



## WAI<sub>S</sub> and PWdWA submission in response to the Royal Commission Background Paper



### **'Roundtable Supported decision making and guardianship: proposals for reform'**

#### **Background – WA's Individualised Services and People with Disabilities WA Inc.**

In June 2022, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Royal Commission**) provided an invitation to external stakeholders to prepare a response to the Royal Commission's 'Supported decision – making and guardianship proposals for reform roundtable' dated 16 May 2022 (**Background paper**).

#### **About WAI<sub>S</sub>**

Western Australia's Individualised Services (WAI<sub>S</sub>) is a member-based community organisation working in partnership with people, families, service providers and government agencies to promote and advance individualised, self-directed supports and services for people living with disability, including psychosocial disability.

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#### **About People With disabilities WA (PWdWA)**

Since 1981 PWdWA has been the lead member-based disability advocacy organisation representing the rights, needs, and equity of all Western Australians with a physical, intellectual, neurological, psychosocial, or sensory disability via individual, self and systemic advocacy. We provide access to information, and independent individual and systemic advocacy with a focus on those who are most vulnerable.

PWdWA is run by and for people with disabilities and aims to empower the voices of all people with disabilities in Western Australia (WA).

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PWdWA and WAI<sub>S</sub>, including information and examples from partner Developmental Disability WA (**DDWA**) and Albany Community Legal Centre - Regional provider of the Individual Disability Advocacy Service for Sussex Street Community Law Service, have prepared a submission regarding:

- current guardianship and administration arrangements in Western Australia; and
- Royal Commission proposals to reform guardianship and administration arrangements – particularly as they apply to the guardianship and administration arrangements in this state (**Submission**).

### **About Developmental Disability WA**

Developmental Disability WA (DDWA) was established by families in 1985 and is a trusted source of independent information, advocacy, education and support for people with intellectual and other developmental disability, their families and the people who support them. DDWA has a particular focus on supporting people with a more significant level of disability, which may affect their ability to communicate and/or their behaviour, when their needs are not being met by others.

### **Acknowledgement**

PWdWA and WAI<sub>S</sub> acknowledges that there are dedicated individuals who work in the Western Australia State Administrative Tribunal (**SAT**), Office of the Public Advocate and Public Trustee to deliver services and support to people with disability.

This Submission has no intention of disparaging these hard-working individuals; rather, we hope to demonstrate that the problems with guardianship and administration orders are of systemic origin, with the harm described being directly caused by institutional policies and processes.

It is our hope that the work of the Royal Commission can serve as a catalyst to ensuring the right to legal capacity through resolving the systemic issues we describe in this Submission.

WAI<sub>S</sub> and PWdWA provide these submissions:

- in light of the issues raised by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission) in the 'Promoting inclusion Issues Paper' dated December 2020 (Inclusion Issues Paper).
- in response to Part 1 of the and Part 2 of Royal Commission background paper 'Roundtable Supported decision making guardianship: proposals for reform' dated May 2022 (Background Paper).

- assist the Commission to examine people’s lived experience of violence, abuse, neglect and exploitation associated with substitute decision-making, including guardianship and administration;
  - to inform the reform proposals currently being prepared by the Royal Commission to:
  - recognise and enable supported decision making; and
  - apply the proposed supported decision-making model within Australia’s guardianship and administration legal framework, with a particular focus on the Guardian and Administration Act 1990 (WA).

**Part 1: Supported Decision Making - Response of WAI S and PWdWA to Reform Proposals**

Below is the joint position of WAI S and PWdWA regarding supported decision making and the joint responses of WAI S and PWdWA to the reforms proposed by the Royal Commission to recognise and enable supported decision-making.

The recommendations made in this submission are based on the experiences of people with disability, their families and carers as well as advocates and advisors who provide information and support to people. They are underpinned by the provisions in the UNCRPD, and best-practice models of supported decision making.

**RESPONSES TO REFORM PROPOSALS**

**Reform proposal 1: Australian, state and territory governments should embed the national supported decision-making principles in federal, state and territory laws, policies and legal frameworks.**

WAI S and PWdWA agrees with the proposed national supported decision-making principles.

**Reform proposal 2(a and b): Support guideline**

WAI S and PWdWA broadly agrees to the inclusion of a guideline on support. We propose an inclusion to the guideline, ensuring people have support in a way that is accessible, timely, and individualised to the person and their culture.

We also support the inclusion of a supported decision-making process that is not mandated, but a guide to support decision making. See below

**Supported Decision Making Process**

- What is the decision?
- Who are the right people / right time to assist?
- What’s the right communication to explore the decision?
- What’s the right info (benefits, risks & consequences)?
- How can we assist the person to weigh it up?
- How do we hear the person’s decision?

