

MIGA Ref: CSM:TJB

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Dear Sirs

Re: MIGA preliminary submissions to the review of the *Guardianship Act 1987* (NSW)

MIGA is grateful for the opportunity to provide preliminary submissions to the Commission's review of the *Guardianship Act 1987* (NSW) (**the Review**).

Background - MIGA

MIGA is a specialist insurer offering a range of medical indemnity insurance products and associated services to the healthcare profession across Australia.

We insure medical practitioners, health care companies, privately practising midwives and medical students.

Our members and policy holders include significant numbers of health professionals who are regularly dealing with guardianship and other issues of decision-making capacity.

Our lawyers are often called on by those professionals to give advice on such issues.

Through its risk education program MIGA works with its members and policy holders to provide presentations and resources which address issues of guardianship, advanced care directives, other decision-making issues and consent to treatment more generally.

We provide advice and education to our members and policy holders, not just in New South Wales, but across Australia, and appreciate the differing legal requirements and practices in various states and territories.

Focus of MIGA's submissions

MIGA understands the call for preliminary submissions by the Commission is a request to identify any broad issues thought to be relevant to the Review's terms of reference, and that detailed comments are unnecessary at this stage.

We are conscious that the issues involved are complex and that there is significant work to be done by the Commission.

In those circumstances, MIGA foresees that it may have more to contribute once the Commission has identified any options and preferences for reform or other changes.

Given our role in the health industry, MIGA's interest and those of its members and policy holders focus on:

- (a) understanding guardianship regimes and the various obligations they impose on health professionals; and
- (b) ensuring those obligations are clear, workable and consistent with legal and ethical obligations health professionals have more generally.

Accordingly, MIGA's interest and preliminary submissions focus on Part 5 of the *Guardianship Act 1987* (NSW) (**the Act**) relating to medical treatment and any related issues, ie powers of a guardian (such as scope of any 'health care' power granted under Section 21 of the Act).

In terms of broad issues for consideration by the Commission and the Review, MIGA proposes the following.

A. Clarification of guardianship powers relating to withdrawal or refusal of life-sustaining treatment

There is uncertainty about whether decisions relating to withdrawal or refusal of life-sustaining treatment can be made either:

- (a) under a 'health care' decision-making power granted by a guardianship order; and
- (b) by a 'person responsible' under Part 5 of the Act.

In particular, is what is contemplated to be 'health care' under a guardianship power the same thing as what is contemplated as 'medical treatment' under Part 5 of the Act? Can both a guardian with a 'health care' decision-making power and a 'person responsible' make a decision about withdrawal or refusal of life-sustaining treatment?

If there is doubt about the ability to make such decisions, does the scope to withdraw or refuse life-sustaining treatment need to be specified as part of a 'health care' decision-making power in a guardianship order? Can 'medical treatment' under Part 5 of the Act include these steps without them being explicitly referred to in the Act?

A number of decisions, particularly *WK v Public Guardian* [2006] ADT 93 and 121, and *FI v Public Guardian* [2008] NSWADT 263, have attempted to deal with these uncertainties.

There were differences of opinion between the Tribunals in those matters over whether:

- (a) a guardian invested with authority to make 'health care' decisions had the power to consent to withdrawal of life-sustaining treatment; and
- (b) specific reference to such a power in a guardianship order may create confusion as to whether withdrawal of life-sustaining treatment is part of a power to make 'health care' decisions under a guardianship order, or is 'medical treatment' under Part 5 of the Act.

The position of the law following *FI* appears to be that:

- (a) a Tribunal, in considering whether to make a guardianship order, is able to provide an explicit power to consent to withdrawal of life-sustaining treatment, as seen for instance in *QAN* [2008] NSWGT 19 where a guardian was provided an 'end of life health care function'; and
- (b) 'medical treatment' under Part 5 of the Act does not include withdrawal or refusal of life-sustaining treatment.

