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9 February 2018

NSW Law Reform Commission

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

Dear Colleagues

MIGA Submission – Review of the *Guardianship Act 1987* – Draft Proposals

MIGA appreciates the opportunity to make a further response to Commission's Review of the *Guardianship Act 1987*, this time focusing on the Commission's draft proposals for legislative reform.

A copy of its Submission is enclosed.

You can contact Timothy Bowen, [redacted] if you have any questions about MIGA's Submission.

Yours sincerely

[redacted]

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MIGA Submission

NSW Law Reform Commission

Review of the *Guardianship Act 1987*
Draft Proposals

February 2018

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9 February 2018

NSW Law Reform Commission

Review of the *Guardianship Act 1987* – Draft Proposals

Executive Summary – MIGA's position

1. MIGA is broadly supportive of the Commission's proposals for legislative reform in the healthcare context, subject to comments it has on certain issues.

2. In particular, it supports the proposed reforms around advance care directives and clarification of end of life decision-making powers.

3. It also provides a number of suggestions for clarification arising from discrete issues encountered in the healthcare context. These include ensuring appropriate protections for medical and other health practitioners, merits of a voluntary register of documents (including for advance care directives, agreements and orders) and the need for concerted efforts in educating the health professions and community before introducing the proposed reforms.

MIGA's interest

4. MIGA is a medical defence organisation and medical / professional indemnity insurer with a national footprint. It has represented the interests of the medical profession for 117 years and the broader healthcare profession for 15 years. It has in excess of 31,000 members and policy holders Australia wide including medical practitioners, medical students, privately practising midwives and healthcare organisations.

5. It has significant expertise and experience in providing advice and assistance to its members on medical treatment decision making, and in both educating the medical profession and advocating for the interests of its members in various consultations and inquiries about these issues.

MIGA's previous Submissions

4. MIGA's Submission should be read in conjunction with its previous Submissions to the Commission's Review dated 21 March 2016, 27 October 2016 and 25 May 2017, together with its position at the Commission's medical roundtable discussion on 8 August 2017.

Proposed new framework for NSW assisted decision-making laws

(a) Support for a new Act

5. MIGA supports the regimes for supported and substitute decision-making in healthcare consolidated into a new Act, using simple and clear language and addressing:
   - the regimes' objects and principles
   - principles to guide assessment of decision-making ability and decision-making
   - roles and responsibilities of decision-makers
   - arrangements, mechanisms and safeguards around assisted decision-making

(b) Restrictive practices

6. MIGA has some reservations about whether the broad definition of restrictive practices under National Disability Insurance Scheme legislation, including that under section 9 of the *National Disability Insurance Scheme Act 2013* (Cth), is appropriate for the healthcare context.

7. A definition of restrictive practices more tailored to the healthcare context is being considered in South Australia as part of a South Australian Health Department consultation on the draft Consent to Medical Treatment and Palliative Care (Restrictive Practices) Amendment Bill 2017, which MIGA has contributed to.

8. Consideration should be given to the merits of the proposed definition of restrictive practices in the draft South Australian Bill, both in the interests of national consistency and relevance for the healthcare context.

(c) Maintaining personal and social well-being

9. The duty to observe the general principle of maintaining a person's "*personal and social well-being*" requires clarification in the provision of healthcare.

10. There will be a broad range of views on what constitutes maintenance of personal and social well-being in a healthcare setting, adding to complexity in attempting to apply this principle.

11. This clarification could be accomplished through the provision of guidance to the healthcare professions and community.

(d) Determining a person's will and preferences

12. The criterion of practicality should be added to the existing criterion of possibility for matters to consider in giving effect to a person's will and preferences.

13. This additional criterion avoids issues around whether a certain form of healthcare should be provided where there are issues of whether it is reasonable and practical to do so, such as the provision of unnecessary and/or unsuitable treatments. These may be possible, but not practical.

(e) Support for decision-making ability / capacity proposals

14. MIGA supports the proposed definition of decision-making ability where it is based on the existing test for assessing decision-making capacity in healthcare under the common law and by reference to clinical judgement.

15. It also supports the statutory, rebuttable presumption that a person has decision-making ability / capacity.

(f) Assessing decision-making ability / capacity

16. The proposal that a decision-maker must take reasonable steps to conduct an assessment of decision-making ability potentially raises some uncertainty around who is to undertake the assessment.

17. In the provision of healthcare, assessment of decision-making ability / capacity would normally be undertaken by an appropriately qualified medical or other health practitioner.

