The Executive Director

Australian Law Reform Commission

GPO Box 3078

SYDNEY NSW 2001

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**By Email:** [**elder\_abuse@alrc.gov.au**](mailto:elder_abuse@alrc.gov.au)

**Discussion Paper 83 (DP 83) – Elder Abuse**

1. **Background**
   1. Hamilton Blackstone Lawyers refers to the Australian Law Reform Commission (**ALRC**) *Discussion Paper 83 – Elder Abuse* (**DP 83**). We welcome the opportunity to contribute to this important area of law and public policy, and thank the ALRC for the crucial work it has performed to date in this area.
2. **Submission**
   1. This submission will focus on the following aspects of DP 83, and proposals in respect thereof:
3. The definition of "elder abuse".
4. Enduring Powers of Attorney and Enduring Guardianships.
5. Wills.
6. Superannuation.
7. **About Hamilton Blackstone Lawyers**
   1. Hamilton Blackstone Lawyers is a leading provider of estate planning, elder law, estate administration and related advice and services. The firm is based in Sydney, but with a national presence: our clients are based in both regional and metropolitan NSW, and in other states and territories including Victoria, Queensland, and the ACT. Hamilton Blackstone Lawyers is a strong, national, and respected brand*.*
   2. The firm’s Managing Director, Cristean Yazbeck, is a senior lawyer with over 10 years’ experience in the industry. Cristean is an expert in estate planning and financial services law and compliance, having worked with, and delivered timely and commercially-centric solutions to, some of the country's leading financial services providers.
   3. Cristean is a respected industry advocate, having close ties with APRA, ASIC, the Financial Planning Association (FPA) and the Financial Services Counsel (FSC).
8. **Definition of "elder abuse"**

***Scope***

* 1. Hamilton Blackstone Lawyers supports a broad-ranging definition of what constitutes or what may form the elements of what DP 83 refers to as "elder abuse". In this regard, we are broadly satisfied with the World Health Organisation (WHO) definition of elder abuse as referenced in paragraph 1.11 of DP 83.
  2. The only caution we would express is to ensure that the elements of a definition of "elder abuse" are not subject to overly or inadvertently restrictive parameters, which could operate to limit the definition’s effectiveness. Elder abuse by its very nature is personal, fact-specific, and subjective, and we are concerned that any attempts to expressly define the core elements of a definition of "elder abuse" (for example, *harm*, *trust*,or *older person*) will potentially derogate from the definition’s primary purpose, which in our view should be to ensure that as many instances of what reasonable Australians would consider as constituting "elder abuse" as possible are captured, without recourse to technical parameters.
  3. In this regard, we are keen to ensure that the definition of or application to "*older person*" does not restrict any person based on age. Our experience suggests that "elder abuse" is not limited to persons over a particular age group. Rather, "elder abuse" is a factor of the person’s circumstances, which include age, mental capacity, physical capacity, health, and financial situation. By way of instructive example, we have acted on a matter in which our client, being a mother in her mid-40s and having lost physical capacity, was subject to acts by her 20-year old son which would meet the WHO definition of "elder abuse" (specifically, the acts in question constituted elder *financial* abuse, being the misuse of a valid power of attorney by the principal’s son).
  4. We strongly recommend that no aspect of any definition or application for the purposes of the proposals contemplated by DP 83 and reforms thereafter operates on the basis of a person’s age: rather, the focus should be on the other operative elements of the WHO definition of "elder abuse", being *acts* occurring within a *relationship* in which there is an *expectation of trust*. This might suggest that the term "elder abuse" is of itself incorrect or improper, as the application will extend beyond persons who would normally be considered as "elders". However, for the purposes of reform in this area, we consider the reference to "elder abuse" to be useful in highlighting the need for reform and in encouraging an understanding of the issues at hand, as the term "elder abuse" will more likely resonate with Australians. Any other categorisation (for example, "relationship abuse") is unlikely to engender the same urgency which we consider is required to address "elder abuse".
  5. Furthermore, and in any event, the evidence overwhelmingly supports the proposition that what might be considered as "elder abuse" does in fact impact those who are objectively considered to meet any definition of "elder" more so than *non*-elders (however defined).

