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12 September 2019

Mr Rob Hansen
Committee Secretary
Health, Communities, Disability Services and
Domestic and Family Violence Prevention Committee
Queensland Parliament

Via email - health@parliament.qld.gov.au

Dear Mr Hansen

MIGA submission – Queensland Health Transparency Bill 2019 inquiry

MIGA appreciates the opportunity to provide a submission to the Committee's inquiry into the Health Transparency Bill 2019, focusing on proposed amendments to the *Health Ombudsman Act 2013* (Qld) (the **HO Act**) and reporting public and private hospital and health service information.

This submission follows MIGA's contributions to the 2016 Inquiry into the performance of the Health Ombudsman's functions (**the Parliamentary inquiry**) that led to these proposed reforms and its participation in recent Queensland Health Department consultation on proposed HO Act reforms.

Executive summary - MIGA's position

1. In response to the proposed reforms to the HO Act

   - **MIGA supports**
     - Introducing a joint consideration process and reducing matter splitting between the Health Ombudsman (**HO**) and professional boards / AHPRA, but allowing splitting of serious matters involving impairment between the HO and relevant professional board / AHPRA
     - HO having discretion not to proceed with a complaint if more appropriate for the parties to try and resolve directly, or where the complaint is better handled by another body
     - Removing the need for a QCAT judicial member to sit on registration appeals, except where triable issues around legal error or procedural fairness are raised and other matters having an appropriate mix of legal and medical expertise amongst tribunal members
     - HO having appropriate powers around post-immediate registration action monitoring
     - Allowing a streamlined process for the Director of Proceedings to seek more information via the HO, but only on the basis that practitioners are informed of what has occurred
     - For unregistered health practitioners, permitting the HO to make final prohibition orders and removing the need for a judicial member to sit on QCAT appeals
   - **MIGA sees a need for further consequent initiatives around**
     - Ensuring the HO has sufficient clinical input from its end in contributing to the joint consideration process and decisions on whether to retain serious matters
     - Development of policies for the HO and professional boards / AHPRA around handling split serious impairment matters and HO monitoring of immediate action registration compliance
   - **MIGA believes further reforms are required around the following issues**
     - Expanded use of the joint consideration process to post-assessment and investigation stages
     - More realistic timeframes for practitioner complaint responses and HO assessment timeframes, beyond merely ensuring public holidays do not impact timeframes already provided

- More broadly reducing the splitting of matters between the HO and professional boards / AHPRA.

2. MIGA supports clinician level data not being published arising out of information collected about public and private hospitals and other health services.

MIGA's interest

3. 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.

4. With over 34,000 members nationally, MIGA has represented the medical profession almost 120 years and the broader healthcare profession for over 16 years.

5. Its position reflects its experience nationwide over many years advising and assisting medical practitioners, medical students, healthcare organisations and privately practising midwives in regulatory and disciplinary matters, spanning performance, health and conduct issues.

6. MIGA's advocacy work covers a broad range of issues, including reforms to regulatory and disciplinary processes across the country in the context of both Federal Senate inquiries and Health Practitioner Regulation National Law reform consultations, and consultation around publishing clinical data.

Need for a broader joint consideration process

7. MIGA supports a joint consideration process for all complaints between the HO and the professional boards / AHPRA, covering each of the initial decision, assessment and investigation stages.

8. It believes the proposed joint consideration process is insufficient where it only covers
   - The initial decision following receipt of a complaint on which entity should handle the matter prior to the assessment and investigation stages – this is before substantive information is available about the complaint, including clinical records and the practitioner's response
   - Where the HO proposes to take no further action on a complaint after the initial decision for the HO to handle it.

9. MIGA believes the joint consideration process should extend to the assessment and investigation stages of all matters retained by the HO, whether serious or otherwise. The HO should consult with the relevant professional board / AHPRA on any proposed action following assessment and / or investigation.

10. Such a broader model of joint consideration between the HO and the professional boards / AHPRA at various stages of a matter is warranted given
    - The range of scenarios which can arises following initial decision on who is to handle a complaint
    - It would be consistent with a regime that works well in the other co-regulatory jurisdiction of New South Wales.

11. Under the proposed reforms, the HO is required to deal with matters consistently with any agreed view with a professional board / AHPRA (proposed ss 35E and 35H of the HO Act). However there is no clear mechanism of what HO should do if information emerges warranting a different course of action, except in circumstances where the HO proposes to take no further action (proposed s 35J of the HO Act).

