

11 August 2014

Professor Rosalind Croucher
Presiding Commissioner
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Professor Croucher

ALRC Inquiry into Legal Barriers For People With Disability

The Law Council is pleased to provide this submission in response to the Australian Law Reform Commission's Discussion Paper on Equality, Capacity and Disability in Commonwealth Laws.

We apologise for the delay in the lodgement of this submission and appreciate the extensions of time given to lodge the submission.

Please contact Valerie Perumalla on (02) 6246 3750 or at valerie.perumalla@lawcouncil.asn.au if you have any inquiries.

Yours sincerely



MARTYN HAGAN
SECRETARY-GENERAL

Inquiry into Equality, Capacity and Disability in Commonwealth Laws

Australian Law Reform Commission

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Introduction

1. The Law Council is pleased to provide the following submission in response to the Australian Law Reform Commission's (the Commission) Discussion Paper released on 22 May 2014 regarding its Inquiry into Equality, Capacity and Disability in Commonwealth Laws. This submission follows a Law Council submission provided on 21 February 2014 in response to Issues Paper No. 44.
2. As outlined in **Attachment A**, the Law Council is the national peak body for the Australian legal profession, effectively representing around 60,000 Australian lawyers through the law societies and bar associations of the states and territories, and the Large Law Firm Group Ltd (collectively referred to as the "Constituent Bodies" of the Law Council).
3. The Law Council thanks the Commission for engaging in consultations with the Working Group that was established by the Law Council to respond to this Inquiry.
4. The Law Council is grateful for contributions by the Law Council's Family Law Section and Superannuation Law Committee; the Law Society of New South Wales and the Victorian Bar; and, in particular, to members of the Working Group formed by the Law Council's Access to Justice Committee.
5. This submission focuses on the following matters raised in the Discussion Paper:
 - the will, preferences and rights of people with disabilities;
 - supported and substituted decision-making;
 - guardianship;
 - access to justice;
 - unfitness to stand trial;
 - limits of detention;
 - litigation representatives;
 - solicitors' duties;
 - witnesses;
 - jury service;
 - superannuation; and
 - binding death benefit nominations.

General Comments

6. The Law Council commends the Commission on its comprehensive Discussion Paper, which provides a number of proposals and questions on wide ranging issues relating to Commonwealth laws and legal frameworks affecting equal recognition of people with disability before the law and their ability to exercise legal capacity.
7. The Law Council notes that the focus of the Inquiry is confined to decision-making issues that may require amendment to Commonwealth legislation and legal frameworks¹ but considers legislative and policy reform will only be meaningful if people with disability are able to access legal services.

¹ Discussion Paper, 11.46.

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8. The Law Council considers that lack of appropriate funding to legal assistance services has severely undermined the capacity of legal assistance providers to meet the legal needs of specific and vulnerable target groups, particularly people with disabilities.
 9. For instance, the Commonwealth Government announced that it would cut \$43 million over four years in funding for legal assistance sector services in the December 2013 Mid-Year Economic and Fiscal Outlook,² and a further \$15 million in funding for Legal Aid Commissions alone in the May 2014 Federal Budget announcement. These funding cuts, to an already seriously underfunded legal assistance sector, significantly and disproportionately impact the capacity of people with disabilities to gain equal recognition before the law, exercise legal capacity and enforce their legal rights.
 10. The Law Council recommends that the Commission examine the impact of funding cuts to legal assistance sector services on people with disability, including:
 - the impact of funding cuts on frontline legal services for people with disability;
 - the impact of funding cuts to policy reform and advocacy, which may result in frontline service providers not being able to inform governments on significant legislative and policy initiatives on behalf of their clients, including people with disabilities; and
 - the additional legal need created by the National Disability Insurance Scheme (NDIS) as a result of reviewable decisions made about their rights and entitlements under the scheme.

