandatory notification by a health professional about a fellow health professional is a reasonable belief that a professional has practised in a way which constitutes a significant departure from acceptable professional standards, placing the public at risk of harm.

This is a relatively new regime, introduced with the National Law in 2010.

AHPRA published guidelines for mandatory notification in 2014 (**the AHPRA guidelines**).

In MIGA's experience of advising health professionals, particularly medical practitioners, who are either considering making, or are the subject of, a mandatory notification:

- the requirements in relation to making such a notification based on significant departures from professional practice are not well understood

- the AHPRA guidelines are not well known.

The AHPRA guidelines provide some guidance on what constitutes a significant departure from acceptable practice. They emphasise that this provision is

> *"not meant to trigger notifications based on different professional standards within a health profession, provided the standards are accepted within the health profession; that is, by a reasonable proportion of practitioners"*

In doing so, AHPRA identifies different accepted standards, or accepted innovated practice, as two examples.

In some contexts, this broad guidance is insufficient to guide medical practitioners in determining whether to make a mandatory notification in relation to the professional standards of another health professional.

Practitioners will often need to take guidance from colleagues on what constitutes a range of acceptable practices, and what falls outside that.

Personal experience and preferences can also affect, however unintentionally, one's perception of another's practice.

These uncertainties create an environment where issues of bullying and harassment can either intentionally or unintentionally influence the making of a mandatory notification based on significant departure from professional standards.

The practice of medicine is inherently complex. Reasonable and considered minds can differ. Health professionals, particularly medical practitioners and midwives, can have strong views on the merits of certain practices and the evidence in support of them.

The AHPRA annual reports for 2013 / 2014 and 2014 / 2015 and AHPRA report, *Medical regulation at work in Australia 2014/15,* raise issues in relation to mandatory notifications about professional standards which warrant further consideration and research.

MIGA has reservations about the expertise, experience and perspectives of those assessing complaints, particularly those who are not health professionals or lawyers working in the area.

A health professional, lawyer or other professional involved in assessing complaints needs to develop judgement and experience to make good decisions. This takes training and time.

Without sufficient training and experience in assessing competing practices, it can be difficult for a well-intentioned assessment officer to determine what to do about a complaint.

MIGA proposes that consideration be given to the underlying training and experience needed for those involved in the complaints handling process, both for employees of the Board, AHPRA and various state and territory boards and councils, and those who serve on committees which assess complaints.

e. Whether the National Registration and Accreditation Scheme, established under the National Law, results in better health outcomes for patients, and supports a world-class standard of medical care in Australia. Whether nationalising the registration and monitoring of medical practitioners improved medical care in Australia

MIGA, as a medical defence organisation who insures medical practitioners, privately practising eligible midwives, medical students and health care organisations, providing legal and risk management advice and education to those professionals, has only one of a number of perspectives on whether the National Law has resulted in better outcomes for patients.

This is a very complex issue, one over which there are differing perspectives and where input is required from various sources.

As set out above, given the focus of the Inquiry is on bullying and harassment, MIGA is uncertain how this complex issue can be grappled with in any meaningful way, given it involves much broader considerations.

At a general level, this issue is a worthwhile focus of research, gathering together anecdotal perspectives, input from various stakeholders and using studies already undertaken on discrete areas, with a view to determining whether further research, and ultimately particular reforms, are required.

f. The benefits of 'benchmarking' complaints about complication rates of particular medical practitioners against complication rates for the same procedure against other similarly qualified and experienced medical practitioners when assessing complaints. Whether there should be stronger requirements for patient specific outcome data to be used both in lodging and investigating complaints

In MIGA's experience, complication rates themselves, and rates of complaint relating to particular issues, can be a useful 'triaging' tool or pointer towards potential issues, which it uses in targeted risk management and for educating its members and policy holders.

Considerable caution must be had in using comparative complication rates, other outcome specific data or complaint rates, beyond the initial assessment of a complaint.

Each individual case, and the context in which the practitioner works, must be assessed on its individual merit and circumstances.

If greater use of complication or complaint rate benchmarking is contemplated beyond a "triaging context", MIGA considers that further research into its utility, and potential limitations, is required.

In addition, detailed guidelines should be prepared, with input from appropriate stakeholders such as specialist colleges, other professional associations and medical defence organisations such as MIGA, into the use and relevance of such data in assessing complaints.

MIGA suggests extreme caution in progressing this concept.

g. The desirability of requiring complainants to sign a declaration that their complaint is being made in good faith. Is there evidence to suggest vexatious complaints are being made and, if so, what systems could be put in place to reduce the prevalence?

MIGA has reservations about the need for, and utility of, requiring complainants to sign a declaration that their complaint is being made good faith.

In its experience the vast majority of complainants, both health professionals and patients, believe sincerely that their complaints are made in good faith.

If bullying and harassment issues arise, it is usually only as a matter of effect, not intent.

The better approach is for regulators to be better equipped to deal with vexatious complaints.

The National Law provides an appropriate framework for vexatious complaints to be dismissed at an early stage. However, the principal issue is the ability to identify a vexatious complaint. As set out above, this is best dealt with by ensuring regulator staff and those working with regulators have appropriate training and experience to deal with these issues.

If you have any questions about MIGA's submission, or would like further information or input, please contact Timothy Bowen, Senior Solicitor – Advocacy, Claims & Education,

Yours sincerely

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