As nothing had been mentioned about MDOs until now, we offer a full submission on an alternative format to that required by the Royal Commission. This is because it covers matters beyond those required by the Interim Report invitations by 25 October 2018.

Introductory Background

The failures of the Industry are not to:

1. Thoroughly and professionally investigate and establish the true facts and circumstances of complaints by patients. Regulators and any party are free to perform exaggeration distortion.

2. Hold Regulators to account of their Statutory Duties and Obligations in the investigation and dealings - particularly regarding Natural Justice & Due Process.

3. Be skeptical of the motives and veracity of claims of the Regulator and other civil litigants.

4. Engage professionally with the Insured and treat the insured with due respect and acknowledge the effect and gravity of the effect of claims of professional misconduct.

5. Establish strong ethical relationships with legal advisers who are capable of impartially analyzing case material, and holding Regulators and litigants to account in all aspects of a claim.

6. Deal honestly with the Insured Registrant and involve the Registrant in ALL aspects of the matters.

7. Avoid cozy relationships with Regulators and Law firms, and be prepared to call them out for breaches of propriety, honesty and accountability,

8. Always Deal honestly with and support the Insured emotionally in stressful times –and afterwards.

9. Seek not to have the Insured “retire” in order to access Government “tail-cover” funds.

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10. Support the Insured in Occupational Health and Safety issues which are apparent in almost every complaint against an insured Practitioner/Registrant.

11. Interfere with the client relationship between the Insured and the Legal Advisers the Insurer appoints.

12. Seek publication of the Regulators' "standards" of required conduct and the corresponding grading's of reprisals/corrective action in accordance with proven misconduct.

13. Firmly oppose the ratcheting-up of charges to force "plea bargaining".

14. Place the interests of the Health professions above those of the insurance industry.

History

Following major medical litigation cases in the 1990's and decisions by the High Court of Australia the traditional UK evolved Bolam Standard of Health Care was rescinded. Courts decided each litigated case on merits and thus current standards determined following evidence by court-sanctioned experts.

Consequently, Queensland and NSW very rapidly overtook California as the world's leaders in medical litigation and have continued to consolidate that position since, particularly after the re-organization of the Medical Indemnity Industry in 2002.

The growth of the Medical Litigation Industry and a reliance on its inherent ethical weakness and continuation as a lucrative secure career option has embedded many vested interests in maintaining the current status quo.

Such vested interests have allowed cozy relationships between litigants, expert witness and prosecutors to flourish distorting perceptions of truth, honesty, fact and circumstance- as well as current appropriate standards to the detriment of the interests and justice to Health Registrants.

This has been facilitated as there are few published universal standards of Health Care in Australia for a defendant to rely upon because of the diverse nature of how, when and where the services are provided. Quite clearly big-

City standards are different than remote and rural simply because of availability of facilities and expertise.

However, the Regulator is prepared to discretionarily apply the label of ‘unprofessional conduct’ on every party. Like it or not, the politics which invaded the provision and availability of Health Care in Australia during the Whitlam era with the effective nationalization of Health Providers by stealth and the gradual erosion of the autonomy of doctors. The doctor-patient relationship has continued to dominate and control the provisions and quality of Medical services by industry and profession.

Medical Practitioners have gradually become *de facto* servants of the Government and Nation by creeping Regulation and codification of every conceivable aspect of Health practice and corresponding Medicare benefits.

Such straight –jacketing has created that *de facto* civil-servant status that is not protected by provision of the traditional conditions of service that other civil servants enjoy, particularly in the occupational health and safety aspects in stressful and dangerous environments.

The remaining veil of the privacy and autonomy of the Doctor-Patient relationship preserves and sheets home still the ultimate liability of the Health Practitioner for undesired outcomes of episodes of Health Care.

Stress related problems in Practitioners have increased in parallel with the nationalization of the service and increasing accountability, which in many cases, take little cognizance of root cause analysis of adverse events.

Anxiety levels in Registrants are now universally high because of the two-edged sword of private litigations and accountability to Courts and public accountability to Regulators and Tribunals.

Present Problems

In 2002 the Commonwealth Government introduced major changes to Medical Indemnity insurance, amongst other changes, Indemnity Insurance became compulsory- and at the last minute before implementation of the Act, “tail cover “for up to 21 years after retirement was to be provided by the Federal Government.

Mutual indemnity insurers all vacated the field. New privately owned firms sprung up vying for business to exploit the vacuum the changes created.

