Our Ref: SSC:LGD:1194933

25 February 2025

Private & Confidential

Mr Stuart Jacobs
Principal Solicitor
Special Commission of Inquiry into Healthcare Funding

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Dear Mr Jacobs

Special Commission of Inquiry into Healthcare Funding
The Australian Medical Association (NSW) Limited (AMA (NSW))

1. We refer to your letter of 19 February 2025 regarding the Inquiry's final hearings scheduled for 26 to 28 February 2025 in which you invited AMA (NSW) to consider whether it wishes to seek leave to appear at these final hearings and if so, requested that AMA (NSW) indicate the topics it wished to address at the final hearings.

2. We also refer to our application for leave to appear on behalf of AMA (NSW) at the Inquiry's final hearings dated 21 February 2025 (**Application**).

3. As outlined in the Application we are instructed that if AMA (NSW) does make any closing oral submissions it will be limited to matters in reply to the written and oral submissions of NSW Health (**NSW Health Submissions**). To, hopefully, assist the Commission a large extent the position of AMA (NSW) in response to the NSW Health Submissions is summarised below. Consequently, it may not be necessary for AMA (NSW) to provide oral closing submissions, however AMA (NSW) remains happy to do so should it be of assistance to the Commissioner.

NSW Health Submissions

4. We are instructed as follows.

5. AMA (NSW) has carefully considered the NSW Health Submissions and confirms that its position remains as has been outlined in its prior written submissions of 31 October 2023, 14 June 2024 and, , its closing written submissions of 7 February 2025, and the evidence provided to the Inquiry.

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6. Specifically, AMA (NSW) wishes to address the following aspects of the NSW Health Submissions as they relate to the recommendations made by Counsel Assisting in their submissions of 20 December 2024.

Counsel Assisting's Recommendation 17 - Award Reform ([10.41] to [10.52] of the NSW Health Submissions)

7. AMA (NSW) remains supportive of Award and Determination reform for all medical practitioners employed or engaged in the NSW public hospital system. This was outlined in AMA (NSW)'s submission of 7 February 2025 and addressed in the evidence given by Ms Dominique Egan, Director of Workplace Relations, on 5 August 2024 and during the concurrent evidence given by her together with other members of a panel on 17 October 2024.

8. As has been previously submitted and discussed in evidence, since as early as February 2024, AMA (NSW) made repeated representations to the Ministry of Health, the New South Wales Minister for Health and New South Wales Minister for Industrial Relations for legislative amendments to be made to the *Industrial Relations Act 1996* (NSW), the *Health Services Act 1997* (NSW) and associated regulations to provide for the appointment of an arbitrator from the Industrial Relations Commission, upon the re-establishment of the Industrial Court.

9. Following the introduction of a Private Members Bill in November 2024, the Government moved to amend the *Health Services Regulation 2018* to allow for the appointment of an arbitrator and undertook to make further amendments to the legislation in 2025.

10. AMA (NSW) sought appointment of an arbitrator on 13 December 2024 but is yet to receive a response to the request and was advised in February that an arbitrator cannot be appointed until amendments are made to the *Industrial Relations Act 1996* (NSW) and the *Health Services Act 1997* (NSW). This is contrary to what has been suggested at [10.44] of the NSW Health Submissions and reinforces the need for Counsel Assisting's recommendation 17(c).

11. We **enclose** a copy of letter from AMA (NSW) to the Ministers for Industrial Relations and Health dated 24 February 2025 which addresses the ongoing delays and, in turn, the making and hearing of the application for necessary reforms to VMO Determinations.

12. Whilst AMA (NSW) is not the representative body for employed medical staff in the public hospital system it remains supportive of the need for significant and urgent reform to their industrial instruments as is proposed in Counsel Assisting's Recommendation 17.

Counsel Assisting's Recommendation 18 - Model By-Laws & Concord Hospital Case Study ([10.53] to [10.62] and [10.102] to [10.107] of the NSW Health Submissions)

13. AMA (NSW) remains supportive of a comprehensive review of the model by-laws for local health districts and specialty health networks with a view to clearly identifying the role and functions of each council and committee established by them and ensuring the matters raised in Counsel Assisting's Recommendation 18 are addressed.

