



30 April 2021

Senator Rachel Siewert
Chair
Senate Community Affairs References Committee
Parliament of Australia

Via online submission

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Dear Senator

MIGA Submission – Ahpra & National Boards inquiry

Thank you for your letter of 25 March 2021 inviting MIGA to provide a submission to the Committee's Inquiry into the Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law.

A copy of MIGA's Submission is enclosed. This follows its contributions to previous Senate inquiries into the [Australian medical notifications process](#) and the [National Law notifications mechanism](#).

MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting, educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With more than 36,000 members nationwide, MIGA has represented the medical profession for over 121 years and the broader healthcare profession for more than 18 years.

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

Yours faithfully

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MIGA Submission

Senate Community Affairs References Committee

Ahpra & National Boards inquiry

April 2021

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MIGA Submission – Senate Ahpra & National Boards inquiry

Executive Summary – MIGA's position

1. MIGA is generally supportive of the role and operation of the Australian Health Practitioner Regulation Agency (**Ahpra**) and the National Boards under the *Health Practitioner Regulation National Law* (**the National Law**).
2. It has seen considerable and commendable changes to how Ahpra / National Boards operate over the past few years. Broader and more frequent stakeholder engagement, improved timeliness in dealing with notifications, increased clinical input into notifications handling, new policies and guidelines, and a process for handling vexatious notifications have been some of the more important changes.
3. MIGA has also welcomed the staged reviews of the National Law undertaken by Australian Health Ministers. These involve important changes to the National Law around mandatory reporting and notifications handling. With a few exceptions MIGA is generally content with most of the further changes agreed on by Ministers following consultation. It appreciates opportunities for further consultation on how these changes will work in practice.
4. It has significant concerns with certain proposed changes to the National Law, namely to make public confidence a paramount consideration, mandatory reporting of scheduled medicines issues and notification of risks to a practitioner's former employers, hospitals and healthcare entities. MIGA is broadly supportive of the underlying rationale for these changes, but considers what is proposed is likely to pose significant problems. Better approaches are available.
5. With the significant improvements in the National Law and Ahpra / National Board operation over the past few years, there is now the chance to deal with key challenges for the notifications system, namely
 - Year on year increase in notification numbers, with only a comparatively small proportion warranting any regulatory response
 - Improving recognition and response to the systemic factors underpinning significant numbers of notifications, assisting to improve healthcare workplace conditions and to ensure both patient safety and the highest standards of healthcare.

MIGA's interest

6. MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With more than 36,000 members across the country, MIGA has represented the medical profession for over 121 years and the broader healthcare profession for more than 18 years.
7. MIGA has extensive expertise and experience in professional regulatory and disciplinary processes, including under the *Health Practitioner Regulation National Law* as it applies in different ways across the country.
8. On a daily basis its lawyers are advising, assisting and supporting its members and clients through professional regulatory and disciplinary processes.
9. Through its Risk Management Program, MIGA educates the healthcare profession on a range of medico-legal and risk management issues arising from professional regulation and discipline.
10. MIGA's advocacy work includes regular and ongoing engagement with the Medical Board / Ahpra and other key professional stakeholders. It has contributed to many inquiries and consultations involving National Law issues, including with Parliaments, Australian Health Ministers, Medical Board / Ahpra and state / territory health complaints entities.

Changes since last Senate inquiries

MIGA position at a glance

Ahpra / National Boards have responded well to previous Senate inquiries into healthcare notifications.

It has seen considerable and commendable changes to how Ahpra / National Boards operate over the past few years, including improved stakeholder engagement and notification handling timeliness, increased clinical input and a framework for managing vexatious notifications.

Important National Law changes have been made around mandatory reporting and notifications handling.

