



Our Ref:ELCS:DHjl 1442976

26 February 2018

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY

By email: nsw_lrc@agd.nsw.gov.au

Dear Mr Cameron,

Review of the *Guardianship Act 1987* – Draft proposals

The Law Society of NSW appreciates the opportunity to comment on the NSW Law Reform Commission ('NSW LRC') draft proposals in relation to the review of the *Guardianship Act 1987* ('the Review'). The Law Society's Elder Law, Capacity and Succession Committee, Human Rights Committee and Indigenous Issues Committee have contributed to this submission.

The Law Society also notes the extensive consultation process undertaken by the NSW LRC, particularly through the release of Question Papers 1-6, which the Law Society has previously provided responses to.

Please find attached a table with comments specific to each of the proposals. The Law Society supports, or has no objection to, the majority of the proposals. Our substantive comments are reflected below.

Chapter 1: A new Act

The Law Society supports the primacy of the supported decision making model operating alongside the substituted decision making model, which is to be used as a last resort. We reiterate the need for any supported decision making model to impose appropriate safeguards against forms of abuse, particularly financial abuse. To this extent, the Law Society also strongly supports the proposal to provide the Public Advocate with a greater ability to proactively investigate matters, as discussed below.

In respect of Indigenous and culturally and linguistically diverse ('CALD') people who may require decision-making assistance, the Law Society supports the inclusion of the matters in proposals 1.14, 1.15 and 1.16. As previously submitted, if informal supported decision making arrangements are to have an increased role, there will be a need for education of, and information for, the public, government agencies, business and service providers about how informal arrangements can assist people who need some assistance to form a decision or express a view.

Chapter 2: Personal support arrangements

The Law Society notes that proposal 2.1 requires that a person may appoint a supporter through a support agreement if the person making the appointment "...has decision-making ability to enter the agreement, and is making the agreement voluntarily". The Law Society is concerned with this issue, as there is no proposed guidance or reference for how a person may be judged to have the decision making ability to enter an agreement, nor how it may be determined that they are doing so voluntarily. This is particularly troubling given that proposal 2.4 states that any agreement of the kind discussed in proposal 2.1 is to be certified by an 'eligible witness' who should witness the signature of the person making the support agreement, and also be able to certify that the person making the appointment "...signed voluntarily and appears to have decision-making ability in relation to the agreement". The term 'eligible witness' is not defined in the proposals. The Law Society is of the view that given the gravity and importance of support agreements, proper consideration must be given to the class or classes of persons that can witness these documents.

Further, the Law Society is concerned that if an 'eligible witness' is defined as being (or including) legal practitioners, that this will create a new stream of work for the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal ('the Tribunal'), particularly in the areas of declaring the validity of appointments under a support agreement (see proposal 2.15), and also reviewing support agreements (see proposal 2.12). Legal practitioners should not be placed in the position of making such assessments through the witnessing of agreements, and it is our view that many practitioners will refuse to do so. We submit that this will in turn lead to individuals seeking to formalise such agreements before the Tribunal. The Law Society questions whether in such circumstances the Tribunal would be able to deal with such an increase in workload without a commensurate increase in resources.

Chapter 4: Enduring representation agreements

The Law Society notes that proposal 4.5 states that an enduring representation agreement will only have effect when a person does not have decision-making ability in relation to a decision. We note the related comment in the draft proposals document (at page 25), states: "Other powers of attorney arrangements (that is, those that do not relate to enduring powers of attorney) will continue to be dealt with under the *Powers of Attorney Act*". The Law Society queries how an enduring representation agreement would operate where a principal wishes to appoint an attorney with powers to come into immediate effect and continue beyond when they lose decision making ability. Under the current proposal, it appears that in this situation there would be a requirement for the execution of two separate documents – which would be costly, confusing and unnecessary.

The Law Society also notes that proposal 4.9(g) requires enduring representatives managing financial functions to keep accurate records and accounts. The Law Society supports this proposal in principle, however queries whether this will require enduring representatives to maintain a separation of all property from the principal (except in circumstances where property is owned jointly).

Chapter 5: Representation orders

The Law Society notes that proposals 5.6(3) and 5.6(4) require the Tribunal to specify that 'representation orders', (which under the proposed unified scheme may include orders relating to financial management) are only to have effect for defined periods, and that the Tribunal must review a representation order at the conclusion of the period to

which the order has effect, unless the order specifically provides that there is to be no review at the end of the period (pursuant to proposal 5.20(2)(a)).

The Law Society submits that representation orders made for defined periods that relate to financial management or, more specifically litigation as part of the financial management function, may prove problematic as the decision to be made under the order may take longer to make or implement than the life of the order itself. The Law Society is also of the view that this proposal would require significant increased resourcing for the Tribunal, the Supreme Court of NSW and the NSW Trustee and Guardian, who would be required to deal with the large volume of extra work arising as a result of the changes.

Chapter 8: Restrictive practices

The Law Society notes that the draft proposals document considers it appropriate to continue to monitor the implementation of the NDIS restrictive practices regulator scheme. We take the opportunity to reiterate our comments made in response to Question Paper 5 in respect of some of the factors that a decision-maker should consider before authorising a restrictive practice.

Chapter 9: Advocacy and investigative functions

The Law Society strongly supports the establishment of advocacy and investigative functions in a proposed 'Public Advocate' function. The Law Society considers it important to acknowledge that many vulnerable people in society may require assisted decision-making but do not have anyone to advocate for their rights and interests.

Further, the Law Society supports proposal 9.1(3)(f), which relates to providing the Public Advocate with appropriate investigative functions. The Law Society considers that this proposal is a necessary proactive step in providing protection to people who require assisted decision making. Although the proposed powers are extensive in nature (albeit based on existing powers contained in the *Guardianship Act 1987*), the Law Society considers that oversight by the NSW Ombudsman and the ability to apply for administrative review of a representation decision are appropriate and sufficient safeguards in the circumstances.

The Law Society notes that it will be particularly important that there be appropriate training and resources available for supporters and representatives of Indigenous and CALD people who are not from those backgrounds so that they can properly carry out their functions in respect of both determining whether the person has decision-making ability, and in exercising their supporter/representative functions.

Particularly in respect of Indigenous peoples, such training and resources should include material on the following issues:

- Recognising and appropriately dealing with unconscious biases; and
- Cultural competency in respect of:
 - communication;
 - intergenerational trauma;
 - understanding the impact and effect of shame;
 - taboos;
 - situations that may lead to family conflict;
 - kinship structures;
 - expectations around interpersonal obligations; and
 - expectations around gendered roles.

Chapter 10: Provisions of general application

The Law Society is strongly opposed to proposal 10.1. The Supreme Court currently has jurisdiction over any cause of action or claim for equitable relief available against a supporter or representative. These matters are currently dealt with by a dedicated equity division of the Supreme Court, ensuring that there is familiarity by judges with the issues and complexities that regularly arise. The Law Society is of the view that given the small number of these matters that are heard each year, there is a real and significant risk that moving jurisdiction to the District Court will result in judges with no background or insufficient relevant experience hearing and making determinations on matters.

Chapter 11: Tribunal procedures and composition

The Law Society agrees with proposal 11.5, which provides that a legal representative of a person subject to an application before the Tribunal is not required to seek leave to appear. The Law Society submits that this is particularly important given the often wide-ranging and significant impacts of the orders that may be made.

Chapter 14: Interaction with mental health legislation

The Law Society strongly supports proposal 14.5, which prohibits a represented person from being admitted to, or not being discharged from, a mental health facility as a voluntary patient at the request of their representative without the agreement of the person being represented. The Law Society notes that this proposal would eliminate situations such as that which occurred in the matter of *Sarah White v The Local Health Authority & Anor* [2015] NSWSC 417.

Thank you for considering this submission. Should you have any queries with regard to this submission, please contact Jonas Lipsius, Principal Policy Lawyer, 

Yours sincerely,



Doug Humphreys OAM
President

No.	Proposal	Law Society comments
1.	<i>A new Act</i>	
1.1	<p><i>1.1 A new Act</i></p> <ol style="list-style-type: none"> 1. There should be a new Act to provide for supported decision-making and substitute decision-making called the Assisted Decision-Making Act (“the new Act”). 2. The new Act should replace the Guardianship Act 1987 (NSW) and the enduring power of attorney provisions in the Powers of Attorney Act 2003 (NSW). 3. The new Act should include: <ol style="list-style-type: none"> a. statutory objects and general principles that reflect the values upon which the Act is based and guide its interpretation b. principles to guide the assessment of decision-making ability c. assisted decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointments, court and tribunal appointments and default arrangements d. principles to guide decision-making e. the roles and responsibilities of decision-makers f. safeguards that ensure accountability of decision-makers, including monitoring and review of orders and decisions, and g. the functions and powers of a new Public Advocate role. 	<ul style="list-style-type: none"> • The Law Society supports this proposal. • The Law Society supports the primacy of the supported decision making model operating alongside the substituted decision making model, which is to be used as a last resort. We reiterate the need for any supported decision making model to impose appropriate safeguards against forms of abuse, particularly financial abuse. • The Law Society also supports the establishment of an office of a Public Advocate (provided that it is adequately resourced without reducing the resourcing available to the Public Guardian) which undertakes systemic advocacy, has guardianship functions for adults and has powers to investigate complaints and allegations against guardians and administrators.
1.2	<p><i>1.2 Language and structure of the Act</i></p> <p>The new Act should contain language and a structure that are as simple and as accessible as possible.</p>	The Law Society supports this proposal.
1.3	<p><i>1.3 Key terms</i></p> <ol style="list-style-type: none"> 1. The new Act should provide: <ol style="list-style-type: none"> (1) When someone appoints another person to make personal, financial, healthcare and/or restrictive practices decisions on their behalf, that person is to be referred to as an “enduring representative” and the person on whose behalf they act is a “represented person”. (2) A person appointed by the Supreme Court or Tribunal to make personal, financial, healthcare and/or restrictive practices decisions on behalf of someone else is to be referred to as a “representative” and the person on whose behalf they act is a “represented person”. (3) A person appointed by the court or tribunal or under a personal 	The Law Society supports this proposal.

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	<p>agreement to support someone else make decisions, is to be referred to as a “supporter” and the person they support is a “supported person”.</p> <p>(4) The NSW Trustee and Guardian is to be renamed NSW Trustee.</p> <p>(5) The Public Guardian is to be renamed the Public Representative.</p> <p>(6) The Guardianship Division of the NSW Civil and Administrative Tribunal is to be renamed the Assisted Decision-Making Division (“the Tribunal”).</p>	
1.4	<p><i>1.4 Personal decisions</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A “personal decision” is a decision that affects a person’s everyday activities and wellbeing. 2. The following are examples of personal decisions: <ol style="list-style-type: none"> a. where the person is to live (for example, in the person’s home or in an aged care facility) b. what kind of personal services the person should receive (for example, in-home care, respite services, or occupational therapy), and c. any other matters that concern the person’s everyday activities (for example, organising holidays or arranging for groceries). 	The Law Society has no comment in relation to this proposal.
1.5	<p><i>1.5 Financial decisions</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A “financial decision” is a decision about one or more aspects of the person’s property. 2. The following are examples of financial decisions: <ol style="list-style-type: none"> a. paying bills b. making gifts and donations c. paying for improvements to property d. executing documents (for example, contract for sale of goods or property, signing a lease, and authorising bank payments) e. maintaining the person’s dependents f. maintaining the person, including ensuring their future maintenance (for example, ensuring sufficient funds for amenities, clothing, furniture, medical payments and other everyday expenses) g. disposing of property h. paying debts i. taking up the rights to the issue of new shares to which the person is entitled j. making decisions on legal matters (for example, bankruptcy, signing 	The Law Society has no comment in relation to this proposal.

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	<p>contracts or deeds, and retaining a lawyer for legal advice), and</p> <p>k. investing money.</p>	
1.6	<p><i>1.6 Healthcare decisions</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A healthcare decision is a decision about a person’s healthcare. 2. Healthcare has the meaning set out in Proposal 6.3. 	The Law Society has no comment in relation to this proposal.
1.7	<p><i>1.7 Restrictive practices decisions</i> The new Act should:</p> <ol style="list-style-type: none"> a. provide that a “restrictive practices decision” is a decision to approve or disapprove the use of restrictive practices on a person. b. adopt the definition of restrictive practices used in the National Disability Insurance Scheme legislation. 	The Law Society supports this proposal.
1.8	<p><i>1.8 Statutory objects</i> The new Act should include a statement of statutory objects that sets out that:</p> <ol style="list-style-type: none"> a. the Act is founded on the principle that people in need of decision-making assistance have the same human rights as all members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights, and b. the objects of the Act are accordingly to: <ol style="list-style-type: none"> (i) implement the principles of the UN Convention, and (ii) promote the independence and personal and social wellbeing of people in need of decision-making assistance and provide safeguards in relation to the activities governed by the Act. 	The Law Society supports this proposal, and in particular agrees with the Act reinforcing the principle of only applying to people who are ‘in need’ of decision making assistance.
1.9	<p><i>1.9 General principles</i> The new Act should provide that it is the duty of everyone exercising functions under the Act to observe the following principles with respect to people in need of decision-making assistance:</p> <ol style="list-style-type: none"> a. Their will and preferences should be given effect where possible, in accordance with Proposal 1.11. b. They have an inherent right to respect for their worth and dignity as individuals. c. Their personal and social wellbeing should be maintained. d. They have the right to participate in and contribute to social and economic life. e. They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be 	The Law Society supports the inclusion of general principles in the Act, and supports the general principles listed.