18. This reality could be reflected by clarifying that reasonable steps must be taken to conduct or arrange assessment of decision-making ability by an appropriate person.

(g) Retaining Supreme Court jurisdiction

19. MIGA supports the new Act not limiting the Supreme Court's inherent jurisdiction, including its parens patriae jurisdiction.

Access to information

20. For the avoidance of doubt, it would be preferable for the functions of both a supporter and enduring representative to include access, collection and / or obtaining health information in addition to personal information.

21. Although the definition of health information arguably falls under that of personal information, they are different concepts under the *Privacy Act 1988* (Cth) and the *Health Records and Information Privacy Act 2002* (NSW).

22. It would be better to refer to both health and personal information being accessed. This would avoid any perceived limitation on the information which supporters or representatives can be privy to.

Personal support agreements

23. MIGA supports the introduction of a formal regime for supported decision-making in healthcare, including support agreements and Tribunal support orders, where these models reflect developing understandings in Australia.

24. It is imperative that medical and other health practitioners have a thorough understanding of the role of the support person, who they can be and what they both can and cannot do.

25. There are practical issues which the proposed model raises, and which need to be addressed, namely:
    - There may be misunderstandings around informal support arrangements which will continue to exist, in that some may mistakenly believe the obligations of a formal arrangement also apply to informal arrangements – given this, it would be preferable to recognise the existence of informal arrangements in the new Act
    - Given the prescribed requirements for personal support agreements and Tribunal support orders, consideration should be given to:
        - a voluntary register where such agreements could be made available for access by medical and other health practitioners (as indicated in previous Submissions, there are a range of issues to be worked through around how such a register would work in practice)
        - ability to upload these agreements and orders into My Health Record

26. MIGA has some concerns about the requirements as to form of a personal support agreement. This could potentially place obligations on medical or other health practitioners faced with such agreements to consider their validity. The proposed protections from liability of third parties, including health practitioners, acting in good faith and without knowledge an agreement is not valid, go some way to addressing those concerns. Those concerns would be addressed more fully if the protections from liability were extended to any civil, criminal, disciplinary or other liability under an administrative process, and preclude any discrimination or adverse action in the context of employment or other workplace arrangements.

27. It also supports both the Tribunal and Supreme Court having jurisdiction to review appointments and make consequential declarations or orders as appropriate.

28. Given this will be a new model for healthcare, it is important that there be a targeted and concerted education campaign for the medical and other health professions prior to introduction, including through a variety of face-to-face and online means and platforms.

Tribunal support orders

29. MIGA agrees it is appropriate to introduce a regime of Tribunal support orders to function as a 'last resort' to facilitate supportive decision-making.

30. Given each of:
    - Developing understandings about decision-making capacity in children and young people, namely those considered to be a 'mature minor' or *Gillick* competent
    - The reality that there may be children and young people whom their parents or other family members look to in supporting them in decision-making about healthcare

    it would be worthwhile considering giving the Tribunal jurisdiction to appoint a person under the age of 16 as a supporter if they are a 'mature minor' or *Gillick* competent.

31. MIGA repeats its earlier submissions around potential utility in voluntary registration of agreements which are accessible by medical and other health practitioners, protections for practitioners and the need for education prior to the introduction of the new regime.

Enduring representation agreements

32. The proposed enduring representation agreements will effectively replace current enduring guardianship arrangements in relation to the provision of healthcare.

33. MIGA supports the proposal that an advance care directive is valid notwithstanding that it is contained in an enduring representation agreement that has been suspended, revoked (unless revoked by the appointor) or has lapsed.

34. It would be helpful to clarify that a pre-existing, valid advance care directive has primacy over powers granted to an enduring representative.

35. MIGA repeats its earlier submissions in relation to potential scope for voluntary registration of enduring representation agreements, protections for medical and other health practitioners and education for the health professions prior to regime introduction.

Representation orders

36. MIGA supports the introduction of representation orders for healthcare, which effectively replace arrangements for guardianship.

37. It repeats its earlier submissions in relation to scope for a voluntary register of representation orders, protections for health practitioners and the need for education prior to regime introduction.

