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Dear Prof Paterson

MIGA submissions to the independent review of chaperones to protect patients

As an insurer of significant numbers of medical practitioners and medical students throughout Australia, MIGA welcomes the opportunity to provide submissions to the independent review of chaperones to protect patients (**the Review**).

Through advising and assisting its members and policyholders in disciplinary complaints, investigations and hearings, and providing risk education, MIGA has many years of experience in dealing with the issue of chaperones in medical practice.

Executive summary

Responding to the consultation questions posed by the Review, MIGA's position is that:

- chaperone conditions can be an effective measure to protect patients, but their effectiveness will depend on:
 - the particular circumstances in question
 - the quality of the decision-making processes leading to the imposition of such conditions
 - the suitability of and training provided to chaperones
 - an effective monitoring regime of condition compliance
- where it is appropriate to impose chaperone conditions the steps taken to protect and inform patients should depend on the particular circumstances in question
- there will be circumstances in which chaperone conditions are inappropriate

- given the variety of circumstances in which chaperone conditions may be considered, it would be generally inappropriate to outline particular circumstances in which they should not be imposed
- the current regulatory measures to protect patients while allegations of sexual misconduct are being investigated are appropriate, namely the powers under the *Health Practitioner Regulation National Law (the Law)* to:
 - suspend a practitioner
 - impose chaperone conditions
 - impose conditions which restrict a practitioner from seeing a patient demographic which is considered to be at increased risk
- the critical issue is ensuring proper implementation of the existing regulatory regime, through a thorough and fair assessment process, use of suitable chaperones and careful monitoring of compliance with chaperone conditions

The reasons behind MIGA's position are set out below, placed in context of the use of chaperones in medical practice more generally.

MIGA raises a number of additional issues, including:

- concern that any need for regulatory change not be unduly influenced by 'sentinel' cases
- the need to ensure that the use of chaperones in medical practice is not of itself seen as something casting doubt on the integrity of a medical practitioner
- there is a need to consider changes to how chaperones are trained, and how both patients and certain chaperones are informed, in contexts where chaperone conditions are imposed on a 'precautionary' basis

'Sentinel' cases

At the outset, MIGA acknowledges that 'sentinel' cases can provide a compelling reason to examine closely the ways in which regulatory systems work, such as in the case of imposing chaperone conditions.

However, it approaches such cases with a degree of caution.

The particular, and perhaps unique, circumstances of a sentinel case should not be the primary driver of any change if issues in that case have not generally arisen elsewhere. This is particularly so if the circumstances of those cases were unique and / or appropriate processes in place failed to work.

Chaperones in medical practice

It is important that the issue of precautionary or protective chaperone conditions not be considered in a vacuum, but rather in the context of the use of chaperones in medical practice generally.

There are three principal circumstances in which chaperones may be used in medical practice, namely:

- as a “risk management” measure, making the patient and / or the medical practitioner more comfortable, particularly in the context of intimate examinations
- ‘precautionary’ chaperone conditions imposed following a complaint about a medical practitioner, where the veracity of those complaints is yet to be determined – we note this is the focus of the Review
- ‘final’ or ‘definitive’ imposition of chaperone conditions following Tribunal or Court determination of a patient complaint/s, based on the fullest understanding of comparative risk to patients and a practitioner’s fitness to practice

MIGA has advised its members and policyholders, published literature and contributed to professional discussion over the use of chaperones generally in medical practice.

MIGA’s views on the use of chaperones as a risk management measure in medical practice are summarised in a Fact Sheet provided to its members and policyholders, entitled “Managing Risk of Chaperones” (copy enclosed), which identifies:

- the nature of intimate examinations themselves can warrant chaperones
- ideally a chaperone would be present for all internal, genital or rectal examinations, subject to the patient’s wishes
- the use of chaperones is not per se reflective of deficiencies in the necessary elements of trust in the doctor-patient relationship, but instead represents:
 - a realistic view of the inherent intimacy of certain aspects of medical practice
 - the different backgrounds, perceptions and experiences patients can bring in relation to ‘intimate’ matters
 - the inherently varying levels of comfort that different medical practitioners have when providing care and treatment in such areas
- the proposal of a chaperone by either a patient or a medical practitioner in such circumstances, absent some concern about the practitioner’s conduct in those areas, should not be seen as a matter of concern, but rather as part of a desire to ensure openness, transparency and comfort for all involved

It is imperative that the outcome of the review does not lead to any perception that the use of chaperones generally casts doubt on a medical practitioner’s integrity, conduct or professionalism.

The use of a chaperone must remain to be seen by the regulator, profession and public as an important tool in the provision of good medical practice.

Chaperone conditions pre- and post-complaint determination

The relevant body determining whether to impose a chaperone condition, whether it be a state or territory Medical Board, the Medical Council of NSW or the Office of the Health Ombudsman in Queensland, faces quite different circumstances in considering the precautionary imposition of chaperone conditions, as opposed to the position of a Tribunal or Court imposing such conditions following determination of a complaint.

