

17 February 2021

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission

Via email – nsw-lrc@justice.nsw.gov.au

**General Enquiries
and Client Service**

P 1800 777 156

F 1800 839 284

**Claims and Legal
Services**

P 1800 839 280

F 1800 839 281

www.miga.com.au

miga@miga.com.au

Postal Address

GPO Box 2048, Adelaide
South Australia 5001

Dear Mr Cameron

MIGA submission – NSWLRC open justice consultation paper

MIGA appreciates the opportunity to provide a response to the Commission's consultation paper - Open justice: Court and tribunal information: access, disclosure and publication.

MIGA's interest

As a medical defence organisation and medical / professional indemnity insurer, MIGA's interest in the Commission's work relates to its potential impact on legal matters involving delivery of healthcare.

It regularly advises, assists, educates and advocates for its members and clients in civil compensation claims, professional disciplinary proceedings, coronial investigations / inquests and guardianship / mental health matters (**healthcare matters**).

MIGA's position

MIGA's position is

- The current NSW framework for open justice in healthcare matters, including exclusion, non-disclosure and suppression orders, and publication and access restrictions, remains appropriate
- There is no case for change in healthcare matters, particularly given inherent sensitivities in a range of professional disciplinary, coronial and guardianship / mental health matters
- Any uniform reforms on open justice must contain appropriate exclusions for healthcare matters.

Professional disciplinary matters

For professional disciplinary matters, s 165K and Schedule 5D, cl 7 of the *Health Practitioner National Law* as they apply in NSW provide an appropriate framework around closing tribunal or Professional Standards Committee hearings and suppression / non-publication orders.

This framework reflects the range of special considerations which can arise in those matters. For example

- Identities of patients and complainants are usually suppressed
- Closed court or publication restrictions are often considered in matters involving a health practitioners' physical or mental health.

Scope to make orders based on the particular circumstances of a case must be preserved for professional disciplinary matters.

The *Open Courts Act 2013* (Vic) offers comparable scope for tribunal proceedings to be closed to that already in place in NSW.

Coronial matters

Given the broad scope and range of interests in coronial matters, coroners must continue to be vested with powers to close courts or restrict publication based on public interest considerations.

As is the case for professional disciplinary matters, the Victorian *Open Courts Act* also provides similar scope for coronial proceedings to be closed to that already in place in NSW.

No changes to the *Coroners Act 2009* (NSW) around these matters can be contemplated pending release of the final report of the statutory review of that Act. The scope of that review covers whether there is case for change around these issues, but is based on the unique issues arising in that jurisdiction.

Access to information

MIGA opposes any reforms which would permit non-party access to information held by courts or tribunals where that information has not emerged in open proceedings.

There is no proper basis in healthcare matters to provide non-party access to information held by a court or tribunal, such as originating processes and responses, answers to interrogatories, witness statements, expert reports and submissions, before that material emerges in open court.

The uncommenced *Court Information Act 2010* (NSW) does not extend to tribunals or coronial matters.

Next steps

MIGA looks forward to engaging further with the Commission as its reference progresses.

If you have any questions or would like to discuss, please contact [REDACTED]

Yours sincerely

[REDACTED]

Timothy Bowen
Manager – Advocacy & Legal Services

[REDACTED]

Cheryl McDonald
National Manager – Legal Services