Will, Preferences and Rights Guidelines

Proposal 3-6	Will, Preferences and Rights Guidelines
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| <ol style="list-style-type: none">(a) Threshold: The appointment of a representative decision-maker should be a last resort and not as a substitute for appropriate support.(b) Appointment: The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time.(c) Supporting decision-making:<ol style="list-style-type: none">(i) a person's will and preferences, so far as they can be determined, must be given effect;(ii) where the person's will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters; and(iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person's human rights and act in the way least restrictive of those rights. |
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11. The Law Council supports the right of people with disabilities to exercise legal capacity and make decisions for themselves, where possible. It is noted that this is consistent with National Decision-Making Principle-1 at Proposal 3-2 of the Discussion Paper.

² <http://budget.gov.au/2013-14/content/myefo/html/index.htm>

Supported and substituted decision-making

12. The Commission outlines the paradigm shift from a 'best interests' standard to one that emphasises the will and preferences of the individual in 'supported' decision-making models.³
13. The Law Council submits that the 'best interests' of an individual should be consistent with their will and preferences in the majority of circumstances. If these are inconsistent, or if one is unable to be ascertained, the objective and subjective elements of each approach can be balanced by reference to appropriate international human rights standards.
14. The Law Society of New South Wales (LSNSW) advises that 'best interests' standards should be retained as a last resort for people with disabilities whose will and preferences cannot be determined, for example, to prevent elder financial abuse.

Guardianship

15. The LSNSW advises that the New South Wales Civil and Administrative Tribunal will avoid making guardianship orders where possible, particularly if informal supported decision-making is an available option.
16. For example, the NSW Civil and Administrative Tribunal (NCAT) website states that:

The Tribunal will not make a guardianship order unless it is satisfied by the evidence before it that the person the application is about:

- *has a decision-making disability;*
- *the disability results in the person being partially or wholly incapable of managing themselves; and*
- *there is a need for the person to have a guardian appointed.*

If the person already has informal decision making or an enduring guardianship appointment arrangement in place that are working in their best interests, the Tribunal may not make an order.⁴

17. The Law Council is further advised that anyone acting as a guardian under the *Guardianship Act 1987* (NSW) is required to restrict as little as possible the freedom of decision making and action of a person in need of, or under, guardianship.

Question 4-4 What safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model?
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18. The Law Council supports the formalisation of supported decision-making mechanisms to promote the autonomy of a person with disabilities and to ensure supporters are properly accountable, which is consistent with Article 16(1) of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).⁵

³ Discussion Paper, p27, para 2.2.

⁴ See http://www.ncat.nsw.gov.au/ncat/guardianship/gt_matter_about/matter_guardianship.html.

⁵ As noted in the Discussion Paper (at 1.25), 'Article 16(1) of the CRPD stresses the need for States Parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender based aspects'.

Holding supporters accountable for their decisions provides an important safeguard against abuse, neglect, negligence or exploitation.

19. The LSNSW advises that legal recognition of supported decision-making may, in the family law context, degrade informal supported decision-making arrangements and queries how legal practitioners can advise supported decision-makers of their exposure to liability for decisions they make.

Unfitness to stand trial

20. It is noted that the focus of this chapter of the Discussion Paper, and indeed this entire Inquiry, is on laws and legal frameworks affecting people who may need decision-making support⁶ and to give effect to Article 13 of the CRPD, which stipulates that States Party must ensure effective access to justice for persons with disabilities on an equal basis with others⁷.

Proposal 7–1 The *Crimes Act 1914* (Cth) should be amended to provide that a person is unfit to stand trial if the person cannot:

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
- (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
- (c) use or weigh that information as part of the process of making decisions; and
- (d) communicate decisions in some way.

Question 7–1 What other elements should be included in any new test for unfitness to stand trial, and why? For example, should there be some threshold requirement that unfitness be due to some clinically-recognised mental impairment?

