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14 September 2018

Ms Jeanette Radcliffe
Committee Secretary
Senate Standing Committees on Community Affairs

Via email: community.affairs.sen@aph.gov.au

MIGA submission: My Health Record system inquiry

MIGA appreciates the opportunity to make a submission to the Community Affairs References Committee inquiry into the My Health Record system.

A copy of its Submission is enclosed.

MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting and educating medical practitioners, medical students, health care organisations and privately practising midwives throughout Australia. With over 33,000 members and a national footprint, MIGA has represented the medical profession for 118 years and the broader healthcare profession for 16 years.

As set out in the enclosed Submission, MIGA has significant interest and involvement in the medico-legal and risk management issues around both My Health Record and eHealth more broadly.

You can contact Timothy Bowen, telephone 1800 839 280 [REDACTED] if you have any questions about MIGA's Submission.

Yours sincerely



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MIGA Submission

Senate Standing Committees on Community Affairs

My Health Record system inquiry

September 2018

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Senate Standing Committees on Community Affairs

My Health Record system inquiry

Executive Summary – MIGA's position

1. MIGA supports the development of the My Health Record system, which has potential to enhance Australian healthcare.
2. It recognises concerns have been raised around the security of the My Health Record system, and about who can access material on it.
3. MIGA's perspective is on how these issues may impact doctors, other health practitioners and healthcare organisations who use the system appropriately.
4. In addressing issues around My Health Record security and access, it is imperative that:
 - (a) A fair and appropriate balance is struck between maintaining the right level of security and privacy on the one hand, and ensuring that My Health Record facilitates improvements in Australian healthcare on the other
 - (b) Doctors, other healthcare practitioners and healthcare organisations are not discouraged from using the system by unduly onerous regulatory obligations, or impractical time and administrative burdens
 - (c) Due weight is given to existing and proposed safeguards around privacy and security in the system, and sufficient time taken to assess their effectiveness following broader system use before considering any further changes
 - (d) Other existing regulatory, professional and ethical frameworks within which doctors and other health practitioners work are recognised, particularly for how they can contribute towards ensuring appropriate use of the My Health Record system.
5. MIGA responds to a number of the inquiry's terms of reference below, which are of particular relevance to the interests of the healthcare professions.

MIGA's interest

6. MIGA is a medical defence organisation and medical / professional indemnity insurer with a national footprint. It has in excess of 33,000 members and policyholders Australia wide including medical practitioners, medical students, privately practising midwives and healthcare organisations.
7. It has represented the interests of the medical profession for 118 years and the broader healthcare profession for 16 years.
8. Its lawyers regularly advise and assist members and policy holders on issues arising out of eHealth, particularly electronic health records, record-keeping obligations and privacy and confidentiality. This can also extend to complaints and claims relating to these issues.
9. MIGA's Risk Management Program provides educational workshops and material, both face-to-face and online, to its members and policyholders, and to the health profession more generally. The Program covers eHealth issues, and has previously included a series of interactive seminars around Australia on eHealth initiatives, including Q&A sessions with various experts. It also provides bespoke education to various professional groups on eHealth issues.
10. MIGA has been involved in industry consultations around My Health Record (and its predecessor) over a number of years, including with government bodies and other key stakeholders. Its advocacy around eHealth issues more broadly includes:
 - (a) Office of the Australian Information Commissioner (**OAIC**) review of health privacy guidelines
 - (b) Commonwealth Attorney General's consultation on mandatory data breach laws
 - (c) OAIC consultations on notifiable data breach resources
 - (d) Australian Digital Health Agency (**ADHA**) consultation on development of the Australian Digital Health Strategy
 - (e) Queensland Parliament inquiry addressing general practitioner electronic access to hospital discharge information
 - (f) South Australian independent review into the Enterprise Patient Administration System (**EPAS**), an electronic platform for public hospital clinical records.

Benefits of My Health Record

11. MIGA supports the development of the My Health Record system.
12. It believes the system has potential to improve healthcare for Australians.
13. My Health Record is one potential source of health information that doctors and other health practitioners can use in caring for their patients. It can add further information so as to improve co-ordination and continuity of care for a patient who may see a variety of practitioners over time.
14. Although the system has certain inherent limitations, particularly around how comprehensive and up-to-date it can be for different patients, it is helpful source of a range of health information from various sources.
15. From MIGA's experience, the following issues can pose challenges for doctors and other health practitioners in using the My Health Record system:
 - (a) **Inherent limitations** – its personally controlled nature and fragmented method of information collection make it only one element of a patient's clinical picture, which for the most part needs to be considered in conjunction with other information sources
 - (b) **Inter-operability** – it is important that My Health Record not be an isolated fragment of a patient's health picture and that it can communicate effectively with other components involved in providing healthcare to patients, including:
 - a. Electronic health record systems – this already occurs for a number of systems in community settings, but inter-operability with the wide range of hospital systems is also important
 - b. Secure messaging systems
 - c. Real-time prescription monitoring systems
 - d. Appropriate medical and health apps as they are developedThere are a range of initiatives underway around these issues, and it is important that they continue
 - (c) **Excessive administrative and time burdens** – the investments needed by practitioners and healthcare organisations in time, finances and understanding to use My Health Record effectively are significant. The capacity to do this varies significantly across professionals and locations
 - (d) **Medico-legal issues** – the obligations on practitioners and healthcare organisations around use of the My Health Record system are already considerable, and in some ways go beyond existing obligations for handling health information through other means, including when:
 - a. Information can and cannot be uploaded to the system
 - b. The ADHA and OAIC need to be informed of 'data breaches'Consequently it is important that legal obligations do not become inconsistent, or unduly burdensome and impractical.
16. MIGA supports:
 - (a) Ensuring all eHealth platforms, including My Health Record, can continue to improve and develop to reflect the evolving realities of Australian healthcare
 - (b) Augmenting My Health Record to improve its operation, utility and take-up amongst the health professions
 - (c) Ensuring regulatory frameworks and other obligations relating to both My Health Record and eHealth more generally, particularly around privacy and confidentiality, remain fair, practical and fit for purpose, and harmonised with other medico-legal requirements on Australian healthcare practitioners.

