Law Council
OF AUSTRALIA

21 June 2013

Attention: Charter Group
The Treasury
Langton Crescent
PARKES ACT 2600

supercharter@treasury.gov.au

Dear Sir / Madam

Discussion Paper: Charter of Superannuation Adequacy and Sustainability and Council of Superannuation Custodians

I am pleased to provide a submission prepared by the Superannuation Committee of the Legal Practice Section for the Law Council of Australia.

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact the Chair of the Law Council of Australia's Superannuation Committee, Ms Pamela McAlister on (03) 9603 3185 or at pam.mcalister@hallandwilcox.com.au.

Yours sincerely

Margery Nicoll.

Ms Margery Nicoll
Deputy Secretary-General

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Charter of Superannuation Adequacy and Sustainability and Council of Superannuation Custodians

The Treasury

Submission by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia

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1. About the Law Council of Australia's Superannuation Committee

1.1 The Law Council of Australia is the peak national representative body of the Australian legal profession. It represents some 60,000 legal practitioners nationwide. Attachment A outlines further details in this regard.

1.2 This submission has been prepared by the Law Council of Australia's Superannuation Committee (the Committee), which is a committee of the Legal Practice Section of the Law Council of Australia.

1.3 The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear, consistent with the Law Council's *Policy Statement on Rule of Law Principles* and *Corporate Plan 2012–14*. The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

2. Executive Summary

2.1 From a legal perspective, the Law Council does not see any particular legal problems arising from the proposal to establish the Charter and the Council, at least not at this early stage.

2.2 Of course, neither the Charter nor the Council will be able to bind the Government or fetter the Government's ability to make laws. The extent to which the Charter is complied with, in practice, will therefore be a function of the willingness of the Government of the day to comply with it. A Government could of course simply abide by its own articulated principles without the need to refer to a Charter. That said, the establishment of the Charter and the Council does represent an opportunity to clarify and articulate important principles and to make a demonstrable commitment to those principles.

2.3 These initiatives would need to be funded and it would seem to follow that the Charter and the Council should be expected to add real value to the overall superannuation system.

2.4 In designing the Charter, we assume that it would apply not just to Governments, but also to the Australian Taxation Office, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investment Commission (ASIC) when making legislative instruments (such as prudential standards and class orders) and when making other regulatory statements (such as prudential practice guides and regulatory guides).

2.5 We also assume that the Charter would not apply to industry participants, such as trustees, members, employers, administrators, custodians, investment managers or other service providers. If the Charter were to apply in this way, this would raise additional concerns from a rule of law and constitutional perspective, and would require detailed scrutiny and consultation from a legal perspective.

2.6 If the Council were to be established, this should not take the place of real and genuine consultation between industry, on the one hand, and governments and regulators, on the other hand, when changes to the superannuation system are being considered.

2.7 This submission focusses on issues of a legal nature, for example:

(a) the principles underpinning the Charter, including several additional proposed principles;

(b) safeguards and procedural fairness in the process for changing superannuation laws;

(c) preliminary issues to consider when choosing the form of the Charter; and

(d) preliminary issues to consider when structuring the Council.

3. Core principles and additional principles (Questions 1 and 2)

3.1 In our view, the proposed core principles of certainty, adequacy, fairness and sustainability are not contentious and are not objectionable when considered in the abstract.

3.2 However, if these principles are to give rise to criteria and principles which will be upheld by the Council, it will be necessary to describe the principles with some degree of particularity so that they can be objectively applied in practice. If left in the abstract, the principles may be so malleable and open to interpretation that they provide little practical assistance or comfort.