- Support the person to act on the decision.
- Reflect on the decision and the consequences. Is action required?

Supporting people who choose to disengage with supports may be vulnerable and at risk and therefore, careful, respectful exploration may be required.

Some people chose to cease to be supported due to a range of factors that are not linked to the person or their wish or will to make a decision. It can be due to a decision supporters' approach, the inaccessibility of a decision-making process, lack of understanding of the person their culture, their family dynamics and/or their wants/needs, coercive control that is used, etc. Ensuring that decision supporters are considering their role in the cessation of decision support is a key element, and recognition that as a supporter, they may not be the best person to assist the person with that decision.

### **Reform proposal 3: Will, preferences and rights guidelines**

WAI S and PWdWA broadly agrees with the inclusion of a guideline on will preferences and rights.

We also note:

- In relation to 'communicate by any means that enable them to be understood', it is important that the decision supporter has a responsibility to seek to understand what the person is communicating, particularly where people do not use words. People are much more likely to be labelled as challenging, or be noted as having behaviours of concern, and restrictive practices implemented, when in fact, they are communicating what they want and need, but it goes unheard and not acted upon by the decision supporter.
- In response to 'where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life', we believe that the 'all the information available' includes who the person is, their culture, how that can be demonstrated, how the person communicates, what's important to and for them etc. Ensuring who a person is, guides and directs the decision-making process.
- In response to a representative may override the person's will and preferences only where necessary to prevent harm, the risk in determining what 'harm' is can be subjective, and based on white paternalistic value judgement, and not related to the individual's circumstances, culture, and community.

### **Reform proposal 4: Safeguards guidelines**

WAI S and PWdWA broadly agrees with the inclusion of a guideline on safeguards.

We also note in relation to:

- 'Regular, independent and impartial monitoring and review'.  
We support and advocate for formal legal recognition of supported decision making. However, in doing so, this should not equate to over formalising the supported decision-making process for people

When a system has in built ‘monitoring’, the issue of what is monitored, how it is monitored and how it gets addressed, can have significant risks of people having more control exerted over them, not less.

Safeguards we all have that keep us safe from abuse and neglect, and for support with decision making, are people around us, who we love, and who love us, together with people who we can access to assist us with specific decision making.

- ‘Supported decision-making must be free of conflict of interest and undue influence.’ Whilst some decision supporters may have some identified (real or perceived) bias/conflict of interest/influence with the person, it does not mean they cannot be impartial or free from this conflict in supporting specific decisions with the person. It is about the quality and integrity of the decision support and process that is important, together with decision supporters’ awareness of their bias.

People who know a person well, may always have some bias/conflict, particularly when decisions may have risks or consequences (for the person or the supporter) associated with them.

We propose that ‘free from bias/conflict’, does not mean that the only people who can assist someone with the decision, is someone who doesn’t know the person.

- ‘Any appointment of a representative decision-maker should be:
  - a last resort and not an alternative to appropriate support
  - limited in scope, proportionate, and apply for the shortest time possible’

We believe that appointing a legal representative to make decisions on behalf of a person, needs to be understood in the same way that Restrictive Practices are understood in the disability sector. It is taking away someone’s human and legal rights to act on their own behalf and can have significant trauma associated with that.

IF a decision-making representative is being considered, people need timely, culturally appropriate access to legal representation and advocacy that will assist them in contributing to the decision. Often people who are being appointed a legal decision-making representative, have few resources to challenge any such appointment. They may not have the social, material, financial or personal capital and therefore are already much more likely to have their human rights taken from them.

For our Australian First Nations people, individual, structural and systemic racism can mean that they are also more likely to have a decision-making representative appointed especially in regional and remote areas. Having a representative decision maker that is not a person they want/know, or someone not from their culture or community can be seen as very colonised way of controlling someone’s decisions across their life, including finances.

### **Reform proposal 5: Decision-making ability guideline**

WAIIS and PWdWA believes that the person, plus the people who know them well (understand will and preference), plus individually and culturally appropriate ways to support the person,

equals the persons decision making capability. It is not simply about the person being able to make a decision with the right information, in the right way.

Decision making ability for us all is more complex than simply having and understanding information to make a decision about. We rely on other people to help us with decision making. We may talk with friends, family, colleagues, associates, neighbours, especially when making a decision about important matters. They are rarely made in isolation, and if they are, it is usually due to previous decision-making exploration, experience and/or consultation with others.

