



7 December 2022

Moderator
Rev Andrew Gunton

Hon Ronald Sackville AO QC

Chair

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

GPO Box 1422

Brisbane Q 4001

Dear Chair,

Submission on supported decision-making and guardianship proposals for reform

The Uniting Church in Australia Queensland Synod (Queensland Synod) welcomes the opportunity to provide feedback on the supported decision-making and guardianship proposals for reform. We commend the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability for proposing these reforms in order to give expression to human dignity and value in addition to enhancing autonomy for people with disability in Australia.

The Queensland Synod and its service delivery agencies, UnitingCare Queensland and Wesley Mission Queensland, are making a response that brings together our views and experiences. The Queensland Synod would welcome future opportunities to discuss this submission further. Should you require any more information, I can be contacted on 07 3377 9705.

Yours sincerely,

Rev. Andrew Gunton

Moderator, Uniting Church in Australia Queensland Synod

Supported by:

Craig Barke

Chief Executive Officer, UnitingCare Queensland

Jude Emmer

Chief Executive Officer, Wesley Mission Queensland



Table of Contents

Submission on supported decision-making and guardianship proposals for reform	5
Introduction	5
Queensland Synod	5
UnitingCare Queensland	5
Wesley Mission Queensland	5
Consultation Questions.....	6
1. Principles: Discussion questions	6
1. Do you agree or disagree with the proposed national supported decision-making principles? 6	
2. Are there any unintended consequences or barriers to implementation we need to consider?	6
2. Guidelines: Discussion questions	6
1. Do you agree with the inclusion of the guideline on support?.....	6
2. Are there any unintended consequences or barriers to implementation we need to consider?	8
3. Will, preferences and rights: Discussion questions	8
1. Do you agree with the inclusion of the guideline on will, preferences and rights?	8
4. Safeguards: Discussion questions	9
1. Do you agree with the inclusion of the guidelines on safeguards?	9
5. Decision-making ability: Discussion questions.....	10
1. Do you agree with the inclusion of the guideline on decision-making ability?	10
a. What skills and experience are likely to be required for a person to carry out a decision-making ability test?	10
b. Should public officials be permitted to undertake this test with appropriate guidance?.....	10
6. Recognition of informal supporters and advocates: Discussion questions	10
1. Do you agree with the inclusion of a guideline to recognise the role of informal supporters? 10	
a. What is needed to ensure information protection and prevent potential privacy breaches?. 11	
7. Respect for the right to dignity of risk: Discussion questions.....	12
1. Do you agree with the inclusion of a guideline on the right to dignity of risk?.....	12
2. Are there any unintended consequences or barriers to implementation we need to consider?	12
8. The Royal Commission is interested in the practical effect of all the guidelines discussed above: Discussion questions	12



1. What, if any, legal or regulatory effect should the guidelines have?	12
2. Should there be legal duties for public agencies and bodies to secure supported decision-making for people who need it?	12
9. Supported decision-making model: Discussion questions.....	13
1. Do you agree with the introduction of this supported decision-making model nationally?....	13
Is the model applicable to all relevant laws and legal frameworks across jurisdictions at both the Commonwealth and state and territory level?.....	13
10. Supporters: Discussion questions	13
1. Do you agree with the proposal to introduce and standardise the role of supporters nationally?.....	13
11. Representatives: Discussion questions	13
1. Do you agree with the proposal to introduce and standardise the role of representatives nationally?.....	13
12. Safeguard mechanisms: Discussion questions.....	13
1. Do you agree that all the Australian, state and territory governments should implement safeguards for supporters and representatives, such as those listed above?.....	13
2. a. Are any non-statutory safeguards needed?.....	14
b. Should supporters be required to best demonstrate that a decision made by a person requiring supported decision-making is in fact a decision of that person?.....	14
13 Education, training and capacity building: Discussion questions	15
1. Do you agree with the proposal on education, training and capacity building on supported decision-making?	15
14 Establishing a governance body: Discussion questions	15
1. Do you agree with the proposal to establish a governance body, in line with the parameters above?.....	15
a. Should the governance body have further functions and responsibilities?	15
b. Could an existing governance body implement and monitor the national supported decision-making framework?	15
2. b. How should the impact of a national supported decision-making framework be measured over time? Should there be ongoing evaluations and periodic reports?	15
15 National 'best practice' model of guardianship: Discussion questions	16
1. Do you agree with the implementation of a national 'best practice' model of guardianship?	16
Is the Australian Guardianship and Administration Council the right body to coordinate this?..	16
2. If not, what changes do you suggest and why?	16
16 'Best practice' safeguards in guardianship: Discussion questions.....	17