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	<p>assisted in making those decisions if they want or require assistance.</p> <ul style="list-style-type: none"> f. They have the right to respect for their age, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs. g. They should be supported to develop and enhance their skills and experience. h. They have a right to privacy and confidentiality. i. They have the right to live free from neglect, abuse and exploitation. j. Their relationships with their families, carers and other significant people should be recognised. k. Their existing informal supportive relationships should be recognised. l. They have changing abilities, strengths, goals and needs. m. Their rights and autonomy should be restricted as little as possible. 	
1.10	<p><i>1.10 Additional general principles for Aboriginal people and Torres Strait Islanders</i> The new Act should provide that everyone exercising functions under this Act with respect to a person in need of decision-making assistance who is an Aboriginal person or Torres Strait Islander must:</p> <ul style="list-style-type: none"> a. to the extent that it is practicable and appropriate to do so, act in accordance with that person's culture, values and beliefs b. recognise that Aboriginal people and Torres Strait Islanders have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters c. recognise that many Aboriginal people and Torres Strait Islanders may face multiple disadvantage d. address that disadvantage and the needs of Aboriginal people and Torres Strait Islanders, and e. work in partnership with Aboriginal and Torres Strait Islander people in need of decision-making assistance to enhance their lives. 	The Law Society supports this proposal.
1.11	<p><i>1.11 Determining a person's will and preferences</i> The new Act should state that anyone exercising functions under it should approach the task of giving effect to a person's will and preferences wherever possible, as follows:</p> <ul style="list-style-type: none"> a. First, to be guided by the person's expressed will and preferences (including a valid advance care directive) wherever possible. b. If these cannot be determined, to be guided by the person's likely will and preferences. These may be determined by the person's previously 	The Law Society supports this proposal.

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	<p>expressed will and preferences, and by consulting people who have a genuine and ongoing relationship with the person and who may be or have been aware of the person's will and preferences.</p> <ul style="list-style-type: none"> c. If these too cannot be determined, to make decisions that promote the person's personal and social wellbeing. d. If giving effect to a person's will and preferences creates an unacceptable risk to the person (including the risk of criminal or civil liability), to make decisions that promote the person's personal and social wellbeing. e. Regardless, a person's decision to refuse healthcare in an advance care directive must be respected if that refusal is clear and extends to the situation at hand. 	
1.12	<p><i>1.12 Definition of decision-making ability</i> The new Act should provide that a person has decision-making ability for a particular decision if they can, when the decision needs to be made:</p> <ul style="list-style-type: none"> a. understand the relevant information b. understand the nature of the decision and the consequences of making or failing to make that decision c. retain the information to the extent necessary to make the decision d. use the information or weigh it as part of the decision-making process, and e. communicate the decision in some way. 	<p>The Law Society supports this proposal, and in particular supports the framing being in terms of ability rather than disability. Further, the Law Society agrees that decision-making ability should not be linked with disability.</p>
1.13	<p><i>1.13 Presumption of decision-making ability</i> The new Act should provide for a rebuttable presumption that a person has decision-making ability.</p>	<p>The Law Society supports this proposal as it is a codification of the already existing common law presumptions.</p>
1.14	<p><i>1.14 Assessing decision-making ability</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. When assessing whether a person has decision-making ability, a decision-maker must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision-making ability can be assessed most accurately. 2. In determining whether a person has decision-making ability, a decision-maker should consider that: <ul style="list-style-type: none"> a. decision-making ability is specific to the decision being made b. inability to make a decision may be temporary or permanent c. decision-making ability may be different at different times d. a person may develop, gain or regain decision-making ability, and 	<p>The Law Society supports this proposal.</p>

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	<p>e. a person has decision-making ability for a matter if it is possible for the person to make the decision with practicable and appropriate support.</p> <p>3. A decision-maker should not reach the conclusion that a person does not have decision-making ability only because of one or more of the following:</p> <ul style="list-style-type: none"> a. the person's age b. the person's appearance c. an aspect of a person's behaviour (or manner) d. the person's political, religious, or philosophical beliefs e. the fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise f. the fact that the person has a physical or mental condition g. the fact that a person is a forensic patient, or may become a forensic patient h. the person's methods of communication i. the person's gender identity, sexual preference or sexual conduct j. the person's cultural identity, or k. the person's history of drug or alcohol use. 	
1.15	<p><i>1.15 Assessing decision-making ability of Aboriginal people and Torres Strait Islanders</i></p> <p>The new Act should provide that, to the extent that it is appropriate and practicable to do so, when determining whether an Aboriginal person or Torres Strait Islander has decision-making ability, a decision-maker should have regard to:</p> <ul style="list-style-type: none"> a. any cultural or linguistic factors that may impact on an assessment of the person's decision-making ability, and b. any other relevant considerations pertaining to the person's culture. 	The Law Society supports this proposal.
1.16	<p><i>1.16 Additional Tribunal considerations for orders about Aboriginal people and Torres Strait Islanders</i></p> <p>The new Act should provide that, to the extent that it is appropriate and practicable to do so, the Tribunal must, when determining whether a support or representation order should be made for an Aboriginal person or Torres Strait Islander, have regard to:</p> <ul style="list-style-type: none"> a. the likely impact of the order on the person's culture, values, beliefs (including religious beliefs) and linguistic environment b. the likely impact of the order on the person's standing or reputation in their 	The Law Society supports this proposal.

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	<p>Indigenous community, and</p> <p>c. any other relevant consideration pertaining to the person's culture.</p>	
1.17	<p><i>1.17 Supreme Court's inherent protective jurisdiction</i></p> <p>The new Act should not limit the Supreme Court's inherent jurisdiction, including its <i>parens patriae</i> jurisdiction.</p>	The Law Society supports this proposal.
2.	<u>Personal support agreements</u>	
2.1	<p><i>2.1 Eligibility to appoint a supporter</i></p> <p>The new Act should provide that a person may appoint a supporter through a support agreement if the person making the appointment:</p> <ol style="list-style-type: none"> a. is at least 18 years of age b. has decision-making ability to enter the agreement, and c. is making the agreement voluntarily. 	<p>The Law Society supports this proposal, however notes that it requires that a person may appoint a supporter through a support agreement if the person making the appointment "...has decision-making ability to enter the agreement, and is making the agreement voluntarily". The Law Society is concerned with this issue, as there is no proposed guidance or reference for how a person may be judged to have the decision-making ability to enter an agreement, nor how it may be determined that they are doing so voluntarily. This is particularly troubling given that proposal 2.4 states that any agreement of the kind discussed in proposal 2.1 is to be certified by an 'eligible witness' who should witness the signature of the person making the support agreement, and also be able to certify that the person making the appointment "...signed voluntarily and appears to have decision-making ability in relation to the agreement". The term 'eligible witness' is not defined in the proposals. The Law Society is of the view that given the gravity and importance of support agreements, proper consideration must be given to the class or classes of persons that can witness these documents.</p>
2.2	<p><i>2.2 Types of decisions a support agreement may cover</i></p> <p>The new Act should provide that a support agreement may apply to decisions including those about personal matters, financial matters, healthcare and</p>	The Law Society has no comment in relation to this proposal.

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	restrictive practices. The agreement should specify what decisions or types of decisions the supporter may assist with as well as any conditions or limitations.	
2.3	<p><i>2.3 Eligibility for appointment as a supporter</i> The new Act should provide that a person is not eligible to be appointed as a supporter if:</p> <ol style="list-style-type: none"> a. the person is under 16 years of age b. they are to assist with financial decision-making and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the support agreement, or c. they are the Public Representative or the NSW Trustee. 	<ul style="list-style-type: none"> • The Law Society agrees with this proposal. • The Law Society considers that persons who have been convicted of domestic violence offences should also be excluded from eligibility for appointment as a supporter. • The Law Society also notes that the proposal permits the appointment of paid care workers, volunteers and others involved in providing medical, accommodation and other daily services, as supporters. While the Law Society acknowledges that there is a role for public agencies, paid workers and professional organisations as supporters in some situations, the Law Society does not support the appointment of community volunteers as supporters.
2.4	<p><i>2.4 Making a support agreement</i> The new Act should provide:</p> <ol style="list-style-type: none"> a. that a support agreement must be in a prescribed form and be signed by the person making the appointment and the proposed supporter accepting the appointment (although not necessarily at the same time or in the presence of each other) b. for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and c. for eligible witnesses to witness the signature, and, in the case of the person making the appointment, to certify that the person signed voluntarily and appears to have decision-making ability in relation to the agreement. 	<ul style="list-style-type: none"> • The Law Society supports this proposal. • The Law Society notes that the term 'eligible witness' is not defined in the proposals. The Law Society is of the view that given the gravity and importance of support agreements, proper consideration must be given to the class or classes of persons that can witness these documents.
2.5	<p><i>2.5 When a support agreement has effect</i> The new Act should provide that a support agreement has effect in relation to a decision to which it applies except for any period during which:</p> <ol style="list-style-type: none"> a. the supported person does not have decision-making ability for that 	The Law Society has no comment in relation to this proposal.

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	<p>decision even when assisted by the supporter, or</p> <p>b. the agreement is revoked or suspended or has lapsed.</p>	
2.6	<p><i>2.6 Appointment of multiple supporters</i></p> <p>The new Act should:</p> <p>a. allow a person to appoint two or more supporters to act jointly or severally, in relation to one or more functions, and</p> <p>b. provide for situations where one or more of the supporters cannot act (by reason of death, resignation, or loss of decision-making ability).</p>	<p>The Law Society does not support this proposal, and submits that only one formal supporter should be appointed for each type of matter.</p>
2.7	<p><i>2.7 Appointment of reserve supporters</i></p> <p>The new Act should allow a person to appoint a reserve supporter to act if the original supporter dies, resigns or does not have decision-making ability (temporarily or permanently) to act under the agreement.</p>	<p>The Law Society supports this proposal.</p>
2.8	<p><i>2.8 Functions of supporters</i></p> <p>The new Act should provide:</p> <p>1. A supporter may have the following functions:</p> <p>a. to communicate or assist the supported person in communicating their decisions to other people, and advocate for the implementation of the decision where necessary, and</p> <p>b. to access, collect or obtain, or assist the supported person in accessing, collecting or obtaining any relevant personal information (including financial information) about the supported person in order to assist the supported person to understand the information.</p> <p>2. A supporter's functions and any limits on these functions are determined by the support agreement.</p> <p>3. A supporter is not authorised to:</p> <p>a. make decisions on behalf of the supported person, or exercise their powers without the supported person's knowledge and consent.</p> <p>b. access, collect or obtain personal information about the supported person that the supported person would not be entitled to access, or collect or obtain personal information beyond that permitted by the agreement.</p> <p>4. Unless otherwise specified in the agreement, a supporter may, on behalf of a supported person, sign and do all such things as are necessary to give effect to any function under the agreement.</p>	<p>The Law Society supports this proposal.</p>
2.9	<p><i>2.9 Responsibilities of supporters</i></p> <p>The new Act should provide:</p> <p>1. Supporters must:</p>	<ul style="list-style-type: none"> • The Law Society supports this proposal. • The Law Society is of the view that an

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	<ul style="list-style-type: none"> a. observe the Act's general principles b. act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the supported person c. act within the conditions or limitations of the agreement d. ensure that they identify and respond to situations where their interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary e. treat the supported person and important people in their life with dignity and respect f. if they are assisting with financial decision-making, keep accurate records and accounts g. respect the supported person's privacy and confidentiality by: <ul style="list-style-type: none"> i. only collecting personal information to the extent necessary for carrying out the supporter's role, and ii. only disclosing such information in circumstances permitted by Proposal 10.5, and h. notify the Public Representative and/or NSW Trustee as appropriate, if the supported person no longer has the decision-making ability to be supported to make the relevant decision. <p>2. Supporters must, where possible, develop a person's decision-making ability and promote and maximise a person's autonomy.</p> <p>3. Supporters must sign an acknowledgement that they have read and understood these responsibilities.</p>	<p>appropriate level of training is necessary to ensure that supporters can adequately carry out their obligations under 2.9(1)(d) and give the supported person all relevant information (both positive and negative) which is free from the supporter's own views. Further, the Law Society is of the view that it should also be made clear to supporters that they have the responsibility to express and follow the supported person's views.</p>
2.10	<p><i>2.10 Resignation of a supporter</i> The new Act should provide that a supporter under a support agreement may resign their appointment:</p> <ul style="list-style-type: none"> a. if the supported person understands the nature and consequences of the resignation, by giving notice in a prescribed form (signed and witnessed) to the supported person, or b. if the supported person does not understand the nature and consequences of the resignation – with the approval of the Tribunal. 	<p>The Law Society supports this proposal.</p>
2.11	<p><i>2.11 End or suspension of a support agreement</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A supported person may, by a prescribed form that is signed and witnessed, revoke an appointment under a support agreement if the supported person: 	<p>The Law Society has no comment in relation to this proposal.</p>

No.	Proposal	Law Society comments
	<ul style="list-style-type: none"> a. has decision-making ability in relation to the agreement and its revocation, and b. revokes the agreement voluntarily. <ul style="list-style-type: none"> 2. A support agreement does not lapse when a supporter dies, if there is a joint or reserve supporter to carry out the functions. 3. A support agreement is suspended, so far as it appoints a supporter, if the supporter becomes a person who does not have the decision-making ability to act as a supporter under the agreement. 4. If a supported person becomes subject to a Tribunal representation order, any support agreement is suspended for the duration of the order, unless the Tribunal orders otherwise. 	
2.12	<p><i>2.12 Tribunal review of support agreements</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. The Tribunal may review a support agreement on its own motion. 2. The Tribunal must review a support agreement if requested to do so by: <ul style="list-style-type: none"> a. the supported person b. the supporter, or c. a person with a genuine interest in the personal or social wellbeing of the supported person, unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the agreement. 3. The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate a decision). 4. The Tribunal may order that the agreement is suspended until the review is complete. 	The Law Society supports this proposal.
2.13	<p><i>2.13 Tribunal action on review</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. The Tribunal must, when reviewing the agreement: <ul style="list-style-type: none"> a. determine whether the supported person had the decision-making ability to enter into the agreement, and b. if the person did have the decision-making ability to enter into the agreement, have regard to: <ul style="list-style-type: none"> i. the fact that the supporter was chosen by the person ii. whether the eligibility criteria for a supporter are still met, and iii. whether the supporter is meeting their responsibilities and carrying out their required functions. 	The Law Society supports this proposal.