14. The thrust of the NSW Health Submissions on this issue appear to be focused on opposing the recommendation for there to be an invitation for the chairs of all councils created by the Model By-Laws to attend board meetings.

15. AMA (NSW)'s position remains that a representative body such as the Medical Staff Council can provide a means by which medical staff can raise a variety of issues and engage meaningfully with local health district's boards and management relating to the delivery of medical services and the day to day arrangements in the hospital. It would be appropriate that there be a mechanism by which, in turn, a representative of a Medical Staff Council can raise these issues with the board of a local health district without the need for an invitation from the Board to do so.

16. AMA (NSW) does not believe that review of the model by-laws should be restricted to attendance at Board meetings and maintains that any such review should be comprehensive. In particular, as AMA (NSW) has submitted previously, such a review should consider ensuring Medical Staff Council meetings provide a safe forum for medical practitioners to come together to discuss issues without fear of reprisal, and a process by which relevant persons may be permitted speak on behalf of their Medical Staff Council, including the media, without fear of reprisal.

Counsel Assisting's Recommendation 19 - Workplace Complaints & Grievances ([10.63] to [10.77] of the NSW Health Submissions)

17. AMA (NSW) maintains its support for a review of the processes dealing with workplace complaints and grievances including but not necessarily confined to the matters set out in Counsel Assisting's submissions and the resulting recommendation 19.

18. AMA (NSW) does not agree with the "potential challenges" outlined at [10.74] to [10.77] of the NSW Health Submissions. AMA(NSW) does not understand Counsel Assisting to have limited its recommendation to an external review by a person. AMA(NSW) encourages consideration of all options, including a right of review to a tribunal or panel (this could be to an existing tribunal for example, the Industrial Relations Commission) with defined grounds of review. AMA (NSW) has difficulty reconciling the position adopted at [10.75] and [10.76] of the NSW Health Submissions, wherein it is suggested that an external review may not ensure impartiality or independence but then goes on to suggest that an internal review may be appropriate.

19. As AMA (NSW) has outlined in its closing written submissions, its specific written submissions on this issue dated 14 June 2024 (copy **enclosed** for ease of reference) and in the oral evidence that has been provided by Ms Egan on 5 August 2024, it is a common experience amongst medical practitioners that the relevant policies that apply to investigations conducted by local health districts in relation to complaints or concerns are not complied with or are applied in different ways by different local health districts. AMA (NSW) remains particularly concerned about the impact upon medical practitioners from the manner in which these policies are applied and administered by local health districts.

20. It appears that NSW Health may have conflated the concept of review of decisions that might be said to be "final" such as decision to suspend or terminate a medical practitioner's employment or appointment along with decisions that might be taken

during the course of an investigation that impact implementation of a policy or procedure, such as:

(a) undue delay in conducting an investigation;

(b) a failure to apply the correct policy;

(c) a denial of procedural fairness during an investigation; or

(d) a "final" decision other than suspension or termination of employment or an appointment.

21. A mechanism wherein there is a right of internal review available to medical practitioners in such situations will, in AMA (NSW)'s view, not address this ongoing issue. AMA (NSW) maintains that there should be the establishment of a mechanism for all staff (including VMOs) to seek a review of workplace actions or decisions which is external to the local organisation and that this should be the same for all medical practitioners regardless of their role or manner of engagement.

22. AMA (NSW) also maintains its reservations regarding any right of review of workplace actions or decisions being managed through the Committee of Review process available for VMOs under the *Health Services Act 1997* (NSW) for the reasons outlined in its closing written submissions, and it would more likely than not require legislative amendment. If it would be of assistance to the Commissioner, AMA (NSW) would be prepared to expand on its submissions in this regard and why it is of the view that the Committee of Review process is not the appropriate means to manage external reviews of workplace actions or decisions.

23. Consistent with AMA (NSW)'s position on this issue and the need for a right of external review, there should also be a central contact within the Ministry of Health for local organisations to seek advice about investigating and managing workplace complaints and grievances in order to promote greater compliance with the relevant policies.