The new firms promised to defend the insured, just as before but the intervening years show this is not always the case. Token defenses are commonplace with insurers only prepared to do the minimum.

For example, reliance on negotiated settlements involving acknowledgement of wrongdoing by the insured as almost universal.

Few independent investigations ever take place so that errors in the facts and circumstances alleged are difficult to challenge or correct. Successful but unmeritorious cases have devastating impact on Health Practitioners future employment World Wide.

In the 16 years since then a trend has developed in the blowback of the new era to not hold the complainant or Regulator(s) to account thus spurious unmeritorious and excessive civil claims succeed.

There are many examples of insured practitioners being dissatisfied and frustrated with unmeritorious outcomes. The unfair impact on their publicly published record, their future ability to practice their professions and economic consequences and viabilities such impediments or caveats create permanent impediments of going forward,

Such changes have spawned an increasingly intrusive Medical Litigation Industry from the top down, there are many vested interests in maintaining the current model which, from disaffected practitioners' viewpoint is a disaster.

With the corresponding concurrent increase in Regulation and the intervention of the Regulator there is an increased need for competent legal representation – but somehow the he necessary diligence and competence of those appointed to act to defend Registrants and Practitioners has not followed the same trajectory.

Wrong prosecutions and wrong outcomes have been encouraged by the Regulator and use of the State Civil Tribunals where rules of evidence, natural justice and due process are not always followed resulting in an increase in questionable adverse determinations on Registrants-and corresponding sometimes fatal psychological effects.

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Much of this could be prevented by diligent defence measures. Such comes at a cost that the current indemnity insurers are reluctant to fund. Thus, Regulators and Civil litigants buoyed by this knowledge and the growth of Plaintiff Lawyer firms and sometimes no win-no fee situations. The sensationalized press and social media have dominated if not dictated the outcomes.

Medical Indemnity providers no longer operating on a mutual system take short term and short-sighted views of cases on an individual case by case basis rather than on forward broader implications on the whole profession and rarely challenge complaints in Courts or Tribunals- and when the rare occasions they do take a half-baked, limited efforts to protect the broader effects and implications to the profession.

All this contributes to stress levels, in Registrants, which run routinely high, and promote defensive medicine, which is wasteful in time, resources and costs - not the least of which are the ever-rising insurance premiums.

A standard response seems to have now developed from the involvement of Indemnity Providers and their surrogate Legal Firms appointed – since it is the Registrants obligation to inform and involve their Indemnity Provider in the slightest sign of an actual or potential dispute or complaint.

The fallback position or response of Indemnity Providers is not to challenges an assertion of wrongdoing but to negotiate an outcome from the start. Such avoids the cost and time of investigation to establish the correct facts and circumstances for their client. It involves a *mea culpa* admission of fault, usually extracted from the Registrant under threats of cancellation of their policy. Regardless, there are resultant increased premiums and the permanent embedding of fault be it right or wrong in records available to the public and other Regulators World Wide.

Whilst this suits the bottom-line of the Insurer and the legal firms involved- such an approach does nothing for true accountability, honesty or integrity, let alone the dignity and reputation of the individual or profession as a whole.

Registrants are threatened with cancellation of their indemnity cover if they refuse to follow this preferred pattern. Premiums inevitably rise, even if the insured is not guilty of the complaint, and the complaint is embedded in the public record permanently.

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The devastating potential and real effect on the Insured are apparently not as consideration to the shareholders and executives of three public companies providing the Indemnity Insurance.

Such plays into the hands of Regulators as well as un-scrupulous lawyers and, litigants.

Recommendations

1. All Medical Indemnity Insurance Organizations need to be Mutual Associations – as has traditionally shown to be effective. Profit-based companies looking after their shareholder interests are not the preferred models

2. All current Indemnity Companies need to devolve their shares and thus ownership to the Members. (I.e. Insured)

3. Powers of the Regulator(s) need to be supervised by the Courts – and not Tribunals - preferably the Federal Court, which must supervise the imposition of restrictions and sanctions on a Registrant.

4. Federal and State Regulators should be supervised by control at Supreme/Federal Court level.

5. All tail-cover claims need to be examined for the reasons the Registrant has retired – particularly if this seems premature.

6. Occupational Health and Safety legislation, rules, provisions and insurance are needed for ALL Health Registrants linked to Medicare reimbursements they are being *de-facto* Government employees.

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