1. Are the safeguards above the right ones within administration and guardianship?	17
Are any safeguards missing?.....	17
17 Safeguards for restrictive practices within guardianship: Discussion questions.....	18
1. What safeguards for restrictive practices are required within guardianship?	18
18 Reforms for cultural safety: Discussion questions.....	18
1. How else can the cultural safety of guardianship and administration systems be improved?	18
Do you agree with the proposed requirements on tribunal members listed above?	20
19 Transitions out of guardianship: Discussion questions.....	20
1. Do you agree that states and territories should take measures to decrease the numbers of people subject to guardianship and administration?	20
What are the merits of the suggested measures listed above?	20
What other measures would be effective?	20
20 Education and training on supported decision-making: Discussion questions	21
Do you agree with the proposal on education and training for stakeholders involved in guardianship and administration matters?	21
Can you point to any existing good practice in education and training in this area?.....	22
2. Should education and training on supported decision-making be mandatory and supplemented with practice directions?	23
21 Data collection and reporting: Discussion questions.....	24
1. Do you agree with that a consistent approach to the collection and reporting of data is needed?	24
Should the Australian Guardianship and Administration Council be responsible for this?.....	24
Are the categories of data listed above sufficient?	24
If not, what changes do you suggest and why?	24
2. Are there any unintended consequences or barriers to implementation we need to consider?	24



Submission on supported decision-making and guardianship proposals for reform

Introduction

Queensland Synod

The Uniting Church in Australia Queensland Synod (Queensland Synod) is committed to working towards a society characterised by love, compassion, justice, inclusion and reconciliation so that all people, at every stage of life, can experience 'life in all its fullness' (John 10:10). Our faith calls us to the preferential care for the most marginalised in society and the Christian vision for a flourishing society includes valuing and promoting the compassionate service and love of the most vulnerable, based on the sanctity of all life. Throughout Queensland we have Uniting Church congregations contributing to wellbeing, bringing people together and building meaningful connections and communities.

UnitingCare Queensland

Uniting Care Queensland (UCQ) is the second largest Queensland based not-for-profit employer with 16,500 staff and 9,000 volunteers providing health, aged care, disability, and community services to over 400,000 people a year. UCQ is Queensland's largest aged care provider operating 48 aged care facilities in Queensland and providing in-home care to older Australians under BlueCare. UCQ also operates four private hospitals with over a thousand beds and 9% of the Intensive Care Unit (ICU) capacity in Queensland.

Wesley Mission Queensland

Since 1907, Wesley Mission Queensland (WMQ) has been helping people across Queensland build stronger and more inclusive communities. As an innovative and responsive not-for-profit community service provider, WMQ offers community support, mental health services, aged care and retirement living supporting people in Queensland through all stages of life. WMQ operates 13 residential aged care homes, three retirement villages, supported disability accommodation two hospices. WMQ also provides community services across the state and operates the Auslan interpreting services to 3,500 members of the Deaf community nationally.

WMQ operates as a parish mission activity of the Albert Street Uniting Church and is focused on providing flexible services to older people, those living with a disability or mental illness, Aboriginal and Torres Strait Islanders, refugees and vulnerable children and families.



Consultation Questions

1. Principles: Discussion questions

1. Do you agree or disagree with the proposed national supported decision-making principles?

We agree with the proposed national supported decision-making principles, however we believe the following amendment should be made:

- We recommend that Principle 4 should be reworded to: Recognition of the role of *supporters* and advocates. The role of *supporters* and advocates who provide supported decision-making should be acknowledged and respected. This removes the word *informal*, which subsequently removes the need to define *informal supporters* and provides coverage of all supporters. The term supporters could be defined as “any person who provides supported decision-making in accordance with the national supported decision-making principles”.

2. Are there any unintended consequences or barriers to implementation we need to consider?

We recommend that an education and awareness campaign on relevant human rights and the national supported decision-making principles be undertaken in conjunction with embedding the principles in legislation. This should include broad community awareness-raising, as well as targeted activities such as training and information sessions, for the health and social care sector, legal sector, and financial services sector.

In Australia’s Disability Strategy Safety Targeted Action Plan, it is reported that the ACT Government, as part of its review of guardianship legislation to provide greater options for inclusion of supported decision-making, will be supported by a program to create cultural shifts where supported decision-making is recognised as a preferred and achievable alternative to guardianship by community, service providers and the justice sector by 2022¹.

2. Guidelines: Discussion questions

1. Do you agree with the inclusion of the guideline on support?

We agree with the inclusion of the guideline on support. However, below we have a number of suggestions for inclusion in the guidelines on support:

¹ Australian Government (2021). Safety Targeted Action Plan.
<https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-12/1981-tap-safety-accessible-web.pdf>



- We recommend that the “Steps that should be undertaken in providing supported decision-making” should include in the first step an extra condition, to say that “a question or issue is presented to a person *in their preferred communication format*, with additional contextual information as required and alternatives”.
- We recommend that the last dot point be amended to state “the decision is documented *in an approved form*, acted upon, and is legally enforceable”. Using the proposed New York legislation as an example, the *approved form* could document as a minimum²: the areas in which support is desired e.g. personal, health or financial; by whom the support is given; and what kinds of support each supporter is to give in any area for which s/he is chosen to support the decision-maker. It is important, however, that any template or statutory form provide only an approved, but not required, model. Decision-makers and their supporters should be able to vary or modify the form so long as the agreement substantially complies with minimum terms and provisions, to ensure consistency and the ability to be recognized by third parties³.