24. Reference is made in the NSW Health Submissions at [10.69] to [10.72] of the Addressing Grievances and Concerns Portals however AMA (NSW) is not aware of any evidence about the effectiveness of these Portals including whether this has resulted in an improved knowledge and understanding on the part of staff, contractors and administration of the policies and procedures in place, and / or whether it has led to greater compliance with the relevant policies.

Counsel Assisting's Recommendation 20 - Collection and Collation of Data on Workforce Wellbeing ([10.96] to [10.100] of the NSW Health Submissions).

25. AMA (NSW) reiterates that consideration ought to be given to the regular collection and collation of data regarding wellbeing of the workforce and most importantly that steps be taken to address the evidence collected and collated.

26. Further, it submits that there is a need for the sharing of relevant workforce data with key stakeholders, including AMA (NSW).

27. Whilst NSW Health does share some information with AMA (NSW), as outlined at [10.98] of the NSW Health Submissions, AMA (NSW) has experienced issues in obtaining relevant information and workforce data from NSW Health. This was addressed in the oral evidence of Ms Egan given on 5 August 2024 (TS:4608:25) and in her statement of 25 July 2024 at [18] in relation to a request made of NSW Health by AMA (NSW) in 2023 for confirmation of the number of VMOs working in the New South Wales Health system. This data had not been provided at the time Ms Egan provided her statement and gave her oral evidence.

28. AMA (NSW) does not agree with the concerns expressed at [10.97] of the NSW Health Submissions that workforce data may be misinterpreted, misrepresented or misused by stakeholders as being a legitimate basis upon which to decline to provide such data or to delay its provision. This is especially so in circumstances such as those outlined above wherein a registered industrial body is seeking data relating to the workforce whose interests it represents.

29. AMA (NSW) is of the view that any concern held by NSW Health in this regard, including the suggestion that it could it could led to the public unjustifiably losing confidence in the NSW Health system, could be addressed by NSW Health responding to and clarifying any misinterpretation, misrepresentation or misuse if and when it arises and that this is not a legitimate basis upon which to withhold such data. Further and contrary to what NSW Health has submitted, transparency regarding the status of NSW Health and its workforce improves public confidence in the NSW Health system, particularly when that data is provided to relevant stakeholders whose purpose is to advocate for the improvement of the public health system in NSW.

Please contact us should you wish to discuss the above further.

Yours sincerely

Scott Chapman

Scott Chapman
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HWL Ebsworth Lawyers

Luke Depares
Senior Associate
HWL Ebsworth Lawyers

AMA NEW SOUTH WALES

From the President's Office
Dr Kathryn Austin
BPharm BMed FRANZCOG CMFM GAICD

24 February 2025

The Hon. Ryan Park MP
Minister for Health
Minister for Regional Health
GPO Box 5341
SYDNEY NSW 2001

The Hon. Sophie Cotsis
Minister for Industrial Relations
GPO Box 5341
SYDNEY NSW 2001

***By email:** office@park.minister.nsw.gov.au / canterbury@parliament.nsw.gov.au*

Dear Ministers,

Visiting Medical Officer Arbitrations under the *Health Services Act* 1997

I refer to previous correspondence regarding Visiting Medical Officer (***VMO***) Arbitrations under the *Health Services Act* 1997.

AMA (NSW) commenced negotiations with the NSW Ministry of Health regarding the *Public Hospital (Visiting Medical Officers Fee-for-Service Contracts) Determination* 2014 in 2023. In 2024 those negotiations were extended to include the *Public Hospital (Visiting Medical Officers Sessional Contracts) Determination* 2014.

As you are both aware, AMA (NSW) first raised with Ministry of Health in February 2024 the anomaly that the then *Industrial Relations Bill* 2024 proposed amendments to the *Health Services Act* 1997 which reinstated the role of the Industrial Court in matters of interpretation of the VMO Determination but did not amend the provisions relating to the persons eligible to be appointed as an arbitrator to determine the terms and conditions under which VMOs are engaged in the public hospital system.

On 6 May 2024 AMA (NSW) wrote to each of you. Minister Cotsis replied advising the matter was under active consideration on 27 June 2024.

On 29 August 2024, AMA (NSW) wrote to Deputy Secretary Phil Minns, a copy of which was sent to each of you.

