

24 February 2022

Mr Scott McDougall
Commissioner
Queensland Human Rights Commission

Via email – adareview@qhrc.qld.gov.au

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Dear Mr McDougall

MIGA submission – Review of Queensland Anti-Discrimination Act

As a medical defence organisation and professional indemnity insurer MIGA appreciates the opportunity to provide a submission to the Commission’s Review of Queensland’s Anti-Discrimination Act discussion paper.

MIGA’s position

As a healthcare sector stakeholder MIGA’s submission focuses on

- Significant challenges the COVID-19 pandemic can pose for delivering healthcare in the context of discrimination regimes
- Ensuring due recognition of the existing culture of equal opportunity and anti-discrimination in healthcare
- Maintaining protection for decisions made based on public health and work health / safety grounds
- Assessing carefully potential for certain reform options offering unintended impacts on healthcare
- Need for further engagement and work to explain what is, and is not, unlawful discrimination in healthcare and to clarify interaction of discrimination regimes with other legal and professional obligations.

MIGA’s interest

MIGA advises, assists, educates and advocates for doctors, medical students, healthcare organisations and privately practising midwives in Queensland and throughout Australia.

With over 36,000 members and clients across the country, MIGA has represented the medical profession for more than 122 years and the broader healthcare profession for over 19 years.

MIGA regularly advises and assists its members and clients in relation to their medico-legal, professional and regulatory obligations. This covers a wide range of judicial, quasi-judicial and administrative processes across civil, disciplinary, coronial, governmental and workplace contexts.

Challenges of the COVID-19 pandemic

As detailed further below the healthcare profession has long-standing, well-developed and clear obligations for ensuring equal opportunity and avoiding discrimination when delivering healthcare.

Prior to the COVID-19 pandemic complaints of discrimination in healthcare were relatively rare.

The pandemic has led to frequent assertions of discrimination by patients and others in the community across a broad range of healthcare situations. This has been very challenging for healthcare providers, who have been working in good faith and often trying circumstances to

- Meet legal requirements and public health imperatives
- Follow government, regulatory and peak body advice
- Ensure good clinical practice
- Protect each of their patients, their staff, themselves and the broader community.

Sources for claims of discrimination in healthcare during the pandemic include healthcare providers

- Meeting legal requirements, work health / safety and professional obligations – for example
 - o Requiring mask use under public health direction or where advised by governments, regulators and / or peak bodies
 - o Using telehealth where public health restrictions limit face-to-face care, governments advise reducing non-essential movement and / or providers at are increased risks from contracting COVID-19
 - o Taking other steps to minimise health risks to staff and patients.
- Declining patient requests for exemption from COVID-19 vaccination or mask requirements which are not based on permissible legal exemptions or good clinical practice.

Healthcare providers are also grappling with challenges of staff asserting discrimination around

- Mandating COVID-19 vaccination (whether under or without public health direction)
- Implementing other ‘COVID Safe’ requirements.

The intersection of healthcare and discrimination regimes offer inherent uncertainties. Healthcare providers also have a range of other legal and professional obligations affecting what they can and cannot do. This can make it difficult for healthcare providers trying to do the right thing to know what to do.

It is unhelpful to both a patient or staff member asserting discrimination, and the healthcare provider recipient of that complaint, when these claims are made on unjustifiable grounds or arise out of misunderstandings about how discrimination regimes operate.

These considerations create an imperative for clearer understanding and guidance around what is and is not unlawful discrimination in healthcare.

Existing healthcare discrimination regimes

In assessing complaints of discrimination in healthcare, it is important to recognise existing regimes and culture of equal opportunity and anti-discrimination in this sector.

These regimes and culture mean that unlawful discrimination in healthcare is rare.

Both Queensland healthcare professionals and their colleagues across the country have clear professional and ethical expectations for avoiding discrimination in healthcare. These are enforceable through professional regulatory and disciplinary action.