21. The Law Council considers that the criteria for unfitness to stand trial should focus on the person's ability to make rational decisions in order to effectively participate in the trial process.
22. As noted in the Discussion Paper, the Victorian Supreme Court in *R v Presser*⁸ sets out six factors relevant to the test for unfitness, which includes '*the ability to challenge jurors*'. The Law Council considers that this aspect of the test encompasses an ability to both understand and exercise that right.
23. The Law Council favours the approach by the Law Commission of England and Wales in its 2010 Consultation Paper, *Unfitness to Plead*,⁹ which provides that 'a defendant should be found unfit to stand trial if he or she is unable:
- to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial,
 - to retain that information,

⁶ Discussion Paper, (7.6).

⁷ Ibid, (7.4).

⁸ (1958) 45 VR cited in the ALRC's Discussion Paper at 7.13.

⁹ http://lawcommission.justice.gov.uk/docs/unfitness_issues.pdf

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- to use or weigh that information as part of decision making process, or
 - to communicate his or her decisions.’
24. The Law Council further considers that the term ‘rationally’ should be included after the term ‘unable’, so that this reads, ‘...a defendant should be found unfit to stand trial if he or she is unable **rationally** to...’.
25. There are combinations of factors that impair a person’s decision-making ability in criminal proceedings, including a person’s literacy and numeracy skills, socio-economic background, and various factors not necessarily confined to ‘disability’. It is important that defendants are provided with adequate support to be able to stand trial to ensure that innocent people are not pleading guilty (or being advised to plead guilty) to avoid the consequences of unfitness,¹⁰ or unfairly disadvantaged by being put on a supervision order.¹¹

Proposal 7–2 The *Crimes Act 1914* (Cth) should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial.

26. The Law Council agrees with proposal 7-2 in principle if it can be demonstrated that decision-making support will assist a person to make rational decisions, however the Law Council notes the difficulty for a court to assess whether that support is sufficient to enable a defendant to stand trial where they would otherwise be unfit to stand trial.
27. The Law Council is concerned that taking into account decision-making assistance and support available to a person who would otherwise be determined unfit to stand trial may water down the test for unfitness.
28. The Law Council also notes practical difficulties associated with ensuring that supporters are indeed supporting a person to make decisions, and suggests that the Commission consider possible safeguards against undue influence.
29. The Law Council submits that legal representatives should not be considered substitutes for the decision-making assistance and support required for a person to stand trial, who would otherwise be unfit to stand trial.

¹⁰ The Anti-Discrimination Commissioner (Tasmania) observed that as a result of being determined unfit to stand trial, a person may ‘end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts’. They ‘will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed’. [see DP p159, para 7.16].

¹¹ The Discussion Paper, para 7.17

Limits on detention

Proposal 7–3 State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.

30. The Law Council considers that the period of detention should not exceed the period for which a court determines the individual would have been detained if convicted, bearing in mind all the circumstances which the court would have taken into account in sentencing the individual
31. As noted in the Discussion Paper, ‘under the Crimes Act, where a person is found unfit to stand trial, the Commonwealth Attorney-General must, at least once every six months, consider whether or not the person should be released from detention based on medical or other reports’¹².
32. The Law Council considers that the Commonwealth position under the *Crimes Act* should guide law reform at the state and territory level to ensure that a review is undertaken at least every six months *where a person is found unfit to stand trial*.
33. The Law Council strongly recommends that the review process occur regularly within the period in which a person is detained (the limiting period). The limiting period should not be a substitute for the review process.

Litigation representatives

Proposal 7–4

The rules of federal courts should provide that a person needs a litigation representative if the person cannot:

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
- (b) retain that information to the extent necessary to make the decisions;
- (c) use or weigh that information as part of a decision-making process; and
- (d) communicate the decisions in some way.

34. The Law Council does not support the test in proposal 7-4, that is, that a person must meet each of the proposed categories in order for a litigation representative to be appointed. If a person is unable, for instance, to communicate their decisions in some way, that ought to be sufficient to ensure that a litigation representative be appointed. To this end, the Law Council suggests that the word "and" at the conclusion of sub-paragraph (c) be replaced with "or".
35. The Law Council also considers the proposed test focuses too heavily on the needs of self-represented litigants, and does not adequately address the difficulties a disabled litigant may face if they wish to be legally represented. That is, the test

¹² Discussion Paper, 7.60.

focuses too narrowly on the disabled person's direct engagement with the legal process, and does not address the capability or otherwise of the disabled person to instruct legal practitioners. The test for assessing a person's need for a litigation representative in the rules of the Family Court and the Federal Circuit Court refers to both a person's capacity to "conduct" the proceeding, and to a person's capacity to "give adequate instruction for the conduct" of the proceeding.

