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Dear Colleagues

MIGA submission to the Australian Law Reform Commission Elder Abuse Issues Paper (IP 47)

MIGA welcomes the opportunity to provide a submission to the Commission's Elder Abuse Issues Paper (**the Issues Paper**).

Its submissions address certain issues in relation to health services and appointed decision-makers, particularly those arising at questions 30 (registration of decision-making instruments), 35 (role of health professionals in identifying and responding to elder abuse), 36 (potential improvements to professional codes) and 38 (hospital responses to suspected elder abuse) posed by the Commission.

MIGA welcomes the Commission's work in this area, seeing it as building on the interest MIGA's members and policy holders have in caring for their older patients.

MIGA's interest

MIGA is a medical defence organisation and medical indemnity insurer with a national footprint. It has represented the medical profession for in excess of 115 years. Its members and policyholders include significant numbers of medical practitioners working throughout Australia who provide care and treatment to older people on a daily basis, often in general practice, hospital or aged care settings.

MIGA's lawyers advise and assist their members and policy holders on a variety of medico-legal issues relating to their care and treatment of older patients, including capacity, advance care directives, substitute decision-makers and guardianship. Through its Risk Management Program, MIGA also provides various education and resources, both to its own members and policy holders and to the wider profession, based on medico-legal issues encountered by MIGA.

Recently, MIGA has been involved in the NSW Law Reform Commission Review of the NSW *Guardianship Act*, the NSW Health Review of Advance Care Directives Project and in responding to the position paper produced by the Victorian Department of Health & Human Services entitled *Simplifying Medical Treatment Decision Making and Advance Care Planning*.

MIGA's interest is in clear and practical medico-legal frameworks for its members, the broader health profession and patients so they can facilitate and enhance the provision of health care in Australia. From its experience, it sees the critical importance in:

- medical practitioners and other health professionals having a clear understanding of their roles and obligations in caring for older patients
- professionals understanding when issues of potential elder abuse may arise in their patients, and knowing what to do about them

Appointed decision makers - question 30 - instrument register

MIGA notes the suggestion of a register for various instruments relating to older members of the community, which could potentially include advance care directives.

It supports a register of orders made by guardianship bodies being available for access by medical practitioners caring for their older patient. It does however have concerns about how this may work in practice. Issues such as:

- currency
- accuracy of information
- maintenance of register
- privacy
- ease of access

Are examples of the significant factors for consideration in requiring a register.

That said, the concept of a register has merit.

Members and policy holders have faced situations where family members or other carers have asserted the existence of such orders, but they have not been produced. Alternatively various family members may have made different assertions about what orders, and their nature, are in place.

In addition, although MIGA would support the opportunity to register advance care directives, it opposes any registration being a pre-requisite for directive validity.

There are differing requirements across Australian states and territories for advance care directives. A person may make a directive in one state, but relocate to another. This is another issue for consideration.

MIGA's view is that if a directive is valid under either local legislation or the common law (following the requirements set out in *Hunter and New England Area Health Service v A* [2009] NSWSC 761), it should be followed. Accordingly, it is important that scope for following a valid advance care directive be preserved irrespective of local legislative regimes or requirements for registration.

Health services – questions 35, 36 and 38 - identifying and responding to elder abuse

Medical practitioners and other health care professionals, wanting to provide a high standard of care and treatment to their patients, would be concerned if they suspected possible abuse of their older patients.

The difficulty for health care professionals can often be knowing what to do about suspected abuse.

Complaints could be made, or notifications given, to family, other carers, regulators or police, but situations will vary widely and it may be that the professional is uncertain of the best approach to take, even after consulting with their colleagues, medical defence organisation or professional association.

MIGA sees potential in frameworks similar to that used at St Vincent's Hospital in Melbourne (see paragraphs 166-167 of the Issues Paper) for identifying and responding to elder abuse. Beyond implementing similar frameworks in other hospitals, it is conceivable such frameworks could be extended so that there are central bodies, perhaps local hospitals, which general practitioners and other health professionals caring for older patients can contact if they suspect elder abuse in one of their patients. Such bodies could then advise, assist or intervene in the matter as appropriate.

From the Issues Paper, it appears that contemplation may be given to a mandatory or voluntary reporting regime for elder abuse, perhaps utilising a similar framework to notification regimes throughout Australia for children at risk. If such a framework was proposed, it would require clearly defined criteria for reporting, and appropriate protections for medical practitioners and other health professionals who make reports in good faith. Any proposed framework would need close review to ensure it is sufficiently clear and practical, which would require input from stakeholders such as MIGA and peak professional bodies.

If you have any questions, please contact Timothy Bowen, Senior Solicitor – Advocacy, Claims & Education, email: timothy.bowen@miga.com.au or tel: 1800 839 280.

Yours sincerely

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

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