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8 August 2016

Ms Deborah Jeffrey
Research Director
Health, Communities, Disability Services and
Domestic and Families Violence Prevention Committee

Via email: hcdsdfvpc@parliament.qld.gov.au

Dear Ms Jeffrey

MIGA submission to Inquiry into the performance of the Queensland Health Ombudsman's functions

MIGA welcomes the opportunity to make a submission to the Committee's inquiry into the performance of the Queensland Health Ombudsman's functions.

Its submission follows an earlier submission it made to the Committee's review of the Health Ombudsman Bill 2013 (**MIGA's previous submission**), a **copy** of which is enclosed.

MIGA's interest and work in the Queensland health complaints management 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 Queensland health care system.

MIGA's lawyers regularly advise and assist medical practitioners in responding to complaints and other issues involving the Office of the Health Ombudsman (**OHO**), the Australian Health Practitioner Regulation Agency in Queensland (**AHPRA**) and the Queensland Board of the Medical Board of Australia (**the Board**). Its risk management and education program for its members and policy holders has a focus on understanding and minimising the causes of patient complaints.

Due to MIGA's national footprint, it has a presence throughout the rest of Australia, assisting its members and policy holders with complaints and disciplinary matters throughout the country. This allows it to compare the experiences of its Queensland members with those of its members in other states and territories. In particular, it has a significant footprint in New South Wales, another co-regulatory state for health complaints. Its lawyers deal regularly with both the NSW Health Care Complaints Commission (**the HCCC**) and Medical Council of New South Wales, which are the bodies managing complaints and other matters relating to medical practitioners' performance, conduct and health in that jurisdiction.

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Key issues

MIGA's submissions focus on the following issues:

- **timeframes**, there can be inadequate timeframes allowed to health practitioners to respond to complaints and other issues, and delays associated with referral and investigation processes

- **interactions between the OHO and AHPRA / the Board**, particularly around the types of matters referred by the OHO to AHPRA, whether those entitles deal with matters in a consistent way, the "*fast tracking*" of matters from the OHO to AHPRA and the "*splitting*" of matters, with some aspects of a matter being retained by the OHO and others being referred to AHPRA

- **dual immediate action powers for the OHO and the professional Boards**, allowing either to take steps to suspend or restrict a practitioner's right to practice, particularly whether these powers should be consolidated into one body

- **management of 'performance' matters,** particularly AHPRA / the Board investigation process leading to cautions in matters of unsatisfactory professional performance, which MIGA does not consider an ideal system

- **improvements which could be made in handling 'health' matters**, involving a practitioner's health and fitness to practice

Timeframes

(a) Initial responses to complaints

In MIGA's previous submission, it endorsed a system which improves the complaint handling process and mandates timely and efficient complaints handling. This remains a key objective for MIGA. It emphasises the importance of the integrity of the investigation process and the need for procedural fairness. This must not be compromised because of a need to comply with stringent and unrealistic timeframes.

MIGA remains concerned about the relatively tight timeframes allowed to practitioners in Queensland in responding to complaints, particularly for responding to the OHO during its initial assessment process. This is a mandated timeframe of not more than 14 days under Section 47 of the *Health Ombudsman Act 2013* (Qld) (**the Act**), with a further requirement under Section 49 of the Act to complete the assessment process within 30 days after deciding to carry out an assessment, which can extend by a period of a further 30 days.

By comparison, in New South Wales under the *Health Care Complaints Act 1993* (NSW), involving the HCCC (which is the closest comparator in Australia to the OHO), Section 22 provides for completion of assessment within 60 days of receiving a complaint. Usually, practitioners are given between 21 and 28 days to respond to a complaint with scope for extension if reasonably necessary. Unfortunately, the same scope does not exist in Queensland and has caused practical problems. Examples include a practitioner on leave who has either not received the complaint or been unable to respond meaningfully to it, or the complaint raising particularly complex issues.
It may be argued that an initial response does not preclude further submissions being made at a later time if the matter progresses. However, information available and decisions made at any early stage can have a significant impact on the future handling of a complaint. All stakeholders have an

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interest in all relevant and necessary information being available at the earliest possible stages, as opposed to it only becoming progressively available.