12. There are a wide range of scenarios which can arise for the HO on a matter following the initial decision that the HO handle the matter. There is uncertainty around what the HO is to do if circumstances change following joint consideration on the initial decision about who is to handle the matter. A matter can appear quite different initially to how it appears after assessment and / or investigation, when more information is available.

13. For example the HO's assessment or investigation might reveal new information, which would alter the original shared intent of the HO and the professional boards / AHPRA during the earlier joint consideration process. It may be that a matter initially appeared more serious or concerning that it ultimately was following either assessment or investigation. It may now warrant some form of action, such as conditions requiring further training, but not the degree of action initially contemplated, such as disciplinary proceedings.

14. A comparable process encompassing the assessment and investigation stages of a complaint has worked well for many years in New South Wales, involving the Health Care Complaints Commission (**HCCC**) and professional councils.[1]

15. A broader joint consideration process encompassing each of the initial decision, post-assessment and post-investigation stages of matters managed by the HO is both necessary and appropriate.

Response timeframes

16. Introduction of a joint consideration process also raises important issues around fair and reasonable timeframes for practitioner responses to complaints.

17. Ensuring appropriate timeframes for medical and other health practitioners to provide responses to complaints is a critical part of a fair, practical and sensible healthcare complaints system.

18. As the Parliamentary inquiry recognised implementing a joint consideration process also requires consideration of appropriate timeframes for practitioner responses. In particular the inquiry indicated consideration was required around whether the maximum timeframe of 14 days for medical and other health practitioners to make submissions and provide information in response to a complaint (see s 47 of the HO Act) is adequate to ensure decision-makers have sufficient information to make informed decisions.[2]

19. Although a range of timeframes are proposed to be changed to reflect time lost for public holidays, this does not alter the maximum timeframe for a response in the vast majority of circumstances. Instead it merely ensures consistent provision of the maximum 14 day period to respond to any complaint, irrespective of whether the practitioner receives notice of it or whatever its complexity.

20. It is in the interests of practitioners, the HO and the community that both the HO and professional boards / AHPRA are able to make decisions on the best information available. A strict 14 day timeframe to respond does not facilitate this in many circumstances.

21. As MIGA outlined in its Parliamentary inquiry submission and hearing evidence, this strict timeframe in all circumstances is insufficient and inappropriate. Examples of inability for a practitioner to comply with this timeframe include where
    - They are on leave and have not received the complaint or been unable to respond meaningfully to it
    - The complaint raises complex issues requiring further time for a response.

23. This strict timeframe is also at odds with the fairer, more reasonable timeframes provided to practitioners to respond to complaints at comparable stages by the professional boards / AHPRA, and by the HCCC in New South Wales.

24. The HO's latest annual report for 2017-2018 indicates that 28% of complaints are not assessed within the expected timeframe (p19). As the report recognises, HO's ability to meet assessment timeframes has been affected by the "*continuing complexity of matters, and delays in receiving information from parties and in sourcing the independent clinical advice required to appropriately and effectively assess matters*".

25. Although the HO's latest quarterly performance report suggests some improvement in compliance with assessment timeframes, this does not account for issues around whether
    - A practitioner is able to provide an appropriate response within a fair timeframe
    - The increased clinical input contemplated by the joint consideration process with the professional boards / AHPRA and the resultant practicalities associated with this process will require additional time to ensure appropriate decision-making.

26. If improved assessment timeframes were used as basis to argue that providing additional time for practitioner responses was unnecessary, logically the same argument could be applied to the proposed change from calendar days to business days to avoid posed by public holidays.

[1] Sections 12 and 39, *Health Care Complaints Act 1993* (NSW)
[2] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Inquiry into the performance of the Health Ombudsman's functions pursuant to section 179 of the Health Ombudsman Act 2013* (Report No. 31, 55th Parliament, December 2016) (the **Parliamentary inquiry report**), p45

27. The reality is that fair and appropriate timeframes are required to each reflect public holidays and provide discretion to allow for appropriate timeframes where there are complexities or practical difficulties around practitioners providing responses and the HO assessing a matter.

28. As outlined in MIGA's Parliamentary inquiry submission the appropriate approach is to
    - Remove the timeframe for practitioners to make submissions under s 47 of the HO Act
    - Retain the requirement under that provision for any submission within a reasonable period
    - Extending the timeframe for completion of the assessment process under s 49 of the HO Act to 60 days generally.

29. This regime would be consistent with the timeframe in New South Wales for the HCCC assessment process.[3] There is nothing to suggest such a timeframe has compromised the protection of the public, or otherwise adversely effected the health complaints management system in New South Wales.