Past Senate inquiries

11. MIGA appreciated the opportunities it has had to contribute to the Committee's earlier inquiries into similar issues.
12. It welcomes how Ahpra / National Boards have responded to a range of issues it raised in those inquiries, including
 - (a) Increased clinical / peer input into notifications
 - (b) Using different approaches for notification assessment and investigation, drawing on the best aspects of approaches taken in different parts of the country (particularly the educative focused approach used in NSW for performance matters)
 - (c) Improved stakeholder engagement and responsiveness, particularly around emerging / recurring issues, codes, guidelines and policies
 - (d) Work done on recognising the impact of notifications on practitioners, including the continued support of doctors' health services across the country
 - (e) Development of a framework for dealing with vexatious notifications.
13. MIGA also recognises that Ahpra / National Boards have taken a thoughtful and considered approach to handling notifications during the COVID-19 pandemic, acknowledging the broad range of pressures on practitioners.
14. Whilst further improvements can be made (see below), for things within the power of Ahpra / National Boards (i.e. which do not require National Law changes) MIGA is optimistic these can be worked through co-operatively and collaboratively with Ahpra / National Boards.

Mandatory reporting reforms

15. Although short of what was sought by MIGA and other key stakeholders, reforms made last year to treating practitioner mandatory reporting obligations acknowledge significant concerns raised about the reluctance of doctors and other practitioners to seek healthcare, and misperceptions about what is a health issue requiring a mandatory report to a regulator.
16. Ahpra / National Board consultation on key guidance to the profession on these changes led to important initiatives and welcome clarification for the profession.

Getting the right paramount principles

MIGA position at a glance

MIGA

- Believes the proposed paramount consideration of public confidence in the safety of health services is too vague and impractical to interpret in a meaningful and fair way
- Proposes the alternative of integrity of a health profession as a paramount consideration.

Confirming the existing reality of a public protection focus

17. Proposed National Law changes involve stipulating that public protection is a paramount consideration in administering the National Law across the country.
18. MIGA supports this approach. It is already a reality for Ahpra / National Boards in handling notifications. It is already provided for in the NSW and Queensland versions of the National Law.

Problems with a paramount consideration of public confidence

19. MIGA agrees health professions need to have the confidence of their patients.
20. A paramount consideration of 'public confidence' in the National Law is the wrong way to achieve this.
21. Unlike for public protection, 'public confidence' is not already a paramount consideration under NSW and Queensland National Laws.
22. 'Public confidence' is an inherently vague and uncertain concept. The sources and measurement of public confidence are unclear. It offers inherent problems of being open to a wide array of interpretations and range of inappropriate influences.
23. It is imperative that National Law decision-makers and tribunals are able to make decisions based on objective, carefully considered and widely shared criteria reflecting broad consensus.
24. There are significant risks that vague notions of public confidence could be invoked to limit appropriate debate on issues where there is no broad clinical consensus, or broader professional or ethical issues where there are a range of validly held views.
25. MIGA is particularly concerned that public confidence could be determined on the basis of surveys, representations of a limited range of advocacy groups and / or media reporting alone. A paramount consideration for the National Scheme should not come down to selected representations of the interests of a limited selection of stakeholders, or what is considered to be topical or newsworthy at any one time.

Integrity of a profession – a better paramount consideration

26. MIGA considers the better approach is to include the integrity of a health profession as a paramount consideration.
27. This would allow a more nuanced, balanced approach that assesses matters by reference to professional standards and ethics.
28. Integrity of a profession provides a much better basis for consistent interpretation across a wide variety of circumstances.

Reporting scheduled medicines issues

MIGA position at a glance

MIGA

- Opposes all scheduled medicines charges and offences being reportable to National Boards
- Supports drugs and poisons regulators having scope to disclose information to Ahpra / National Boards where there is a serious risk of harm.