The comparative advantage that a Tribunal or Court has in determining whether to impose chaperone conditions after determination of the complaint is that the veracity of a complaint has been determined and the practitioner's current and ongoing fitness to practice has been thoroughly and properly assessed. Inevitably, it is that body which is then best placed to determine whether chaperone conditions are appropriate in the circumstances, rather than the person/s or body doing this on a precautionary basis.

Those determining whether to impose chaperone conditions where a complaint has been made, including of sexual misconduct, but not yet determined, are at a comparative disadvantage. The information available is more limited. The veracity of the complaint is yet to be tested. Issues of procedural fairness and natural justice to the parties involved, particularly the medical practitioner, assume more importance. The quality of the decision making process by the determining body is critical.

In both circumstances the key objectives, which MIGA supports, remain the same, namely those under Section 3 of the National Law, being:

- the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered
- restrictions on the practice of a health professional are to be imposed only if necessary to ensure health services are provided safely and are of appropriate quality

MIGA also notes and endorses the regulatory principles for the National Scheme as they apply to this issue, particularly:

- the primary consideration being to protect the public by taking timely and necessary action
- to identify risks, assess their likelihood and possible consequences, and respond in proportionate ways to manage risk to adequately protect the public
- using the minimum regulatory force appropriate when protecting the public and not punishing practitioners
- upholding professional standards and maintaining public confidence in the profession

MIGA sees no need for any change to how the National Law or the regulatory principles operate in the context of chaperone conditions, whether at a precautionary or final stage. It believes these objectives and principles to be fair, thorough and well-balanced.

Judicial consideration of chaperone conditions

There has been careful judicial deliberation of the use of chaperone conditions, outlining a decision-making process which MIGA endorses. In particular, they emphasise that any decision to impose chaperone conditions needs to be based on the individual circumstances of the case in question, not broad principles. This is the only way in which a fair and proportionate balance can be drawn between public protection on one hand, and fairness to the practitioner involved on the other.

Although these deliberations have occurred in the context of imposing chaperone conditions following final determination of the veracity of a complaint, the underlying principles are applicable to the precautionary imposition of such conditions.

In *Health Care Complaints Commission v Wingate* [2007] NSWCA 326, the NSW Court of Appeal emphasised that it would be wrong to derive a principle of over-general application from *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630.

In *Litchfield*, it was seen that a condition requiring a medical practitioner to have a chaperone present whenever seeing a female patient indicated a conclusion they could not be trusted in relation to a fundamental aspect of professional conduct.

In *Wingate*, the Court determined that:

"Conditions may be imposed in various circumstances and for varying purposes. The circumstances and purposes will always be important, in part because of the need for the Tribunal can be satisfied the condition will be effective" (at [62])

In that case the Court of Appeal paid very close attention to the nature of the practitioner's work, comparative risk of inappropriate conduct and maintenance of public confidence, albeit public concerns may be reasonable or irrational.

It is MIGA's view that the factors identified in *Wingate* are key issues in determining whether use of chaperone conditions in precautionary circumstances are appropriate. The question is then one of ensuring that these issues are considered properly by a high quality decision-making process.

Varying circumstances where chaperone conditions are used

There are a wide variety of circumstances in which a body may be required to consider whether chaperone conditions should be imposed.

It may involve one or more complaints of alleged sexual misconduct in the course of clinical practice or outside it, or other alleged conduct which is thought to warrant possible chaperone conditions.

Even comparing matters involving one complaint of sexual misconduct in clinical practice can be difficult, as the nature and the circumstances of the complaint, and consequent risk to the public, may vary.

This makes it effectively impossible to draw any form of meaningful guidelines about when chaperone conditions should be used in a precautionary context.

To shift the focus away from a thorough examination of carefully determined principles of protection, risk and fairness (as ideally should occur now), and towards a system of specific rules and guidelines, could well lead to reduced public protection, and a punitive system for practitioners.

To try and specify rules or guidelines for when and where chaperone conditions can and cannot be used runs a significant risk of failing to protect the public by attempting to foresee a wide range of circumstances which cannot be properly appreciated before they occur.

Is the current regulatory regime appropriate?

The current regulatory regime for considering whether to impose precautionary or protective chaperone conditions is appropriate.

A body considering precautionary or protective imposition of conditions on a medical practitioner pending Tribunal or Court determination of a complaint/s should be equipped with the power to impose a chaperone condition in appropriate circumstances.

There should be no presumption for or against a chaperone condition in particular circumstances, or generally.

It is effectively impossible to draw meaningful, proper or fair general principles, let alone any specific rules or guidance, beyond those already in Section 3 of the National Law and the regulatory principles to apply to these situations.

Each circumstance requires close consideration, based on all relevant and available information, to determine whether any chaperone conditions are required, or if the more appropriate course is restriction of the practitioner from seeing a certain patient demographic and / or undertaking certain treatments, or suspension from practice.