36. The Law Council also suggests that the word "decisions" in the proposed test is too narrow. A person involved in legal proceedings is not only required to make "decisions", but also, for instance, to give instructions, provide information and answer questions. The Law Council suggests that the phrases "conduct" and "give adequate instruction for the conduct" as referred to above, are a better description of the broad range of actions that a person involved in legal proceedings undertakes.
37. In addition, The Law Council supports the harmonisation of rules for the Family Court and Federal Circuit Court in family law matters, regarding the test to be applied to assess whether a person needs a litigation representative. The Law Council also supports the harmonisation of terminology describing the litigation representative (as currently, the Family Court of Australia uses the terminology "*case guardian*" and the Federal Circuit Court uses the terminology "*litigation guardian*").

Proposal 7-5 The rules of federal courts should provide that available decision-making support must be taken into account in determining whether a person needs a litigation representative.

38. The Issues Paper notes that the implementation of this proposal is more likely than not to result in more people being involved in civil litigation without having a litigation representative formally appointed.¹³
39. The Law Council's Family Law Section advises that this requirement is likely to result in more protracted and costly litigation for all parties, particularly in family law matters.
40. The Law Council is also concerned that limited court resourcing, chronic underfunding of legal aid and rising costs of litigation present serious practical barriers to the implementation of this proposal.

Proposal 7-6

The rules of federal courts should provide that litigation representatives:

- a. must support the person represented to express their will and preferences in making decisions;
- b. where it is not possible to determine what are the wishes of the person, must determine what the person would likely want based on all the information available;

¹³ Discussion Paper, 7.83.

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- c. where (a) and (b) are not possible, the litigation representative must consider the human rights relevant to the situation; and
- d. must act in a manner promoting the personal, social and financial and cultural wellbeing of the person represented.

41. The Law Council considers that while proposal 7-6 promotes the optimal inclusion of represented persons in litigation, the issue of the availability and willingness persons or organisations to act as a litigation representative must first be addressed.
42. The Law Council supports the principle aims and objectives of proposal 7-6 but is concerned that the additional duties and responsibilities imposed may provide a disincentive for persons who might otherwise accept such an appointment.

Proposal 7-7

Federal courts should issue practice notes explaining the duties of litigation representatives to the person they represent and to the court.

43. The Law Council supports the proposal.
44. The Law Council is advised that statutory authorities are increasingly unwilling to act as litigation representatives in family law litigation (where they have not otherwise been appointed as guardian and administrator under State or Territory legislation), and that this has led to an increase in lay individuals being appointed as litigation representatives.
45. Significant issues concerning the personal, social, financial and cultural wellbeing of the person being represented can arise in family law litigation. In addition there is a real likelihood of conflict of interest arising between a lay representative and the person they represent, particularly where they are related the person they represent. All of these issues create challenges for lay litigation representatives. Accordingly, practice notes explaining the duties of litigation representatives will be of assistance.

Paragraph 7.95 (ALRC Discussion Paper No. 81)

The ALRC recognises that, in practice, other problems relating to litigation representatives may be of equal or greater significance, but are not a focus of this Inquiry. For example, submissions raised concerns about:

- *the cost and availability of litigation guardians for people who are unable to instruct legal counsel;*
- *the lack of funding to meet the legal costs of case guardians in Family Court proceedings;*
- *the difficulties in securing the nomination by the Attorney-General of case guardians in Family Court proceedings where another suitable person is not available;*
- *the availability of legal representatives who are independent of guardians appointed by state tribunals.*