OHO's performance report for June 2016 indicates that assessments for more than 50% of complaints received that month took more than 60 days, and only just over 34% were completed within 30 days. The OHO indicated this arose from:

> "*...the complex nature of assessing some complaints and the need to ensure all of the necessary information is gathered to make well-informed and impartial decisions*."

MIGA supports OHO being given the time necessary to make appropriate, well-informed and impartial assessment decisions, so long as this includes a fair and appropriate amount of time for a practitioner to respond to the complaint. It sees the time being taken for the majority of matters as a reflection of the potential complexities and work required for the assessment process.

MIGA supports the Act being amended to provide for a similar timeframe for the assessment process as in New South Wales, eliminating a mandated timeframe for a practitioner to respond and providing for an assessment period of 60 days after a decision to proceed to assessment. It has not seen anything to suggest that such a framework has compromised the protection of the public, or otherwise adversely effected the health complaints management system in New South Wales. Conversely, it believes that this process works reasonably well. Moving towards such a framework would reflect a practical reality in Queensland. It would still achieve the "*...balance between timeliness and the quality of decisions*" that OHO seeks.

(b) Delays in referral and investigation processes

MIGA is concerned how long a complaint assessment and any subsequent investigation processes can take for matters referred from the OHO to AHPRA.

It recognises that there has been a "*fast tracking*" process implemented, leading to some matters being sent directly from the OHO to AHPRA. However, this has not necessarily improved the time it can take for AHPRA / the Board to deal with those matters.

MIGA is conscious that there are limited resources for regulatory agencies, and some matters can be quite complex, requiring considerable investigation. However, it is troubled that practitioners are often being asked to respond to matters in tight timeframes, in the context of investigations thereafter taking significantly longer. This can lead to inevitable perception that insufficient weight is being given to issues of natural justice and procedural fairness for the practitioner involved.

Obviously, it is important for the professions and the public to have confidence in its regulators, and that there is a fair balance between the respective aims and obligations of each of the OHO, AHPRA / the Board, public protection, natural justice and procedural fairness.

These are not easy issues to resolve, but MIGA encourages careful consideration being given to potential efficiency improvements in referral and investigations, and how to better balance opportunities for practitioner participation, particularly in more complex matters.

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Interactions between OHO and AHPRA / the Board

The Act, particularly Sections 38 and 91, provide for certain types of matters to be referred to AHPRA, and for others to be retained by the OHO.

In MIGA's recent experience, the vast majority of matters involving any issues of clinical judgement or other professional performance are referred by the OHO to AHPRA.

MIGA understands that the OHO has the benefit of expert clinical input. It believes there are an unnecessary number of matters involving issues of clinical assessment and / or treatment referred to AHPRA. Instead, a significant number of these matters could be dealt with by the OHO itself more quickly. This is what occurs for the HCCC in New South Wales during its assessment stage, which has a similar scope for expert clinical input.

The referral to AHPRA of the vast majority of clinical or performance matters means additional delay in finalising matters for all concerned, and calls into question the utility of the OHO having any input in these types of matters.

MIGA would prefer to see the OHO have the ability to exercise its own judgement in determining what further action, if any, is required for clinical matters at the assessment stage. It considers this could be achieved via a combination of early OHO consultation with AHPRA / the Board, as is the case in New South Wales, and additional targeted resourcing to ensure appropriate expert clinical input is available promptly. At present, as contemplated by Section 91 of the Act, consultation between OHO and AHPRA occurs when OHO proposes to refer a matter to AHPRA, not generally before.

As set out above, the OHO and AHPRA have put in place a "*fast track*" process allowing for a number of matters to be sent straight from the OHO to AHPRA, effectively circumventing the OHO assessment process. Although such a system has the commendable aim of reducing the time taken in dealing with matters, MIGA sees this as raising issues about the OHO's role on an ongoing basis. This process may create greater burdens on AHPRA in managing matters which ideally should be dealt with relatively quickly by the OHO.

MIGA is very concerned about the "*splitting*" of certain matters. This involves certain aspects of a matter, i.e. those involving a clinical judgement component, being referred to AHPRA, where others, i.e. involving a communication component, being retained by the OHO. It acknowledges that Sections 41 and 42 of the Act provide scope for this to occur. MIGA believes that such a power is more appropriately used in matters involving two or more different practitioners or other entities, as contemplated in Section 41 of the Act.