No.	Proposal	Law Society comments
	<p>2. The Tribunal may, on reviewing a support agreement, do any of the following to the agreement, in whole or in part:</p> <ol style="list-style-type: none"> a. confirm it, with the consent of the supported person b. vary it, including by appointing a replacement supporter who is suitable and eligible c. suspend it, or d. revoke it. <p>3. The Tribunal may make a representation order or a support order in accordance with the new Act to supersede the agreement which has been suspended or revoked.</p>	
2.14	<p><i>2.14 Supreme Court review of a support agreement</i> The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of a supporter under a support agreement and make such orders as it thinks appropriate in respect of the appointment.</p>	The Law Society supports this proposal.
2.15	<p><i>2.15 Tribunal may declare appointment has effect</i> The new Act should provide that a supporter, a supported person, or other person with a genuine interest in the personal or social wellbeing of the supported person, may apply to the Tribunal for a declaration that an appointment under a support agreement is valid.</p>	The Law Society has no comment in relation to this proposal.
2.16	<p><i>2.16 Protection from liability for supporters and third parties</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A person who acts as a supporter under a support agreement in good faith and without knowing the agreement does not have effect is entitled to rely on the agreement in any case. 2. A third party dealing with a person who acts as a supporter under a support agreement is entitled to rely on the agreement, so long as the third party acts in good faith and without knowing that the agreement does not have effect. 	The Law Society has no comment in relation to this proposal.
3.	<u>Tribunal support orders</u>	
3.1	<p><i>3.1 Application for a tribunal support order</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. An application to the Tribunal for a support order may be made by: <ol style="list-style-type: none"> a. the person to whom the order will apply b. the Public Representative or the NSW Trustee, or c. a person with a genuine interest in the personal or social wellbeing of the person who is the subject of the application. 2. An application must specify the grounds upon which there is a need for an 	The Law Society has no comment in relation to this proposal.

No.	Proposal	Law Society comments
	<p>order.</p> <ol style="list-style-type: none"> 3. As soon as practicable after making the application, the applicant must serve the application on each of the parties. 4. Before conducting a hearing into the application, the Tribunal must notify each party of the hearing's time, date and location. 5. Failing to serve a copy of the application or a notice does not invalidate the Tribunal's decision on the application. 6. The Tribunal may treat an application for a representation order, or review of a support order, support agreement or enduring representation agreement as an application for a support order. 	
3.2	<p><i>3.2 Making a support order</i> The new Act should provide that, after conducting a hearing into an application, the Tribunal may appoint a supporter to assist the person if:</p> <ol style="list-style-type: none"> a. the person needing support ("the person") is of or above the age of 18 b. there are one or more decisions to be made c. an eligible and suitable supporter is available d. the person would have decision-making ability in relation to the decision(s) covered by the order if assisted by the proposed supporter e. less intrusive and restrictive measures have already been considered and are either unavailable or not suitable f. the proposed supporter consents to the appointment, and g. the person consents to the appointment. 	The Law Society has no comment in relation to this proposal.
3.3	<p><i>3.3 Types of decisions a support order may cover</i> The new Act should provide that the Tribunal may make orders which apply to decisions including those about personal matters, financial matters, healthcare and restrictive practices. The order should specify what decisions or types of decisions the supporter may make as well as any conditions or limitations.</p>	The Law Society has no comment in relation to this proposal.
3.4	<p><i>3.4 Eligibility for appointment as a supporter</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may not appoint a person as a supporter under a support order if: <ol style="list-style-type: none"> a. the person is under 16 years of age, or b. they are the Public Representative or the NSW Trustee. 2. The Tribunal may appoint the Public Representative or the NSW Trustee to facilitate the development of a support agreement between parties. 	The Law Society supports this proposal.
3.5	<i>3.5 Suitability for appointment as a supporter</i>	

No.	Proposal	Law Society comments
	<p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. In deciding whether a proposed supporter is suitable, the Tribunal must take into account: <ol style="list-style-type: none"> a. the will and preferences of the person in need of decision-making assistance ('the person'), determined as set out in Proposal 1.11 b. the nature of the relationship between the proposed supporter and the person c. the abilities and availability of the proposed supporter d. whether the proposed supporter will be likely to act honestly, diligently and in good faith in the role e. whether the proposed supporter has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts f. whether the supporter would promote the person's personal and social wellbeing g. the person's cultural identity, and h. where the proposed supporter will assist with financial decision-making, whether they have been bankrupt or been convicted of a dishonesty offence. 2. A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment. 	<ul style="list-style-type: none"> • The Law Society supports this proposal. • In addition to the listed characteristics that should exclude people from being supporters, the Law Society is of the view that people who have been convicted of domestic violence offences should be excluded from being supporters.
3.6	<p><i>3.6 When a support order has effect</i></p> <p>The new Act should provide that a support order has effect for the period specified in the order, except when:</p> <ol style="list-style-type: none"> a. the supported person does not have decision-making ability for that decision even when assisted by the supporter, or b. the order is terminated or suspended. 	<p>The Law Society has no comment in relation to this proposal.</p>
3.7	<p><i>3.7 Appointment of multiple supporters</i></p> <p>The new Act should:</p> <ol style="list-style-type: none"> a. allow the Tribunal to appoint two or more supporters for a person, to act jointly or severally, in relation to one or more functions, and 	<p>The Law Society considers that the Tribunal should only appoint one formal supporter for each type of matter, i.e. one for financial matters and one for personal/health matters.</p>

No.	Proposal	Law Society comments
	<p>b. provide for situations where one or more supporters cannot act (by reason of death, resignation, or loss of decision-making ability).</p>	
3.8	<p><i>3.8 Appointment of reserve supporters</i> The new Act should allow the Tribunal to appoint a reserve supporter to act if the original supporter dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the order.</p>	The Law Society supports this proposal.
3.9	<p><i>3.9 Functions of supporters</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A supporter may have the following functions: <ol style="list-style-type: none"> a. to communicate or assist the supported person in communicating their decisions to other people, and advocate for the implementation of the decision where necessary, and b. to access, collect or obtain, or assist the supported person in accessing, collecting or obtaining any relevant personal information (including financial information) about the supported person in order to assist the supported person to understand the information. 2. A support order must set out the supporter's functions and any limits on those functions. 3. A supporter is not authorised to: <ol style="list-style-type: none"> a. make decisions on behalf of the supported person, or exercise their powers without the supported person's knowledge and consent b. access, collect or obtain personal information about the supported person that the supported person would not be entitled to access, or access, collect or obtain personal information beyond that permitted by the order 4. Unless specified in the order, a supporter may, on behalf of a supported person, sign and do all such things as are necessary to give effect to any function under the order. 	<ul style="list-style-type: none"> • The Law Society supports this proposal. • The Law Society is of the view that the Act should not provide an overly prescriptive list of powers and functions of supporters.
3.10	<p><i>3.10 Responsibilities of supporters</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. Supporters must: <ol style="list-style-type: none"> a. observe the Act's general principles b. act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the supported person c. act within the conditions or limitations of the order d. ensure that they identify and respond to situations where their interests conflict with those of the supported person, ensure the supported person's 	The Law Society supports this proposal.

No.	Proposal	Law Society comments
	<p>interests are always the paramount consideration, and seek external advice where necessary</p> <ul style="list-style-type: none"> e. treat the supported person and important people in their life with dignity and respect f. if they are assisting with financial decision-making, keep accurate records and accounts g. respect the supported person's privacy and confidentiality by: <ul style="list-style-type: none"> i. only collecting personal information to the extent necessary for carrying out the supporter's role, and ii. only disclosing such information in circumstances permitted by Proposal 10.5, and h. notify the Public Representative and/or NSW Trustee as appropriate if the supported person no longer has the decision-making ability to be supported to make the relevant decision. <p>2. Supporters must, where possible, develop a person's decision-making ability and promote and maximise a person's autonomy.</p> <p>3. Supporters must sign an acknowledgement that they have read and understood these responsibilities.</p>	
3.11	<p><i>3.11 Effect of order on other appointments</i> The new Act should provide that a support order (including an order of the Supreme Court to like effect) operates to suspend any support agreement in its entirety, unless the Tribunal or Court allows limited operation of the agreement.</p>	The Law Society has no comment in relation to this proposal.
3.12	<p><i>3.12 Resignation of a supporter</i> The new Act should provide that a supporter under a support order may resign their appointment:</p> <ul style="list-style-type: none"> a. if the supported person understands the nature and consequences of the resignation - by giving notice in a prescribed form (signed and witnessed) to the supported person, or b. if the supported person does not understand the nature and consequences of the resignation – with the approval of the Tribunal. 	The Law Society has no comment in relation to this proposal.
3.13	<p><i>3.13 End or suspension of a support order</i> The new Act should provide:</p> <ul style="list-style-type: none"> 1. A supported person may, by a prescribed form that is signed, witnessed and provided to the Tribunal and Public Representative, terminate a support order, if the supported person: <ul style="list-style-type: none"> a. has decision-making ability in relation to the termination of the order, and 	The Law Society has no comment in relation to this proposal.

No.	Proposal	Law Society comments
	<ul style="list-style-type: none"> b. terminates the order voluntarily. 2. A support order does not lapse when a supporter dies, if there is a joint or reserve supporter to carry out the functions. 3. A support order is suspended, so far as it appoints a supporter, if the supporter becomes a person who does not have the decision-making ability to act as a supporter under the order. 4. If a supported person becomes subject to a representation order, any support order is suspended for the duration of the order, unless the Tribunal orders otherwise. 	
3.14	<p><i>3.14 Tribunal review of support orders</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. The Tribunal may review a support order on its own motion. 2. The Tribunal must review a support order if requested to do so by: <ul style="list-style-type: none"> (i) the supported person (ii) the supporter, or (iii) a person with a genuine interest in the personal or social wellbeing of the supported person, unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the order. 3. The Tribunal must, before carrying out the review, notify each party of the review's time, date and location (although failure to do so will not invalidate any decision). 4. The Tribunal may order that the support order is suspended until the review is complete. 	The Law Society supports this proposal.
3.15	<p><i>3.15 Tribunal action on review</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. The Tribunal must, in deciding what action to take upon review: <ul style="list-style-type: none"> a. determine whether the supported person had the decision-making ability to consent to the order and, b. if so, have regard to whether: <ul style="list-style-type: none"> i. there is still a need for a support order ii. the eligibility and suitability criteria for a supporter are still met, and iii. the supporter is meeting their responsibilities and carrying out their required functions 2. The Tribunal may, on reviewing a support order, do any of the following to the order, whole or in part: <ul style="list-style-type: none"> a. confirm it, with the consent of the supported person 	The Law Society has no comment in relation to this proposal.

No.	Proposal	Law Society comments
	<ul style="list-style-type: none"> b. vary it, including by appointing a different supporter who is suitable and eligible c. suspend it, or d. terminate it. <p>3. The Tribunal may make a representation order in accordance with the new Act to supersede the support order which has been suspended or terminated.</p>	
3.16	<p><i>3.16 Supreme Court review of a support order</i> The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of a supporter under a support order and make such orders as it thinks appropriate in respect of the appointment.</p>	The Law Society has no comment in relation to this proposal.
3.17	<p><i>3.17 Protection from liability for supporters and third parties</i> The new Act should provide:</p> <ul style="list-style-type: none"> 1. A person who acts as a supporter under a support order in good faith and without knowing the order does not have effect is entitled to rely on the order in any case. 2. A third party dealing with a person who acts as a supporter under a support order is entitled to rely on the order, so long as the third party acts in good faith and without knowing that the order does not have effect. 	The Law Society has no comment in relation to this proposal.
4.	<i>Enduring representation agreements</i>	
4.1	<p><i>4.1 Eligibility to appoint an enduring representative</i> The new Act should provide that a person may appoint an enduring representative through an enduring representation agreement if the person making the appointment:</p> <ul style="list-style-type: none"> a. is at least 18 years of age b. has decision-making ability to enter into the agreement, and c. is making the agreement voluntarily. 	The Law Society has no comment in relation to this proposal.
4.2	<p><i>4.2 Types of decisions an enduring representation agreement may cover</i> The new Act should provide that an enduring representation agreement may apply to decisions including those about personal matters, financial matters, healthcare and restrictive practices. The agreement should specify what decisions or types of decisions the enduring representative may make as well as any conditions or limitations.</p>	The Law Society has no comment in relation to this proposal.
4.3	<p><i>4.3 Eligibility for appointment as an enduring representative</i> The new Act should provide:</p> <ul style="list-style-type: none"> 1. A person is not eligible to be appointed as an enduring representative if: <ul style="list-style-type: none"> a. they are under 18 years of age 	The Law Society agrees with the proposed eligibility criteria for enduring representatives. However, the Law Society considers that people should have the choice to

No.	Proposal	Law Society comments
	<ul style="list-style-type: none"> b. they (or their spouse, child, brother or sister) provide, for fee or reward, healthcare, accommodation or other support services to the appointing person c. they are to be given a financial function and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the enduring representation agreement, or d. they are the Public Representative or the NSW Trustee. <p>2. The appointment does not lapse if an enduring representative (or their spouse, child, brother or sister) is subsequently engaged to provide for fee or reward healthcare, accommodation or other support services to the represented person.</p>	<p>appoint NSW Trustee as enduring representative where they so wish. As there is no equivalent restriction on the appointment of private trustee companies, it is the view of the Law Society that this would disproportionately disadvantage individuals who have limited financial resources.</p>
4.4	<p><i>4.4 Making an enduring representation agreement</i> The new Act should provide:</p> <ul style="list-style-type: none"> a. that an enduring representation agreement must be in a prescribed form and be signed by the person making the appointment and the proposed enduring representative accepting the appointment (although not necessarily at the same time or in the presence of each other) b. for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and c. for eligible witnesses to witness the signatures, and, in the case of the person making the appointment, to certify that the person signed voluntarily and appeared to have decision-making ability in relation to the agreement. 	<p>The Law Society has no comment in relation to this proposal.</p>
4.5	<p><i>4.5 When an enduring representation agreement has effect</i> The new Act should provide that, unless an enduring representation agreement is revoked or suspended or has lapsed, it has effect in relation to a decision to which the agreement applies only when the represented person does not have decision-making ability for that decision.</p>	<p>The Law Society notes that the proposal states that an enduring representation agreement will only have effect when a person does not have decision-making ability in relation to a decision. We note the related comment in the draft proposals document (at page 25), states: "Other powers of attorney arrangements (that is, those that do not relate to enduring powers of attorney) will continue to be dealt with under the <i>Powers of Attorney Act</i>". The Law Society queries how an enduring representation agreement would operate where a principal wishes to appoint an attorney with powers to come into immediate</p>