***Financial Abuse***

* 1. Hamilton Blackstone Lawyers further supports the proposition expressed in DP 83 that the leading category of elder abuse in Australia is *financial* abuse, and welcomes the ALRC’s focus on addressing elder financial abuse. In our experience, not only this is the leading form of elder abuse in respect of matters pertaining to the estate planning arrangements of elder Australians, but we further express the proposition that three (3) of the four (4) categories of elder abuse referenced in DP 83 (namely*, psychological/emotional abuse, physical abuse,* and *neglect*) are motivated by financial needs and/or imperatives, and thus it can be further expressed that *financial* abuse is a catalyst for psychological/emotional abuse, physical abuse, and neglect. This has certainly been our experience in this space. For completeness, we have no evidentiary basis to express a proposition that *sexual* abuse of elder Australians is motivated by *financial* imperatives.
  2. Accordingly, we consider that the focus of reform (at least in the first instance) should be on *elder financial abuse*. Consequently, this submission will focus on elder financial abuse.

***Intention***

* 1. A critical threshold issue on which we wish to comment, is the question of whether any definition of "elder abuse", and courses of action available to or on behalf of affected persons, should be subject to an element of *intention*. In other words, must there be an *intention* to cause harm (or whatever might be the requisite element), or is the mere fact that a person has suffered harm (which is potentially a subjective concept) sufficient for the application of "elder abuse"?
  2. Hamilton Blackstone Lawyers’ view is that any application of "elder abuse" should be subject to the requisite element of *intention*. In other words, the person must have *intended* to cause harm (or whatever might be the requisite element) to the person with whom they have the requisite relationship. We agree with the ALRC that the WHO definition of "elder abuse" itself does not address the question of *intention*. However, individual acts in which the alleged perpetrator did not intend to cause harm should not be captured. We do not agree with any proposition that the focus of reform should be on the effects on the affected person, at the expense of the intentions of the perpetrator.
  3. If, for example, criminal proceedings are brought against an alleged perpetrator, the element of *intention* would need to be established in any event. Further, and indeed, the reference to elder "abuse" of itself suggests that an element of *intent* is present.
  4. Proponents of the view that the definition or application of "elder abuse" should not be subject to a requisite element of *intention*, will likely express the position (not unreasonably) that it will usually be difficult for the alleged victim (whether because of age, physical or mental incapacity, to name a few) to establish that the alleged perpetrator *intended* to cause the harm in question, and therefore the focus should be on whether the alleged victim *in fact* suffered harm by the alleged perpetrator’s actions. Whilst we are sympathetic to this position, we consider that it is wholly improper to cause "elder abuse" to be enlivened merely by reference to the alleged victim’s subjective assessment of whether harm (or the relevant requisite element) has occurred.
  5. We further consider that any future proposals or reforms in this regard run the risk of disincentivising persons to act in such trusted capacities (for example, attorney under a power of attorney, or executor/executrix under a will), which will prove both counterintuitive and counterproductive, particularly when the focus should be on encouraging the development of such trusted relationships (see further below).

***Trust***

* 1. We note the references to the element of "trust" in the WHO definition of "elder abuse". We agree with the proposition that the requisite element should be an *expectation* of trust. This means that a formal relationship does not need to exist. It further means that an *expectation* of trust can arise in a wider range of cases. Addressing some of the examples raised in DP 83, an *expectation* of trust means:

1. Conduct by "strangers" (such as telemarketers) would and should be captured.
2. It is irrelevant whether a relationship has been created through payment of or for services.
3. All relationships, whether formal or informal, should be captured.
   1. We further express the proposition that concerns which have been expressed in DP 83 about the potential scope of an *expectation* of trust can be adequately addressed by subjecting "elder abuse" to the requisite element of *intention* as discussed above.
   2. **We consider that an act within a relationship in which there is an expectation of trust, in which the alleged perpetrator intended to, and did, cause harm to the person in question, provides a useful barometer for discussion and consideration of proposals and reforms to address "elder abuse".**
   3. We further support the proposition that additional work should be undertaken to understand and conceptualise "elder abuse" for Aboriginal and Torres Strait Islanders, and indeed all Australian indigenous communities.
4. **Enduring Powers of Attorney and Enduring Guardianships**
   1. This submission will respond to the following proposals:

***Proposal 5–1*** *A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.*

***Proposal 5–2*** *The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.*

* 1. We do not agree with the proposals, for the following reasons.
  2. We consider that the policy basis for the proposals is incorrect; specifically, that a register will reduce the incidence of elder financial abuse. We note the ALRC’s reference to the 2016 Report on *Elder Abuse in New South Wales,* the Legislative Council, General Purpose Standing Committee No. 2 (NSW Parliamentary Committee), in which it was noted that:

*It is perplexing that such powerful documents are not registered anywhere; that there is no formal record of those that have been activated and those revoked. A register would rightly enable solicitors, banks and others to check the authenticity of an instrument or to track one down and would also send the signal that these are documents to be taken seriously. It thus seems clear that mandatory registration would deliver greater safeguards against financial abuse*.

* 1. Further, paragraph 5.2 of DP 83 provides that:

*enduring documents may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney. Enduring documents are more commonly abused than non-enduring powers of attorney because a principal (the donor of the power) with diminished decision-making ability may not be able to effectively monitor the activities of their attorney and take action before significant loss is incurred*.

* 1. The proposals have been made *[i]n order to address the abuse of older persons* (paragraph 5.3). Further, the ALRC asserts that (paragraph 5.29):

*Registration would assist in ensuring that enduring documents are operative only in circumstances genuinely authorised by an older person, upholding choice and control.*

* 1. It was further noted (paragraph 5.30) that registration:

*will help minimise the extent to which these documents are misused, forged or amended without consent or knowledge of the older person and their families.*

* 1. In our view and in our experience, there is little to no evidence that these will be the case.
  2. It appears from the above that the policy basis for the proposals is a combination of one or more of the following:

1. That registration will reduce the incidence of unauthorised conduct, such as forgery, unauthorised amendments to existing enduring documents, or the commission of unconscionable conduct or undue influence in the granting of authorities the subject of the enduring documents.
2. That registration will reduce the incidence of misuse of otherwise valid enduring documents.
3. That registration will allow the activities of authorised persons to be better monitored.
4. That registration will allow action to be taken against perpetrators of elder financial abuse.
   1. Interestingly, the ALRC notes (paragraph 5.2, referenced above) that:

*in a* ***significant minority of cases****, the financial abuse is facilitated through misuse of a power of attorney*. (emphasis added)

* 1. In our view and experience, however, this is the most common form of elder financial abuse when it comes to powers of attorney (in particular enduring powers of attorney). That is, we consider the pertinent issue to be the misuse of validly executed enduring documents, rather than forgery or unauthorised amendments of existing documents or unconscionable conduct and undue influence in the granting of authorities. **Our experience indicates that the significant majority of cases involving what would be accepted as constituting elder financial abuse (whether by virtue of the WHO definition of "elder abuse" or otherwise), arises from the misuse of authority validly granted by the principal, whereby the authorised person "abuses" powers validly granted to them for their own use and benefit. Most commonly, this occurs by way of misappropriation of the principal’s funds**.
  2. Indeed, it is inherently difficult to forge an enduring power of attorney or some other form of unauthorised grant of authority to deal with a person’s financial matters. In New South Wales, for example (as is similarly the case in other states and territories), the execution by a principal of an enduring power of attorney must be done in the presence of a "prescribed witness" (see section 19 of the *Powers of Attorney Act 2003* (NSW)), which is defined to mean one of the following:

1. a registrar of the Local Court;
2. a barrister or solicitor of a court of any State or Territory of the Commonwealth;
3. a licensee under the *Conveyancers Licensing*[*Act 2003*](http://www.austlii.edu.au/au/legis/nsw/consol_act/cla2003236/), or an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the *Trustee Companies Act*[*1964*](http://www.austlii.edu.au/au/legis/nsw/consol_act/tca1964208/), who has successfully completed a course of study approved by the Minister, by order published in the Gazette;
4. a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an [attorney](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#attorney) under the [instrument](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#instrument);
5. any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of the legislation (of which there are currently none).
   1. Section 19 of the *Powers of Attorney Act 2003* (NSW) prescribes that the "prescribed witness" needs to certify that, with regard to enduring powers of attorney:
6. they explained the effect of the [instrument](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#instrument) to the [principal](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#principal) before it was signed;
7. the [principal](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#principal) appeared to understand the effect of the power of [attorney](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#attorney);
8. the person is a [prescribed witness](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s19.html#prescribed_witness);
9. the person is not an [attorney](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#attorney) under the power of [attorney](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#attorney); and
10. the person witnessed the signing of the power of [attorney](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#attorney) by the [principal](http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s3.html#principal).
    1. It must be the case, therefore, that any forged or otherwise unauthorised enduring power of attorney, requires the participation (directly or indirectly) by the "prescribed witness" in that forgery or unauthorised conduct (unless of course the perpetrator forged the "prescribed witness" certification as well). The point to be emphasised, however, is that the existing legislation provides a mechanism to enable choice and control to be upheld (noting these were the areas of concern identified by the ALRC), as the "prescribed witness" is required to actively ensure that the principal understands the effect of the document in question and must witness the principal’s execution of the document.
    2. We consider that reforms in this space would be better served through **education, advocacy and awareness** on the importance of proper estate planning and the preparation of enduring documents. Unfortunately, and again as our experience suggests, many Australians do not understand:
11. What is a power of attorney.
12. The difference between a general and an enduring power of attorney.
13. The difference between a power of attorney and an enduring guardian.
14. That enduring documents can be subject to restrictions and limitations on authority, and do not need to apply to a principal’s entire financial or health & lifestyle affairs (as the case may be).
15. That enduring documents can be revoked at any time (subject to legal capacity).
    1. Our view is that the incidence of elder financial abuse can be more effectively mitigated through a series of education, advocacy and awareness sessions for Australians which highlight their rights and obligations with regard to enduring documents, and the importance of ensuring that a person’s estate planning arrangements are properly documented with the assistance of legal specialists with expertise in these areas. In this regard, Australians should be discouraged from purchasing "off the shelf" kits or using online sources (all of which are readily available), without the benefit of proper engagement and consultation with specialists. Further insights in this regard are provided in Part 6 of the submission below.
    2. We take this opportunity to also address the following further related proposal in DP 83:

***Proposal 5–4*** *Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:*

1. *legal practitioner;*
2. *medical practitioner;*
3. *justice of the peace;*
4. *registrar of the Local/Magistrates Court; or*
5. *police officer holding the rank of sergeant or above.*

*Each witness should certify that:*

1. *the principal appeared to freely and voluntarily sign in their presence;*
2. *the principal appeared to understand the nature of the document; and*
3. *the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.*
   1. We do not consider this proposal will assist in mitigating the incidence of "elder abuse". In fact, we consider that, when combined with the additional costs to be incurred by principals in needing to arrange registration of enduring documents (an issue identified in DP 83), the proposals will provide counterintuitive and counterproductive, as they will discourage rather than encourage entry into such enduring documents. The proposals add a further layer of administrative complexity which will likely compromise the intention of the reforms, which ultimately should be to encourage Australians to engage in, and take control over, their estate planning affairs.
   2. A "prescribed witness" is already required in New South Wales for enduring powers of attorney as outlined above, and that witness is subject to prescriptive witnessing and execution obligations. Adding a second witness will not alter the legal effect of the document or reduce the incidence of misuse of valid powers and authorities. The proposal that one of the witnesses might be a medical practitioner appears unnecessary because a person cannot execute an enduring document in any event without legal capacity in the first place.
4. **Wills**
   1. This submission will respond to the following proposal:

***Proposal 9–1*** *The Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:*

1. *common risk factors associated with undue influence;*
2. *the importance of taking detailed instructions from the person alone;*
3. *the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and*
4. *the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.*
   1. Legal practitioners who specialise in estate planning and related areas are already well-versed (or should be well-versed) with these matters. There is a plethora of guidance available to practitioners on these aspects. These are basic matters for estate planning practitioners. We do not consider that the proposal of itself adds any probative value to the reforms and on addressing "elder abuse".
   2. In addition to the above matters, and by way of instructive example, the Law Society of New South Wales has prepared guidance to legal practitioners regarding mental capacity. Titled *When a Client’s Mental Capacity is in Doubt: A Practical Guide for Solicitors*, the publication provides guidance to legal practitioners on what to do when there are concerns about the client’s mental capacity, including potential indicators that a client’s mental capacity is in doubt, and what steps the practitioner should take. It also contains a *capacity worksheet* to encourage practitioners to detect key behavioural indicators, including in relation to matters such as potential undue influence. The guide is available via the following link:

<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf>

* 1. In our view, the fact that such basic matters have needed to be identified under a specific proposal, unequivocally highlights the unfortunate reality that estate planning documentation is often not prepared by estate planning specialists: specifically, documentation is prepared by solicitors with little to no expertise in this space, or by individuals themselves using inadequate templates such as "Will Kits" which can be purchased from local post offices.
  2. By way of general observation, the proposal reflects the reality of what Hamilton Blackstone Lawyers has termed the "commoditisation" of estate planning, where documents are sold "off the shelf" as "products" or prepared by solicitors with inadequate expertise, meaning "templates" are usually produced with little to no regard to a client’s specific circumstances: DIY and generic versions are available online for less than a few hundred dollars, all at the click of a few buttons on an "instruction sheet" and the provision of credit card details. Those with little to no expertise in estate planning promote "wills and estates" services in a variety of forms, with the end product being a "one size fits all" template which falls well short of being the definitive representation of one’s personal, business and financial circumstances and intentions. Wills are not prepared with the empathy and attention to detail that one should come to expect when reflecting on what should happen with their affairs when they pass away.
  3. In support of the above, we note with interest the opening paragraph of a leading Supreme Court of Western Australia decision involving a disputed estate due to a poorly drafted will (*Gray v Gray* [2013] WASC 387):

*Home made wills are a curse. Occasionally where the assets of a testator are limited and where the beneficiaries are not in dispute no difficulties may arise in the administration of an estate. Flaws in the will can be glossed over and the interests of all parties can be reconciled. But where, as here, the estate of the deceased is substantial, the will is opaque and there is no agreement among the beneficiaries, the inevitable result is an expensive legal battle which is unlikely to satisfy everyone. All of this could have been avoided if the testator had consulted a lawyer and signed off on a will which reflected his wishes. There is no question but that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent*.

* 1. In our view, reforms which focus on **education, advocacy and awareness** on the importance of proper estate planning and the preparation of enduring documents, will achieve far greater outcomes. The timing for proper education, advocacy and awareness is no more pertinent than it is today. As family dynamics change, a proper will becomes even more critical. Breakdowns in family relationships now occur at a far greater rate than at any time in Australian history. Blended family arrangements are now common. Grandparents and relatives are now more likely than ever to have the full-time care of children, and more people are raising children who aren’t biologically related to them. With the growth in superannuation balances and increasing property values, estates are becoming larger and larger, which means tax and social security become even more relevant post-death.
  2. The statistics indicate that people are living longer, too. With advances in modern medicine, this trend will only continue. Add to this the intricacies of aged care and the prevalence of mental illnesses such as dementia and Alzheimer’s disease, and it becomes clearly apparent that proper estate planning with an expert is critical if Australians want to give themselves and their loved ones the peace of mind they deserve.
  3. This becomes especially important for Australian women, in particular elderly women. Studies show that around half of adult Australians don’t have a Will. Women comprise the significant majority of this statistic. For those who do have estate planning documents in place, many are found to be inadequate: either because they were prepared years ago and haven’t been updated to accommodate changing circumstances, or because they were poorly drafted to begin with.
  4. Unfortunately, women are disadvantaged when it comes to many of the key social and financial indicators which particularly impact their estate planning, which means that proper estate planning becomes particularly critical. The statistics tell us that women endure a disproportionate share of the financial burden of their families, whether because of increased life expectancy, care of elderly relatives, and/or care and custody of children. However, women are also disproportionately subject to financial abuse, domestic violence, and divorce can be financially crippling to them when they also have to manage the financial burden of children and the elderly.
  5. We strongly encourage the ongoing development of education, advocacy and awareness programs, led by the Law Societies in each state and territory, to highlight the importance of proper estate planning in consultation with specialists in these critical areas.