Included in the proposed New York legislation is a requirement for the agreement to be executed for recognition by third parties⁴. This means the agreement must be witnessed by two adults who should be able to understand the decision-maker’s mode of communication and should not be supporters. There should also be a process that confirms that the decision-maker and supporter/s actually signed the agreement, that the decision-maker was informed of what they were signing and that they were doing so voluntarily⁵.

The benefit of mandating requirements for an agreement in legislation is that the law can impose a legal obligation on third parties to accept decisions made pursuant to an agreement and, in return,

² The New York State Senate (2022). Senate Bill S7107B. <https://www.nysenate.gov/legislation/bills/2021/s7107/amendment/b>; Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law.

<https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

³ Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

⁴ The New York State Senate (2022). Senate Bill S7107B. <https://www.nysenate.gov/legislation/bills/2021/s7107/amendment/b>; Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law.

<https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

⁵ Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>



grant corresponding immunity from liability for good faith acceptance⁶. Under the New York legislation, if an agreement made by a decision-maker meets the statutory requirements, then third parties are obligated to accept the capacity of the decision-maker and give full legal effect to their decisions made pursuant to that agreement, unless the third party has reasonable cause to believe that the decision is the product of exploitation or abuse⁷. A person who in good faith relies on a decision made pursuant to an agreement will not be subject to civil or criminal liability, or to discipline for unprofessional conduct⁸.

2. Are there any unintended consequences or barriers to implementation we need to consider?

The support needs for First Nations people and people from a CALD background may not be met by this support guideline. We recommend the Royal Commission undertake further consultation with First Nations people and people from a CALD background.

3. Will, preferences and rights: Discussion questions

1. Do you agree with the inclusion of the guideline on will, preferences and rights?

We agree with the inclusion of the guideline on will, preferences, and rights. However, we make the following suggestions:

- We recommend that the obligations for supporters and representatives could be strengthened by adding an additional obligation for each, which states “Assist the person to identify their relevant human rights”.
- We recommend that the second last dot point under “Representative decision-making” should be amended to state that “if it is not possible to determine what the person would likely want, the representative must act to *uphold the person’s human rights, act in the way least restrictive of those rights, and promote the personal and social wellbeing of a person*”. Personal and social

⁶ Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

⁷ The New York State Senate (2022). Senate Bill S7107B. <https://www.nysenate.gov/legislation/bills/2021/s7107/amendment/b>; Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

⁸ The New York State Senate (2022). Senate Bill S7107B. <https://www.nysenate.gov/legislation/bills/2021/s7107/amendment/b>; Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>



wellbeing of a person should be defined similarly to section 3, provision 4 of Victoria's *Guardianship and Administration Act 2019*:

Section 3

4 Meaning of promote the personal and social wellbeing of a person

For the purposes of this Act, and without limiting the ways in which this may occur, the personal and social wellbeing of a person is promoted by—

- (a) recognising the inherent dignity of the person; and
- (b) respecting the person's individuality; and
- (c) having regard to the person's existing supportive relationships, religion, values and cultural and linguistic environment; and
- (d) respecting the confidentiality of confidential information relating to the person; and
- (e) recognising the importance to the person of any companion animal the person has and having regard to the benefits that may be obtained from the person having any companion animal.

- We recommend that the word “harm” be removed from the last dot point and the words “an offence being committed by the person”. This removes the need for a legislative definition of harm, which the participants in the roundtables highlighted as problematic.

4. Safeguards: Discussion questions

1. Do you agree with the inclusion of the guidelines on safeguards?

We agree with the inclusion of the guideline on safeguards. However, we make the following recommendations:

- We recommend that the fourth dot point be amended to state: “Supported decision-making must be free of bias, conflict of interest and undue influence.” The Queensland Human Rights Commission offers a four-hour training course on unconscious bias⁹. It is designed to raise awareness of bias from the unconscious to the conscious level and provide methods for positively managing prejudices.
- We also recommend that the second last point be amended to: “a last resort and not an alternative to appropriate support, with evidence of the lack of alternative options such as the lack of persons to act as private guardians and administrators”.

In Ireland, the new legislation relating to supported decision-making provides that in some cases, the court may ask the Decision Support Service to provide a decision-making representative from their

⁹ Queensland Human Rights Commission (2020). Unconscious bias.
https://www.qhrc.qld.gov.au/data/assets/pdf_file/0018/24660/QHRC_trainingoverview_UnconsciousBias.pdf



panel of trained experts to act as a person's decision supporter¹⁰. This may be a solution for people who do not have family, friends, or an informal network to draw from for decision-making support.

5. Decision-making ability: Discussion questions

1. Do you agree with the inclusion of the guideline on decision-making ability?

We agree with the inclusion of the guideline on decision-making ability.

