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27 January 2017

Dr Monica Trujillo
Executive General Manager
Clinical & Consumer Engagement and Clinical Governance
Australian Digital Health Agency
Level 25, 56 Pitt Street
SYDNEY NSW 2000

Via email: yoursay@digitalhealth.gov.au and post

Dear Dr Trujillo

MIGA submission to National Digital Health Strategy consultation

In response to your letter dated 15 November 2016, MIGA thanks you for the opportunity to contribute to the National Digital Health Strategy.

A copy of MIGA's submission is **enclosed**.

As a medical defence organisation advising, assisting and educating medical practitioners, medical students, health care organisations and midwives throughout Australia, MIGA has a particular interest in the medico-legal and risk management issues around digital health.

If you or your colleagues have any questions about MIGA's submission, please contact Timothy Bowen, telephone 1800 839 280 or email timothy.bowen@miga.com.au.

We look forward to further engagement on these issues.

Yours sincerely



Mandy Anderson
CEO & Managing Director

Timothy Bowen
Senior Solicitor - Advocacy, Claims & Education

MIGA submission

**Australian Digital Health Agency
National Digital Health Strategy Consultation**

January 2017

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MIGA submission

Australian Digital Health Agency - National Digital Health Strategy consultation

January 2017

Executive summary

1. MIGA's submission addresses the questions posed by the Australian Digital Health Agency's discussion paper, '*Your health. Your say. Shaping the future of health and care together*' (**the discussion paper**) focused on health practitioners. They also explore issues MIGA has encountered in relation to digital health, particularly the use of electronic health records and My Health Record, and various legislative / regulatory issues.
2. MIGA supports the following:
 - exploring potential improvements to digital health initiatives, particularly electronic health records and My Health Record, to reflect better the realities of Australian health care
 - a focus on augmenting existing digital health initiatives to improve their operation, utility and take-up amongst the health profession
 - review of laws impacting on digital health, particularly privacy and confidentiality, so as to harmonise them with the other medico-legal requirements on Australian health care practitioners

MIGA's interest

3. MIGA has a particular interest in digital health issues.
4. Its involvement in various government and regulator initiatives includes:
 - membership of the Agency's predecessor medical indemnity working group and consultation with it on e-referral initiatives
 - contributing to the Office of the Australian Information Commissioner's review of health privacy guidelines
 - contributing to the Commonwealth Attorney General's consultation on mandatory data breach laws
 - contributing to Queensland Parliament inquiry addressing general practitioner electronic access to hospital discharge information
5. MIGA's risk management program has a significant digital health component, particularly around electronic health records, privacy and My Health Record. It provides workshops and materials both to its own members and policy holders, and to the health profession more

generally, on these issues. Over recent years, MIGA has run a series of interactive seminars around Australia on e-health initiatives, including a Q&A session attended with over 800 doctors with Dr Mukesh Haikerwal and Dr Nathan Pinksier representing the Agency's predecessor.

6. Its lawyers regularly advise and assist members and policy holders on issues arising out of digital health, particularly electronic health records, and privacy and confidentiality.

Impediments to health practitioners connecting, communicating and coordinating

7. In MIGA's experience, issues which health practitioners and organisations encounter with digital health include:
 - **fragmentation** – digital health initiatives, particularly electronic health records, My Health Record, other depositories of health information and developing medical and health apps, each have significant capabilities, but also a propensity to operate in isolation, with limited connectivity
 - **inconsistency** – use of digital health initiatives across the Australian health profession is variable, meaning the contribution it could make is more limited than could be the case
 - **overload** – the investments needed by health practitioners and organisations in time, finances and understanding to develop and implement complex digital health capacities – the capacity to do this varies significantly across professionals and locations
 - **My Health Record** – its personally controlled nature and fragmented method of information collection make it only one element of a patient's clinical picture, which for the most part needs to be considered with other information sources
 - **other health information depositories** – access to this material, such as Medicare and Pharmaceutical Benefit Scheme (**PBS**) information, can be limited and delayed
 - **legal issues** – legal regimes around privacy and confidentiality are not necessarily consistent with other legal obligations and expectations around the provision of health care, particularly around collecting, accessing and communicating a patient's health information

What do health practitioners need to effectively connect, communicate and coordinate?

8. MIGA considers the issues identified above necessitate consideration of the following:
 - (a) **Fragmentation and inconsistency**
9. Much of the focus of digital health initiatives has been on developing and enhancing individual applications or initiatives.