All aspects of a complaint against one practitioner should be dealt with by the same body, in the interests of consistency, efficiency and fairness.

Dual immediate action powers of the OHO and the Board

In MIGA's previous submission, it expressed significant reservations about the immediate action powers given to the Health Ombudsman, particularly where a show cause process is not required, and as had been (and remains) the case for the Board taking commensurate action under the *Health Practitioner Regulation National Law* (**the National Law**).

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Although MIGA appreciates that these powers are used by the Ombudsman relatively sparingly, the concerns it outlined in its previous submission remain.

Both the OHO and the Board have separate powers to suspend or restrict the practice of health practitioners. Other states and territories, particularly the only other co-regulatory jurisdiction of New South Wales, place such powers in the hands of one body only.

MIGA understands that the statistics for immediate action taken by the OHO, as compared with both similar powers utilised before the Act's inception and as against action taken by the Board in more recent times, raise questions of consistency.

MIGA submits the powers to take immediate action, or to otherwise suspend or restrict practice, should reside in one body for each profession, and have a similar process to that elsewhere in Australia, including a show cause process.

Management of performance matters

MIGA sees a significant number of matters referred to AHPRA by the OHO, in which an investigation is undertaken and subsequently AHPRA / the Board propose to caution a practitioner and impose conditions on their practice, such as undergo further training. This is usually put on the basis of the practitioner's professional performance being seen as unsatisfactory, being below the standard expected.

MIGA believes that this process effectively turns what is a performance or educational issue into a disciplinary one, by the use of cautions and the imposition of conditions. Although cautions are generally not published, the conditions are. Cautions of themselves are a significant step for any regulator to take. Often both cautions are administered and conditions imposed even though the practitioner involved has shown insight, general fitness to practice and taken steps to learn from what occurred.

MIGA submits Queensland should adopt a similar process to the Medical Council of New South Wales performance program for similar matters. This involves matters of performance, i.e. clinical judgement which may be below expected standards, but not significantly so, being identified at an early stage. The Council's performance committee then decides on whether to hold a counselling interview or require the practitioner to undergo performance assessment. Subsequently, and depending on what arises out of those processes, no further action may be taken, a Performance Review Panel hearing could be held or, if significant concerns arise, the matter could be referred for disciplinary action.

Although Queensland has scope to use performance assessments, they seem to be used less than for similar cases in New South Wales. They appear to be used more as an investigative tool, rather than a performance improvement or educational tool. Similarly, although Performance and Professional Standards Panels can be convened, these have a broader range of uses than a Performance Review Panel hearing in New South Wales, and tend to be more formal and labour intensive in their preparation.

MIGA suggests the implementation of a process similar to that used in New South Wales could make a significant contribution towards improving the standard of health care in Queensland. This process assists practitioners who need to improve certain aspects of their practice, but have the insight, willingness and ability to do so. It achieves improvement through a process of peer input, which is less disciplinary and less punitive in nature.

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Health matters

The Queensland health complaints management system and the National Law have scope for practitioners who may be suffering from an impairment affecting their ability to practice to be assessed by suitable practitioners, and for the subject practitioner to then be interviewed by another practitioner to address the issues arising out of that assessment. There is also the scope for the Board to impose to conditions relating to the practitioner's health, such as requiring them to see certain treating practitioners. A practitioner can also be cautioned by the Board.

Both cautioning and the imposition of conditions can occur without the practitioner having the opportunity for matters to be dealt with at a hearing, as the Board has discretion to take action of its own initiative or refer the matter to a health panel.

MIGA considers that Queensland would benefit from adopting a similar approach to that used by the Medical Council of New South Wales with its Health Program. This involves a process of initial health assessment, followed by an Impaired Registrants Panel Hearing if there is an issue of impairment affecting ability to practice, to determine whether a practitioner should have conditions imposed on their practice and enter the Council's Health Program. If this occurs, the program involves regular review by a Council-appointed practitioner and regular Council review interviews.