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AMA NEW SOUTH WALES

Ms Egan of AMA (NSW) gave evidence at the Special Commission of Inquiry into Healthcare Funding on 5 August 2024. Her evidence included that AMA (NSW) was then preparing for arbitration[1]. She also participated in a panel at the on 17 October 2024, at which time the need for amendment to the legislation was discussed and NSW Health gave evidence of its support for the amendments[2]. As you would both be aware, a recommendation of Counsel Assisting the Inquiry is that the legislation be amended to ensure VMOs have access to the industrial relations system for reform of the VMO arrangements[3].

On 29 October 2024 AMA (NSW) wrote again to Minister Cotsis.

In November 2024 the Hon. Joe McGirr introduced a Private Members Bills into New South Wales Legislative Council seeking amendments to the *Health Services Act* 1997 (NSW) and the *Health Services Regulation* 2018 (NSW). In response to same, the Government indicated it would amend the *Health Services Regulation* and amendments to the *Industrial Relations Act* 1996 (NSW) and *Health Services Act* 1997 (NSW) could be made in 2025. Representations were made to AMA (NSW) Chief Executive Officer, Fiona Davies, that for an arbitrator to be appointed, the amendment to the *Health Services Regulation* was sufficient. While there was some healthy scepticism as to whether this was able to be done, AMA (NSW) accepted those representations from Minister Cotsis' office.

The amendment to the *Health Services Regulation* was made on 13 December 2024, and AMA (NSW)'s legal representatives wrote to the Minister seeking the appointment of an arbitrator the same day (a copy of the correspondence was sent to your respective offices). No response has been received to date.

AMA (NSW) has now been advised that an arbitrator cannot be appointed until amendments are made to the *Industrial Relations Act* and the *Health Services Act*. As is transpires, the scepticism regarding the advice provided regarding the amendment of the Regulation was well placed.

For over a year, AMA (NSW) has been advocating for amendments to permit an experienced industrial relations Judge to be appointed to as arbitrator and for the efficient and timely prosecution of the case for modernisation of the VMO Determinations.

While AMA (NSW) welcomed the Minns Government's acknowledgement in November 2024 of the 'vital contribution' of VMOs in the public hospital system and the need to recognise and protect VMOs by returning the arbitration of VMO terms and conditions to a member of the Industrial Court, the reality this is yet to occur.

The ongoing delays of the Minns Government to amend the legislation to allow VMOs to prosecute their case for reform is very disappointing. VMOs have been, and continue to be, prejudiced by the ongoing delays of the Minns Government to ensure the appointment of an arbitrator from the Industrial Court and the efficient and timely prosecution of the case for modernisation of terms and conditions.

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[1] Transcript of evidence 4604.9 – 16 (5 August 2024)

[2] Transcript of evidence 5900.2-30 (17 October 2024

[3] Outline of Submissions by Counsel Assisting, Special Commission of Inquiry into Healthcare Funding (at p246 para 765(c))

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AMA (NSW) has continued the negotiations with the Ministry of Health that commenced in 2023 and remains committed to reaching agreement where possible to ensure arbitration proceedings can proceed efficiently and expeditiously. In addition to seek to engage constructively in negotiations, AMA (NSW) has made repeated and reasonable requests for legislative amendment to ensure an arbitrator is appointed from the Industrial Court with the requisite expertise and experience to make determinations in the best interests of VMOs and the patients of New South Wales.

Despite the constructive way AMA (NSW) and VMOs have engaged, the Minns Government has failed to reciprocate.

AMA (NSW) will be tendering a copy of this correspondence, as well as earlier correspondence, at arbitration and will seek appropriate compensation for VMOs arising from the ongoing and extensive delays.

The patients of New South Wales deserve better.

Yours sincerely

Dr Kathryn Austin
President, AMA (NSW)

AMA NEW SOUTH WALES

Further to the request of the Commission, the Australian Medical Association (NSW) (***AMA(NSW)***) provides the following initial submission on complaints processes at NSW Public Hospitals.

Executive Summary

1. AMA(NSW) makes the following submission in relation to the management of concerns and complaints regarding medical practitioners in the NSW Public Hospital System (TOR F(vi)).