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		effect and continue beyond when they lose decision making ability. Under the current proposal, it appears that in this situation there would be a requirement for the execution of two separate documents – which would be costly, confusing and unnecessary.
4.6	<p><i>4.6 Appointment of multiple enduring representatives</i> The new Act should:</p> <ul style="list-style-type: none"> • allow a person to appoint two or more enduring representatives to act jointly or severally, in relation to one or more functions, and • provide for situations where one or more enduring representatives cannot act (by reason of death, resignation, or loss of decision-making ability). 	The Law Society has no comment in relation to this proposal.
4.7	<p><i>4.7 Appointment of reserve enduring representatives</i> The new Act should allow a person to appoint a reserve enduring representative to act if an original enduring representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the agreement.</p>	The Law Society supports this proposal.
4.8	<p><i>4.8 Functions of enduring representatives</i> The new Act should provide:</p> <ol style="list-style-type: none"> a. An enduring representative’s decision-making functions (and any limits or lawful conditions on them) are determined by the enduring representation agreement. b. An enduring representative may sign and do all such things as are necessary to give effect to any decision-making function. c. An enduring representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions. d. The following functions cannot be given under an enduring representation agreement: making or revoking a will, making or revoking an enduring representation agreement, voting in elections, consenting to marriage, divorce, surrogacy arrangements or sexual relations, making decisions regarding the care and wellbeing or adoption of children, and managing the represented person’s property after their death. 	<ul style="list-style-type: none"> • The Law Society supports this proposal. • The Law Society is of the view that the Act should not provide a detailed list of powers and functions for enduring representatives, and that the list of functions should not be overly prescriptive.
4.9	<p><i>4.9 Responsibilities of enduring representatives</i> The new Act should provide:</p>	<ul style="list-style-type: none"> • The Law Society supports this proposal.

No.	Proposal	Law Society comments
	<ol style="list-style-type: none"> 1. Enduring representatives must: <ol style="list-style-type: none"> a. observe the Act's general principles b. act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person c. act within the conditions or limitations of the agreement d. ensure that they identify and respond to situations where their interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary e. communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible f. treat the represented person and important people in their life with dignity and respect, g. if they have a financial function, keep accurate records and accounts, and h. respect the represented person's privacy and confidentiality by: <ol style="list-style-type: none"> i. only collecting personal information to the extent necessary for carrying out the enduring representative's role, and ii. only disclosing such information when permitted by Proposal 10.5. 2. Enduring representatives must, where possible: <ol style="list-style-type: none"> a. develop a person's decision-making ability b. promote and maximise a person's autonomy, and c. provide decision-making support. 3. Enduring representatives must sign an acknowledgement that they have read and understood these responsibilities. 	<ul style="list-style-type: none"> • The Law Society also notes that proposal 4.9(g) requires enduring representatives managing financial functions to keep accurate records and accounts. The Law Society queries whether this will require enduring representatives in this situation to maintain a separation of all property from the principal (except in circumstances where property is owned jointly).
4.10	<p><i>4.10 Resignation of an enduring representative</i> The new Act should provide that an enduring representative under an enduring representation agreement may resign their appointment:</p> <ol style="list-style-type: none"> a. if the represented person understands the nature and consequences of the resignation – by giving notice in a prescribed form (signed and witnessed) to the represented person. b. if the represented person does not understand the nature and consequences of the resignation – with the approval of the Tribunal. 	The Law Society has no comment in relation to this proposal.
4.11	<p><i>4.11 End or suspension of an enduring representation agreement</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A represented person may, by a prescribed form that is signed and witnessed, revoke an appointment under an enduring representation agreement if the 	The Law Society has no comment in relation to this proposal.

No.	Proposal	Law Society comments
	<p>represented person:</p> <ol style="list-style-type: none"> a. has decision-making ability in relation to the agreement and its revocation, and b. revokes the agreement voluntarily. <ol style="list-style-type: none"> 2. An enduring representation agreement does not lapse when the enduring representative dies if there is a joint or reserve representative to carry out the functions. 3. An enduring representation agreement is suspended, so far as it appoints an enduring representative, when the enduring representative does not have the decision-making ability to act under the agreement. 	
4.12	<p><i>4.12 Effect of marriage on an enduring representation agreement</i> The new Act should not provide that the marriage of a person who has made an enduring representation agreement automatically revokes the agreement.</p>	The Law Society has no comment in relation to this proposal.
4.13	<p><i>4.13 Tribunal review of enduring representation agreements</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may review an enduring representation agreement on its own motion. 2. The Tribunal must review an enduring representation agreement if requested to do so by: <ol style="list-style-type: none"> a. the represented person b. a person with a genuine interest in the personal or social wellbeing of the represented person, or c. the enduring representative, unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the agreement. 3. The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision). 4. The Tribunal may order that the agreement is suspended until the review is complete. 	The Law Society has no comment in relation to this proposal.
4.14	<p><i>4.14 Tribunal action on review</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal must, when reviewing the agreement: <ol style="list-style-type: none"> a. determine whether the person had the decision-making ability to enter into the agreement, and b. if the person did have the decision-making ability to enter into the 	The Law Society has no comment in relation to this proposal.

No.	Proposal	Law Society comments
	<p>agreement, have regard to:</p> <ol style="list-style-type: none"> i. the fact that the representative was chosen by the person ii. whether the eligibility criteria for a representative are still met, and iii. whether the representative is meeting their responsibilities and carrying out their required functions. <ol style="list-style-type: none"> 2. The Tribunal may, on reviewing an enduring representation agreement, confirm it (in whole or in part), vary it (including appointing a replacement enduring representative who is eligible and suitable), suspend it (in whole or in part) or revoke it (in whole or in part). 3. The Tribunal may, where there is doubt about the validity of an appointment, confirm the appointment if the Tribunal is satisfied it was the appointment the person intended to make. 4. The Tribunal may make a representation order or support order in accordance with the new Act to supersede a representative agreement that has been suspended or revoked in whole or in part. 	
4.15	<p><i>4.15 Supreme Court review of an enduring representation agreement</i> The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of an enduring representative under an enduring representation agreement and may make such orders as it thinks appropriate.</p>	The Law Society supports this proposal.
4.16	<p><i>4.16 Possession or control of a represented person's property</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. Nothing in the new Act operates to change the ownership of any part of a represented person's property. 2. An enduring representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to: <ol style="list-style-type: none"> a. the formerly represented person, or b. any replacement representative who has functions in relation to that part of the represented person's property. 	The Law Society has no comment in relation to this proposal.
4.17	<p><i>4.17 Status of an advance care directive</i> The new Act should provide that an advance care directive is valid notwithstanding that it is contained in an enduring representation agreement that has been suspended or revoked (unless revoked by the appointor) or has lapsed.</p>	The Law Society supports this proposal, and believes that an advanced care directive should not be held invalid except in limited circumstances, such as when the person does not have capacity or is under duress at the time a directive is executed.
4.18	4.18 Tribunal may declare appointment has effect	The Law Society has no comment in relation to

No.	Proposal	Law Society comments
	<p>The new Act should provide that the Tribunal may, on application by a person appointed as an enduring representative, declare that the appointment has effect if it is satisfied that:</p> <ol style="list-style-type: none"> a. the represented person does not have decision-making ability for a decision covered by the enduring representation agreement, and b. the appointment is valid. 	this proposal.
4.19	<p><i>4.19 Supreme Court may confirm any function of an enduring representative</i> The new Act should provide that the Supreme Court may, on application by a person appointed as an enduring representative, confirm (in whole or in part) any function under the enduring representation agreement if:</p> <ol style="list-style-type: none"> a. it appears that the represented person does not have decision-making ability to affirm the function, and b. affirming the function is in accordance with the represented person's will and preferences. 	The Law Society has no comment in relation to this proposal.
4.20	<p><i>4.20 Protection from liability for enduring representatives and third parties</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A person who acts as an enduring representative under an enduring representation agreement in good faith and without knowing the agreement does not have effect is entitled to rely on the agreement in any case. 2. A third party dealing with a person who acts as an enduring representative is entitled to rely on the enduring representation agreement, so long as the third party acts in good faith and without knowing that the agreement does not have effect. 	The Law Society has no comment in relation to this proposal.
5.	<u>Representation orders</u>	
5.1	<p><i>5.1 Application for a representation order</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The following may apply to the Tribunal for a representation order: <ol style="list-style-type: none"> a. the person to whom the order will apply b. the Public Representative or the NSW Trustee, or c. a person with a genuine interest in the personal or social wellbeing of the person the subject of the application. 2. An application must specify the grounds upon which there is a need for an order. 3. As soon as practicable after making the application, the applicant must serve a copy of the application on each of the parties. 4. Before conducting a hearing into the application, the Tribunal must notify each 	The Law Society has no comment in relation to this proposal.

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	<p>party of the date, time and place of the hearing.</p> <p>5. Failing to serve a copy of the application or a notice does not invalidate the Tribunal's decision on the application.</p> <p>6. The Tribunal may treat an application for a support order, or review of a support order, support agreement or enduring representation agreement as an application for a representation order.</p>	
5.2	<p><i>5.2 Grounds for an order</i></p> <p>The new Act should provide:</p> <p>1. The Tribunal may, after conducting a hearing into an application, appoint a person to be a representative under a representation order if:</p> <ol style="list-style-type: none"> the proposed represented person is of or above the age of 17 there are one or more decisions to be made less intrusive and restrictive measures are either unavailable or not suitable, and there is a need for an order. <p>2. In considering whether there is a need for an order, the Tribunal should take into account, where relevant:</p> <ol style="list-style-type: none"> the adequacy of existing or available formal or informal arrangements in meeting the person's decision-making needs, and the availability and suitability of less restrictive and intrusive measures to meet the person's needs, including but not limited to a support order or support agreement. <p>3. The onus is on the applicant to show that the person does not have decision-making ability in relation to the decision(s) the proposed order relates to. If this onus is not met, there will not be a need for an order.</p>	<ul style="list-style-type: none"> The Law Society supports this proposal. The Law Society also strongly supports the inclusion of a precondition before an order is made that the Tribunal must be satisfied that a person is in need of an order (5.2(1)(d)) and the inclusion of a guiding principle that the Tribunal should consider the means which is the least restrictive of a person's freedom of decision-making (5.2(1)(c)).
5.3	<p><i>5.3 Types of decisions a representation order may cover</i></p> <p>The new Act should provide that a representation order may apply to decisions about personal matters, financial matters, healthcare and/or restrictive practices. The order should specify what decisions or types of decisions the representative may make as well as any conditions or limitations.</p>	<p>The Law Society supports the powers and functions of a representation order being listed, however submits that the list should be non-exhaustive and not prescriptive.</p>
5.4	<p><i>5.4 Eligibility for appointment as a representative</i></p> <p>The new Act should provide:</p> <p>1. The Tribunal can appoint as a representative under a representation order:</p>	<p>The Law Society supports this proposal.</p>

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	<ul style="list-style-type: none"> a. an eligible person, or b. in relation to personal, healthcare and/or restrictive practices decision-making functions - the Public Representative c. in relation to financial decision-making functions - the NSW Trustee. <p>2. A person is an “eligible person” if they are:</p> <ul style="list-style-type: none"> a. of or above the age of 18, or b. of or above the age of 16 and: <ul style="list-style-type: none"> i. they are the represented person’s primary carer, and ii. they are already supporting the person or making decisions on their behalf, and iii. the proposed functions are consistent with their decision-making abilities. <p>3. The Tribunal (other than in an emergency representation order) shall not appoint the Public Representative or the NSW Trustee as a representative if some other person can be appointed.</p>	
5.5	<p><i>5.5 Suitability for appointment as a representative</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. The Tribunal may only appoint a person as a representative if it is satisfied that they are suitable and the proposed representative consents to the appointment. 2. In deciding whether a person (other than the Public Representative or NSW Trustee) is suitable, the Tribunal must take into account: <ul style="list-style-type: none"> a. the will and preferences of the person in need of decision-making assistance (‘the person’) b. the nature of the relationship between the proposed representative and the person c. the abilities and availability of the proposed representative d. whether the proposed representative is likely to act honestly, diligently and in good faith e. whether the proposed representative has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts f. whether the proposed representative would promote the person’s personal and social wellbeing g. the person’s cultural identity h. whether the proposed representative has been convicted of a serious 	The Law Society supports this proposal.