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46. The Law Council is advised that the most critical issue which adversely affects the ability of people with a disability to exercise their legal rights or to participate in the legal process under the *Family Law Act* is the high cost and unavailability of authorities or persons willing to act as litigation representatives.
 47. The Law Council agrees with the submission of Chief Justice Bryant dated 17 January 2014, particularly on the costs, and availability of litigation guardians.
 48. The Rules of both the Family Court and the Federal Circuit Court provide for a straightforward process for the appointment of a litigation representative where an authority or person has already been appointed as administrator or guardian of the disabled person's affairs under State or Territory legislation.
 49. However, the Law Council is advised that issues arise in circumstances where the person requiring a litigation representative does not already have a guardian or administrator appointed under State or Territory legislation.
 50. For instance, in some of those situations a family member can be appointed as the litigation representative despite not being suitable for appointment, because (for example) they have an interest in the case that may be adverse to the interests of the person with disability, or there is a real prospect of them being called as witnesses.
 51. The Law Council is advised that in some States and Territories statutory authorities which are regularly appointed as administrators or guardians under State or Territory legislation are willing to take up appointments as litigation representatives in the Family Court and the Federal Circuit Court in the absence of an order appointing them as guardians under the relevant State legislation (for instance, in South Australia and in the Australia Capital Territory).
 52. However, the Law Council is advised that in other States and Territories those statutory authorities are unwilling to accept appointments as litigation representatives unless an order has been made appointing them as guardians under State legislation (for instance in Victoria).

Nomination of case guardians in family law proceedings

53. The Rules of the Family and Federal Circuit Courts provide that in the event that a litigation representative cannot be found, the Court may request that the Commonwealth Attorney General nominate a person to act as litigation representative.
54. The Law Council is advised that for the last few years and in the vast majority of cases where the Court has made such a request, the Attorney-General has not been in a position to make such a nomination because of the unwillingness of authorities or lay people to act as litigation representatives.
55. There had previously been an agreement between State and Territory Governments and the Commonwealth Government to facilitate the appointment of statutory authorities as litigation representatives in family law litigation where no other litigation representative could be found. The Law Council is not aware of the terms of that agreement or, if it no longer operates, why. The Law Council suggests that the reactivation of such an agreement may significantly improve access to justice for people with disabilities in family law litigation.

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56. The Law Council notes that in many circumstances the statutory authority would not be required to fund the legal costs of the person it is asked to represent because either:
- i. the disabled person is eligible for a grant of legal aid; or
 - ii. the disabled person or the family have sufficient resources to fund their legal costs.
57. However, there are many cases where a person with disability is not granted legal aid and cannot afford a private lawyer. The Law Council supports the suggestion by Chief Justice Bryant concerning the importance of adequately funding legal aid commissions for that purpose.
58. The Law Council also acknowledges that some government funding may be needed to cover the administrative costs of statutory authorities appointed as litigation representatives in family law litigation. However those costs are likely to be significantly less than legal costs.

Costs orders

59. The Law Council understands that some statutory authorities have refused to accept an appointment as a litigation representative in family law litigation because of the risk of a costs order being made against the authority in the litigation. The Law Council notes however that the primary position in family law litigation is that pursuant to section 117(1) of the *Family Law Act*, each party bears his or her own costs.
60. Whilst costs orders are made in family law litigation, they are made far less frequently than in other forms of civil litigation as costs do not "follow the event". Thus the exposure to a risk of a costs order being made against the litigation representative in family law litigation is less than in other areas of civil litigation.
61. The Law Council suggests that the Commonwealth Government indemnify state authorities who accept appointments as litigation representatives against adverse costs orders. It is further suggested that before doing so, the Commonwealth Government require that state authorities adopt 'model litigant' guidelines.

Solicitor's duties

Question 7-2 Should the Australian Solicitors' Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors' duties of confidentiality:

- (a) the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and
- (b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative?

62. The Law Council noted the Law Institute of Victoria's submission in response to the discussion paper that Australian Solicitors' Conduct Rules be amended to provide for a new exception to solicitors' duties of confidentiality.