2. AMA(NSW) is not submitting that complaints and concerns regarding medical practitioners should not be investigated. AMA(NSW) does submit that complaints and concerns should be investigated expeditiously and in a procedurally fair manner.

3. There are several NSW Ministry of Health ('***Ministry***') policies that may apply to investigations regarding complaints or concerns raised regarding medical practitioners in the NSW Public Hospital System. Those policies include:

    - *Managing Complaints and Concerns about Clinicians* (PD 2018_032)[1]
    - *Managing Misconduct* (PD2018_031)[2]
    - *Resolving Workplace Grievances* (PD2016_046)[3]
    - *Prevention and Management of Bullying in NSW Health* (PD2021_030)[4]
    - *Prevention and Management of Unacceptable Workplace Behaviours in NSW Health – JMO Module* (PD2020_031)[5]

4. The Policies set out the process for dealing with a complaint or concern including how investigations are to be conducted. It is a common experience amongst medical practitioners that these policies are not complied with or are applied in different ways by different Local Health Districts (***LHDs***). There are variances between LHDs, and between Hospitals within the one LHD, as to how these policies are interpreted and applied.

5. AMA(NSW) is particularly concerned about the impact upon medical practitioners resulting from the way the policies are applied and administered at the LHD and Hospital level.

6. There is very little if any consideration given by LHDs, Hospitals and / or investigators about the impact of allegations and investigations on medical practitioners.

7. The failure to expeditiously investigate complaints or claims has a detrimental effect on the mental (and often physical) health of medical practitioners. It also has a detrimental impact

[1] https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2018_032.pdf
[2] https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2018_031.pdf
[3] https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2016_046.pdf
[4] https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2021_030.pdf
[5] https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2021_031.pdf

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on the delivery of medical services to patients, with medical practitioners taken out of the system (wholly or in part) for lengthy periods of time.

Delay

8. There is often a significant time delay between advising a medical practitioner that a complaint or allegation has been made and advising the medical practitioner of the particulars of the complaint or allegation and undertaking an investigation.

9.

10.

11.

Risk Assessment

12. These delays in the provision of information to the medical practitioner are difficult to understand when LHDs and Hospitals frequently appear to have sufficient information available to them to complete a risk assessment which not infrequently results in the suspension or standing down of the medical practitioner.

13. In many cases there seems to be a 'suspend now, ask questions later' approach taken by Hospitals/LHDs. There is no formal (or informal) show cause process as a part of the risk assessment. The medical practitioner is usually first made aware that a risk assessment has been undertaken after the event at the time the medical practitioner is informed of the action to be taken in relation to their position pending a formal investigation.

14. Rarely is any meaningful information provided to the medical practitioner regarding the risk assessment including the rationale for the decision made. This is concerning given often the decision made may have serious implications for the medical practitioner both from a

reputational perspective and a financial perspective (particularly for VMOs who are not paid during periods when they are stood down or suspended).

Decisions to Stand Down or Suspend - consequences

15. A decision to suspend or vary or withdraw clinical privileges triggers reporting obligations for the medical practitioner under the *Health Practitioner Regulation National Law* 2009 (NSW).[6] Often, as a consequence of the notification the Medical Council of NSW may review a matter, convene a section 150 hearing and determine either that no action is required or that action is required (in the latter case, then referring the matter to the Health Care Complaints Commission for a considered investigation). During this time (often a few months) the LHD fails to progress its investigation of the matter.

16. AMA(NSW) is aware of several cases where the regulator has determined there is no need for any action to be taken at the section 150 hearing, and yet the LHD declines to reconsider its risk assessment pursuant to which the medical practitioner has been suspended or had their privileges restricted. While a LHD must make its own determinations, such refusals to reconsider action and / or provide reasons for same is difficult to understand.

17. Delays in commencing and / or progressing investigations means that some medical practitioners are not providing services for over 12 months (and sometimes longer) before the investigation is concluded, which means patients cannot access care in a timely manner and at the same time, medical practitioners risk de-skilling because they cannot practise.

