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27 October 2016

NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

Via email: nsw_lrc@agd.nsw.gov.au and post

Dear Colleagues

**MIGA submissions to the Review of the *Guardianship Act 1987* (NSW) – Question Paper 1 –
Preconditions for alternative decision-making arrangements**

MIGA welcomes the opportunity to provide further submissions to the Commission's review of the *Guardianship Act 1987* (NSW) (**the Review**), this time dealing with Question Paper 1 – Preconditions for alternative decision-making arrangements.

These submissions follow MIGA's preliminary submissions to the Review in March 2016. They are directed at the questions relevant to the interests of medical practitioners in managing patients who may be affected by the *Guardianship Act*.

Question 3.1: Elaboration of decision-making capacity

From a health care perspective, MIGA has significant reservations about unintended, detrimental effects which could arise with further legislative clarification of issues to consider when assessing decision-making capacity.

In New South Wales, the tests for medical practitioners in assessing decision-making capacity in health care are based on:

- common law, particularly as explored in cases such as *Hunter New England Area Health Service v A* [2009] NSWSC 761 and *Application of a Local Health District: Re a Patient Fay* [2016] NSWSC 624
- clinical judgment, explained further through the NSW Attorney-General's *Capacity Toolkit*

Taken together, these elements provide a logical and practical framework for assessing capacity.

From MIGA's experience in assisting medical practitioners who are assessing decision-making capacity, practitioners generally have a good understanding of the clinical judgment issues involved.

They may not be as aware of the other issues for consideration, particularly those arising under common law. This is a matter for better education and training of the profession.

The scope for wider dissemination of material along the lines of the *NSW Capacity Toolkit*, and the development of written and interactive resources for medical practitioners to consult if required when assessing capacity, should be looked at closely.

MIGA has significant reservations about providing further legislative clarification about what constitutes decision-making capacity in health care.

It is difficult for legislation to address the range of issues to consider when assessing capacity to make decisions about one's health. Issues such as:

- nature of condition
- gravity of decision involved
- potential consequences
- differences between consent to and refusal of treatment
- potential considerations of irrationality and reasonableness
- influences of others

can all be relevant to capacity. It would be challenging to reduce these wide-ranging elements, the comparative importance of which can vary from situation to situation, to a legislative test in a way which does not compromise or confuse assessment processes.

Even with legislative amendments further clarification, particularly through material similar to the *NSW Capacity Toolkit*, is still likely to be required.

If legislative amendments are proposed, MIGA would appreciate the opportunity to scrutinise any proposed amendments closely.

Question 3.4: Acknowledging variations in capacity

In the health care perspective, decision-making capacity can fluctuate over time.

In MIGA's experience, medical practitioners are generally conscious of the potential for fluctuating capacity, and re-assess capacity as circumstances develop or change. Any consideration of whether this should be reflected in legislation raises similar issues to those raised in Question 3.1.

Question 3.5: Should the definitions of decision-making capacity be consistent?

Definitions of decision-making capacity in health care must be based on all relevant considerations in that context. What is relevant can vary significantly from other decision-making fields, such as testamentary or financial management.

It may be possible to determine a set of shared criteria for assessing decision-making capacity in different contexts. However, these cannot unduly restrict assessment in any area such as health care and must provide mechanisms for issues unique to health care to be given sufficient weight.

Question 3.6: Statutory presumption of capacity

Where there is already a common law presumption of capacity in health care, MIGA supports a statutory presumption of capacity in this context.

MIGA looks forward to contributing further as appropriate to the Review, focusing on matters affecting 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 timothy.bowen@miga.com.au, tel: 1800 839 280.

Yours sincerely

A handwritten signature in blue ink that reads "Medical Insurance Group Australia".

Cheryl McDonald
National Manager – Claims and Legal Services

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Timothy Bowen
Senior Solicitor – Advocacy, Claims & Education

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