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63. The Law Council's Professional Ethics Committee will be considering this issue in due course. However, at the present time the Law Council would not support weakening the lawyer's duty of client confidentiality to disabled clients.

Witnesses

64. The Law Council is advised that the Victorian Bar is developing a vulnerable witness accreditation program designed to enhance the ability of barristers to deal with vulnerable witnesses, addressing various issues relating to access to justice and the provision of evidence.
65. The accreditation program will draw on best practice in Australia and the United Kingdom, including judicial bench books and The Advocate's Gateway materials (www.theadvocatesgateway.org).

Jury Service

66. As noted in the Law Council's submission in response to Issues Paper, jury service is a solemn responsibility and legislative provisions which provide for the exclusion or ineligibility of certain people from serving on a jury are generally reasonable.
67. It is noted there is likely to be some difficulty establishing a more specific objective standard by which those with certain disabilities will be excluded, or whether they are able to 'discharge the duties of a juror'.
68. The Law Council suggests that the Commission consider the issues which arise in the following recent cases:
- *Lyons v State of Queensland (No 2)* [2013] QCAT 731 which considered the ability of a deaf juror to participate in jury trials with an Auslan interpreter¹⁴; and
 - Re: the Jury Act 1995 and an application by the Sherriff of Queensland [2014] QSC 113, which similarly considered ability of a deaf juror to participate in jury trials with an Auslan interpreter. Douglas J of the Queensland Supreme Court determined that the deaf juror was ineligible for jury service because an interpreter is not permitted to sit in a jury room.¹⁵

Superannuation

Question 11–3 Should the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide:

- (a) for supported decision-making regarding a binding death nomination of a beneficiary;
- (b) that a state or territory decision-maker (such as under an enduring power of

¹⁴ Available at <http://archive.sclqld.org.au/qjudgment/2013/QCAT13-731.pdf>.

¹⁵ Available at <http://archive.sclqld.org.au/qjudgment/2014/QSC14-113.pdf>.

attorney) may nominate a beneficiary on behalf of the member?

Question 11–4 If a person acting under an enduring power of attorney may make a binding death nomination on behalf of a person holding a superannuation interest under the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth), should they be required to have regard to the will, preferences and rights of the member in making the nomination? What safeguards need to be in place?

Background – regulatory regime for superannuation death benefits

69. The payment of death benefits is regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (Regulations) to the extent that:
- the category of persons that a death benefit can be paid to is restricted to ‘dependants’ (as defined) or the member’s legal personal representative¹⁶;
 - the governing rules of a fund can provide for a member to lodge a binding death benefit nomination (**BDBN**) in the form and signed and witnessed in accordance with SIS Regulation 6.17A;
 - a BDBN, if in the correct form and made or confirmed within 3 years before the member’s death, is binding on the trustee;
 - the decision about who the benefit is paid to is otherwise at the discretion of the trustee of the fund.
70. Not all superannuation funds accept BDBNs and, if not, they typically permit members to lodge a non-binding death benefit nomination expressing a preference as to who the benefit will be paid to.
71. There is no statutory form for a non-binding death benefit nomination and the trustee of the fund is not obliged to pay the benefit in accordance with the nomination. In practice trustees often pay death benefits in accordance with their death benefit policy despite the member expressing a different preference in a non-binding death benefit nomination. For these reasons, the right to make a non-binding death benefit nomination is of considerably less significance than the right to make a BDBN.
72. There is some ongoing debate in the superannuation industry as to whether the current regulatory regime requires reform, including:
- whether trustees should be **required** to accept BDBNs; or
 - whether benefits form part of a member’s estate, with trustees having no discretion in relation to payment.
73. Given that re-assessment of the current regulatory regime is outside the scope of this review, this section will focus on how the rights of people with a disability can be recognised within the existing regime.

¹⁶ As noted in the Discussion Paper, ‘legal personal representative’ is defined under s10 of the SIS Act to mean ‘the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person’ (p245 at 11.50).

Policy considerations – are BDBNs similar to wills?