10. MIGA sees a need for greater focus now on:

- how to best introduce useful, meaningful initiatives consistently throughout the health profession - providing access by general practitioners to public hospital discharge information in Queensland and developing a secure messaging system between health practitioners, advocated for by the Australian Medical Association, are good examples of this
- ways to allow different applications or initiatives to communicate properly with each other – in particular, this should include interaction between electronic health records, My Health Record and other repositories of health information, including digital imaging and pathology
- encouraging take up of applications or initiatives widely accepted amongst the health profession as useful, including targeted identification of priorities, education of health practitioners and their patients, and meaningful encouragement and incentives for involvement
- looking at ways which could provide more timely access to important health information, such as that held by Medicare or the PBS – a focus on national implementation of a real time prescribing system, accessible by health practitioners, would be welcome

(b) Legislative schemes

11. Obligations under the Commonwealth *Privacy Act* and My Health Record legislation are not ideally suited to developing digital health initiatives. In particular:

- privacy legislation does not necessarily reflect the realities of health care
- My Health Record legislation limits the utility of that system by imposing additional restrictions beyond that normally expected around health information

Careful review of these regimes as they impact on digital health is warranted.

Immediate priority initiative for My Health Record to ensure real value for health care professionals

12. MIGA suggests a focus on the following:

- integration of My Health Record with existing electronic medical records systems – where appropriate information added in the patient's electronic health record by a health practitioner, it is automatically exported to the same patient's My Health Record if standing consent is provided by the patient – we are aware that some systems already do this, and this should be encouraged – a further step would be to make sure this integration assists with making a patient's My Health Record up-to-date and accurate, culling or archiving outdated information as appropriate

- reviewing 'Nominated Provider' provisions – having one nominated provider does not reflect the realities of modern health care, particularly for patients who see different general practitioners in one practice, or who have multiple practitioners making decisions about different aspects of their care

Better use of data and technology

13. As set out above, MIGA suggests a focus on implementation of a real time prescribing system. Multiple coronial inquests have identified this would be a significant initiative to reduce doctor shopping and over-prescribing of particular medications, potentially saving lives and improving health and well-being more generally.
14. MIGA also suggests a focus on the implementation of real time access to radiology and pathology reports to assist health practitioners treating presenting patients and avoid duplication of testing.

Further issues

(a) *Legislative / regulatory issues*

15. Firstly, the expectations under the *Privacy Act* on health practitioners to ensure reliability and security of digital health systems cause challenges for health practitioners engaging in digital health initiatives, particularly electronic health records and exchanges of information with patients and other health practitioners or health organisations.
16. It can be difficult for health practitioners and organisations, not possessing digital technical expertise and sufficient time, to ensure that legislative requirements around reliability and security of information are met.
17. There is a need to develop better ways of sharing such obligations amongst regulators, digital health providers, health practitioners and health organisations.
18. Secondly, the *Privacy Act* and My Health Record legislation impose significant penalties for breaches of their obligations on health practitioners. These penalties go well beyond those contemplated under other laws which regulate the provision of health care and use of clinical information.
19. In effect, such laws treat all those involved with health information in the same way. They fail to recognise the professional obligations of trust and confidence, and ethical frameworks, developed for health practitioners using such information over many years.
20. MIGA sees no compelling reason to warrant health practitioners facing the same penalties as all who use health information. It believes it can cause considerable reluctance amongst the health profession in moving towards digital health initiatives.

(b) My Health Record – aims, obligations and other uncertainties

21. There are a number of issues relating to My Health Record which MIGA believes warrant consideration:

- the aim of My Health Record is unclear – while it is not a comprehensive clinical record for a patient, its ultimate role is uncertain and can vary amongst patients, depending on their willingness to contribute to it and allow use by other health professionals. MIGA endorses working towards a core set of clinical information which can be relied on, as supported by the Australian Medical Association, and giving consideration to its use as a registry of providers of care to a patient, who can be contacted as required for health information
- uncertain medico-legal implications of patients having a My Health Record system - although access of the system by a health practitioner is not expected, MIGA is concerned about the potential for this changing, particularly where the health profession has understandable reservations about reliability and utility of this system
- better ways to communicate the classes of records which may be missing from a My Health Record system, hidden from view by patients - the need for patient privacy is acknowledged, but it may be critical for a health practitioner to know that a certain class of information has been omitted, without disclosing the substance of that information
- access without consent to My Health Record is presently contemplated in situations of imminent risk or emergency for five days – these situations can involve a need for access for longer than this - there should be provision for extension of this timeframe based on reasonable need
- the current scheme for minors using My Health Record, involving parents managing the record until age 14, and children having the opportunity to manage it afterwards, does not acknowledge the realities of *Gillick* competency or the mature minor test in different cases - careful review of how this protocol could be developed to reflect better the these legal tests is needed

(c) Burdens affecting personal health

22. MIGA believes that consideration should also be given to ways in which the requirements and burdens of digital health could impact on the health of health practitioners. In particular, commissioning research on this issue with a view to developing any necessary initiatives to improve those burdens would be welcome.