Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

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Mr Aaron Harper MP
Chair
Health and Environment Committee
Queensland Parliament

Via email – hec@parliament.qld.gov.au

Dear Chair

MIGA submission – Health Practitioner Regulation National Law reforms

1. As a medical defence organisation and healthcare professional indemnity insurer, MIGA appreciates the opportunity to contribute to the Committee's inquiry into the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022.

Summary – MIGA's position

2. MIGA is supportive of a broad range of the proposals in the bill.
3. It appreciates how the bill acknowledges a range of issues it has raised during past consultations.
4. It remains concerned about
   - Making "*public confidence*" a National Law paramount consideration – this should be replaced by "*integrity of a health profession*"
   - A tribunal referral being required unless there is no public interest in prosecution – the test should be "*insufficient*" public interest.
5. In addition, it believes that removal of the ban on clinical testimonials should be delayed pending development of guidance for the professions on what constitutes an acceptable clinical testimonial, and delivery of a concerted education campaign to the professions, one that starts before the ban is removed.

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.
7. With more than 36,000 members across Australia, MIGA has represented the medical profession over 122 years and the broader healthcare profession for more than 19 years.
8. Its involvement in professional regulation and discipline is extensive and long-standing.
9. MIGA supports its members and clients through notifications and complaints. It educates the profession on minimising the risk of complaints and improving healthcare practice.
10. It works with governments, regulators and professional stakeholders on systemic reforms. This has included contributions to a range of inquiries and consultations on changes to the Health Practitioner Regulation National Law and state / territory complaints frameworks.

Paramount consideration of public confidence (Chapter 3, Part 2, Clause 34)

MIGA position at a glance
MIGA - Believes the proposed paramount consideration of 'public confidence' in the safety of health services is inappropriate - Proposes as an alternative that "*integrity of a health profession*" be a paramount consideration.

Problems with a paramount consideration of public confidence

11. MIGA agrees health professions need to have the confidence of their patients. A paramount consideration of 'public confidence' in the National Law is the wrong way to achieve this.

12. Unlike for the other proposed paramount consideration of public protection, 'public confidence' is not already a paramount consideration under NSW and Queensland National Laws.

13. 'Public confidence' lacks clear definition and scope. Any use of this as a paramount principle would require considerable guidance to the National Boards / Ahpra on how to assess public confidence, developed in consultation with key stakeholders.

14. Even with such guidance MIGA is highly doubtful it would resolve the inherent problems of such a concept. Reasonable minds will differ significantly on what it involves in particular circumstances.

15. The intrinsic difficulty interpreting such an uncertain concept is illustrated by recent cases.

16. 'Public confidence' has been identified as a key component of the concept of 'public interest' under the National Law, being "*the need for patients and others to have confidence in the competence of practitioners and that practitioners will exhibit traits consistent with the honourable practice of an honourable profession*".[1] Its uncertainties are illustrated by the judicial observation that

> "*its content will depend on each particular set of circumstances … The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination*".[2]

17. Different courts and tribunals have adopted different interpretations of what constitutes public interest or confidence.

18. In one recent case, it has been defined as "*public interest in the protection of the public's health and safety*".[3] In another case the tribunal did not tie public interest to issues of public health and safety when indicating "*We do not consider that public confidence in the medical profession would be jeopardised in every case in which a medical practitioner faces a criminal charge*".[4]

19. In addition, 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. 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 on broader professional or ethical issues where there are a range of validly held views.

20. MIGA is particularly concerned that public confidence could be determined on the basis of surveys, patient advocacy groups and media reporting. 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.

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[1] *Karimi v Medical Council of New South Wales* [2017] NSWCATOD 180 at [123](6)(b) – see also Explanatory Notes to *the Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017*, pp13, 32 and *Lee and Medical Board of Australia* [2022] WASAT 28 at [28]

[2] *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70; [2005] FCAFC 142 at [9]-[11]

[3] *Pridgeon v Medical Council of New South Wales* [2022] NSWCA 60 at [68]

[4] *Lee and Medical Board of Australia* [2022] WASAT 28 at [44]

Integrity of a profession – a better paramount consideration

21. In *Crickitt v Medical Council of NSW (No2)* [2015] NSWCATOD 115 the Court gave some consideration to what should be considered in the context of 'public interest', namely

> "*the need for patients to have confidence in the competence of medical practitioners and that medical practitioners will exhibit traits consistent with the honourable practice of an honourable profession. Integrity, trustworthiness and high moral and ethical values are an integral part of the practice of medicine, as is compliance with regulatory requirements and codes of practice established by those responsible for the administration of the medical profession. The public must have confidence that medical practitioners who treat them exhibit these traits*".[5]

22. Given these considerations, MIGA considers the better approach is to include the 'integrity of a health profession' as a paramount consideration instead of 'public confidence'.

23. This would allow a more nuanced, balanced approach that assesses matters by reference to professional standards and ethics.

24. Integrity of a profession provides a much better basis for consistent interpretation across a wide variety of circumstances.

Clinical testimonials (Chapter 3, Part 16, Clause 85)

MIGA position at a glance
The removal of the ban on clinical testimonials be delayed until Ahpra has had the opportunity to develop guidance on ensuring testimonials meet advertising requirements, and to embark on an awareness campaign to explain the changes.

25. MIGA has concerns about the unintended effects which the removal of the prohibition on clinical testimonials will have, particularly challenges for the professions in assessing whether testimonials meet the advertising requirements of s 133 of the National Law.

26. Practitioners and healthcare facilities are likely to face significant obligations to 'vet' testimonials provided by patients for potential breaches of the National Law. This will often be a challenging task, technically and practically.

27. Much work will need to be done to provide clear, detailed guidance to the professions and public on acceptable and unacceptable, testimonials before the new regime commences.

28. In those circumstances, removal of the ban on testimonials should be delayed pending Ahpra issuing guidance on meeting advertising requirements in using testimonials, and the roll-out of a public awareness campaign around use of testimonials.

Not referring matters to a tribunal (Chapter 3, Part 26, Clause 109)

MIGA position at a glance
MIGA - Supports a National Board having broad discretion not to refer a matter to a disciplinary tribunal - Considers this should be based on there being "*insufficient*" public interest in referring the matter - Any existing protections or alternative action should also be required consideration.

29. MIGA supports broad discretion for a National Board to not refer a matter to a tribunal.

30. Given finite prosecutorial and tribunal resources, and the need to ensure timely and efficient disposition of tribunal matters, it is important that only the cases which truly need to be before a disciplinary tribunal are put before it.

[5] *Crickitt v Medical Council of NSW (No 2)* [2015] NSWCATOD 115 at [56](7)(f)

31. If there are other ways of resolving a matter that ensure public protection and integrity of the healthcare profession, there should be appropriate discretion to explore and pursue these alternatives.

32. The requirement that there be "*no*" public interest in the matter being heard by a responsible tribunal may render it impossible not to refer a matter to the tribunal.

33. Reasonable minds may differ on whether there is a public interest in a matter being heard by a tribunal, and what that public interest is.

34. Proposed s 193A(1) of the National Law should instead indicate a National Board may decide not to refer a matter to a tribunal if it decides there is "*insufficient*" public interest in referral.

35. Complementary to considering "*the need to protect the health and safety of the public*" under s 193A(2)(a), the following issue should also need to be considering in determining possible tribunal referral under proposed s 193A of the National Law

    Whether the public is sufficiently protected by existing mechanisms or by the taking of alternative action

Next steps

36. Please contact us if you have any questions or if you would like to discuss.

37. MIGA looks forward to continuing to engage with regulators and stakeholders as these reforms progress.

Yours sincerely

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