Clinical input for Health Ombudsman in joint consideration process

28. MIGA is concerned to ensure that the introduction of the joint consideration process does not lead to a reduction in clinical input to the HO's participation in the joint consideration process.

29. As the Parliamentary inquiry recognised, there is a need to ensure appropriate clinical input is available and utilised, where necessary, to inform joint consideration of complaints.[4]

30. MIGA expects that the professional boards / AHPRA would bring clinical input from their perspective to the joint consideration process.

31. This does not remove the need for clinical input to inform the HO's participation, either from within the HO's office or otherwise commissioned by it. This is particularly so if the HO is proposing to take a different view to that of a professional board / AHPRA, or where it is considering whether to retain a complaint as a 'serious matter' under proposed s 91C of the HO Act.

32. The need for clinical input is reinforced by the observation in the Bill's Explanatory Notes that

    > [T]*he Health Ombudsman (or their delegate) must come to an independent decision about how to proceed in each case and cannot be bound by, or give determinative weight to, the views of AHPRA or the National Boards. The Health Ombudsman Act requires the Health Ombudsman to act independently, impartially and in the public interest, and the Health Ombudsman must not be subject to direction* (p5).

33. Where the proposed joint consideration process model involves the HO having the ability to insist it retain a matter, even over AHPRA / professional board objection or advice, it is critical that HO's decision is informed by its own clinical input, not just that from the AHPRA / professional board perspective, which it has implicitly decided to reject in such a scenario.

Reduction in matters splitting

34. MIGA supports the proposed reforms to reduce matter splitting between the HO and the professional boards / AHPRA, particularly the referral of all impairment matters to the professional boards / AHPRA (proposed ss 91B and 91D of the HO Act).

35. It notes and endorses the concerns expressed by the Parliamentary inquiry's report about the splitting of matters into conduct, performance and health issues.[5]

36. MIGA generally supports dealing with all complaints as a whole, not just impairment matters. Ideally all aspects of a complaint against one practitioner should be dealt with by the same body, in the interests of consistency, efficiency and fairness.

37. Matters involving clinical care should not be split, for example by referring standard of care issues to a professional board / AHPRA, and the HO retaining a communication issue.

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[3] Section 22, *Health Care Complaints Act 1993* (NSW)
[4] Parliamentary inquiry report, p45
[5] Parliamentary inquiry report, p46

38. MIGA also opposes the scenario contemplated by proposed s 91E of the HO Act, namely referral of a matter to a professional board / AHPRA while HO conciliates a matter.

39. Recognising the policy intent that the Health Ombudsman should be responsible for handling the most serious complaints about Queensland health practitioners (Bill Explanatory Notes, p5) MIGA supports changes made to the bill following recent consultation contained in proposed s 91D of the HO Act.

40. This change reflects concerns MIGA raised about the HO retaining serious matters involving impairment without involvement of the professional boards / AHPRA. It was concerned that the impairment element of the complaint would not be dealt with appropriately, and that it would catch a range of matters which are ultimately best dealt with by the professional boards / AHPRA where the HO's retention decision would normally be made at an early stage, on limited information. Pleasingly the amended bill addresses this concern.

41. Proposed Section 91D of the HO Act reflects MIGA's position that there should be a power to split a serious matter in these limited circumstances so that the impairment aspect can be referred to the professional boards / AHPRA for appropriate management, including any necessary assessments.

42. To assist this mechanism a policy should be developed, with input from key stakeholders such as MIGA, on how the HO and professional boards / AHPRA should handle these split serious matters involving impairment.

43. More generally MIGA sees a need to deal with matter splitting more broadly by amendments to s 41 of the HO Act, as sought in its Parliamentary inquiry submissions and hearing evidence. This would include
    - Amending s 41 of the HO Act by removing the broad scope for the HO to deal separately with two or more matters arising from a complaint, particularly as they affect one practitioner, but preserving the ability for the HO to deal with a complaint concerning two or more practitioners as if a separate complaint had been made against each practitioner
    - Amending s 42 of the HO Act, to clarify that the HO may only take one relevant action at a time in relation to a matter involving one practitioner.

Declining to deal with a complaint

44. MIGA supports the HO having discretion not to deal with complaint in appropriate circumstances under proposed s 35A of the HO Act.

45. This may include certain situations where
    - A complainant does not first attempt to resolve their concerns directly with the practitioner
    - The complaint is better handled by another body, such as by the hospital or other health service where they practice.

46. MIGA is conscious there are circumstances where it is not appropriate for the HO to decline to deal with the complaint. This may be based on the nature of complaint or extent to which there is likely to be any meaningful interaction between a complainant and a practitioner.