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	<p>indictable offence, and</p> <p>i. where they will have a financial function, whether the proposed representative has been bankrupt or been convicted of a dishonesty offence.</p>	
5.6	<p><i>5.6 When a representation order has effect</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A representation order has effect only if the represented person is aged 18 years or over. 2. Unless a representation order is revoked or suspended or has lapsed, it has effect in relation to a decision to which the order applies only when the represented person does not have decision-making ability for that decision. 3. The Tribunal must specify that an order (except for an emergency order) has effect for no more than: <ol style="list-style-type: none"> a. 1 year for an initial order, or b. 3 years for an order that is renewed following review. 4. However, if the Tribunal is satisfied that the represented person will never have the relevant decision-making ability, the Tribunal may specify that the order (except for an emergency order) has effect for no more than: <ol style="list-style-type: none"> a. 3 years for an initial order, and b. 5 years for an order that is renewed following review. 5. The Tribunal may specify that an order will not be reviewed at the end of the period for which it has effect, but only if the Tribunal is satisfied that, in all the circumstances, not reviewing the order promotes the personal and social wellbeing of the person. 	<p>The Law Society notes that proposals 5.6(3) and (4) require the Tribunal to specify that 'representation orders', (which under the proposed unified scheme may include orders relating to financial management) are only to have effect for defined periods, and that the Tribunal must review a representation order at the conclusion of the period to which the order has effect, unless the order specifically provides that there is to be no review at the end of the period (pursuant to proposal 5.20(2)(a)).</p>
5.7	<p><i>5.7 Emergency orders</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may, where it considers it appropriate by reason of urgency, <ol style="list-style-type: none"> a. make an order it considers appropriate in the circumstances in respect of a person that remains in effect for a specified period of no more than 30 days, and b. renew the order for a further specified period of not more than 30 days. 2. The Tribunal may make the order on its own motion, or at the request of the person to whom the order relates, or at the request of a person with a genuine interest in the personal and social wellbeing of the person to whom the order relates. 3. In making an emergency order, the Tribunal may, if the person is not a 	<ul style="list-style-type: none"> • The Law Society holds concerns that emergency orders can be made by the Tribunal without holding a hearing. • The Law Society considers that the Tribunal ought to have the power to make orders with a time limit of longer than 30 days where circumstances warrant such an order being made and where medical evidence is available to indicate further time is required.

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	<p>represented person, and it considers that there may be grounds for making a representation order, appoint the Public Representative (in relation to personal, healthcare and/or restrictive practices decisions) and/or the NSW Trustee (in relation to financial decisions) as representative.</p> <p>4. In making an emergency order, the Tribunal is not required to:</p> <ol style="list-style-type: none"> a. find a “need for a representation order” as required by Proposal 5.2, or b. give notice to any person, or c. hold a hearing, but the Tribunal must make such inquiries or investigations as it thinks appropriate. <p>5. In making an emergency order, the Tribunal must specify the extent (if any) to which the representative has custody of the person.</p> <p>6. The Tribunal cannot make an emergency order if:</p> <ol style="list-style-type: none"> a. it is not the least restrictive option b. there is a valid advance care directive that expressly prohibits the decision for which the order is sought, or c. another order would be more appropriate. 	
5.8	<p><i>5.8 Orders to be forwarded to Public Representative and/or NSW Trustee</i> The new Act should provide that if the Tribunal makes a representation order appointing a person other than:</p> <ol style="list-style-type: none"> a. the Public Representative as a representative in relation to a personal, healthcare or restrictive practices decision-making function, and/or b. the NSW Trustee as a representative in relation to a financial decision-making function, it should forward a copy to the Public Representative and/or the NSW Trustee as the case may require. 	The Law Society has no comment in relation to this proposal.
5.9	<p><i>5.9 Appointment of multiple representatives</i> The new Act should:</p> <ol style="list-style-type: none"> a. allow the Tribunal to appoint two or more representatives to act jointly or severally, in relation to one or more functions b. provide for situations where one or more representatives cannot act (by reason of death, resignation, or loss of decision-making ability), and c. ensure that the Public Representative and NSW Trustee are not appointed as joint representative with each other or with anyone else. 	The Law Society has no comment in relation to this proposal.
5.10	<p><i>5.10 Reserve representatives</i> The new Act should allow the Tribunal to appoint a reserve representative to act if an original representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the order.</p>	The Law Society supports this proposal.

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5.11	<p><i>5.11 Functions of representatives</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A representative's decision-making functions (and any limits or conditions on them) are determined by the representation order. 2. A representative may sign and do all such things as are necessary to give effect to any decision-making function. 3. A representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions. 	<p>The Law Society has no comment in relation to this proposal.</p>
5.12	<p><i>5.12 Responsibilities of representatives</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. Representatives must: <ol style="list-style-type: none"> a. observe the Act's general principles b. act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person c. act within any conditions and limitations of the order d. ensure that they identify and respond to situations where their interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary e. communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible f. treat the represented person and important people in their life with dignity and respect g. if they are assisting with financial decision-making, keep accurate records and accounts, and h. respect the represented person's privacy and confidentiality by: <ol style="list-style-type: none"> i. only collecting personal information to the extent necessary for carrying out the representative's role, and ii. only disclosing such information when permitted by Proposal 10.5. 2. Representatives must, where possible: <ol style="list-style-type: none"> a. develop a person's decision-making ability b. promote and maximise a person's autonomy, and c. provide decision-making support. 3. Representatives must sign an acknowledgement that they have read and 	<p>The Law Society has no comment in relation to this proposal.</p>

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	understood these responsibilities.	
5.13	<p><i>5.13 Supervision of representatives with a financial function</i></p> <p>1. The new Act should provide:</p> <ul style="list-style-type: none"> a. The Tribunal may require the NSW Trustee to supervise a representative with a financial function, but only if the Tribunal considers it necessary. b. In considering whether supervision is necessary, the Tribunal must take into account: <ul style="list-style-type: none"> i. the size and complexity of the represented person's property ii. whether there are other measures to protect the represented person iii. any potential conflicts of interest between the represented person and the representative, and iv. any other relevant matters. c. The Tribunal must always require NSW Trustee supervision when appointing a professional representative with a financial function. (see Proposal 5.14). d. If the order requires NSW Trustee authorisation for the representative to make financial decisions, the representative can do what is necessary to protect the property pending authorisation. <p>2. The NSW Trustee and Guardian Act 2009 (NSW) should provide that the NSW Trustee, when supervising a representative with a financial function, may decide the nature and timing of any financial reporting.</p>	The Law Society supports this proposal.
5.14	<p><i>5.14 Remuneration of professional representatives with financial functions</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. The Tribunal may determine that a representative with financial functions who carries on a business that includes the administration of estates, is entitled to remuneration out of the represented person's estate for their work in administering that estate. 2. The NSW Trustee should decide the amount of any remuneration as part of any oversight and direction of representatives with financial functions. 	The Law Society does not support this view, and is of the view that any legislative scheme that provides for commercial or remunerated guardians will be necessarily very complex, and will give rise to significant conflict of interest issues.
5.15	<p><i>5.15 Effect of order on other appointments</i></p> <p>The new Act should provide that a representation order (including an order of the Supreme Court to like effect) suspends any enduring representation agreement, support agreement, or support order in its entirety, unless the court or Tribunal order expressly allows a limited continuing operation.</p>	The Law Society has no comment in relation to this proposal.
5.16	<i>5.16 Enforcing representatives' decisions</i>	The Law Society has no comment in relation to

No.	Proposal	Law Society comments
	<p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A Tribunal order may specify the actions which: <ol style="list-style-type: none"> a. a representative b. a specified person or a person of a specified class, or c. a person authorised by the representative may take, including the use of force, to ensure that the represented person complies with any decision of the representative in the exercise of the representative's functions. 2. However, the Tribunal may not make such an order unless the Tribunal is satisfied that: <ol style="list-style-type: none"> a. the person will be exposed to harm, including by way of neglect, abuse or exploitation, if the order is not made b. allowing such action is the least restrictive option for ensuring the person is not exposed to harm, and c. the actions authorised by the order are appropriate and proportionate to the circumstances. 3. If the part of the order is to have effect for longer than 21 days, the Tribunal must review the order within 21 days. 4. A person permitted in the order to use force may use such force as is reasonably necessary in the circumstances. 5. A person acting in accordance with such a permission, in good faith, is not liable to any action, liability, claim or demand arising from the action. 	<p>this proposal.</p>
5.17	<p><i>5.17 Resignation of a representative</i> The new Act should provide that a representative may resign with the approval of the Tribunal.</p>	<p>The Law Society has no comment in relation to this proposal.</p>
5.18	<p><i>5.18 End or suspension of a representation order</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A representation order does not lapse when a representative dies, if there is a joint or reserve representative to carry out the functions. 2. A representation order is suspended, so far as it appoints a representative, when the representative does not have the decision-making ability to act under the order. 	<p>The Law Society has no comment in relation to this proposal.</p>
5.19	<p><i>5.19 Assessment of represented people</i> The new Act should provide that the Tribunal may, in a representation order, require the Tribunal, or someone else on behalf of the Tribunal, to assess the decision-making ability of the represented person and the operation of the order at a specified time during the order's operation.</p>	<p>The Law Society has no comment in relation to this proposal.</p>

No.	Proposal	Law Society comments
5.20	<p><i>5.20 Tribunal review of representation orders</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may review a representation order on its own motion. 2. The Tribunal must review a representation order: <ol style="list-style-type: none"> a. at the end of the period for which the order has effect (unless the order provides there is to be no review at the end of the period), or b. if requested to do so by: <ol style="list-style-type: none"> i. the represented person ii. a person with genuine interest in the personal or social wellbeing of the represented person iii. the representative, or iv. the Public Representative, the NSW Trustee or the Public Advocate, unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the order. c. The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision). 	<p>The Law Society has no comment in relation to this proposal.</p>
5.21	<p><i>5.21 Tribunal action on review</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal should, when reviewing an order, consider, where relevant: <ol style="list-style-type: none"> a. whether there is still a need for the order b. whether eligibility and suitability criteria for a representative are still met, and c. whether the representative is meeting their responsibilities and carrying out their required functions. 2. The Tribunal may, on reviewing a representation order: <ol style="list-style-type: none"> a. at the end of the period for which the order has effect, renew it, renew and vary it, or decide that it may lapse b. confirm, vary, suspend (in whole or in part) or revoke the order, or c. make a support order in accordance with the new Act. 	<p>The Law Society supports this proposal.</p>
5.22	<p><i>5.22 Supreme Court review of a representation order</i></p> <p>The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of a representative under a representation order and may make such orders as it thinks appropriate.</p>	<p>The Law Society has no comment in relation to this proposal.</p>
5.23	<p><i>5.23 Possession or control of a represented person's property</i></p> <p>The new Act should provide:</p>	<p>The Law Society has no comment in relation to this proposal.</p>

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	<ol style="list-style-type: none"> 1. Nothing in the new Act operates to change the ownership of any part of a represented person's property. 2. A representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to: <ol style="list-style-type: none"> a. the formerly represented person, or b. any replacement representative who has functions in relation to that part of the represented person's property. 	
5.24	<p><i>5.24 Protection from liability for representatives and third parties</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A person who acts as a representative under a representation order in good faith and without knowing the order does not have effect is entitled to rely on it in any case. 2. A third party dealing with a person who acts as a representative is entitled to rely on the representation order, so long as the third party acts in good faith and without knowing that the order does not have effect. 	The Law Society has no comment in relation to this proposal.
6.	<i>Healthcare decisions</i>	
6.1	<p><i>6.1 Statutory objects</i></p> <p>The new Act should not have separate statutory objects for healthcare decision-making. The provisions in Proposal 1.8 should apply.</p>	The Law Society has no comment in relation to this proposal.
6.2	<p><i>6.2 Application of healthcare provisions</i></p> <p>The new Act should provide that its healthcare provisions apply to a patient:</p> <ol style="list-style-type: none"> a. who is of or above the age of 16 years, and b. who does not have decision-making ability for a healthcare decision. 	The Law Society has no comment in relation to this proposal.
6.3	<p><i>6.3 Definition of "healthcare"</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. "Healthcare" includes <ol style="list-style-type: none"> a. any care, service, procedure or treatment provided by, or under the supervision of, a registered health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person b. in the case of healthcare in the course of a medical research procedure – the giving of placebos, and c. any other act declared by the regulations to be healthcare. 2. "Healthcare" does not include: <ol style="list-style-type: none"> a. any non-intrusive examination for diagnostic purposes (including a visual 	The Law Society supports this proposal.

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	<p>examination of the mouth, throat, nasal cavity, eyes or ears)</p> <ol style="list-style-type: none"> b. first-aid c. administering a pharmaceutical drug for which a prescription is not required and which is normally self-administered in accordance with the manufacturer's recommendations as to purpose and dosage level d. mental health treatment given to a patient or affected person under the Mental Health Act 2008 (NSW) or Mental Health (Forensic Provisions) Act 1990 (NSW), or e. anything else that the regulations declare is not healthcare for the purposes of these provisions. <p>3. "Registered health practitioner" means a person who practises in:</p> <ol style="list-style-type: none"> a. a health profession within the meaning of the Health Practitioner Regulation National Law (NSW), and/or b. any other profession or practice as declared by the regulations. 	
6.4	<p><i>6.4 Decision-making ability</i> The definition of decision-making ability outlined in Proposal 1.12 should apply to the new Act's healthcare provisions.</p>	The Law Society supports this proposal.
6.5	<p><i>6.5 Advance care directives</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A patient may consent to healthcare in a valid advance care directive. 2. Healthcare must not be given if it would be strictly against a patient's will and preference as expressed in an advance care directive that is clear and extends to the situation at hand. 3. An advance care directive can be made in any form, including orally. 4. The provisions do not limit the common law about advance care directives. 5. A requirement to consider a person's will and preferences includes considering any valid advance care directive (see also Proposal 1.11). 6. A registered health practitioner must make a reasonable effort in the circumstances to find out if a patient has an advance care directive before treating them or seeking another person's consent to treat them. 7. Notwithstanding an advance healthcare directive, a registered health practitioner is not under any obligation to deliver a life-sustaining measure if to do so would be inconsistent with standard medical practice. 	<ul style="list-style-type: none"> • The Law Society supports this proposal, however considers that a definition of an 'advanced care directive' and a template (but not prescribed form) could serve to provide further clarity and facilitate and promote their use. • The Law Society also supports the retaining of the common law position in relation to advanced care directives.
6.6	<p><i>6.6 Urgent healthcare</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. Healthcare may be provided to a patient without consent if the registered 	The Law Society has no comment in relation to this proposal.