74. Under the existing regime, the main issue around BDBNs, as suggested in the Discussion Paper, is that there is currently no clear policy position on whether a BDBN should be considered similar to a will or simply an instruction in relation to a person's asset.¹⁷
75. It is noted that, once uniform succession laws are adopted in most jurisdictions, it is expected that superannuation benefits could be included in a notional estate order and therefore subject to 'family provision' claims.
76. The enduring power of attorney (**EPA**) regimes under state and territory legislation are designed to provide a mechanism for people to appoint someone to make decisions for them if they subsequently lose capacity or sometimes when they may be unavailable to sign documents for an extended period (for example, when they are going overseas). It would generally be appropriate for an attorney, who has been appointed for financial matters, to make decisions about a person's superannuation in the same way as they would make decisions about other assets of the member.
77. However, an attorney cannot make a will (i.e. they cannot make a decision about disposal of the person's assets after death). The Law Council agrees with the Commission's suggestion that a BDBN is 'will-like in nature' because the BDBN deals with payment of the person's superannuation after death.¹⁸
78. On balance, the Law Council supports treating BDBNs similarly to wills.
79. However, as an exception, an attorney for a person who has become disabled may set up a superannuation account for that person so that, for example, the person can access a superannuation pension benefit. In these cases it would seem appropriate that the attorney can exercise all aspects of the member's powers in relation to the benefit, including a BDBN.

Suggested amendments to treat BDBNs similarly to Wills

80. As noted in the Discussion Paper, many decision-making issues in relation to superannuation concern the operation and power of state and territory appointed decision-makers, including powers of attorney.¹⁹ The Discussion Paper further notes that the focus of the Inquiry is confined to decision-making issues that may require amendment to Commonwealth legislation and legal frameworks.
81. To avoid complicating the scope of EPAs and the obligations of attorneys under state and territory legislation, the Law Council suggests that a separate regime for supported or substituted decision making, governed by Commonwealth legislation, may be preferable for superannuation death benefits.
82. If the Commission agrees that BDBNs should, as a matter of policy, be treated similarly to wills the Law Council suggests that the Commission give consideration to the following approach to amending the SIS Act and Regulations:
 - a BDBN generally cannot be made on behalf of a member by a person exercising powers under an EPA.²⁰

¹⁷ Discussion Paper, pp 246 - 247 at 11.56 – 11.58

¹⁸ Discussion Paper, p 246 at 11.56

¹⁹ Discussion Paper, p 244 at 11.46

²⁰ This does not necessarily require an amendment to the definition of 'legal personal representative'. It is likely that an appropriate amendment to SIS Regulation 6.17A would be adequate.

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- a BDBN can be made by a member's attorney under an EPA only if the attorney established the superannuation account for the member. If this is not permitted, carers may be discouraged from setting up pension and other superannuation arrangements for people with disabilities.
 - alternative mechanisms for signing and witnessing the BDBN form are available where a member has legal capacity, and does not require decision-making assistance, but does not have the physical capability to sign the form.²¹ Where the member requires decision-making assistance, the Law Council would support an assessment of practices under State legislation for supported will-making and adoption of a similar regime for BDBNs.
83. Superannuation fund trustees will not have the expertise or resources to assess whether a decision made under a supported or substituted decision making mechanism was appropriately made. Any mechanisms for supported or substituted decision-making will need to include an objective verification mechanism that trustees can rely on without making further enquiry. The process for scrutinising the way in which BDBNs are made on behalf of a person could involve an approval of a Court or of a State authority (such as a public trustee or guardian's office).
84. The appropriate person to assist a member in making a BDBN may also be the person appointed with their power of attorney under an EPA. It is further suggested that the superannuation regime should apply regardless of whether the person with a disability has made an EPA and should not rely on the power of attorney granted under an EPA.
85. To ensure that trustees implement the new mechanisms for signing and witnessing BDBN forms and for supported or substituted decision-making, the legislation could expressly provide that a BDBN made in accordance with the prescribed mechanisms must be regarded as a BDBN given by the member.
86. However the Law Council believes it is likely that superannuation funds which accept BDBNs will (mindful of their obligations under anti-discrimination law) generally adopt a practice of accepting a BDBN executed in compliance with the new mechanisms, provided the trustee is entitled to rely on the verification mechanism and cannot be liable for that reliance.

