Telephone: (02) 9230 8336
Facsimile: (02) 9223 1906
DX 613 SYDNEY

A.B.N. 49 110 847 399

Your Ref:
Our Ref:

FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

18 July 2014

Professor Rosalind Croucher
President
Australian Law Reform Commission
Level 40
MLC Centre
19 Martin Place
SYDNEY NSW 2000

By email::disability@alrc.gov.au

Dear Professor Croucher,

Equality, Capacity and Disability in Commonwealth Laws Inquiry

I am writing on behalf of the Court's National Practice Committee to comment on some of the proposals made by the Commission in Discussion Paper 81.

In that Discussion Paper the Commission seeks submissions and comment on a large number of proposals and a smaller number of questions covering a very broad range of laws and legal frameworks of the Commonwealth and States and Territories. Many of these relate to matters which are outside of the Federal Court's jurisdictional experience or which are matters of policy for the relevant Government on which it would be inappropriate for the Court to make any comment. Accordingly the comments made below are restricted to a number of the proposals made and questions asked in Chapter 7 of the Discussion Paper regarding access to justice.

Proposals are made (Proposals 7-1, 7-2, 7-9 and 7-10) and questions asked (Questions 7-1 and 7-3) in relation to possible reform of criminal laws, including the *Crimes Act 1914* (Cth). The Federal Court has jurisdiction to deal with some summary and indictable criminal matters for cartel offences under the *Competition and Consumer Act 2010,* both at first instance and on appeal, as well as appellate jurisdiction to hear appeals from judgments of the Supreme Court of external Territories including in criminal matters. The Court does not believe that the experience it has had in dealing with such matters is sufficient to enable it to usefully comment on these proposals and questions.

It is proposed that the rules of each of the federal courts should adopt a new capacity test for a person to participate in civil proceedings modelled on the National Decision-Making Principles which are proposed in Chapter 3 of the Discussion Paper (Proposal 7-4) and provide that available decision-making support be taken into account in determining whether a person needs a litigation representative (Proposal 7-5). It is also proposed that the rules of each of the federal courts should impose specific obligations on a litigation representative to

make decisions that reflect the will, preferences and rights of the person represented (Proposal 7-6) and issue practice notes explaining the duties of litigation representatives (Proposal 7-7).

The Committee agrees that should National Decision-Making Principles along the lines proposed by the Commission be adopted for the reform of Commonwealth, state and territory laws and legal frameworks it would be necessary for the judges of each of the federal courts to re-examine the existing rules of court relating to litigation representatives. In that event, the proposals made in the Discussion Paper would be a useful starting point in that consideration.

As noted in the Discussion Paper (see paragraph 7.79), it is arguable that there is little difference between what is proposed in Proposal 7-4 and the common law test. Leaving aside (as discussed in Chapter 2 of the Discussion Paper) adopting language more aligned with contemporary usage, it is not clear that the approach suggested in that proposal would provide a more administratively sensible and practical approach to that currently contained in Division 9.61 of the Federal Court Rules.

As also noted (see paragraphs 7.81 to 7.86), Proposal 7-5 could create a tension with the Federal Court's obligation under section 37M of the *Federal Court of Australia Act 1976* to adopt rules of court and to interpret and apply civil practice and procedure more generally to facilitate the just resolution of disputes as inexpensively and efficiently as possible. Unless accompanied with adequate and appropriate resources and support, greater participation in proceedings before the Court by litigants with impaired decision-making ability would impose an additional burden on the Court. This could quickly become unmanageable, particularly in an environment of increased participation of self-represented litigants generally, diminishing resources and increasing workload and complexity of litigation. Those resources and support would also be essential in the public interest in ensuring that the other parties to any such proceedings are not disadvantaged by inefficiency and delay and that access to the courts by other litigants is not diminished through the clogging of dockets and lists.

Proposals 7-6, if adopted, would require litigation representatives to act in accordance with the National Decision-Making Principles. As noted in paragraphs 7.92 and 7.93 of the Discussion Paper, under the existing law litigation guardians also have an important role in protecting both other parties to the litigation and the process of the court. It is not clear that the proposal made gives adequate weight to this important public interest responsibility.

The Committee recognises the onerous and difficult responsibilities placed on a lawyer who is appointed as a litigation representative. It supports a model for professional rules which would provide the greatest clarity possible in managing potentially conflicting duties and relieve litigation representative lawyers from liability for reasonable decisions and action taken (including disclosure of information) in the best interests of a client with impaired decision-making ability.

Proposal 7-9 will have little practical significance unless accompanied by adequate and appropriate resources to ensure that the necessary communication facilities and techniques, as well as support in their use, are readily available. It would also be essential that the judiciary, lawyers and all other relevant agencies and organisations are aware of the existence of these facilities, techniques and support. The latter, in part, would be assisted by Proposal 7-11.

Proposals 7-12, 7-13, 7-14 and 7-15 propose amendments to the Federal Court of Australia Act to reform jury qualification to make it consistent with the proposed National Decision-Making Principles and to ensure that appropriate support, in the form of a communication assistant, is available to any juror who may require this. As noted in the Discussion Paper (see paragraphs 7.156 and 7.157) juries are extremely rare in the Federal Court. As a result there is little practical experience from the use of juries in the Court to base any comment on these proposals.

The Federal Court has facilities in each of its District Registries to accommodate any required jury trial. These facilities have been designed and built based on current requirements. While the designs of each such facility deliberately affords as much flexibility as possible in how these facilities may be used, it is likely that at least some of these would not adequately cater for the needs of a juror requiring decision-making support – particularly if that is through a communication assistant. These proposals could be implemented only if accompanied with adequate resources, first, for necessary capital works by the owner of the Commonwealth Law Courts Buildings (Department of Finance) and, secondly, for support within or on behalf of the Court.

The Committee hopes that these comments are of assistance to the Commission in this important inquiry.

Yours sincerely

John Mathieson
Deputy Registrar