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	<p>health practitioner carrying out or supervising the healthcare considers the healthcare is necessary, as a matter of urgency:</p> <ul style="list-style-type: none"> (a) to save the patient's life, or (b) to prevent serious damage to the patient's health, or (c) except in the case of special healthcare —to prevent the patient from suffering or continuing to suffer significant pain or distress. <p>2. (2) In urgent circumstances, a registered health practitioner is not required to search for an advance care directive that is not readily available.</p>	
6.7	<p><i>6.7 Definition of "special healthcare"</i></p> <p>The new Act should provide that "special healthcare" means:</p> <ul style="list-style-type: none"> a. any healthcare that is intended, or is reasonably likely, to render the patient permanently infertile b. any healthcare that is not supported by a substantial number of registered health practitioners specialising in the relevant practice area, or c. any healthcare that the regulations declare to be special healthcare. 	The Law Society supports this proposal.
6.8	<p><i>6.8 Tribunal consent to special healthcare</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may consent to special healthcare for a patient if it is satisfied that it is necessary: <ul style="list-style-type: none"> a. to save the patient's life, or b. to prevent serious damage to the patient's health. 2. In the case of healthcare intended or reasonably likely to render the patient permanently infertile: <ul style="list-style-type: none"> a. "serious damage to the patient's health" includes serious and persistent health problems associated with menstruation (for example, seizures or anaemia) b. the Tribunal must be satisfied that the patient will not regain decision-making ability in the foreseeable future, and c. the Tribunal must not take into account: <ul style="list-style-type: none"> i. the risk of pregnancy as a result of sexual abuse ii. the patient's current or hypothetical capacity to care for children, or iii. a desire to prevent inheritable disability. 3. In the case of healthcare that is not supported by a substantial number of health practitioners specialising in the relevant practice area, the Tribunal may give consent only if: <ul style="list-style-type: none"> a. the treatment is the only or most appropriate way of treating the patient, 	The Law Society supports this proposal.

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	<p>and</p> <p>b. it is satisfied that any relevant National Health and Medical Research Council guidelines have been or will be complied with.</p> <p>For matters that the Tribunal must consider before giving consent, see Proposal 6.24.</p>	
6.9	<p><i>6.9 Representative’s consent to continuing or further special healthcare</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may, when consenting to special healthcare, authorise the patient’s representative to consent to: <ol style="list-style-type: none"> a. continuing the special healthcare, or b. further special healthcare of a similar nature. 2. The Tribunal may only give such an authority if the representative requests it or consents to it. 3. The Tribunal may at any time: <ol style="list-style-type: none"> a. impose conditions or give directions as to the exercise of such an authority, or b. revoke such an authority. 4. If the representative has such an authority, any person may ask the representative for their consent to give the relevant special healthcare. 5. In considering a request for consent to further or continuing healthcare, a representative must give effect to the will and preferences of the patient (to be determined as set out in Proposal 1.11). 	The Law Society has no comment in relation to this proposal.
6.10	<p><i>6.10 Definition of “major healthcare”</i></p> <p>The new Act should provide that major healthcare means healthcare that the regulations declare to be major healthcare.</p>	The Law Society has no comment in relation to this proposal.
6.11	<p><i>6.11 Consent to major healthcare</i></p> <p>The new Act should provide that the person responsible or the Tribunal may consent to major healthcare for a patient.</p> <p>For matters that the person responsible must consider before giving consent, see Proposal 6.22.</p> <p>For matters that the Tribunal must consider before giving consent, see Proposal 6.24.</p>	The Law Society supports this proposal.
6.12	<p><i>6.12 Definition of “minor healthcare”</i></p> <p>The new Act should provide that minor healthcare means healthcare that is not special healthcare or major healthcare and is declared by the regulations to be minor healthcare, including:</p>	The Law Society supports this proposal.

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	<ul style="list-style-type: none"> a. testing for HIV, and b. administering oral or injectable contraceptives or the contraceptive implant. 	
6.13	<p><i>6.13 Consent to minor healthcare</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The person responsible may consent to minor healthcare for a patient. 2. If there is no person responsible, minor healthcare may be carried out on a patient without consent provided that the registered health practitioner carrying out, or supervising the minor healthcare certifies in writing in the patient's clinical record that: <ul style="list-style-type: none"> a. the healthcare is necessary and is in a form that will most successfully promote the patient's health and personal and social wellbeing, and b. the patient does not object to the healthcare. 3. The Tribunal may consent to minor health care for a patient in any case. <p>For matters that the person responsible must consider before giving consent, see Proposal 6.22.</p> <p>For matters that the Tribunal must consider before giving consent, see Proposal 6.24.</p>	The Law Society supports this proposal.
6.14	<p><i>6.14 Consent to withdrawing or withholding life-sustaining measures</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The person responsible or Tribunal may consent to withholding or withdrawing a life-sustaining measure, but only if: <ul style="list-style-type: none"> a. starting or continuing the measure would be inconsistent with good medical practice, and b. the decision gives effect to the patient's will and preferences, as set out in Proposal 1.11. 2. Death as a result of withdrawing or withholding life-sustaining measures is not necessarily incompatible with promoting a patient's personal and social wellbeing. 	Although not a view shared by all Law Society members, the Law Society supports the proposal.
6.15	<p><i>6.15 Patient objections to healthcare</i> The new Act should provide that a patient shall be taken to object to healthcare:</p> <ul style="list-style-type: none"> a. if the patient indicates (by whatever means) that they do not want the healthcare, or b. if the patient: 	The Law Society has no comment in relation to this proposal.

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	<ul style="list-style-type: none"> i. has previously indicated, in similar circumstances, that they did not then want the healthcare (including in an advance care directive that is clear and extends to the situation at hand), and ii. has not subsequently indicated otherwise. 	
6.16	<p><i>6.16 Effect of consent and objections</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A healthcare consent has effect as if: <ul style="list-style-type: none"> a. the patient had the ability to consent to the healthcare, and b. the healthcare had been given with the patient's consent. 2. A consent given by person responsible has no effect: <ul style="list-style-type: none"> a. if the person giving or supervising the healthcare knows, or ought reasonably to know, that the patient objects to the healthcare, or b. if the healthcare is to be carried out for any purpose other than that of promoting the patient's health and personal and social wellbeing. 3. A consent given by the patient's representative has effect even if the patient objects when the representative is authorised by the Tribunal under Proposal 6.17. 4. Nothing in the healthcare provisions stops the Tribunal or the person responsible from consenting to healthcare that is specifically excluded from the definition of "healthcare" and any such consent applies as if that healthcare were not excluded from the definition. 	The Law Society has no comment in relation to this proposal.
6.17	<p><i>6.17 Overriding a patient's objection to major or minor healthcare</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal may authorise a representative (at their request or with their consent) to override the patient's objection to major or minor healthcare if satisfied that: <ul style="list-style-type: none"> a. the patient has not refused the healthcare in an advance care directive that is clear and extends to the situation at hand b. there would be an unacceptable risk to the patient if the healthcare was not given, and c. receiving the healthcare would promote the patient's health and personal and social wellbeing. 2. The Tribunal may at any time: <ul style="list-style-type: none"> a. impose conditions on or give directions about exercising the authority, or b. revoke the authority. 3. The patient's representative may exercise the authority only if satisfied that the 	The Law Society supports this proposal.

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	healthcare promotes the patient's health and personal and social wellbeing.	
6.18	<p><i>6.18 Identifying the person responsible</i> The new Act should define the "person responsible" as follows:</p> <ol style="list-style-type: none"> 1. The person responsible for a young person aged 16 or 17 is: <ol style="list-style-type: none"> a. the person with parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1998) b. the Minister for Family and Community Services, if the young person is in the care of the Minister, or c. the Secretary of the Department of Family and Community Services, if the young person is in the care of the Secretary. 2. The person responsible for an adult in the care of the Secretary of the Department of Family and Community Services is the Secretary. 3. In all other cases, the person responsible for an adult is the first person in the person responsible hierarchy who: <ol style="list-style-type: none"> a. has decision-making ability for the decision b. is reasonably available to make a decision, and c. has not, if asked, declined to make a decision. 4. A record should be made in accordance with the regulations if a person in the hierarchy declines to make a decision. 5. Disputes concerning the person responsible may be referred to the Public Advocate for mediation. 	The Law Society has no comment in relation to this proposal.
6.19	<p><i>6.19 The person responsible hierarchy</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. The person responsible hierarchy is: <ol style="list-style-type: none"> a. a person who can make the relevant decision under an enduring representation agreement or representation order b. the spouse of the person, if they have decision-making ability for the decision and the relationship is close and continuing c. a person who has the care of the person, d. a close friend or relative of the person. 2. The "spouse" of an Aboriginal person or a Torres Strait Islander includes spouses married according to customary law. 	The Law Society has no comment in relation to this proposal.
6.20	<p><i>6.20 When a person "has the care of another person"</i></p> <ol style="list-style-type: none"> 1. The new Act should provide that a person may be regarded as having the care of another person where, for example, they, on a regular basis: <ol style="list-style-type: none"> a. provide domestic services and support for another person 	The Law Society has no comment in relation to this proposal.

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	<ul style="list-style-type: none"> b. arrange such services and support for another person, or c. provided or arranged such services and support immediately before the other person moved to a place where they receive care (such as a hospital, nursing home, group home, boarding-house or hostel), provided they are or were not paid for the services and support by the other person or from any other source (except for a carer's pension). <p>2. The definition of "has care of another person" should appear in the same section or part of the new Act as the person responsible hierarchy.</p>	
6.21	<p><i>6.21 Definition of "close friend or relative"</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. A close friend or relative of another person is a friend or relative (including a member of the extended family or kin of an Aboriginal person or a Torres Strait Islander according to their culture) who maintains: <ul style="list-style-type: none"> a. a close personal relationship with the other person through frequent personal contact, and b. a personal interest in the other person's welfare, provided they are not paid by the other person or from any other source (except for a carer's pension) for, or have a financial interest in, any care services that they perform for the person. 2. The Tribunal may issue guidelines specifying the circumstances in which a person is to be regarded as a close friend or relative of another person. 3. The definition of "close friend or relative" should appear in the same section of the new Act as the person responsible hierarchy. 	The Law Society supports this proposal.
6.22	<p><i>6.22 Consent of person responsible</i></p> <ul style="list-style-type: none"> 1. The new Act should provide: <ul style="list-style-type: none"> a. Any person may ask a person responsible to consent to a course of healthcare for a patient. b. The request must explain: <ul style="list-style-type: none"> i. how the person does not have decision-making ability for the decisions that need to be made ii. the patient's condition that requires healthcare iii. the courses of healthcare that are available for that condition iv. the general nature and effect of each of those courses v. the nature and degree of any significant risks associated with those courses, and vi. the reasons why any particular course should be carried out. 	The Law Society supports this proposal, however submits that such consent should always be required in written form.

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	<ul style="list-style-type: none"> c. In considering such a request, the person responsible must: <ul style="list-style-type: none"> i. give effect to the patient’s will and preferences (to be determined as set out in Proposal 1.11), and ii. have regard to the matters referred to in the request. 2. The regulations should provide when a consent or request for consent must be in writing. 	
6.23	<p><i>6.23 Application to Tribunal for consent</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. Any person can apply to the Tribunal for consent for healthcare for a patient. 2. The application shall state: <ul style="list-style-type: none"> a. how the person does not have decision-making ability for the decision or decisions that need to be made b. the patient’s condition that requires healthcare c. the courses of healthcare that are available for that condition d. the general nature and effect of each of those courses e. the nature and degree of any significant risks associated with those courses, and f. the reasons why any particular course should be carried out. 3. The Tribunal need not consider an application if it is not satisfied that the applicant has a sufficient interest in the patient’s health and personal and social wellbeing. 4. Whenever an application is made for consent to healthcare and the healthcare cannot be given without that consent, the Tribunal may: <ul style="list-style-type: none"> a. order the person who is to give the healthcare not to start it, or b. if the healthcare has already started—order the person who is carrying out the healthcare to stop it, at least until the Tribunal has determined the application. 5. The existing service arrangements set out in s 43 of the Guardianship Act 1987 (NSW) continue to apply. 	The Law Society has no comment in relation to this proposal.
6.24	<p><i>6.24 Tribunal consent to healthcare</i></p> <p>The new Act should provide:</p> <ul style="list-style-type: none"> 1. In considering an application for consent to healthcare, the Tribunal must: <ul style="list-style-type: none"> a. have regard to the views of: <ul style="list-style-type: none"> i. the person proposing the healthcare, and ii. the person responsible and b. have regard to the matters that must be stated in the application. 	The Law Society supports the proposal.

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	2. After conducting a hearing, the Tribunal may consent to the healthcare if it is satisfied that it is the most appropriate form of healthcare and gives effect to the patient's will and preferences (as set out in Proposal 1.11).	
6.25	<p>6.25 Liability for healthcare The new Act should provide that nothing in the Act relieves a person from liability in respect of giving healthcare to a patient, if they would have been liable:</p> <ol style="list-style-type: none"> a. had the patient been able to consent to the healthcare, and b. had the healthcare been given with the patient's consent. 	The Law Society has no comment in relation to this proposal.
6.26	<p>6.26 Clinical records The new Act should provide that the regulations may make provision about keeping records of a patient's healthcare carried out under the Act.</p>	The Law Society has no comment in relation to this proposal.
6.27	<p>6.27 Offences The new Act should provide:</p> <ol style="list-style-type: none"> 1. A person must not give healthcare to a patient unless: <ol style="list-style-type: none"> a. consent for the healthcare has been given in accordance with the new Act, or b. the healthcare provisions authorise the healthcare without consent, or c. the healthcare is given in accordance with an order of the Supreme Court in the exercise of its inherent jurisdiction. 2. A registered health practitioner has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a patient and believes on reasonable grounds that the requirements of the Act have been complied with. 3. A person must not take another person without decision-making ability outside Australia to obtain an unauthorised sterilisation procedure. 	The Law Society supports this proposal.
7.	<i>Medical research procedures</i>	
7.1	<p>7.1 Definition of "medical research procedure" The new Act should define a "medical research procedure" as:</p> <ol style="list-style-type: none"> a. a procedure carried out for the purposes of medical research, including (as part of a clinical trial or otherwise): <ol style="list-style-type: none"> i. administering pharmaceuticals, or ii. using equipment or a device, or b. anything prescribed by the regulations as a medical research procedure, but it should not include any of the following: c. any non-intrusive examination including: <ol style="list-style-type: none"> i. a visual examination of the mouth, throat, nasal cavity, eyes or 	The Law Society has no comment in relation to this proposal.