47. It welcomes the HO's intention to prepare guidance material for HO delegates on matters to consider when deciding whether to not to deal with a complaint (Bill Explanatory Notes, p13), reflective of what MIGA sought in recent consultations.

48. MIGA does not support the practitioner not being given notice by HO of decisions not to deal with a complaint, as contemplated under proposed amendments to s 278 of the HO Act. A practitioner may then have no notice of the complaint until after the initial HO approach. This is inappropriate.

49. It is also concerned about the effect of not notifying a practitioner of a complaint this could have on the HO's approach to any future complaint where a record of it is kept on HO's records (proposed amended s 33 of the HO Act).

50. A practitioner needs notice of all concerns expressed to a regulator about them if they could be relevant in any later matters. Concerns about undue administrative burden on the HO do not outweigh this consideration. It is unclear how it could undermine the effectiveness of the proposed reforms.

QCAT composition

51. MIGA supports removing the need for a judicial member to sit on a QCAT registration appeal under Part 7 of the National Law (proposed amended s 97 of HO Act) but only on the following basis
    - A judicial member sits on the appeal if the QCAT President considers there is a triable issue of error of law or denial of natural justice or procedural fairness
    - There be an appropriate mix of non-judicial legal and medical QCAT members where there is no judicial member.

Practitioner monitoring

52. MIGA supports providing the HO with appropriate powers to ensure post-immediate registration action compliance (proposed amended s 228 of the HO Act).

53. Given the significant experience of the professional boards / AHPRA in practitioner monitoring, a policy should be developed by the HO in consultation with those bodies and with input from key stakeholders (including MIGA) on what appropriate monitoring following immediate registration action involves.

Obtaining additional information after Director of Proceedings referral

54. MIGA supports the Director of Proceedings being able to refer matters back to the HO for further investigation as proposed (proposed amended s 103 of the HO Act), but only on the basis that the practitioner is informed of this action.

55. Whilst it accepts that this does not substantively affect how a matter is being dealt with (Bill Explanatory Notes, p14) referral back to the HO will inevitably involve further delay and a practitioner deserves an update about the status of a matter.

56. A short update on where the matter is at, given the relatively limited number of maters with the Director of Proceedings as compared with overall complaint numbers, would not pose an undue administrative burden on the HO, nor would it undermine the effectiveness of the proposed reforms (Bill Explanatory Notes, pp21-22).

57. Whilst MIGA acknowledges informal communication between the Director of Proceedings' office and the practitioners' representatives can already occur in practice, it is concerned that the proposed reform will act as a disincentive to this communication.

58. Given the same communication in substance would occur under an HO Act requirement and an informal arrangement, MIGA sees no reason not to provide for informing the practitioner under the HO Act, particularly to avoid any misapprehension about the need for communication.

Calendar / business days

59. MIGA supports changing terminology around timeframes from calendar days to business days.

60. As set out above it believes this is insufficient to deal with broader issues around providing fair and reasonable timeframes to practitioners to respond to complaints, and more generally around providing appropriate timeframes for the HO in the complaints process.

Final prohibition orders about unregistered practitioners to be made by Health Ombudsman

61. MIGA supports the HO having the power to make final prohibition orders about unregistered health practitioners.

62. It also supports removing the requirement for a judicial member to sit on QCAT appeals by unregistered health practitioners relating to interim and final prohibition orders.

Notice of varying immediate registration action

63. It is unclear why it is proposed to remove the requirement for notice in writing to a practitioner on decisions whether to vary immediate registration action (proposed amended s 58B of the HO Act). MIGA opposes this proposed change.

64. Providing information orally to a practitioner could cause confusion and uncertainty, particularly around any variation to practice conditions, or the invitation to provide submissions on why registration should be varied.

65. It is odd that the practitioner remains required to make an application to vary immediate registration action in an approved form, but there would then be no requirement for the HO to set out its response in writing.

Public and private hospital and health service reporting

66. On the issue of reporting public and private hospital and health service data, MIGA supports the intention not to report clinician level or other confidential or identifying information (Bill Explanatory Notes, p 20).

67. There are a range of reasons why reporting clinician level data is not appropriate, including
    - Unreliability from varying procedural volume / patient load / clinical complexity / sub-specialty expertise
    - Limits of clinical indicators to provide a fair and balanced picture
    - Difficulties in adjusting for relative risk posed by a wide range of patients
    - Inability to properly balance healthcare team / system influences
    - Potential employment, regulatory, disciplinary and civil claim implications.

If you have any questions or would like to discuss, please contact

Yours sincerely

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