Whether this position reflects the objectives and general principles of the Act may be open to question. It may pose considerable practical problems for families and health professionals, particularly in interpreting the legislation, if there is no guardianship order in place, or where there is no explicit mention of withdrawal or refusal of life-sustaining treatment under a 'health care' power in a guardianship order.

MIGA respectfully suggests that the Review give consideration to these issues, particularly the need for clarification in what constitutes 'health care' and 'medical treatment' under the Act.

B. Advanced Care Directives

Increasingly, health professionals are encountering advanced care directives previously made by competent patients who now lack capacity to make decisions about future care and treatment.

Although New South Wales does not have specific legislative requirements relating to advanced care directives, they are clearly recognised under common law in this State.

In those circumstances, MIGA respectfully suggests the Review give consideration to the utility in making explicit reference to the relevance of any advanced care directives as part of making decisions about guardianship orders or consent to treatment, particularly under Sections 14, 21, 37, 40, 45 and 46 of the Act.

C. Treatment Without Consent

Pursuant to Section 37 of the Act, treatment can be given by a medical practitioner without consent if they consider it necessary, as a matter of urgency, to save a patient's life, to prevent serious damage to their health or, unless 'special treatment', to prevent significant pain or distress.

Although the Act places emphasis on the decision-making by and views of a person in question (particularly Section 4 of the Act), it is arguable that Section 37 of the Act could be read in a way to permit 'major treatment' in an emergency situation if it is known that the patient objects, or where their family members and loved ones express well-founded concerns about providing treatment.

Notably, the importance of not proceeding over a patient's objection is referred to in Section 37, but only in relation to the provision of 'minor treatment'.

We appreciate that the provision is directed to situations where a patient lacks capacity, and most likely where health professionals are left in situations of uncertainty, ie where there is no person able to make a decision about what to do, or no indication of what the patient would want. However, this is unclear.

The provision does not account for previously expressed wishes by a patient, or where there is a 'person responsible' who refuses treatment. This may cause considerable difficulties for the health professionals involved.

It is also open to question whether this provision is consistent with practice throughout this country where considerable emphasis is placed on the wishes and input of a patient's family members and other loved ones where a patient lacks capacity to consent.

MIGA respectfully proposes that the Review give consideration to whether Section 37 of the Act is consistent with other legal and ethical obligations in relation to treatment in an emergency situation and health care practice generally, and if further clarification is required.

D. Documentation of Treatment Consents

Under Section 40 of the Act and regulations 13 and 14 of the *Guardianship Regulation 2010* (NSW) (**the Regulation**), various requirements are set out for information to be provided to a 'person responsible' as part of obtaining consent, and what is to be in writing.

Although the requirements for obtaining consent set out under Section 40 of the Act arguably represent matters required to be disclosed to any patient on who any treatment is proposed, we have reservations about:

- (a) the requirement under the Regulation for requests to be made in writing, particularly where we consider this may be unnecessary and impractical in many situations, such as in a hospital where contemporaneous records are kept; and
- (b) where a failure to comply with such provisions would arguably be an offence under the Act, with significant penalties which go beyond those which a health professional may face for failing to comply with similar requirements under the *Health Practitioner Regulation National Law* (NSW), or more generally.

MIGA respectfully requests that consideration be given by the Review to these issues, and whether the current provisions remain necessary and appropriate.

Understanding of guardianship requirements

From our experience in advising and educating members and policy holders on these issues, we are concerned that the requirements of the Act are not widely understood.

Following the Review, we foresee the need to provide further information to health professionals about the Act's requirements, and what they mean for them.

MIGA would welcome being part of this process, both in consulting with the Commissioner, NSW governmental agencies and other stakeholders about educational material, and promoting this material to the health profession more generally.

We hope that our preliminary comments have been of assistance.

We would be grateful for the opportunity to contribute further to the Review in due course, particularly once there are preliminary views reached or options identified on matters which affect the provision of health care in New South Wales.

If you have any questions about our submission or wish to discuss further, please contact Timothy Bowen, Senior Solicitor – Advocacy, Claims and Education at [REDACTED], tel: [REDACTED]

Yours sincerely



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