We note that Catalonia, Spain has reformed its civil code to abolish its guardianship scheme, and as part of this reform, assistance with decision-making is not linked to decision-making capacity, rather assistance is provided solely based on a request by the person needing decision-making support¹¹.

a. What skills and experience are likely to be required for a person to carry out a decision-making ability test?

We recommend that a person who carries out a decision-making ability test should be trained in assessing each of the requirements for decision-making ability in the proposed guideline. We also recommend that skills and experience in communicating with people with diverse communication needs should be required for a person who carries out a decision-making ability test.

b. Should public officials be permitted to undertake this test with appropriate guidance?

Yes, if they are given the training as recommended above, and if they have existing skills and experience in communication with people with diverse community needs, as recommended above.

6. Recognition of informal supporters and advocates: Discussion questions

1. Do you agree with the inclusion of a guideline to recognise the role of informal supporters?

We agree with the inclusion of a guideline to recognise the role of informal supporters, however we make the following recommendations:

- This guideline should be reworded to remove the term *informal* and also add the word *advocate* after the word *supporters* whenever it appears. This rewording provides coverage

¹⁰ Health Service Executive Ireland (2022). Assisted Decision Making - Frequently Asked Questions. <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/faqs/faqs.html>

¹¹ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>



of all supporters, which could be defined as “any person who provides supported decision-making in accordance with the national supported decision-making principles”.

- We recommend that the first sentence be amended to “The role of persons who provide supported decision-making should be legally recognised”. This requirement would allow for third-party recognition of supporters and advocates, for example in allowing them entry to a residential service. For example, the *Assisted Decision-Making (Capacity) Act 2015* of Ireland requires healthcare workers to engage with a person’s legally appointed decision supporter¹².
- We also recommend that the sentence *Informal support arrangements should not be displaced* should be removed from this proposal and included in the proposal relating to guardianship and should also be reworded to remove the word ‘informal’.

We note that in Queensland under the *Guardianship and Administration Act 2000* section 9 authorises the exercise of power by informal decision-makers for certain matters. These decisions can be ratified or approved under section 154.

a. What is needed to ensure information protection and prevent potential privacy breaches?

We recommend that provisions relating to access, use, storage, and disclosure for supporters to personal information of the decision-maker, be included. The proposed New York legislation provides for such access under certain circumstances, and supporters owe a duty of confidentiality to the decision-maker with respect to such records¹³. Legislation in Delaware also provides for supporters to assist the decision-maker access information related to the decision-maker and requires that: supporters keep the information privileged and confidential; make sure the information is not subject to unauthorised access, use, or disclosure; and the information is properly disposed of when appropriate¹⁴.

¹² Health Service Executive Ireland (2022). Assisted Decision Making - Frequently Asked Questions. <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/faqs/faqs.html>

¹³ The New York State Senate (2022). Senate Bill S7107B. <https://www.nysenate.gov/legislation/bills/2021/s7107/amendment/b>; Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

¹⁴ Delaware State Senate (2016). Senate Bill 230. <https://legis.delaware.gov/json/BillDetail/GetPdfDocument?fileAttachmentId=48383>



7. Respect for the right to dignity of risk: Discussion questions

1. Do you agree with the inclusion of a guideline on the right to dignity of risk?

We agree with the inclusion of a guideline on the right to dignity of risk. However, we make the following recommendations:

- We recommend that the word “empower” should be replaced with “encourage”.
- We recommend that the second dot point be amended to: “if a person makes a choice that will involve the commission of an offence by the person, then the supporter, representative, or organisation should help the person understand the risk and how it could be managed”.
- We also recommend that the last dot point be amended to include “and workers”.

2. Are there any unintended consequences or barriers to implementation we need to consider?

The first action does not clearly articulate what a “balanced approach to managing risk and respecting a person’s rights” involves. We recommend that this process should be explained further. In order for the principle of dignity of risk to be accepted, greater value must be placed on the individual’s right to decide, even when decisions seem unreasonable or risky to others¹⁵.

8. The Royal Commission is interested in the practical effect of all the guidelines discussed above: Discussion questions

1. What, if any, legal or regulatory effect should the guidelines have?

We recommend that the guidelines should be mandatory for all of the community. For example, the *Assisted Decision-Making (Capacity) Act 2015* of Ireland applies to everyone in the community¹⁶.

2. Should there be legal duties for public agencies and bodies to secure supported decision-making for people who need it?

We recommend that it should be mandatory for all public agencies and bodies to secure supported decision-making for people who need it. This would ensure that whenever decisions need to be

¹⁵ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>

¹⁶ Health Service Executive Ireland (2022). Assisted Decision Making - Frequently Asked Questions. <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/faqs/faqs.html>



made, there is a positive duty to provide supported decision-making according to the proposed guidelines and principles.

9. Supported decision-making model: Discussion questions

1. Do you agree with the introduction of this supported decision-making model nationally?

We agree with the introduction of the supported decision-making model nationally.

Is the model applicable to all relevant laws and legal frameworks across jurisdictions at both the Commonwealth and state and territory level?