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	<ul style="list-style-type: none"> ears; or ii. the measurement of a person's height, weight or vision; d. observing a person's activities e. administering a survey f. collecting or using information, including: <ul style="list-style-type: none"> i. personal information within the meaning of the Privacy and Personal Information Protection Act 1998 (NSW) ii. health information within the meaning of the Health Records and Information Privacy Act 2002 (NSW), and g. any other procedure prescribed by the regulations as not being a medical research procedure. 	
7.2	<p><i>7.2 Limitations on administering a medical research procedure</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. If a person does not have decision-making ability but is likely to recover it within a reasonable time to make a decision about a medical research procedure, a researcher must not administer the procedure to that person. 2. A "reasonable time" is the time by which, given the nature of the relevant research, the procedure would need to be administered, having regard to: <ol style="list-style-type: none"> a. the person's medical or physical condition b. the stage of medical treatment or care, and c. other circumstances specific to the person. 	The Law Society has no comment in relation to this proposal.
7.3	<p><i>7.3 Requirement to find advance care directives and persons responsible</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. Before a researcher administers a medical research procedure to a participant who does not have decision-making ability, they must make reasonable efforts in the circumstances to ascertain if the participant has: <ol style="list-style-type: none"> a. an advance care directive, and/or b. a person responsible. 2. Failure to take these steps is unprofessional conduct. 	The Law Society has no comment in relation to this proposal.
7.4	<p><i>7.4 Approval and consent to a medical research procedure</i> The new Act should provide:</p> <ol style="list-style-type: none"> 1. A person can consent to a medical research procedure in an advance care directive. 2. A researcher must not administer a medical research procedure to a participant who does not have decision-making ability for that procedure unless the relevant human research ethics committee has approved the 	The Law Society supports this proposal.

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	<p>research; and</p> <ol style="list-style-type: none"> a. the participant has consented to the medical research procedure or medical research procedures of a similar nature in a valid advance care directive b. if there is no relevant advance care directive, the person responsible has consented to the procedure, or c. if there is no person responsible, the Tribunal has consented to the procedure. <p>3. The person responsible or the Tribunal may consent to the medical research procedure only if they are satisfied the decision gives effect to the participant's will and preferences (to be determined as set out in Proposal 1.11) and that:</p> <ol style="list-style-type: none"> a. the drugs or techniques being tested are intended to cure or alleviate a particular condition the participant has or has had or to which the participant has a significant risk of exposure b. the medical research procedure will not involve any known substantial risk to the participant (or, if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments) c. the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to participants with that condition even if those participants cannot consent to taking part, and d. having regard to the potential benefits and risks of participating in the medical research procedure, taking part will promote the participant's personal and social wellbeing. <p>4. Before approving medical research involving participants who do not have decision-making ability, a human research ethics committee must be satisfied that the consent material gives sufficient information in a clear enough form to enable the person responsible to make an informed decision about participating.</p> <p>5. The fact that a research procedure may involve administering placebos should not necessarily prevent the person responsible or the Tribunal from being satisfied that taking part would promote the participant's personal and social wellbeing.</p> <p>6. A researcher cannot administer a medical research procedure if they know that the participant has refused the particular procedure in an advance care</p>	

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	<p>directive.</p> <p>7. An interested person can apply to the Tribunal to review the decision of a person responsible and whether it gives effect to a participant's will and preferences or promotes their personal and social wellbeing. This may include interpreting a participant's will and preferences as expressed in an advance care directive.</p>	
7.5	<p><i>7.5 Emergency treatment</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A human research ethics committee may approve a research project that involves the administration of emergency medical treatment (involving participants who do not have decision-making ability) without prior consent in accordance with Chapter 4.4 of the National Statement on Ethical Conduct in Human Research. 2. Once approved, a researcher may carry out a medical research procedure without seeking consent from the participant or the person responsible if the procedure involves administering accepted emergency treatment. 3. "Accepted emergency treatment" means urgent treatment that aligns with standard clinical practice. 4. A researcher cannot administer a medical research procedure if they are aware that the participant has refused the particular procedure or a procedure of a similar nature in an advance care directive. However, a practitioner is not required to search for an advance care directive not readily available in urgent circumstances. 5. A researcher must notify the participant or the person responsible that they have been included in a medical research project as soon as reasonably possible. The patient or the person responsible must have the opportunity to stop the procedure and withdraw from the research without compromising the person's ability to receive any available alternative medical treatment or care. 	The Law Society has no comment in relation to this proposal.
7.6	<p><i>7.6 Records to be filed with the Public Advocate</i></p> <ol style="list-style-type: none"> 1. The new Act should require medical researchers to file a record with the Public Advocate when a person who does not have decision-making ability is enrolled as a participant in a medical research procedure, including in relation to emergency treatment. 2. The Public Advocate should use these records to monitor and report on medical research in NSW that involves participants who do not have decision-making ability. 	The Law Society has no comment in relation to this proposal.

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7.7	<p><i>7.7 Effect of a participant's objection</i></p> <p>The new Act should provide that nothing may be done to a patient in the course of a medical research procedure if the participant objects orally or by conduct. This includes an objection given in an advance care directive that is clear and extends to the situation at hand.</p>	<p>The Law Society has no comment in relation to this proposal.</p>
7.8	<p><i>7.8 Offences</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. It is an offence for a researcher to administer a medical research procedure to a person who does not have decision-making ability, unless: <ol style="list-style-type: none"> a. a human research ethics committee has approved the procedure, and b. consent has been obtained in accordance with the new Act. 2. A researcher has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a participant and believes on reasonable grounds that the Act's requirements have been complied with. 	<p>The Law Society has no comment in relation to this proposal.</p>
8.	<u>Restrictive practices</u>	
8.1	<p><i>8. Restrictive practices</i></p> <p>8.1 Regulation of restrictive practices</p> <ol style="list-style-type: none"> 1. The NSW Government should closely monitor the implementation of the NDIS restrictive practices regulatory scheme with a view to considering whether to apply comparable regulation in the sectors that NSW regulates, including education and mental health. 2. The new Act should provide that the Public Advocate has the function of educating families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination. 	<ul style="list-style-type: none"> • The Law Society notes that the draft proposals document considers it appropriate to continue to monitor the implementation of the NDIS restrictive practices regulator scheme. We take the opportunity to reiterate our comments made in response to Question Paper 5 in respect of some of the factors that a decision-maker should consider before authorising a restrictive practice. • The Law Society also submits that the inclusion of specific requirements in relation to behaviour support plans may lead to a reduction in the use of restrictive practices. The Law Society submits that the Act could explicitly provide that the guardian may only consent to a restrictive practice in the context of the implementation of a behaviour support plan.
9.	<u>Advocacy and investigative functions</u>	
9.1	<i>9.1 New advocacy and investigative functions</i>	<p>The Law Society supports this proposal. In</p>

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	<ol style="list-style-type: none"> 1. The new Act should introduce new advocacy and investigative functions. 2. The new Act should provide that these functions are to be carried out by the Public Representative. 3. The new functions should be to: <ol style="list-style-type: none"> a. mediate disputes about assisted decision-making, including between: <ol style="list-style-type: none"> i. parties to a court or tribunal application ii. enduring representatives, representatives and/or persons responsible, and iii. informal supporters and/or informal representatives. b. undertake systemic advocacy for people in need of decision-making assistance through: <ol style="list-style-type: none"> i. educating the community and public agencies about the decision-making framework and the role of family and friends ii. educating and advising families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination iii. supporting the establishment and continued operation of organisations that promote advocacy and undertake community education iv. monitoring, investigating, researching, reporting, making recommendations and advising on any aspect of the system the relevant Minister refers to it, and v. having standing in court and tribunal matters of general interest to people who need decision-making assistance. c. provide decision-making advice and assistance to people who do not have access to formal decision-making support, including: <ol style="list-style-type: none"> i. seeking help for people who need decision-making assistance from government agencies (including the NDIS), institutions, welfare organisations and service providers, and negotiating of their behalf to resolve issues ii. advising people on making applications for support and representation orders iii. advising people on and facilitating the development of support and representation agreements, and iv. administering and/or promoting decision-making assistance services and facilities (including its own) 	<p>particular, we support proposal 9.1(3)(f), which the Law Society considers is a necessary proactive step in providing protection to people who require assisted decision making.</p>

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	<ul style="list-style-type: none"> d. providing information and training to supporters appointed under a support agreement or support order e. setting standards and guidelines for supporters f. investigating suspected abuse, neglect and exploitation on its own motion or in response to a complaint, with powers to: <ul style="list-style-type: none"> i. seek a warrant from a Magistrate, Local Court registrar or the Tribunal to search and enter property when there are reasonable grounds for believing that there is a person in need of decision-making assistance living there who is being unlawfully detained or is likely to suffer serious damage to their personal or social wellbeing unless immediate action is taken ii. require people, departments, authorities, service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences iii. refer complaints or allegations of abuse and neglect to Public Advocates (or equivalent) outside NSW for investigation or other appropriate action in response to alleged victims and/or alleged abusers moving across borders iv. exchange information with the relevant state/territory and national bodies (including the Tribunal, the NSW Ombudsman's office, the NDIA, and the NDIS Quality and Safeguarding Commissioner) on matters affecting the safety of a person with disability – such as information relating to allegations of abuse and neglect, and v. have read-only access to the police (COPS) and child protection (KiDS) databases g. when an application for a support or representation order is before the court or Tribunal, investigate, on its own motion or by request from the court or Tribunal, whether there is a need for a support or representation order and if it is the least restrictive option being taken, and h. intervene in court or Tribunal proceedings in certain cases (for example, if the Public Advocate has been closely connected with the person subject to the hearing). 	
9.2	<p><i>9.2 The Public Representative</i></p> <p>In addition to incorporating the changes proposed in Proposal 9.1, the new Act should incorporate the provisions currently in Part 7 (the Public Guardian) of the Guardianship Act insofar as they are consistent with the new framework.</p>	The Law Society has no comment in relation to this proposal.

No.	Proposal	Law Society comments
10.	<u>Provisions of general application</u>	
10.1	<p><i>10.1 Causes of action</i></p> <p>The new Act should provide that the District Court has jurisdiction in relation to any cause of action, or claim for equitable relief that is available against a supporter or representative in the Supreme Court for abuse or misuse of power or failure to perform duties, and has the power to order any remedy available in the Supreme Court.</p>	<p>The Law Society is strongly opposed to this proposal. The Supreme Court currently has jurisdiction over any cause of action or claim for equitable relief available against a supporter or representative. These matters are currently dealt with by a dedicated equity division of the Supreme Court, ensuring that there is familiarity by judges with the issues and complexities that regularly arise. The Law Society is of the view that given the small number of these matters that are heard each year, there is a real and significant risk that moving jurisdiction to the District Court will result in judges with no background or insufficient relevant experience hearing and making determinations on matters.</p>
10.2	<p><i>10.2 No registration required</i></p> <p>The new Act should not require registration of support agreements, support orders, enduring representation agreements or representation orders. However, this should not limit the requirement for registration for the purposes of any other Act.</p>	<p>The Law Society supports this proposal.</p>
10.3	<p><i>10.3 Directions to supporters and representatives</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. Supporters and representatives can apply to the Tribunal for directions about the exercise of their functions. 2. In giving directions, the Tribunal should be guided by the general principles. 	<p>The Law Society has no comment in relation to this proposal.</p>
10.4	<p><i>10.4 Access to personal information</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A representative, person responsible or supporter should be entitled to access, collect or obtain personal information (including financial information) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions. 2. A person holding that information, on being satisfied that a person is entitled to access that information, must allow them to access that information. 	<p>The Law Society has no comment in relation to this proposal.</p>
10.5	<i>10.4 Access to personal information</i>	<p>The Law Society has no comment in relation to</p>

No.	Proposal	Law Society comments
	<p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A representative, person responsible or supporter should be entitled to access, collect or obtain personal information (including financial information) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions. 2. A person holding that information, on being satisfied that a person is entitled to access that information, must allow them to access that information. 	this proposal.
10.6	<p><i>10.6 Resolving disputes between representatives</i> The new Act should provide that, if there are 2 or more representatives and the representatives cannot agree on one or more decisions that need to be made, after attempting to resolve the disagreement (whether informally or through mediation), the representatives may apply to the Tribunal for directions to resolve any such disagreement.</p>	The Law Society has no comment in relation to this proposal.
10.7	<p><i>10.7 Miscellaneous provisions</i> The new Act should incorporate the substance of the provisions contained in Part 9 of the Guardianship Act, except where to do so would contradict another proposal, and with adjustments to ensure consistency with the new framework.</p>	The Law Society has no comment in relation to this proposal.
11.	<i>Tribunal procedures and composition</i>	
11.1	<p><i>11.1 Composition of the Assisted Decision-Making Division and Appeal Panels</i> The new Act should provide that the composition of the Assisted Decision-Making Division and Appeal Panels should continue to be determined by the provisions of Schedule 6 of the Civil and Administrative Tribunal Act 2013 (NSW).</p>	The Law Society has no comment in relation to this proposal.
11.2	<p><i>11.2 Parties to proceedings</i> The new Act should:</p> <ol style="list-style-type: none"> a. retain the definition of a party to Tribunal proceedings set out under the current s 3F of the Guardianship Act with amendments to reflect the new framework (including the addition of the Public Advocate as a party in all cases) b. expressly provide that a child or young person is a party to proceedings before the Tribunal if: <ol style="list-style-type: none"> i. they are the person to whom the application relates ii. they are the primary carer of the person to whom the application relates, or iii. they would be directly affected by any support or representation order. 	The Law Society does not support the Act being amended to allow children to have standing. The Law Society is of the view that the current requirements that the Tribunal seek to preserve the person's existing family relationships is an appropriate way to involve children and should be maintained.
11.3	<i>11.3 The appointment process for representatives who are parents</i>	The Law Society supports this proposal.