For example the [Medical Board’s Good Medical Practice: a code of conduct for doctors in Australia](#) provides

- *There is no place for discrimination (including racism), bullying and sexual harassment in the medical profession or in healthcare in Australia* (cl 5.4)
- *Culturally safe and respectful practice requires genuine efforts to adapt your practice as needed, to respect diversity and avoid bias, discrimination and racism* (cl 4.8)
- *Your decisions about patients’ access to medical care must be free from bias and discrimination* (cl 3.4)
- *Good medical practice involves*
 - o *Upholding your duty to your patient and not discriminating against your patient on grounds such as race, religion, sex, gender identity, sexual orientation, disability or other grounds, as described in anti-discrimination legislation* (cl 3.4.3)
 - o *Doing or saying something about discrimination, bullying or sexual harassment by others when you see it and reporting it when appropriate* (cl 5.4.5).

The jurisdiction of the Queensland Health Ombudsman to deal with complaints relating to a wide range of healthcare issues, including discrimination, provides a bespoke mechanism to address these issues in a way not seen in many other sectors.

Protections for decisions based on public health / workplace health and safety considerations

The broad use of public health directions throughout the COVID-19 pandemic reinforces the continuing need for a general exemption, as in place under s 107 of the *Anti-Discrimination Act*, for actions reasonably necessary to protect public health.

More broadly there remains a need to preserve the general exemption under s 108 of the *Anti-Discrimination Act* for acts reasonably necessary to protect health and safety of people at a workplace.

There can be no question that such exemptions remain necessary. There is no proper basis to modify them. They ensure Queensland health providers continue to have similar protections to their colleagues in most other states and territories.

Unintended impacts of reform?

The COVID-19 pandemic experience indicates that certain reform options canvassed in the discussion paper could have unintended effects on healthcare.

Uncertain obligations and unfair burdens could be imposed on Queensland healthcare providers through

- A greater preventative focus, particularly if this fails to recognise the frameworks and processes already in place for healthcare, or where preventative strategies are not co-designed with healthcare stakeholders
- Positive duties to eliminate discrimination
- Modification of the tests for discrimination
- Shifting the burden of proof
- Adopting a general, standalone duty to make reasonable adjustments.

MIGA recognises that certain reform options reflect positions already in place in other states and territories. However their operation in those jurisdictions remains to be tested properly throughout the evolution and vagaries of a pandemic.

In addition a direct right of access to tribunals, given the experience of the COVID-19 pandemic, removes an important control mechanism of conciliation, particularly where the operation of discrimination laws within healthcare is often not well-understood. It could also lead to significant additional personal, professional and financial burdens on healthcare providers having to respond to matters before a tribunal which lack proper grounds or which merit conciliation.

Next step – engagement and guidance

The COVID-19 pandemic experience reinforces the need for further stakeholder engagement and co-operative work to ensure

- Proper operation and use of discrimination regimes in the healthcare context is well-understood by Queensland healthcare providers and the broader community
- These regimes are not used in ways which impede appropriate delivery of healthcare
- Any reforms to these regimes do not lead to unintended problems for healthcare.

The development of clear guidance on what is and is not unlawful discrimination in healthcare, followed by awareness and education to healthcare providers and the community on these issues, would be welcome. MIGA endorses the approach outlined on p 81 of the discussion paper, contemplating that “*development of guidelines is informed by the practical realities and resources of the relevant industry or entity*”.

The work of the Australian Human Rights Commission (AHRC) on [discrimination and mask use](#) provides a useful starting point for considering how further clarity and guidance around issues of discrimination in healthcare could be helpful for each of healthcare providers, their patients and the broader community. This could be enhanced in the Queensland context through being

- Tailored to healthcare
- Explaining how discrimination issues interact with other legal and professional obligations
- Including a range of hypotheticals / examples.

MIGA would welcome working with the Commission and other key stakeholders on these issues.

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

Yours sincerely



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