3.3 There may also be merit in having the Charter articulate the purpose of the superannuation system, as there can be differing opinions in this regard. It seems well accepted that superannuation savings, as the 'second pillar' of Australia's retirement incomes policy, are intended to improve standards of living for Australians in retirement and to reduce reliance on the age pension. When these concepts are analysed further, however, in light of developments in policy and within the industry since the introduction of the Superannuation Guarantee, numerous questions arise. For example:

- Is the superannuation system best perceived simply as a form of compulsory saving, or as a tax effective portal for making investments?
- Are the tax concessions intended to represent a retirement benefit in and of themselves, or merely an incentive for making voluntary contributions, or are they compensation for the fact that members cannot access their superannuation benefits until after they have retired or satisfied a condition of release?

3.4 Along similar lines, there may be merit in clarifying whether superannuation benefits ought to be thought of as belonging to the member, or whether they belong to the superannuation fund, with the member (or their beneficiaries) merely having a right to receive them in future.

3.4 We would also suggest the adoption of additional principles. Indeed, our Committee's own objective is to ensure that superannuation laws are sound, equitable and demonstrably clear, and we would advocate for these concepts to be included in the Charter. As matters of principle, superannuation laws:

(a) ought to be well-informed and considered;

(b) ought to be comprehensible for members insofar as they impact members directly;

(c) ought to be capable of being implemented and complied with by industry within reasonable timeframes and reasonable cost parameters; and

(d) ought to apply prospectively to future events and decisions (as opposed to historical events and decisions).

We elaborate on these ideas below.

4. Safeguards and procedural fairness for changes (Questions 3 and 4)

4.1 The additional principles we propose above could provide a basis for safeguarding the superannuation system and for ensuring an appropriately rigorous consultation process is applied insofar as future regulatory reforms are concerned.

4.2 Our Committee endeavours to participate in almost every consultation process concerning superannuation regulatory reforms. In recent years, this task has proved to be challenging when comments have been sought from industry unexpectedly and without adequate time to properly consider the reform and to provide detailed feedback. Increasingly, the time-frames for submissions on exposure draft legislation and other consultations have been cut short – in numerous instances, this might be as short as a handful of days. Further, there are often several consultation processes being conducted over the same period. In some instances, it has been apparent that the body undertaking the consultation process has not allowed itself adequate time to properly consider the feedback being sought – for example, when legislation has been introduced within several days of the closure date for receipt of submissions. These factors discourage genuine participation in the consultation process. In some instances, industry has been left wondering whether its feedback was considered at all or, if it was, why identified problems have not been addressed.

4.3 In contrast, APRA's approach in recent consultation processes (for example, in relation to the prudential standards) provides a sound model that could potentially be adopted more broadly by Government, Treasury, regulators and the proposed Council. In our experience, the positive aspects of APRA's approach to consulting with industry are:

(a) reasonable advance notice is provided as to when reforms will be released for comment;

(b) reasonable timeframes are allowed for providing comments (typically one month or longer);

(c) reasonable timeframes are allowed for the comments received from industry to be analysed;

(d) written reports are released to industry to summarise common themes and significant issues identified through the consultation process and to explain how those issues are to be addressed or why they have not been addressed; and

(e) there is typically a second round of consultation to collect feedback with regard to changes made as a result of the first round of consultation.

4.4 The Committee recommends that the Charter provide for a structured approach to be adopted when consulting on proposed changes (assuming that a consultation process would typically apply). The articulation of this approach should in the Committee's view touch on the following matters.

4.5 One of the more challenging aspects of consulting with Government on the Stronger Super and MySuper forms has been the introduction of the legislative reform in separate (and sometimes overlapping) "tranches". It is difficult, perhaps even impossible, for affected parties to provide comprehensive feedback on proposed changes when they do not have access to all of the relevant details

regarding a measure or suite of measures. Industry views on the one tranche of reforms may well change (for better or worse) once details of subsequent tranches become known. The use of tranches also creates a risk that a program of related reforms may be interrupted by a change in Government or some other event which shifts the Government's focus. Earlier tranches which might always have been intended to be modified or clarified by subsequent tranches could potentially be 'orphaned', left on the statute books without being joined by their related tranches. Further, from a practical perspective, advisers and compliance staff experience significant difficulty in ascertaining the state of the law when it is necessary to refer to multiple tranches of legislation, particularly where later tranches amend earlier ones. This adds to compliance costs and creates a risk of inadvertent non-compliance. The Committee considers that the making of legislation in 'tranches' is an undesirable approach to law making that should not be permitted under the Charter.