29. It is important that Ahpra / National Boards have all relevant information to respond to serious risks of harm.
30. Proposals for mandatory reporting by practitioners of all scheduled medicines issues, both charge and conviction, to Ahpra / National Boards is unnecessary and inappropriate.
31. Drugs and poisons regulators already refer matters to Ahpra / National Boards where they consider there are potential risks to the public, even without or before any charge or conviction.
32. To facilitate this process, MIGA supports clarifications that drugs and poisons regulators can share information informally with Ahpra / National Boards where they believe there is a serious risk of harm.
33. The proposals involve significant risks of unnecessary notifications for minor issues, neither impacting patient safety nor requiring a regulatory response.
34. MIGA is particularly concerned about this proposal leading to a significant increase in matters referred to Ahpra / National Boards where practitioners are grappling with new and evolving medication prescription regimes, including
 - (a) Introduction of real-time prescription monitoring in various states and territories
 - (b) Digital image prescribing
 - (c) Developing scope for electronic prescribing.
35. Whilst the proposals include scope for a state / territory to exclude minor offences, this is insufficient. It risks inconsistent approaches across the country. It is questionable whether states and territories could make necessary exclusions prior to the commencement of the proposed changes.
36. The better approach remains to clarify that drugs and poisons regulators may disclose information to Ahpra / National Boards where they believe there is a serious risk of harm to the public.

Notifying former employers, hospitals and healthcare entities

MIGA position at a glance

MIGA

- Opposes broad scope to notify former employers, hospitals and healthcare entities of any risk of harm
- Proposes notification only of serious and continuing risks, considering the entity's role, how they can reduce the risk and providing support to them in doing so.

37. MIGA does not support a broad scope to notify former employers, hospitals and healthcare entities, based merely on a reasonable belief past practice may have exposed people to a risk of harm.
38. It believes this approach would
- Lead to longer, wider and more costly investigations in a range of matters
 - Make it very difficult to determine whether notification is required – it could well lead to significant numbers of unnecessary notifications
 - Impose uncertain responsibilities on former employers, hospitals and healthcare entities, who have a varying range of abilities to know whether and how to respond to such information – the capacities of a small GP practice are very different to those of a metropolitan tertiary hospital.
39. It is important to work with healthcare provider organisations to ensure they understand why disclosure has been made, and what appropriate, proportionate responses may look like.
40. Scope to notify former employer, hospital or healthcare entity should
- Be limited to circumstances involving reasonable belief of a serious and continuing risk to persons arising from the practitioner's past practice
 - In determining whether to notify the former employer, hospital or healthcare entity, Ahpra / National Boards should give consideration to the nature of the relationship between the practitioner and the entity, and the extent to which the entity can reasonably reduce the serious and continuing risk
 - Involve Ahpra / National Boards providing guidance to the former employer, hospital or healthcare entity on what action it believes that entity could consider in reducing the risk, and supporting the entity in taking such action as necessary.

A better approach to increasing notification numbers

MIGA position at a glance

With year on year increases in notifications made to Ahpra / National Boards, and consistently high numbers of notifications where no regulatory action is necessary, a better process is needed to identify how notifications are best dealt with. This would allow Ahpra / National Boards to focus on issues of public safety or which otherwise relate to fitness to practice.