MIGA supports careful and close review of how the scheme works in practice, and practical improvements which could be made, involving input from a wide variety of stakeholders, including professional regulators, health complaints bodies, professional colleges and associations, medical defence organisations and peak patient groups.

Areas for review

Areas in which close consideration could be given to improvements in decision-making processes are:

- **immediate action processes** – the Medical Board of Australia has an appropriate power under Section 156 of the National Law (as does the Medical Council of NSW under Section 150 of the NSW version of the National Law) to take precautionary or immediate action for the protection of the public, based on the degree of risk posed by a practitioner. Whereas the Medical Council of NSW tends to hold a hearing with appropriate Council delegates to determine this issue, much of the time such determinations can be made “on the papers” by the Medical Board of Australia or in Queensland by the Office of the Health Ombudsman under Part 7 of the *Health Ombudsman Act 2013* (Qld). MIGA believes that a hearing process provides a significantly better mechanism for determinations to be made on whether precautionary imposition of chaperone conditions is appropriate in a particular case

- **learning from experience** – it may be worthwhile considering systems for analysing and using data from other matters where a body has considered imposing precautionary chaperone conditions, with a view to learning from experience as appropriate – there would have to be careful protocols and protections around use of such information, and it could ultimately not be determinative of the approach to be taken in a particular circumstance

Alternative regulatory measures

MIGA sees the alternative regulatory measures for protection of patients while allegations of sexual misconduct are being investigated, as opposed to precautionary chaperone conditions being imposed, as being:

- restriction of a practitioner from seeing a particular patient demographic
- only undertaking particular or limited forms of clinical practice
- in certain circumstances, suspension from practice.

It does not see a need to change these alternatives to imposition of chaperone conditions, or to consider other alternatives.

Informing patients of chaperone conditions

The AHPRA chaperone protocol contemplates a clearly visible sign being placed in the practice of a medical practitioner subject to a chaperone conditions, setting out the requirement for presence and direct observations of a chaperone.

MIGA is concerned that this requirement applies in the same way to medical practitioners who have precautionary chaperone conditions imposed as it does for those who have had chaperone conditions imposed following Tribunal or judicial determination of complaints.

It has significant concerns about the use of a practice sign in the context of precautionary conditions, particularly for the inevitable concern it could cause in the minds of patients in a circumstance where the veracity of the complaint/s, a practitioner's ongoing fitness to practise and true degree of risk they pose to the public is yet to be determined properly.

To leave such signs in place in the precautionary context raises issues which cannot be properly explained to patients due to legal considerations, particularly issues of privacy, natural justice and procedural fairness, and prejudice. This poses a significant risk of undermining confidence in not just the practitioner in question, but the medical profession more generally. Where there is no satisfactory way of being able to explain any later removal of conditions, there is the risk of unnecessary stigma remaining.

MIGA considers that it would be better for the practice sign requirement to be removed for the context of precautionary chaperone conditions. Instead, it is appropriate for patients who need to be seen with a chaperone to be informed on a case-by-case basis.

It also has reservations about whether a practice sign should always be used in the situation of chaperone conditions being imposed after the Tribunal or judicial determination of the complaint. Instead, this is an issue which should be left to those determining the complaint, who are best placed to assess issues of risk and protection of the public.

Chaperones in practice

Appropriately equipping and training chaperones is one of the key steps which can be taken in improving the chaperone system.

To be a chaperone goes beyond the mere observation of what occurs, and requires skill and training in ensuring the role is discharged properly. Ideally, a chaperone would be an appropriately trained clinician, such as another practitioner or nurse.

MIGA does not favour the use of a chaperone of the patient's choice in circumstances of precautionary chaperone conditions. However, it accepts that there may be practical impediments, such as patient choice or resources, which make the use of alternative chaperone impossible.

It would prefer to see the use of an AHPRA-approved and appropriately trained chaperone wherever possible and practical. This is particularly so as their use is less likely to undermine the trust and confidence in the therapeutic relationship which may arise from the use of a chaperone of the patient's choice, noting such chaperones are still required to review information beforehand and complete a chaperone log. Importantly, they may not have the necessary skill or training to fulfil the role of chaperone.

MIGA believes it is necessary to do more to educate chaperones than provide an information sheet. Whilst this sheet is helpful, it considers further training is required. It suggests AHPRA give consideration to a focused, pithy and practical training course, for AHPRA-approved chaperones to complete.

The information sheet provided to patient-nominated chaperones, through the background information on page 2, arguably implies that a practitioner is under investigation for serious misconduct. This of itself can undermine significantly confidence in the therapeutic relationship in the precautionary chaperone condition context. This should be modified. However, it accepts that it is appropriate to have such information in the information sheet for chaperones approved by the Board.

If you have any questions or would like to discuss any issues further, please contact Timothy Bowen, Senior Solicitor – Advocacy, Claims & Education on [REDACTED] or [REDACTED].

Yours sincerely



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