General Enquiries
and Client Service
P 1800 777 156
F 1800 839 284

Claims and Legal
Services
P 1800 839 280
F 1800 839 281

www.miga.com.au
miga@miga.com.au

Postal Address
GPO Box 2048, Adelaide
South Australia 5001

24 February 2017

The Executive Director
Australian Law Reform Commission

Via online submission and email: elder_abuse@alrc.gov.au

Dear Colleagues

MIGA submission to the ALRC Elder Abuse Discussion Paper (DP 83)

MIGA appreciates the chance to provide a further submission to the Commission's Elder Abuse Inquiry, this time to the Commission's Discussion Paper (**the Discussion Paper**) focusing on the role of health practitioners.

This submission follows MIGA's earlier submission to the Commission's Elder Abuse Inquiry Issues paper in August 2016, dealing with issues around appointed decision-makers instrument registers and health services both identifying and responding to elder abuse.

Proposal 3-3 – powers of public advocates and guardians

MIGA notes the Commission's proposal that public advocates or public guardians should have the power to require that a person, other than the older person, furnish information, produce documents or participate in an interview relating to an investigation of the abuse or neglect of an older person.

Health practitioners, particularly medical practitioners, are one class of persons who may be subject to these proposed investigation powers and be required to provide various information relating to their older patients.

Given the issues of confidentiality around the therapeutic relationship, and the multiplicity of interests which may be involved in a situation of suspected elder abuse, MIGA believes it is necessary to provide medical and other health practitioners with:

- protections from civil, disciplinary and criminal liability or sanction for acting in good faith in relation to the exercise of the proposed investigation powers

- a reasonable excuse provision for declining or otherwise failing to provide information in response to exercise of the proposed investigation powers, which would include self-incrimination and issues of practicality

Proposal 5-5 – voluntary reporting of elder abuse

Consistent with the position taken in its earlier submission, MIGA supports the Commission's proposal to provide good faith protections from legal or administrative liability or sanction, and from dismissal or discrimination, to medical and other health practitioners who report a reasonable suspicion of elder abuse to an appropriate person or body.

MIGA's experience in advising and assisting its members and policy holders in the context of mandatory reporting schemes, both under child protection legislation in various states and territories, and under the *Health Practitioner Regulation National Law*, has reinforced to it the importance of clarity, education and professional support for those facing mandatory reporting obligations.

As identified in MIGA's earlier submission, clearly defined criteria for reporting elder abuse are necessary. Furthermore, comprehensive and targeted education of health practitioners, and easy access to good decision-making tools and references in a variety of platforms (written, online and via apps) are critical.

The proposed framework and criteria for reporting would need close review to ensure it is sufficiently clear and practical, involving input from stakeholders such as MIGA and other peak professional bodies.

Proposals 5-1 and 5-2; Question 5-1 – enduring documents register

As indicated in its earlier submission, MIGA supports a register of orders made by guardianship bodies being available for access by medical practitioners caring for older patients, but holds some concerns about its practicality, including issues around currency, accuracy, maintenance, privacy and ease of access.

Consistently with its earlier submission, it also supports the proposal in paragraph 5.19 of the Discussion Paper to exclude advance care directives (**ACDs**) from having to be registered. However, for reasons of practicality, there should remain scope for a patient to put their ACD on the national register if they wish. Acknowledging the issues the Commission raises around ACDs in the context of differing interests accessing the national register, MIGA suggests access to ACDs on a national register be restricted to medical practitioners or others explicitly authorised by the guardianship body.

Given the concerns MIGA has already raised about how a national register may work in practice, it suggests a voluntary register be trialled for a period, say 1 to 2 years, before any enduring documents are required to be registered in order to be valid.

In terms of access to the national register, MIGA proposes that guardianship bodies, when making orders, take responsibility for ensuring the ability of a person's treating medical practitioners to access the national register. There should also be scope for a medical practitioner to access the register on application to the relevant guardianship body. However, there may still be situations where an unnamed practitioner would need to access the register as a matter of urgency, such as in an emergency. In those circumstances there should be scope to access relevant documents without direct authorisation.

Proposal 5-4 – witnessing of enduring documents

Noting the Commission's proposal that medical practitioners be a class of persons who can witness an enduring document, clear and comprehensive information, in a variety of platforms, should be provided to the medical profession on the requirements of and expectations on medical practitioners in these situations.

Chapter 12 – Health professionals – other issues

MIGA agrees with the thrust of the Commission's comments around the position of health professionals in identifying and responding to elder abuse.

It makes the following additional comments:

- in any use of health-justice partnerships, careful attention will need to be paid to how the introduction of lawyers into an integrated care model could impact on the existing duties and obligations owed by medical and other health practitioners to their patients, particularly around privacy - detailed guidance would need to be produced, setting out the role and limitations of the legal component in such partnerships

- it has some reservations around possible reticence on the part of patients to engage with a health care service featuring on-site lawyers in a health-justice partnership – careful consideration would need to be given to how this could impact the provision of care, particularly patient openness in the therapeutic relationship

- the Commission's proposed voluntary elder abuse reporting protections should be sufficient to overcome concerns around confidentiality and privacy associated with investigating and reporting suspected elder abuse

- it agrees with the Office of the Australian Information Commissioner that privacy would not usually pose a barrier to sharing or accessing information in a situation of significant risk of harm, such as suspected elder abuse – even so, there should be a review within 1 to 2 years of introducing voluntary elder abuse reporting protections to see if they have been effective in eliminating concerns around reporting elder abuse because of concerns about privacy and confidentiality

I trust our comments are of some assistance. If you have any questions, please contact me.

Yours sincerely

Timothy Bowen
Senior Solicitor – Advocacy, Claims & Education

timothy.bowen@miga.com.au