We recommend that, in addition to the areas mentioned in the model, law reform in the following areas is needed to align the law in these areas to the proposed model: removal of involuntary treatment provisions under state and territory mental health law; removal of forced sterilisation, contraception and abortion under state and territory guardianship and administration law; unsound mind/unfit to plead provisions relating to state and territory criminal law and federal voting law; and relevant provisions in contract law.

10. Supporters: Discussion questions

1. Do you agree with the proposal to introduce and standardise the role of supporters nationally?

We agree with the proposal to introduce and standardise the role of supporters nationally.

11. Representatives: Discussion questions

1. Do you agree with the proposal to introduce and standardise the role of representatives nationally?

We agree with the proposal to introduce and standardise the role of representatives nationally.

12. Safeguard mechanisms: Discussion questions

1. Do you agree that all the Australian, state and territory governments should implement safeguards for supporters and representatives, such as those listed above?

We agree that all the Australian, state and territory governments should implement safeguards for supporters and representatives, such as those listed above. However, we make the following comments in relation to the requirement for police checks for the appointment of supporters.

It is essential that families and members of a person's personal network are not disqualified from becoming a supporter due to the existence of a criminal history that may be irrelevant to appointment as a supporter. Overbroad limitations can both constrain the decision-maker right to



choose and also limit or deprive her/him of the ability to obtain support altogether¹⁷. Given the current understanding of the existence of systemic racism in the criminal justice system, blanket disqualifications on persons who have been convicted of a crime, however long ago, may have a disparate impact on minority decision-makers' ability to choose their supporters¹⁸.

In addition, we recommend that paid staff delivering support services should be disqualified from acting as a representative. Persons who do not have a suitable person from their family and/or personal networks to act for them as a representative could have a representative appointed via a panel of suitable representatives that is coordinated by the new governance body, as proposed for Ireland. We suggest that the disqualifications for acting as a supporter under the Delaware legislation relating to supported decision-making are suitable¹⁹:

- (1) A person who is an employer or employee of the principal unless the person is an immediate family member of the principal.
- (2) A person directly providing paid support services to the principal, with the exception of supported decision-making services, unless the person is an immediate family member of the principal.
- (3) An individual against whom the principal has obtained an order of protection from abuse or an individual who is the subject of a civil or criminal order prohibiting contact with the principal.

2. a. Are any non-statutory safeguards needed?

Education and training and awareness raising is essential, as mentioned in other answers in this submission.

b. Should supporters be required to best demonstrate that a decision made by a person requiring supported decision-making is in fact a decision of that person?

Supporters should not be required to best demonstrate that a decision made by a person requiring supported decision-making is in fact a decision of that person. This should be an automatic assumption, provided for through the legislative requirement suggested in this submission, that a decision made through supported decision-making is taken to be a decision of the person.

¹⁷ Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

¹⁸ Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>

¹⁹ Delaware State Senate (2016). Senate Bill 230. <https://legis.delaware.gov/json/BillDetail/GetPdfDocument?fileAttachmentId=48383>.



13 Education, training and capacity building: Discussion questions

1. Do you agree with the proposal on education, training and capacity building on supported decision-making?

We agree with the proposal on education, training and capacity building on supported decision-making. We agree that responsibility for the development and delivery of this information, guidance and training on supported decision-making should sit with the proposed governance body in Reform proposal 13.

14 Establishing a governance body: Discussion questions

1. Do you agree with the proposal to establish a governance body, in line with the parameters above?

We agree with the proposal to establish a governance body in line with the parameters outlined. Similar bodies have been established in other jurisdictions, for example Ireland has the Decision Support Service which sits within the Mental Health Commission²⁰.

a. Should the governance body have further functions and responsibilities?

We recommend that the governance body should also have the function and responsibility for developing pilot projects of supported decision-making models across different settings and contexts, including for different cohorts and groups of people and should also have responsibility for evaluating the pilot projects.

b. Could an existing governance body implement and monitor the national supported decision-making framework?

We don't believe there is an existing public *governance* body that is led by people with disability and their representative organisations in Australia. We recommend the creation of a new governance body.

2. b. How should the impact of a national supported decision-making framework be measured over time? Should there be ongoing evaluations and periodic reports?

We recommend that the impact of a national supported decision-making framework should be measured through ongoing evaluations after one year, three years, and five years of operation, led by people with disability including psychosocial disability and older people. We also recommend that

²⁰ Health Service Executive Ireland (2022). Assisted Decision Making - Frequently Asked Questions. <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/faqs/faqs.html>; also see: www.decisionsupportservice.ie



a reporting schedule of key indicators of impact should be developed and required in the proposed governance body's annual reports.

15 National 'best practice' model of guardianship: Discussion questions

1. Do you agree with the implementation of a national 'best practice' model of guardianship?

We agree with the implementation of a national 'best practice' model of guardianship. We also recommend that the word "informal" in the last dot point be removed.