41. Since the introduction of the National Law over a decade ago, there has been a consistent trend of year on year increases in notification volumes, but no indication of increasing poor practice. There remains no real change in the number of notifications requiring any regulatory response.
42. Over the 5 years to 2019/20 Ahpra annual report data indicates
 - (a) Between 5% to 5.9% of medical practitioners, and 1.5% to 1.7% of all registered health practitioners, had a notification made about them
 - (b) Notification volumes have increased from 5,371 to 9,477 for medical practitioners, and from 10,082 to 16,858 for all practitioners
 - (c) Between 71.2% and 80.2% of notifications against medical practitioners, and 66.5% to 72% of notifications against all practitioners, have not required any regulatory response by National Boards – i.e. there were no issues of patient or public safety, or fitness to practice more broadly, warranting any action.
43. MIGA acknowledges that protection of public health and safety, and ensuring fitness to practice, should always remain paramount. In addition, the right of and scope for patients to make complaints / notifications and to raise other issues about their healthcare is also very important.
44. Accepting an increasing volume of notifications to Ahpra / National Boards as a reality is not a necessary part of ensuring public protection, fitness to practice and fundamental patient rights and interests.
45. Increasing volume of notifications cause concern around how
 - (a) Issues of public protection and fitness to practice can become obscured
 - (b) There can be misperceptions around what are and are not significant issues
 - (c) There can also be difficulty in separating issues of public protection from issues of dissatisfaction
 - (d) More time is taken and more resources needed to resolve notifications
 - (e) Patients have to wait longer to have a response to their concerns
 - (f) Doctors have to wait longer to resolve issues with the spectre of potential impact on their practice.
46. Large numbers of notifications where there are limited resources can strain the system beyond what it can reasonably cope with.
47. Whilst Ahpra / National Board assessment of, and liaison around, notifications is a key component of determining where a matter may warrant some form of regulatory action, it is not necessarily required for notifications which clearly do not raise issues of public protection.
48. MIGA believes Ahpra / National Boards expending significant time and resources on matters which do not necessarily require their input. These are matters which focus on dissatisfaction with care from a more 'consumer' perspective, which do not raise issues of public protection or fitness to practice which may require a regulatory response. MIGA believes there are significant numbers of these matters, and that there is scope to adopt a different approach towards them.
49. MIGA would support an approach, introduced in Queensland from March 2020, providing that that the Queensland Health Ombudsman
 - (a) May decide not to accept a complaint if satisfied the complainant has not sought a resolution of the matter first with the healthcare provider and it is reasonable in the circumstances for the complainant to first take this step
 - (b) Is also permitted to refer a complaint to an appropriate alternative body.

50. As the [Queensland parliamentary inquiry](#) considering this proposal recognised
- ...these amendments do not authorise legitimate notifications to be refused. Rather, these changes will ensure that the appropriate entity is dealing with a notification and that a complainant has first attempted a direct resolution with the practitioner or service, where possible and appropriate. According to the explanatory notes, these measures will assist in ensuring resources are allocated efficiently and directed to more complex and serious notifications; and that resources are only directed to low-risk matters if attempts by the complainant to resolve the matter are unsuccessful or if it is unsuitable for the parties to resolve the matter without [Health Ombudsman's] involvement.*
51. Although ability to refer a matter to a state / territory health complaints entity following a preliminary assessment already exists, it is MIGA's experience that this generally
- (a) Requires a process of consideration, seeking a response from the practitioner and determination before any referral is made
 - (b) Is not often used to refer matters not requiring a regulatory response to a health complaints entity.
52. MIGA acknowledges that Ahpra / National Boards have [attempted to encourage](#) notifications which seek an explanation, apology, refund / compensation, clinical record access / changes or changes in policy to a health notifications entity. However, it believes this message is not well-understood across the community. More is required from a variety of sources to communicate to the community the appropriate roles of Ahpra / National Boards and health complaints entities respectively.
53. Moreover MIGA believes the language of 'concern' about health practitioners can also contribute to misperceptions around Ahpra / National Board role in dealing with notifications. Complainants are not necessarily best placed to determine whether their notification raises an issue of public safety or fitness to practice.
54. Although Australian Health Ministers have proposed to widen referral powers, this relates to the scope of entities to which a notification can be referred (i.e. not just a health notifications entity) and would still require a preliminary assessment process.
55. MIGA proposes the following
- (a) A clear, concerted community awareness campaign co-ordinated amongst a wide range of stakeholders to clarify where healthcare complaints and other concerns are best raised (ie locally, with a health complaints entity or Ahpra / National Boards)
 - (b) Giving Ahpra / National Boards scope to decline to deal with a notification where it is reasonable for the complainant to first attempt resolution directly with the healthcare provider, or where it is most appropriately made to a health notifications entity
 - (c) Ability to refer notifications to a health complaints entity on a 'triaging' basis, without need for an assessment process
 - (d) If these approaches are insufficient, considering whether a health complaints entity should operate as the single point of access for healthcare complaints, with scope to refer issues to Ahpra / Medical Boards where they raise issues of public safety or fitness to practice.
56. This approach would have the benefit of reducing demands on Ahpra / National Boards to consider notifications which do not require clinical input. It utilises the expertise of health complaints entities to triage matters which require Ahpra / National Board involvement, namely those which raise issues of public protection and fitness to practice which may require a regulatory response. It ensures public confidence in such a system through placing health complaints entities, as independent bodies, as a key triage body.