Privacy and security

17. MIGA recognises concerns have been raised around the security of the My Health Record system, and who can access material on it.
18. It acknowledges the critical importance of ensuring that the system is well-protected from cyberattacks and other inappropriate access attempts.
19. Only the right people should have access to a patient's My Health Record. Key examples are a patient's treating doctors and other health practitioners.

20. It is important to ensure My Health Record cybersecurity. However MIGA is concerned that attempts to ensure this could create a system so difficult to access and use by doctors and other health practitioners that they are deterred from using it.
21. It believes the regulatory framework of the My Health Record system, together with the changes proposed in the My Health Records Amendment (Strengthening Privacy) Bill 2018, provide strong protections against potentially inappropriate or otherwise questionable system access by third parties, particularly outside the healthcare context.
22. In addressing issues around My Health Record security and access, it is important that:
- (a) A fair and appropriate balance is struck between ensuring security and privacy on the one hand, and ensuring that the system facilitates improvements in Australian healthcare on the other
 - (b) Doctors and healthcare practitioners are not deterred from using the system because of any unduly onerous legal obligations, or impractical time or administrative burdens
 - (c) Due weight is given to existing safeguards around privacy and security in the My Health Record system, such as:
 - a. Range of patient controls over access to the system and ability to track when and where their record has been accessed
 - b. Requirements in r 42 of the My Health Records Rule 2016 (Cth) for healthcare organisations using the system to have appropriate policies in place around its use, covering:
 - i. Access
 - ii. Authorisations
 - iii. Training
 - iv. Security
 - v. Risk mitigation strategies
 These policies are to be reviewed at least annually, or when any material new or changed risks are identified by reference to various criteria
 - c. Notifiable data breach obligations under s 75 of the *My Health Records Act 2012* (Cth)
 - d. ADHA ability to suspend access under the My Health Records Rule to:
 - i. A person's record in a range of circumstances, including where there are serious risks to an individual
 - ii. A broader range of records or the system more generally where there are system integrity or security issues
 - e. Penalties for misuse of health information under both the *My Health Records Act* and the *Healthcare Identifiers Act 2010* (Cth)

Protections such as these should be given time to work and their effectiveness assessed before other, potentially unnecessary changes are made

 - (d) Other existing regulatory, professional and ethical frameworks under which doctors and other health practitioners are recognised and appreciated for how they can contribute towards ensuring appropriate use of the My Health Record system – these include:
 - a. The *Health Practitioner Regulation National Law (the National Law)*
 - b. Professional codes and standards such as the Medical Board *Good Medical Practice – A Code of Conduct for Doctors in Australia* and the Australian Medical Association *Code of Ethics* – breaches of these can provide a basis for disciplinary action under the National Law, or be used in support of a civil damages claim
 - c. The Commonwealth *Privacy Act*, which provides a regulatory and enforcement framework which includes remedies such as enforceable determinations or undertakings, injunctions and financial penalties
 - d. Civil law standards of care and confidentiality obligations, breaches of which can lead to damages awards.

Government's administration of the My Health Record system roll-out

23. MIGA's perspective is limited to Government engagement with the profession around the My Health Record roll-out.
24. It has appreciated the significant efforts made by the ADHA to engage with both it and other professional stakeholders around the development and roll-out of My Health Record.
25. The range of resources and training developed, both by the ADHA and OAIC and in conjunction with other professional stakeholders such as the Royal Australian College of General Practitioners, has been an

important part of assisting doctors and other health practitioners in preparing for wider use of the My Health Record system. Helpfully resources and training have been delivered in a range of platforms, including online and face-to-face. They cover a range of issues, including appropriate handling of information and protecting patient privacy.

Broader medico-legal implications

26. It is important to remember that use of My Health Record for healthcare fits within a broader framework of medico-legal obligations on doctors and other healthcare practitioners.
27. This means that how the system is regulated, particularly obligations imposed on those using the system, can create / or affect other existing medico-legal obligations, including around issues such as:
 - (a) Provision of timely care
 - (b) Access to accurate and up-to-date clinical information
 - (c) Continuity of care
 - (d) Transfer of care
 - (e) Follow-up of test results and patients.
28. Limitations or deficiencies in these areas could lead to compromised healthcare, or even harm, to patients. They could also lead to civil claims, disciplinary process and coronial matters against doctors, other healthcare practitioners and healthcare organisations.
29. Obviously all reasonable steps need to be taken to avoid these risks, both to ensure patient safety and to ensure that doctors are not in any way hampered in the care they provide to their patients.
30. Accordingly it is important that obligations and responsibilities around use of My Health Record by doctors and other health practitioners do not make it more difficult for them to comply with their broader medico-legal obligations.