Public administration

We recommend that a 'best practice' model of administration be developed. We believe that the way public administration is both legislated and operationalised in Australian states and territories requires urgent reform. When public administrators are appointed as substitute decision-makers, their primary consideration when managing financial affairs is to provide financial management as if its clients under administration have freely chosen financial management services and are fully informed about the details of the financial management services provided by the public administrator. People with impaired capacity who are under an administration order with the Public Trustee should not be discriminated against because they require support to exercise their capacity and autonomy in relation to their financial affairs, with the imposition of fees and charges. We recommend that the issues raised in Queensland Public Advocate's report *Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee's fees, charges and practices* be considered²¹.

Is the Australian Guardianship and Administration Council the right body to coordinate this?

We do not think the Australian Guardianship and Administration Council is the right body to coordinate the implementation of a national 'best practice' model of guardianship.

2. If not, what changes do you suggest and why?

The Australian Guardianship and Administration Council does not have the structure, funding and resources to coordinate this. Existing bodies that could coordinate this may be the Australian Human Rights Commission, the Australian Law Reform Commission, or the Australian Attorney-General's Department. Otherwise, the proposed governance body that is to be created could coordinate the implementation.

²¹ The Public Advocate (2021). Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee's fees, charges and practices. <https://documents.parliament.qld.gov.au/tp/2021/5721T283.pdf>



16 'Best practice' safeguards in guardianship: Discussion questions

1. Are the safeguards above the right ones within administration and guardianship?

We agree with the safeguards above. However, we make the following recommendations:

- We recommend that the alternative dispute mechanisms for people involved in guardianship matters be conducted independently of any public guardianship and public administration bodies.
- We would also recommend that enhanced investigation powers in cases of suspected abuse, neglect, or exploitation not be given to state and territory public guardians who employ public guardians for appointments by a Tribunal, as this is a conflict of interest.
- We recommend that the words "and/or access to an advocate" be inserted after "mandatory independent legal representation". In Scotland, under the *Mental Health (Care and Treatment) (Scotland) Act 2003* people with a mental disorder or intellectual disability have a right to independent advocacy when they are detained in a hospital or subject to other forms of compulsory placement or treatment. Local authorities and the National Health Service (NHS) have a duty to make sure this is available and to report to the Mental Welfare Commission on this requirement every two years²². Advocates are employed by organisations funded by the local authority and/or NHS²³. The local authority supervises the provision of advocacy and can discontinue the funding if there is a breach of code of conduct or the organisation does not adhere to the applicable standards²⁴.

Are any safeguards missing?

We recommend that the reasons for the decision to appoint a substitute decision-maker should be given to the person within a week of the appointment by a Tribunal, in a format accessible to the

²² Scottish Mental Health Law Review (2022). Scottish Mental Health Law Review consultation.

https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/03/Consultation-html.htm#_Toc98246120

²³ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>

²⁴ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>



person's communication needs. We also recommend that every appointment of a substitute decision-maker be reviewed frequently, such as once a month.

17 Safeguards for restrictive practices within guardianship: Discussion questions

1. What safeguards for restrictive practices are required within guardianship?

We recommend that restrictive practices not be authorised through either state and territory use of the guardianship system for substitute consent, nor through consent of the person subject to the restrictive practices. If elimination of the use of restrictive practices is the outcome ultimately sought, restrictive practices should be illegal.

18 Reforms for cultural safety: Discussion questions

1. How else can the cultural safety of guardianship and administration systems be improved?

We make the following recommendations for improving the cultural safety of guardianship and administration systems:

- We recommend that there be increased funding to First Nations organisations to provide advocates or develop advocacy services to assist First Nations people subject to guardianship and administration proceedings.
- We recommend that when guardianship and administration proceedings are held about a First Nations person, that one of the Tribunal members should be from a First Nations community.
- We recommend that any mandated requirements for capacity assessment tools to be used not apply to First Nations people. Research conducted with First Nations people in Queensland regarding their experiences of the Queensland guardianship and administration system found that tools commonly used to assess capacity are culturally inappropriate²⁵. Assessment tools and processes are usually culturally biased towards western Anglo-European culture, and therefore may produce incorrect results among First Nations people.

²⁵ Cadet-James, D., Cadet-James, Y., Chenoweth, L., Clapton, J., Clements, N., Pascoe, V., Radel K., & Wallace V. (2011). Impaired decision-making capacity and Indigenous Queenslanders, final report. School of Human Services and Social Work, Griffith University, Brisbane.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0007/699208/indigenoqldersidmcfinalreport-dec-2011.pdf; The Office of the Public Advocate (2013). Research Insights Aboriginal and Torres Strait Islander Queenslanders with impaired decision-making capacity.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0003/447087/research-insights-atsi-people-with-impaired-capacity.pdf



- We recommend that employment targets for First Nations people be established within the guardianship and administration public agencies in every state and territory.
- We recommend that a review of the compatibility/incompatibility of guardianship and administration schemes to First Nations cultures and alternative culturally acceptable options, be undertaken and led by First Nations people. The Queensland research found that there are fundamental incompatibilities between the policies and practices of the guardianship and administration system, and First Nations people's values and culture²⁶. An example is the First Nations' cultural concept of 'shame', particularly about telling your business to someone else, and particularly a non-Indigenous person.