Analysing systemic issues – improving workplaces and maintaining high standards

MIGA position at a glance

The broader systemic issues raised in significant numbers of healthcare notifications warrant greater scope to examine and consider these issues by Ahpra / National Boards, both in determining any necessary regulatory action and in working to improve healthcare workplaces and healthcare delivery.

57. In professional regulatory and health complaints contexts, the focus tends to be on individual's role and steps which need to be taken to ensure they are fit to practice.
58. These processes do not usually focus on the role of healthcare contexts within which the practitioner works.
59. Scope to consider broader systemic issues, such as underlying training, staffing levels, fatigue, resourcing and bullying / harassment is relatively limited.
60. Greater consideration of both underlying factors where they arise and the influence of organisational / systemic factors in leading to notifications is warranted.
61. In MIGA's experience, there can be insufficient focus on the underlying causes of notifications, and perhaps too much focus on consequent individual 'performance' issues. This means the symptoms, rather than the cause of them, are the focus.
62. It believes systemic issues can have a very significant impact on healthcare workplace function and culture, and consequently on patient safety and practitioner well-being.
63. The role of the regulator can be an important one in achieving necessary, systemic change.
64. There are also important considerations of whether focusing on the acts or omissions of an individual practitioner, without giving due consideration to the surrounding circumstances, is fair and appropriate.
65. By contrast hospital and coronial investigations are meant to focus on systemic issues so as to reduce the chances of a similar matters occurring again. This is a key part of Coroners' roles in recommending systemic improvements, and recommendations from hospital investigations.
66. MIGA sees scope for Ahpra / National Boards to improve identification of broader, systemic issues in notifications. This would allow it to better contribute to improving the underlying 'system' of healthcare involved. It would also provide necessary and fair context and explanation when errors are made by individual practitioner, avoiding unfair and inappropriate focus of blame on them.
67. It would welcome detailed engagement on these issues, with a view to developing appropriate frameworks / processes for Ahpra / National Boards, and considering whether any National Law reforms are necessary.

Other inquiry terms of reference issues

MIGA position at a glance

MIGA

- Is generally supportive of current practitioner supervisory arrangements
- Offers a range of responsive and preventative supports for doctors' health and well-being
- Believes further work is needed around notification timeframe parity
- Is comfortable with current processes for conflicts of interest and independence
- Supports a mechanism to apply for review of a caution.

TOR (c) - Adequacy and suitability of practitioner supervision arrangements

68. MIGA is generally supportive of the current regime for supervised practice, particularly following notifications.
69. From time to time practical issues can arise relating to
- (a) Appropriateness of proposed education
 - (b) Sourcing required education
 - (c) Finding appropriate supervisors / mentors.
70. MIGA has appreciated the willingness of Ahpra / National Boards to engage around these issues as they arise in individual and similar matters.
71. With continued recognition that such issues can arise from time to time and that stakeholder perspectives are important in trying to resolve them, MIGA is confident they can continue to be dealt with appropriately in a similar manner.