MIGA considers that process has the potential to be a more supportive and fair system for Queensland practitioners suffering from health issues than the present arrangements.

If you have any questions about MIGA's submission, please contact Timothy Bowen, Senior Solicitor – Advocacy, Claims & Education, on 1800 839 280 or

Yours sincerely

Cheryl McDonald
National Manager – Claims & Legal Services

Timothy Bowen
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Encl.

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1 July 2013

PRIVATE & CONFIDENTIAL

Mr Trevor Ruthenberg MP
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Dear Mr Ruthenberg

Health Ombudsman Bill 2013

Thank you for the opportunity to provide a submission on the Health Ombudsman Bill 2013.

Medical Insurance Group Australia is a national provider of Medical Indemnity Insurance to Medical Practitioners and other clients around Australia. It has a breadth of experience in assisting medical practitioners and other health providers with legal and ethical issues arising from practice. This includes assistance with investigations by AHPRA and the Medical Board of Australia (the Board) nationally.

MIGA has received correspondence from members expressing concerns about the Health Ombudsman Bill 2013.

In this submission we concentrate on two of the more significant concerns:

The National Law became operational relatively recently with the purpose of unifying the national regulation of health practitioners. The Bill creates a complaints resolution system which is outside of that set by the National Law and detracts from national consistency in complaints management.

More significantly we ask you to note our concern about the Health Ombudsman's power to take immediate action without undertaking a show cause process. All citizens are entitled to national justice and in this Bill in some areas on the face of it natural justice is denied.

Medical practitioners are acutely sensitive about being the subject of investigation and natural justice and procedural fairness should underpin the investigation process. As drafted we have no confidence these principles can be adhered to.

These concerns are compounded by the Health Ombudsman not having access to the expertise and clinical input necessary to make an informed view.

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We understand the paramount guiding principle for administering the Act is the safety of the public. We also understand the objective to promote professional safe and competent practice, high standards of service delivery and public confidence in the management of complaints. These can be, and currently are being achieved while maintaining the principles of procedural fairness. MIGA is concerned with the unfettered and unilateral power of the Health Ombudsman to take immediate action without undertaking the show cause process.

The Bill in its current form allows:

- The Health Ombudsman (HO) to take immediate registration action to suspend or impose conditions on a health practitioners registration where the practitioner poses a serious risk to the public

- The immediate registration action to be taken without the HO undertaking a show cause process where the HO is satisfied to do so is necessary to ensure the health and safety of the public

- The HO to take this action at any time with or without a complaint being received.

The HO is able to exercise this power without the health practitioner being afforded the opportunity to respond to the concerns or complaint. In our submission this is a clear denial of procedural fairness to the practitioner. Of equal concern is that the legislation in its current form does not have sufficient checks and balances to ensure this power is properly used.

It is imperative there is sufficient provision in the legislation to ensure that practitioners are treated fairly through the complaints handling process.

This would be aided by removing the power to take immediate action without notice to the practitioner (which is the current proposal) and instead allow a show cause process (as currently exists), with time frames accommodating the perceived risk to the public.

We find it surprising there is no timeframe within which QCAT must review the immediate action decision of the HO. In our view this needs to be remedied.

Any action taken to suspend a health practitioner's registration will have serious ramifications on their professional and personal life and finances and there must be some balance with this and the duty to protect the public.

MIGA recommends that the sections relating to immediate registration action mirror the current section 156(2) of the *Health Practitioner Regulation National Law 2009 (Qld)* ('the National Law') which would require the HO to comply with the show cause process (section 157 of the National Law) without exception.

Finally we make a comment about the timeframes.

A key objective of the Bill is to establish a system that deals with complaints expeditiously. We endorse a system which improves the complaint handling process and mandates timely and efficient complaints handling. The integrity of the investigation, procedural fairness, transparency, comprehensive and thorough investigation must not be compromised however by the need to comply with stringent and unrealistic timeframes.

Those responsible for working within the new system must be appropriately resourced to ensure the timeframes can be met whilst ensuring transparency and procedural fairness is afforded to <u>all</u> parties in the process.

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We trust you are in a position to take these submissions into account.

Yours sincerely

Cheryl McDonald
Claims Department Manager