There is a stigma for Indigenous people about having other people making their decision, particularly white people. The process can be extremely damaging, they feel shame and humiliation.

Another key cultural difference relevant for the guardianship and administration system is that the framework is predicated on the individualistic nature of a culture, versus a cultural that is based on the collective. First Nations' cultural norms are based on group decision-making and the concept of reciprocity, whereas the guardianship and administration system does not allow for collective responsibilities, such as people sharing the financial responsibility for one person's debt. This is complicated when purchasing things such as cars and boats, where there is often collective ownership in First Nations' families and communities. This type of functional interdependence between family and community members is not catered for in the guardianship and administration system.

In addition, there is an understandable lack of trust in government agencies by First Nations' Queenslanders and their families, due to past injustices such as stolen wages and the stolen generation:

The Public Trustee is not liked in general by Indigenous people. They say it's like going back to Mission Manager's days.

How much does the government and the Trustee benefit from use of "my money"?

²⁶ Cadet-James, D., Cadet-James, Y., Chenoweth, L., Clapton, J., Clements, N., Pascoe, V., Radel K., & Wallace V. (2011). Impaired decision-making capacity and Indigenous Queenslanders, final report. School of Human Services and Social Work, Griffith University, Brisbane.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0007/699208/indigenoqldersidmcfinalreport-dec-2011.pdf; The Office of the Public Advocate (2013). Research Insights Aboriginal and Torres Strait Islander Queenslanders with impaired decision-making capacity.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0003/447087/research-insights-atsi-people-with-impaired-capacity.pdf



Associated difficulties are the impacts of a lack of flexible policies and procedures with the guardianship and administration system for people living in rural and remote communities. A participant in the research gave a lengthy report on the 'saga' of a person under the care of the Public Trustee who needed to buy new underwear. This person, who lived on an island, had to catch the ferry to the mainland, then a taxi to the shopping centre to get three quotes from shops for the underwear, then get the quotes to the public trustee. They then had to wait to get a cheque from the Public Trustee and finally try and cash the cheque which was a problem because there were no banks on the island. A community member also stated that: *One old man walked an hour each week to get \$50 from the Trustee. Not only was it not enough for him to live on but he couldn't afford the bus ticket to get the money.*

Do you agree with the proposed requirements on tribunal members listed above?

We agree with the proposed requirements on tribunal members.

19 Transitions out of guardianship: Discussion questions

1. Do you agree that states and territories should take measures to decrease the numbers of people subject to guardianship and administration?

We agree that states and territories should take measures to decrease the numbers of people subject to guardianship and administration, and the length of time for which they are subject.

What are the merits of the suggested measures listed above?

We believe the suggested measures are suitable.

What other measures would be effective?

We make the following recommendations about other effective measures:

- We recommend that every state and territory should conduct a review of all existing guardianship and administration orders. Ireland will be abolishing its public substitute decision-making arrangements, and as part of the shift to supported decision-making arrangements, is reviewing all existing appointments with the aim of ending these and moving some wards of court who require support, to supported decision-making arrangements over the next three years²⁷.

²⁷ Health Service Executive Ireland (2022). Assisted Decision Making - Frequently Asked Questions. <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/faqs/faqs.html>



- We recommend that an education and awareness-raising campaign be conducted at the same time as the above measures are introduced, aimed at the general community, so that potential family members and/or friends will be more receptive to undertaking supported decision-making and/or becoming a representative decision-maker rather than a public guardian or public trustee/administrator being appointed. Information about supported decision-making should be available in all state/territory Tribunals, guardianship and administration agencies, and on their websites.
- We recommend that an education and awareness-raising campaign be conducted at the same time as the above measures are introduced, aimed at the healthcare and social care sector and lawyers, so that these key stakeholders will be informed of the alternative options to substitute decision-making and can promote these to people who may need support in decision-making.
- We recommend that state/territory child protection agencies be required to provide information on options for supported decision-making arrangements to all children and young people in contact with the relevant agency once they turn 17, to inform them of alternative options to substitute decision-makers.
- We also recommend that any legislative reform includes a provision similar to the following, which is included in the New York legislation: “Execution of a supported decision-making agreement may not be a condition of participation in any activity, service, or program”²⁸. This would assist in lowering applications for, and appointments of, substitute decision-makers.

20 Education and training on supported decision-making: Discussion questions

Do you agree with the proposal on education and training for stakeholders involved in guardianship and administration matters?

We agree with the proposal on education and training for stakeholders involved in guardianship and administration matters. However, we make the following recommendations:

- We recommend that the proposal specifically name and include: “people who may be or are subject to a guardianship and administration order and their families and friends”.

²⁸ The New York State Senate (2022). Senate Bill S7107B.