TOR (f) – Supports for practitioners in notifications and investigations

72. MIGA is strongly supportive of the financial support provided by Ahpra / National Boards for doctors' health services.
73. Other professional organisations, including colleges, associations and medical defence organisations / professional indemnity insurers, also have important roles to play in supporting practitioners dealing with the personal impacts of notifications.
74. For members who need support in coping with a medico-legal process, MIGA has a Practitioners' Support Service, which includes
- (a) **Medical Support Service** – facilitating access to psychiatrists and psychologists to provide professional support – it is a direct clinical relationship between doctor and the clinician, funded by MIGA
 - (b) **Peer Support Service** – providing referral to peers who are willing to assist those subject to a claim, notification or investigation, with a view to giving guidance to keep the matter in perspective.
75. To encourage preventative health and well-being, MIGA has a Doctors' Health Assessment initiative, where MIGA members can obtain Risk Management Points for undergoing a comprehensive medical assessment with their GP, which can be counted towards a reduction in insurance premiums.
76. It also provides a broad range of education on doctors' health to the medical profession.

TOR (g) – Notification handling timeliness

77. As set out above, MIGA acknowledges improvements made by Ahpra / National Boards around timeliness of notifications handling.
78. Two key issues remain, the first being the sheer volume of notifications received year on year by Ahpra / National Boards (which MIGA believes requires a new approach – see above), and the second being issues of timeframe 'parity', raised by it in an earlier Senate inquiry.

79. This issue relates to disparities which can occur in time taken for Ahpra / National Boards to assess and respond to notifications, and timeframes given to practitioners to respond. This means practitioners may be facing comparatively short timeframes to provide necessary information and other material in the context of a considerably longer-running assessment or investigation.
80. MIGA believes this disparity has been improving over time. It acknowledges the additional time which Ahpra / National Boards are generally willing to provide practitioners to respond to notifications.
81. It believes there would be considerable value in Ahpra / National Boards developing an overall framework towards this issue, in consultation with key stakeholders (including MIGA), to assist National Board decision-makers and Ahpra staff to determine appropriate timeframes around matters, within the limits of the National Law and comparative urgency / significance of an individual notification.

TOR (h) and (i) - Conflicts of interest, professional differences and independent decision-makers

82. Although issues were raised in an earlier Senate inquiry relating to conflicts of interest, dealing with professional differences and the role of independent decision-makers, these are not matters where MIGA has encountered significant problems.
83. It believes the increased use of clinical input through employment of Ahpra clinical advisors may provide some comfort around these issues. These advisors, working across a range of specialties, would not be expected to have any vested interest in supporting a particular practice approach.
84. An important mechanism to ensure the necessary range of professional opinions on a particular issues is available to Ahpra / National Boards is allowing a practitioner sufficient time to obtain independent expert opinion in response to a notification being considered for disciplinary action.
85. MIGA is supportive of the processes which Ahpra / National Boards have in place for dealing with conflicts of interest or professional differences, including for Board and independent decision-makers (e.g. panels, tribunals etc).
86. It has welcomed recent engagement with Ahpra on ensuring issues of procedural fairness / natural justice are well-understood by National Board decision-makers and Ahpra staff.
87. The current balance of legal and professional members of panels and tribunals remains an important mechanism to ensure fairness is both seen and remains for all aspects of decision-making.

TOR (j) – Appeal mechanisms

88. MIGA supported the right to appeal a caution, involving a two stage process of independent review followed by any tribunal appeal, in consultations on National Law reform.
89. It acknowledges Health Ministers elected not to make a caution an appealable decision under the National Law.
90. It is unclear whether the possibility of amending the National Law to provide for a process of independent review of cautions only has been considered sufficiently.
91. Given the potentially serious impact of a caution on the practice, health and well-being of practitioners, careful consideration should be given to introducing this additional review mechanism under the National Law.
92. As suggested during National Law reform consultations, MIGA also proposes Ahpra / National Boards develop a clearer framework on use of cautions, focused on ensuring they are used only where necessary. This would be developed in consultation with key professional stakeholders (including MIGA).