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	Under the new Act, the appointment process for parents of people who do not have decision-making ability where this has been the case since before the person turned 18 should continue to be the same process as the appointment process for other representatives.	
11.4	<p><i>11.4 Notice and service requirements</i></p> <p>The Tribunal should review its procedures to ensure that its registry staff:</p> <ol style="list-style-type: none"> a. take reasonable efforts to determine and notify people with a genuine interest in the person who is the subject of a hearing b. have regard to any family violence considerations evident on the face of the available materials when deciding whether to notify family members, c. afford same-sex and de facto relationships the same consideration with notice as heterosexual and marital relationships, and d. advise all people notified of a hearing of the outcome of the hearing. 	The Law Society has no comment in relation to this proposal.
11.5	<p><i>11.5 Representation of parties</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. A legal representative of the person who the subject of an application before the Tribunal may appear without seeking leave. 2. Separate representatives must act according to the general principles set out in Proposal 1.9. 	The Law Society supports this proposal.
11.6	<p><i>11.6 Requirement to give evidence under oath</i></p> <p>The new Act should require parties to a Tribunal hearing to give their views and evidence under oath or on affirmation where the Tribunal considers there are material factual matters in dispute.</p>	The Law Society does not support this proposal, as it creates unnecessarily rigid requirements on the Tribunal.
12.	<i>Supreme Court</i>	
12.1	<p><i>12.1 Interactions between the Supreme Court and the Tribunal</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. Where an application to the Supreme Court in respect of anything that can be the subject of a support order or representation order is on foot (or an appeal resulting from such an application is on foot), the Tribunal does not have jurisdiction to make a support order or representation order. 2. Where the Supreme Court has made an order, a subsequent representation order by the Tribunal in respect of the same subject matter will take effect only in accordance with an order of the Supreme Court. The Supreme Court order then ceases to have effect with respect to that subject matter. 3. Where the Tribunal has made a representation order, a subsequent order by the Supreme Court will cause the Tribunal order to have no effect to the extent 	The Law Society has no comment in relation to this proposal.

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	<p>that it covers the same subject matter.</p> <p>4. The Supreme Court may, on application by the Tribunal or by a party to proceedings before the Tribunal, order that proceedings before the Tribunal be transferred to the Supreme Court.</p>	
12.2	<p><i>12.2 Supreme Court and Tribunal review of agreements and orders</i></p> <p>The new Act should provide:</p> <p>1. The Supreme Court may review:</p> <ul style="list-style-type: none"> a. part or all of a support agreement b. part or all of a support order c. part or all of a representation order, or d. part or all of an enduring representation agreement (or purported agreement), <p>provided that an application for review of the same matter is not on foot before the Tribunal.</p> <p>2. The Tribunal may review:</p> <ul style="list-style-type: none"> a. part or all of a support agreement b. part or all of a support order c. part or all of a representation order, or d. part or all of an enduring representation agreement (or purported agreement), provided that an application for review of the same matter is not on foot before the Supreme Court. <p>3. An application for review may be withdrawn with the leave of:</p> <ul style="list-style-type: none"> a. the Supreme Court (if the application was made to the Supreme Court), or b. the Tribunal (if the application was made to the Tribunal). <p>4. If an application for review is made:</p> <ul style="list-style-type: none"> a. to the Supreme Court, the Supreme Court may (on its own motion, or on request) refer the application to the Tribunal b. to the Tribunal, the Tribunal may (on its own motion, or on request) refer the application to the Supreme Court. 	The Law Society has no comment in relation to this proposal.
13.	<u>Search and removal powers</u>	
13.1	<p><i>13.1 Where an application is before the Tribunal</i></p> <p>The new Act should provide:</p> <p>1. If an application for a representation order or for the review of a representation order is made to the Tribunal:</p> <ul style="list-style-type: none"> a. the Tribunal may, if it considers it appropriate in the circumstances, to order that the person the subject of the application or the order be 	The Law Society has no comment in relation to this proposal.

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	<p>removed from any premises, and</p> <p>b. an authorised person or police officer acting under such an order, may enter and search premises and remove the person from the premises, using such force as is reasonably necessary in the circumstances.</p> <p>2. A person acting in accordance with such an order, in good faith, is not liable to any action, liability, claim or demand arising from the action.</p>	
13.2	<p><i>13.2 Under a search warrant</i></p> <p>The new Act should provide:</p> <p>1. An employee of the Public Advocate or a police officer who has reasonable grounds for believing that a person in need of or receiving decision-making assistance:</p> <p>a. is being unlawfully detained against his or her will, or</p> <p>b. is likely to suffer serious damage to his or her physical, emotional or mental health or wellbeing unless immediate action is taken, may apply to the Tribunal or an authorised officer within the meaning of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) for the issue of a search warrant.</p> <p>2. The Tribunal or authorised officer, if satisfied there are reasonable grounds, may issue a search warrant authorising a named employee of the Public Advocate or named police officer to enter specified premises, search the premises and remove the person from the premises.</p> <p>3. Division 4 of Part 5 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), relating generally to warrants, applies to a search warrant issued under this provision.</p> <p>4. A person acting in accordance with the search warrant may use such force as is reasonably necessary in the circumstances</p> <p>5. Without limiting s 71 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), a police officer or medical practitioner, or both, may accompany an employee of the Public Advocate acting under a search warrant and they may take all reasonable steps to assist the employee.</p>	The Law Society supports this proposal.
13.3	<p><i>13.3 Care of people pending proceedings</i></p> <p>The new Act should provide that a person is removed in accordance with the search and removal powers, the person should be placed in the care of the Secretary of the relevant government department, but that the Secretary must make an application for a support order or representation order within 3 days.</p>	The Law Society has no comment in relation to this proposal.
14.	<i>Interaction with mental health legislation</i>	

No.	Proposal	Law Society comments
14.1	<p><i>14.1 The Mental Health Act</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. An order or agreement for support or representation may be made in respect of a patient or affected person within the meaning of the MH Act. 2. An order or agreement for support or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the MH Act. 3. If a supported or represented person is, or becomes, subject to orders under the MH Act, any order or agreement for support or representation made under the new Act is only effective to the extent it does not conflict with orders made under the MH Act. 	The Law Society supports this proposal.
14.2	<p><i>14.2 The Mental Health (Forensic Provisions) Act</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. An order or agreement for supported decision-making or representation may be made in respect of a forensic patient or a correctional patient within the meaning of the MH(FP) Act. 2. An order or agreement for supported decision-making or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the MH(FP) Act. 3. If a supported or represented person is, or becomes, subject to orders under the MH(FP) Act, any order or agreement for supported decision-making or representation made under the new Act is only effective to the extent it does not conflict with orders made under the MH(FP) Act. 	The Law Society supports this proposal.
14.3	<p><i>14.3 Decision-maker for healthcare decisions</i></p> <ol style="list-style-type: none"> 1. The new Act should provide as follows: <ol style="list-style-type: none"> a. An authorised medical officer (as defined in the MH Act) may give, or authorise, any “mental health treatment” which he or she considers appropriate, to a supported or represented person who is detained in a mental health facility (as defined in the MH Act), subject to any orders under the MH Act or MH(FP) Act. An authorised medical officer may also give, or authorise, any healthcare that is incidental to “mental health treatment.” b. “Mental health treatment” is a course of action taken to: <ol style="list-style-type: none"> i. remedy a mental illness ii. diagnose a mental illness iii. alleviate or manage the symptoms or reduce the effects of the 	The Law Society has no comment in relation to this proposal.

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	<p>illness</p> <ul style="list-style-type: none"> iv. reduce the risks posed by or to the person with the mental illness, or v. monitor and evaluate a person’s mental health. <p>c. “Mental illness” refers to a mental illness or mental disorder as defined in the MH Act or a mental condition as defined in the MH(FP) Act.</p> <p>d. Any decisions relating to healthcare other than mental health treatment for supported or represented people, are subject to the new Act.</p> <p>2. The MH Act should be amended to include an identical definition for “mental health treatment”.</p>	
14.4	<p><i>14.4 Consent for special healthcare</i></p> <ul style="list-style-type: none"> 1. The provisions in the new Act relating to special healthcare should apply universally, including to people subject to the MH Act. 2. The MH Act should refer to the new Act for matters relating to special healthcare and all provisions relating to “special medical treatment” in the MH Act should be repealed. The MH Act should continue to regulate Electro-Convulsive Treatment. 	The Law Society supports this proposal.
14.5	<p><i>14.5 Voluntary patients</i></p> <ul style="list-style-type: none"> 1. The new Act should provide as follows: <ul style="list-style-type: none"> a. In cases where a representative has relevant healthcare and/or personal functions: <ul style="list-style-type: none"> i. a represented person may be admitted to a mental health facility as a voluntary patient if their representative makes a request to an authorised medical officer and the represented person does not object to this request being made ii. a represented person must not be admitted as a voluntary patient if they, or their representative, objects to the admission to the authorised medical officer iii. an authorised medical officer must discharge a represented person who has been admitted as a voluntary patient if the represented person requests to be discharged, and iv. an authorised medical officer must give notice of the discharge of a voluntary patient who is a represented person to the person’s representative. b. A supporter with relevant healthcare and/or personal functions may assist the supported person to make decisions relating to voluntary admission 	The Law Society strongly supports this proposal, which prohibits a represented person from being admitted to, or not being discharged from, a mental health facility as a voluntary patient at the request of their representative without the agreement of the person being represented. The Law Society notes that this proposal would eliminate situations such as that which occurred in the matter of <i>Sarah White v The Local Health Authority & Anor</i> [2015] NSWSC 417 from reoccurring. Further, the Law Society supports the proposal that the <i>Mental Health Act 2007</i> (specifically ss7 and 8) should be amended to reflect the proposal.

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	<p>and discharge from a mental health facility (as referred to in s 5 and 8 of the MH Act).</p> <p>2. The MH Act, specifically s 7 and 8, should be amended to reflect this proposal.</p>	
14.6	<p>14.6 Financial arrangements for involuntary patients</p> <p>1. The provisions of the NSW Trustee and Guardian Act 2009 (NSW) that relate to Mental Health Review Tribunal orders for management of estates of mental health patients (s 43-51 and 88) should be repealed so as to remove the Mental Health Review Tribunal's jurisdiction over a detained patient's financial matters.</p> <p>2. The new Act should provide that the Tribunal has the power to revoke any orders relating to financial management that were made by the Mental Health Review Tribunal pursuant to the NSW Trustee and Guardian Act 2009 (NSW) or a by a magistrate conducting a mental health inquiry.</p>	The Law Society has no comment in relation to this proposal.
15.	<u>Adoption information directions</u>	
15.1	<p>15.1 Retain the existing provisions</p> <p>The new Act should incorporate the substance of the provisions contained in Part 4A of the Guardianship Act with adjustments to ensure consistency with the new framework.</p>	<ul style="list-style-type: none"> • The Law Society notes that this proposal has been amended by the NSW LRC, and that the amended proposal is to abolish the provisions contained in Part 4A of the Guardianship Act. • The Law Society notes that the new Act will contain a provision that allows a supporter, representative or enduring representative with personal functions to provide the help necessary for a person to exercise their rights under the <i>Adoption Act 2000</i>, which is in accordance with the Law Society's position on this issue. If the new framework allows people who require decision making assistance to continue to exercise their rights in a way that is consistent with the requirements of the Convention on the Rights of Persons with Disabilities, the Law Society does not have an in-principle objection to the abolition of Part 4A.
16.	<u>Recognition of interstate appointments</u>	

No.	Proposal	Law Society comments
16.1	<p><i>16.1 Recognition of appointments made in other jurisdictions</i></p> <p>1. The new Act should:</p> <ol style="list-style-type: none"> a. continue to provide for automatic recognition of valid enduring personal appointments that confer personal, healthcare and/or restrictive practices decision-making functions (often called 'enduring guardianship' appointments) made in other jurisdictions b. extend automatic recognition to valid enduring personal appointments that confer financial decision-making functions (often called 'power of attorney' appointments) made in other jurisdictions c. continue to allow people appointed to have personal, healthcare, restrictive practices, and/or financial decision-making functions under an interstate court or tribunal order listed in the regulations to apply to the Tribunal to have their status recognised, and d. continue to allow people appointed to have personal, healthcare, restrictive practices, and/or financial decision-making functions under the corresponding law of another country, which is listed in the regulations, to apply to the Tribunal to have their status recognised. <p>2. The regulations should be updated to recognise all forms of personal appointments and orders made outside of NSW that grant powers substantially similar to those that can be lawfully granted in NSW, including support arrangements.</p>	<p>The Law Society has no comment in relation to this proposal.</p>
16.2	<p><i>16.2 Effect of recognition</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. Recognition does not affect the validity of the original appointment in its originating jurisdiction. 2. Recognition gives the applicant the same powers as if they had been appointed in NSW. The applicant can only exercise functions authorised by their original appointment and only if those functions can be authorised in NSW. 3. Automatic recognition of a personal enduring appointment made in another jurisdiction will not bring a representative with financial functions under the supervision of the NSW Trustee. 	<p>The Law Society has no comment in relation to this proposal.</p>
16.3	<p><i>16.3 Tribunal review</i></p> <p>The new Act should provide:</p> <ol style="list-style-type: none"> 1. The Tribunal should have the power to review, vary, revoke, replace or confirm an order or personal appointment made in another jurisdiction as it 	<p>The Law Society supports this proposal.</p>

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	<p>operates in NSW. This does not affect the operation of the personal appointment or order in its originating jurisdiction.</p> <p>2. It should be at the discretion of the Tribunal to order that a person with a financial decision-making function under an appointment or order made in another jurisdiction be subject to supervision by the NSW Trustee in relation to their operations in NSW.</p> <p>3. Where the Tribunal reviews, varies, revokes, replaces or confirms an order in NSW, it should notify the relevant court or tribunal in the state or territory in which the original order or personal appointment was made.</p>	
16.4	<p><i>16.4 Registration</i> NSW should not introduce a compulsory register for appointments made in other jurisdictions.</p>	The Law Society supports this proposal.