18. Under the *Managing Complaints and Concerns About Clinicians Policy*, investigations are to be completed within 12 weeks and if further time is required then all key parties should be notified. Investigations are rarely completed within this timeframe, and the medical practitioner is not kept informed of when or how the matter will progress. In answer to the Commission's request for data regarding the time taken to complete investigations, AMA(NSW) has written to the Medical Defence Organisations requesting the data.

19. Medical practitioners are often called to a meeting with little or no notice. A medical practitioner being called to a meeting (no notice of the matter to be discussed is provided) late in the day to be told they are suspended with immediate effect, they are not to return to the hospital until further notice, and are not to discuss the matter with anyone, are not uncommon. While there are a small number of cases where this may be indicated and appropriate, in many cases this is not.

20. A meeting where a medical practitioner is told they are the subject of a complaint or allegation is very distressing, let alone a meeting where they are told they are being suspended. AMA(NSW) is aware of several medical practitioners who asked, when called to

[6] Section 130, Health Practitioner Regulation National Law 2009

a meeting, whether they should bring a support person, only to be told that is not necessary or could not be accommodated if it would result in a delay in the holding of the meeting.

21. The failure of LHDs and Hospitals to acknowledge the distress and accommodate the arrangements for necessary supports is of grave concern. Providing the contact details for an EAP after delivering the news is not a substitute for a support person.

Direct impact on service delivery

22. The failure to prosecute matters efficiently and expeditiously also has a direct impact on service delivery. Medical practitioners can be suspended or stood down for one to two years while an investigation is undertaken. This has a direct consequence on patient access to care, and also can result in a potential de-skilling of the medical practitioner, particularly those with sub-specialist qualifications who may only perform certain procedures in the public system.

23. In some cases, following the completion of the risk assessment, a preliminary investigation is undertaken to determine the allegations to then be investigated in a substantive investigation. This two-stage process is often unnecessary and only adds to the time, cost and stress for all involved.

Correspondence

24. The correspondence that is sent to medical practitioners notifying that a complaint or concern has been made, or during the investigation often only further exacerbate the stress for the medical practitioner. While there are good reasons for all involved in a complaints process to ensure confidentiality, the way this is spelt out in correspondence to medical practitioners is often construed by the reader to amount to a (further) threat. Statements to the effect that you must not discuss this with anyone and if you do you may be subject to disciplinary action, make medical practitioners feel isolated, vulnerable and stress. Greater thought and consideration should be given to the terms (and manner) in which these messages are delivered.

Investigators / Lack of medical input

25. The independence and / or qualifications of the investigators is often a cause of concern. While appreciating the costs involved, in circumstances where the outcome of an investigation may have serious consequences for the medical practitioner concerned, independence and expertise are important.

26. Often when medical practitioners are interviewed about a clinical incident there is no independent peer medical practitioner present, and the medical practitioner is questioned by one or more investigators who lack the technical knowledge to meaningful interrogate the matter. Not only can this add to the time involved, but also has a bearing on the medical practitioner's sense of fairness and can make them feel unappreciated.

Costs

27. In addition to the human costs of lengthy investigation processes, there are also financial costs as medical practitioners will notify their medical indemnity insurer who will often instruct lawyers to represent the medical practitioner. Most policies are limited, and so the longer an investigation goes on, the more likely that the medical practitioner will have to personally pay legal fees. Further, there increasing evidence that notifications not only of medical negligence claims, but also workplace investigations is having a direct bearing on the rising costs of medical indemnity premiums.

Ministry Review of Policies

28. The NSW Ministry of Health is undertaking reviews of the policies and approach to the management of complaints.

29.

30. AMA(NSW) recognises that it is not possible for all hospitals, or even all LHDs, to have staff with expertise in complaints management and investigations. AMA(NSW) would like to see:

    a. The establishment of a Complaints Management Hub at the Ministry of Health to provide support and oversight of LHD/Hospital processes, including identifying the applicable policy or policies and monitoring performance against defined timeframes;

    b. The involvement of medical practitioners in the investigation of clinical matters, and where appropriate, the investigation of other matters;

c. Recognition of the impact of allegations and investigations on medical practitioners, and ensuring measures are taken to ensure medical practitioners can access the support they require.

Dated: 14 June 2024

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Fiona Davies
Chief Executive Officer
AMA(NSW) Limited