<https://www.nysenate.gov/legislation/bills/2021/s7107/amendment/b>; Supported Decision-Making New York (SDMNY) (2021). Principles for an Initial Supported Decision-Making Agreement (SDMA) Law. <https://sdmny.hunter.cuny.edu/wp-content/uploads/2021/01/SDMNY-Principles-with-Commentary.pdf>



- We also recommend that education and training on human rights and supported decision-making be available to the whole community.
- Therefore, we recommend that the proposal be amended to:

The Australian Government and state and territory governments should ensure adequate education and training on human rights and supported decision-making is provided to tribunal members, legal representatives, people who may be or are subject to a guardianship and administration order and their families and friends and other stakeholders involved in guardianship and administration matters. Educational materials and training should also be available to the community.

Can you point to any existing good practice in education and training in this area?

Existing good practice resources in Australia include:

- The La Trobe Support for Decision Making Practice Framework Learning Resource at <https://www.supportforddecisionmakingresource.com.au/>
- My Right to Decide: Building decision making confidence by Council for Intellectual Disability (CID) at https://cid.org.au/event/my-right-to-decide-supported-decision-making/?utm_source=rss&utm_medium=rss&utm_campaign=my-right-to-decide-supported-decision-making
- Life Choices by Women with Disability Australia (WWDA) at <https://oursite.wwda.org.au/life-choices>
- It's My Choice Toolkit by Inclusion Designlab at <https://inclusionmelbourne.org.au/resource/choice/>
- Support my decision by ADACAS at <https://support-my-decision.org.au/>
- My Rights Qld! by ADA Australia and Legal Aid Queensland at <https://myrightsqld.com.au/>
- Power to You! by Mamre at https://powertoyou.thinkific.com/?_ga=2.45077156.1038565052.1653886177-1967610556.1653886177
- Guardianship and Administration toolkit by Law Right at <https://www.lawright.org.au/legal-information/guardianship-and-administration/gaa-guardianship-and-administration-toolkit/>
- Unconscious bias course by the Queensland Human Rights Commission at <https://www.qhrc.qld.gov.au/training/our-training-courses>



Existing good practice resources in overseas jurisdictions include:

- Germany has established around 500 independent participation counselling centres across the country²⁹. The Complementary Independent Participation Advisory Service offers peer counselling is for persons with disabilities or their relatives and is free of charge.
- The Swedish Personal Ombudsman Programme supports decision-making for persons with severe mental or psychosocial disabilities, through the appointment of personal ombudsmen, who are funded by the government³⁰. The person ombudsman can support clients in all kind of matters and advocate for the client's rights in front of various authorities or in court. The programme has been recommended by the UN CPRD Committee as specifically useful for persons with psychosocial disabilities.
- In the Netherlands, the initiative "Eigen Kracht Centrale" brings together persons and their relatives to enable them to reach decisions independently³¹. They offer tailored professional information regarding their problems and what would be the appropriate services.

2. Should education and training on supported decision-making be mandatory and supplemented with practice directions?

We recommend that education and training on supported decision-making be mandatory for all workers in the health and social care sector and financial services sector, for all lawyers, advocates, Tribunal members and registered supporters. This could be done via an online training module on supported decision-making that the general community can also access.

We recommend that practice directions be developed for those professions and sectors mentioned above. The practice directions should be available in alternative languages and in a range of accessible formats. The practice directions should be available to everyone in the community to access.

²⁹ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>

³⁰ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>

³¹ ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020). Implementing supported decision-making Developments across Europe and the role of National Human Rights Institutions. <https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>



21 Data collection and reporting: Discussion questions

1. Do you agree with that a consistent approach to the collection and reporting of data is needed?

We agree that a consistent approach to the collection and reporting of data is needed.

Should the Australian Guardianship and Administration Council be responsible for this?

We do not believe the Australian Guardianship and Administration Council should be responsible for this. Standardised data to be collected by every state/territory Tribunal could be negotiated and agreed upon and could be: incorporated into the data reporting requirements for the annual reporting on government services done by the Productivity Commission; submitted to the AIHW for collation and reporting; and/or included in the annual report of each state/territory public authority with responsibility for public guardianship and public administration.

Are the categories of data listed above sufficient?

We recommend a few additions, discussed in the next answer.

If not, what changes do you suggest and why?

We recommend that following changes:

- We recommend that another category of data be inserted: “the reasons for appointment of a guardian or administrator”. The reasons for any orders should also be reported on, so that trends in reasons provided by Tribunals could be extracted.
- We recommend that another category of data be inserted: “the incidence and nature of support that people utilise in guardianship and administration proceedings”. The amount of people who appear before Tribunals without support and with support, such as family and friends, lawyer and/or advocate, should be collected.
- For the last four data categories, we recommend that the best way to investigate these would be via funding for dedicated research projects, as investigating these would take significant resources.

2. Are there any unintended consequences or barriers to implementation we need to consider?

Without a national register of powers of attorney, private guardians and private appointments of financial administrators, this data will not be able to be collected and reported on at a national level. In addition, not all states/territories have registers of powers of attorney, private guardians, and private appointments of financial administrators.