1. **Superannuation**
   1. This submission will respond to the following proposal:

***Proposal 9–2*** *The witnessing requirements for binding death benefit nominations in the Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should be equivalent to those for wills.*

* 1. We urge caution on any proposals which compromise the ability for persons to complete binding death benefit nominations with the assistance of, and in the presence of, their financial adviser.
  2. Hamilton Blackstone Lawyers observes that in a large proportion of cases where a person has a relationship with a financial adviser, binding death benefit nominations are completed following the provision of advice by that adviser. Furthermore, advisers generally assist in the completion and execution of binding death benefit nominations. It is critical that this continues to be the case. Financial advisers play a crucial role in the preparation of binding death benefit nominations, especially given that these documents are critical elements of a person’s financial and estate plan. We express concern that the proposal will diminish the important role that a financial adviser plays in the estate planning process. At a time when reforms should be designed to encourage Australians to obtain quality financial advice, we consider the proposal to be potentially counterintuitive and counterproductive.
  3. For completeness, we will also address the following proposal:

***Proposal 9–3*** *The Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.*

* 1. We agree in full with the proposal, and strongly encourage the position that a person appointed under an enduring power of attorney should **not** be able to make a binding death benefit nomination on behalf of a member. We agree with the ALRC’s position that a binding death benefit nomination is "will-like" in nature. For further completeness, we express the view that, in any event, the *Superannuation Industry (Supervision) Act 1993 (Cth)* and the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* already do not permit attorneys to make binding death nominations on behalf of the principal, however we welcome the opportunity for further clarity to be provided on this aspect.
  2. We note the following comments in DP 83 regarding binding death benefit nominations (paragraph 9.52) and the issue of whether attorneys should be permitted to make binding death nominations on behalf of the principal:

*Another challenge is that a binding death benefit nomination does not have the flexibility to take into account a change in circumstances. A member may make a binding death benefit nomination in favour of their spouse and then subsequently lose legal capacity. The marriage may thereafter break down, but the death benefit nomination will remain in place notwithstanding the change in circumstances.*

* 1. We wish to highlight for the ALRC’s benefit that many superannuation funds now offer what is referred to in the industry as *­non-lapsing death benefit nominations*. These are functionally similar to binding death benefit nominations, however the nominations do not lapse after three (3) years, and the nominations offer flexibility in that the trustee of the superannuation fund can exercise its discretion to withdraw its consent to the nomination if the member’s circumstances have changed, including because of the example provided above.
  2. Non-lapsing death benefit nominations have been designed to address the valid issues raised by the ALRC in paragraphs 9.50 and 9.51, being:

*The ALRC acknowledges that the proposal to prohibit an attorney, acting under an enduring power, from making a binding death nomination does raise policy challenges in the context of the three-year limit on nominations.*

*For example, a member may make a binding death nomination and then subsequently lose legal capacity. If the attorney does not have the power to renew the binding death nomination when it lapses after three years, on death, the principal’s superannuation funds may be distributed:*

* *in a way that the member had not intended;*
* *in a manner less ideal for tax purposes when compared with the lapsed binding death nomination; or*
* *in a manner that results in the funds forming part of the estate of the member which may be subject to certain creditors’ claims.*
  1. We consider the availability of non-lapsing death benefit nominations assists the ALRC in effecting a proposal which prohibits an attorney to make binding death nominations on behalf of the principal, because not only are more and more superannuation funds offering this form of nomination, but the nomination also allows the trustee to take into account the loss of the member’s mental capacity and thus exercise its discretion appropriately if the member’s circumstances have changed (especially when they would otherwise not have been able to revoke a binding nomination).

1. **Final Remarks**
   1. We thank the ALRC for the opportunity to contribute to this important area of law and public policy, and welcome the opportunity to discuss this submission or to otherwise assist the ALRC further.
   2. Please contact the Managing Director, Cristean Yazbeck, on (02) 9089 8865 if you wish to discuss or clarify any aspect of this submission further.

Yours sincerely

**Hamilton Blackstone Lawyers**

Cristean Yazbeck

**Managing Director**