Healthcare decisions

38. In relation to the proposals for healthcare decisions, MIGA supports:
    - The regime for healthcare decisions applying to all registered health practitioners
    - The proposed definition of decision-making ability / capacity where it correlates with existing law and clinical judgment
    - The proposed regime for advance care directives, providing recognition of their application, preserving existing common law requirements and not imposing particular requirements as to form
    - For urgent healthcare:
        - the proposals around scope to provide urgent healthcare without consent
        - there being no requirement to search for an advance care directive not readily available in such circumstances, consistent with existing law and practice
    - For withholding or withdrawing life-sustaining measures:
        - both the Tribunal and a person responsible having scope to consent to these measures
        - explicitly extending scope for an enduring representatives or other representatives appointed with a healthcare function to consent to such measures, unless explicitly excluded in the appointment - this would address the situation where appointed guardians require specific 'end of life healthcare functions' to make such decisions
    - The proposed hierarchy for persons responsible, namely the first person who has decision-making ability and is reasonably available, and that the new public advocate can have a role in mediating disputes around the person responsible
    - Proposed protection for medical and other health practitioners administering / not administering healthcare in good faith and believing on reasonable grounds that the requirement of the new Act have been complied with. However:
        - the reference to "*without negligence*" is unnecessary, potentially confusing and should be removed
        - the test of reasonable belief of complying with the Act appropriately covers any issues relating to negligence
        - the protection should apply to any civil, criminal, disciplinary or other liability under an administrative process, and preclude any discrimination or adverse action in the context of employment or other workplace arrangements

39. MIGA is otherwise generally supportive of the proposed healthcare decision-making regime, but sees a number of further issues requiring clarification, including:
    - "*Healthcare*" definition - the purpose of "*caring for*" a physical or mental condition should be included in addition to the purposes of diagnosing, maintaining or treating such conditions, as this would encapsulate better the range of 'healthcare' provided
    - Use of the term "*strictly*" in the proposal that healthcare not be given if it would be "*strictly*" against a patient's will and preferences as expressed in advance care directive – this is potentially confusing and seems unnecessary

- Inconsistent terminology around medical practice, including:
  - "*standard medical practice"* in the context of not imposing any obligation to deliver life-sustaining treatment irrespective of what is set out in an advance care directive
  - "*good medical practice*" in the context of the scope for persons responsible or the Tribunal to consent to withholding or withdrawing life-sustaining measures

  These inconsistencies are potentially confusing and consistent phrasing should be used.

Restrictive practices

40. MIGA supports the proposals to closely monitor introduction of NDIS restrictive practices regimes before considering regulation in relation to restrictive practices in healthcare.

Advocacy and investigative functions

41. MIGA supports the introduction of a public advocate with advocacy and mediation functions in the context of healthcare, particularly in individual cases.

42. It also supports advice and assistance around decision-making, and mediation functions being carried out by the one entity.

43. MIGA has found the South Australian Office of the Public Advocate to be particularly helpful in providing dispute resolution services, information and advice in the context of healthcare.

44. As previously submitted, medical and other health practitioners should have:
    - Protections from civil, criminal, disciplinary or other liability under an administrative process, and against any discrimination or adverse action in the context of employment or other workplace arrangements, in relation to the exercise of the public representative's proposed investigation powers
    - Scope for reasonable excuse for declining or otherwise failing to provide information in response to the exercise of any investigatory powers, including around issues of self-incrimination and practicality

Provisions of general application

45. MIGA supports there being no requirement for registration of support agreements, support orders, enduring representation agreements or representation orders. As indicated previously there is merit in scope for voluntary registration, subject to working through the practical issues raised by such a system.

46. MIGA is concerned that the proposal to introduce an offence for a person to disclose information obtained in connection with the administration or execution of the new Act, unless it is in connection with the administration or execution of the Act, may be unduly restrictive for medical and other health practitioners. Information gained by practitioners in this context may be used appropriately for broader healthcare purposes. However, this could potentially be interpreted as not being in connection with the administration of the Act. As a solution, MIGA proposes that disclosure of information also be permitted for the purposes of fulfilling the statutory objects of the new Act.

Supreme Court

47. MIGA supports the proposed powers of the Supreme Court and the Tribunal, and primacy of the Supreme Court in interactions between those bodies.

Recognition of interstate appointments

48. MIGA supports:
    - Proposals for automatic recognition of other Australian enduring personal appointments for healthcare, and the scope to apply to the Tribunal to have orders made elsewhere recognised
    - The Tribunal having the power to review such appointments and orders
    - There being no compulsory register for appointments made in other jurisdictions, but there be scope for a voluntary register, subject to the issues of practicality raised above and previously