4.6 As a general principle, Governments should govern through legislation and legislative instruments and not through announcements. When changes to the superannuation system are announced, as a general principle they ought to be promptly followed by the relevant legislation (or by an exposure draft or bill). Under rule of law and Parliamentary sovereignty principles, it is unreasonable for industry to be expected to begin implementing reforms that have merely been announced, not knowing for certain when or whether the announcement will be enacted by the Australian Parliament. Inevitably, uncertainty leads to additional cost that is ultimately borne by members. It is also unreasonable that members of the community should have to plan and manage their affairs in such a critical area without having certainty as to the rules that apply.

4.7 The Committee also notes that some reforms have been announced or designed principally from an accumulation fund perspective and without regard to how those reforms might apply to defined benefit or hybrid arrangements. The superannuation industry ought to be regulated having regard to all of its constituents, including defined benefit funds and corporate funds. In our experience, defined benefit funds are sometimes overlooked in the initial announcement or policy design, with carve-outs or exceptions 'shoe-horned' at the last minute or in subsequent tranches. Ideally, accumulation funds and defined benefit funds (and the impacts which proposed changes could have on each) would be taken into account from the outset. Alternatively the legislative model developed or adopted for the whole of the superannuation industry going forward would better address the peculiarities of the different kinds of funds and benefit arrangements that exist within the industry.

4.8 The principle that changes to the superannuation system should not apply retrospectively provides the case for judicious 'grandfathering' of existing arrangements when implementing new reforms.

5. Form of the Charter (Question 12)

5.1 Clearly a number of approaches could be taken for implementing the Charter. None of the approaches (short of including the Charter in the Constitution) would provide absolute certainty that the Charter will be complied with or that the Charter will not be opportunistically amended to remove any obstacles that may arise in practice.

5.2 At this point, however, so that the Charter is afforded the appropriate weight and applied with the requisite rigour and formality, there may be a case for the Charter

to be included in a schedule to an Act of Parliament or within associated regulations.

5.3 The Committee notes that the Council is to be charged with assessing future policies against the Charter and providing reports to be tabled in Parliament, and will provide an annual report on the superannuation system against the Charter, also to be tabled in Parliament. However, the Committee queries whether such a process alone will impose sufficient 'real time' oversight, and suggests that the Government might also consider adopting a process analogous to that applying under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). For example, future legislation and disallowable legislative instruments could be required to be accompanied by a statement of compatibility with the Charter.

6. Structure of the Council (Question 16)

6.1 Consideration should be given to whether it is necessary to articulate the perspective which the Council is expected to bring to bear when considering reform changes. There is a range of stakeholders that can potentially have competing interests: for example, trustees, members, dependants, custodians, administrators, fund managers, insurers and other service providers, as well as the national interest and the regulators. This being the case, there may be merit in identifying how the Council is expected to weigh and resolve these conflicts and competing interests.

6.2 This potentially informs the basis for selecting members to serve on the Council. The Committee considers that the Council should include persons with relevant expertise and experience regarding superannuation, as well as members who are independent of any industry perspective. As regards appointees from the superannuation industry, the Committee considers it important that there be a mix of expertise derived from the various sectors of the industry. The membership should include persons who have legal, actuarial, financial and economic expertise.

6.3 If the intention is for the Council to ‘depoliticise’ the superannuation system, presumably this means that the Council would not include members appointed by Government and that those members would not be able to be removed by Government (except perhaps for demonstrated misbehaviour).

Attachment A: Profile of the Law Council of Australia

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

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

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

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

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

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect,
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Executive Member (vacant)

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