Alternative approach – BDBNs executed by an attorney under an EPA

87. If the Commission supports a policy position that BDBNs should be treated as an instruction in relation to an asset, rather than similarly to a will, the Law Council would support amending the SIS Act and Regulations to clarify that a person acting as attorney under an EPA can make a BDBN on behalf of a member.
88. To ensure that trustees accept BDBNs made by an attorney on behalf of a member, the legislation could expressly provide that a BDBN properly executed by a properly authorised person acting under an EPA must be regarded as a BDBN given by the member.
89. *However the Law Council considers it is likely that superannuation funds which accept BDBNs would generally adopt a practice of accepting a BDBN executed by a person acting under an EPA if it were clear under the legislation that this is permitted'.*

²¹ This does happen, for example where a member has suffered a stroke.

The Law Society of New South Wales

Question 11–3

90. The Law Council is advised by the LSNSW that the SIS Act is facilitative, rather than directive in nature. Therefore, changes to the SIS Act and Regulations may not achieve the intended outcome if Question 11-3 is answered in the affirmative.
91. For instance, if a trustee resolves to disallow a BDBN executed by a person exercising enduring Power of Attorney, on the grounds that the governing rules of that superannuation fund (the “Trust Deed”) do not permit it, a legislative change will not alter the position of the trustee.
92. Section 59(1A) of the SIS Act provides the ability to the member to give a binding notice on the trustee provided that it is in accordance with not only the SIS Regulations but also the Trust Deed. Simply amending the SIS Act and/or Regulations will not amend the Trust Deeds of superannuation funds, nor will it affect the positions of the Trustees who refuse to accept BDBNs, unless the amending legislation specifically overrides the trust deed.
93. Subject to the limitations set out above, the LSNSW would agree with the proposal in question 11-3(b) to amend the SIS Act and SIS Regulations to provide that a NSW decision-maker may nominate a beneficiary on behalf of the member. The current position in NSW is unclear and in the LSNSW’s view, it is preferable for a clear position to be articulated. From an estate planning perspective it is better for a person exercising Power of Attorney, to be able to nominate a beneficiary, especially when the principal does not have the capacity to do so, and an earlier nomination has or will lapse.

Question 11–4

94. The Law Council is advised by the LSNSW that ‘best interests’ standards under substituted decision-making should be retained as a last resort for people with disabilities whose will and preferences cannot be determined to.
95. With this in mind, the LSNSW considers, in principle, that a person acting under an enduring power of attorney should have regard to the will, preferences and rights of a person with disabilities. However, apart from the protection that can be derived from a reference to rights, the LSNSW is concerned how this proposal could be implemented in practice in a way that would properly protect a person whose will and preferences cannot be determined.
96. When a principal appoints someone under an enduring Power of Attorney, that person is often provided unfettered power in relation to the principal’s financial rights, which often include allowing the person to pay gifts to themselves, and to transfer assets. The LSNSW queries how the nomination of the payment of death benefits differs in practice to the power allowed under an enduring Power of Attorney.
97. If this proposal were to be pursued, a suitable safeguard may be that actions taken by persons vested with Power of Attorney can be reviewed by the Superannuation Complaints Tribunal, if the application for leave to obtain legal representation is granted. The LSNSW notes that superannuation matters often involve technical legal issues and ideally the review process should allow persons representation as of right. The LSNSW notes that the Superannuation Complaints Tribunal is

overburdened and requires more resourcing.²² The Law Council is advised that it currently takes 12 months to commence a matter in that jurisdiction.

²² The LSNSW notes that the recent decision in D13-14/141 was given in March 2014, where the application was lodged in August 2011. The matter involved a routine claim by non-financially dependent adult children against a spouse.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.