In our society there is also a high level of dependence on the expertise and knowledge of those with qualifications, skill and talents depending on the sorts of decisions that a person is faced with. When people are making a decision about major health or medical issue, they may consult a doctor or specialist or surgeon etc. If people are making a decision to buy a house, they may seek financial advice etc.

Relying on the support and advice of others is not seen as an indication that a person lacks the capacity to make his or her own decisions. It is seen as part of a decision-making process.

It is therefore argued that the idea of the independent, autonomous decision-maker, at least as far as the process of decision-making is concerned, is a myth and that interdependent decision making is the way in which most of us operate

The amount of support and assistance people seek and receive to make decisions varies, depending on the person's ability, personality and life circumstances and on the particular decision.

Some people need more assistance and support than others and is usually decision specific We are recognising that decision making is often a shared process and support plays an important role in changing a person's decision-making ability.

WaiS and PWdWA believe that genuine supported decision making is an alternative for all people, and therefore, assessing decision making ability is not necessary. However, if assessing what support is required in decision-making, the persons culture and the context for the decision needs to be included as a priority. It cannot be an assessment based on an individual in isolation.

### **Reform proposal 6: Recognition of informal supporters' guideline**

WaiS and PWdWA agrees with the recognition of the role of informal supporters, as we believe that all supporters can contribute to our own decision-making capability.

As stated by the UNCRPD, decision support should be established from social networks and community support - meaning the people supporting the person with a disability:

- build the capacity of that person's community to understand their communication.
- help to build the support and communication networks for the person with a disability; and

- help develop the confidence and knowledge of the person and their supporters to engage in supported decision making.

The need for a values-based, culturally relevant supported decision-making process is especially important for people whose decision support needs are complex. Formal decision supporters tend to apply black and white rules to these contexts which err towards taking away a person's right to choose.

Knowing a person is important to being able to assist them with making decisions. Knowing a person's history and life story correlates with intimate or very close relationships.

It can take a group of decision supporters who know the person and who are committed to supporting both their rights and their wellbeing to navigate an effective supported decision-making process.

### **Reform proposal 7: The right to dignity of risk guideline**

How we regard and approach risk as a community is important, as exercising self-determination is a key part of citizenship and living a good life.

For people who are vulnerable, making choices that involve risk taking may be a great concern to decision supporters.

We know that a risk is something that might happen as a result of our vulnerability. It does not mean that something bad will happen – it just means that there is an increased chance it will happen because of the person's unique self, their situation, and their vulnerabilities.

Our role in supporting people with choices, whilst managing the complexities of 'risk' is an important one to think deeply about – and one which tests our underlying assumptions and values

There is increasing emphasis on risk management procedures to help reduce the vulnerability of a person with a disability and respond to any adverse event experienced by the person and their decision supporters.

This risk management needs to be carefully considered when authentically supporting people to have good lives.

The approach aims to balance "positive risk taking" around the values of independence and protection for the person and the community in a proactive and positive way.

People getting support to make decisions, including taking risks to enable them to live their lives the way they choose, including for everyday decisions and interpersonal relationships. This includes actions to recognise a person's strengths and empower them to be independent:

- the supporter, representative, or organisation need to take a balanced approach to managing risk and respecting a person's rights

- if a person makes a choice that is possibly harmful to them, then the supporter, representative, or organisation should help the person understand the risk and how it could be managed

### **Reform proposal 8: Supported decision-making model**

WAI S and PWdWA agrees broadly with a national supported decision-making model. Please see our responses to details of this model in other reform proposals.

### **Reform proposal 9 and 10: Supporters and Representatives**

WAI S and PWdWA have significant concerns in relation to over formalising and standardising the roles, given the level of highly individualised and personalised nature of decision support. We agree that having a guiding set of principles for decision support, provides the basis of the guidance related to the role of a decision supporter.

### **Reform proposal 11: Safeguard mechanisms**

WAI S and PWdWA cautions strongly against creating another white paternalistic bureaucratic structure with formalised systems, policies and processes. This will fundamentally undermine the value and outcomes of supported decision making in the name of 'safeguarding' where there is a real risk of people having more control exerted over their lives, not less.

As stated by the UNCRPD, decision support safeguards should be established from social networks and community support - meaning the people supporting the person with a disability:

- build the capacity of that person's community to understand their communication.
- help to build the support and communication networks for the person with a disability; and
- help develop the confidence and knowledge of the person and their supporters to engage in supported decision making.

Decision supporters need to be held accountable and required to demonstrate that a decision does reflect a persons will and preference.

### **Reform proposal 12: Education, training and capacity building**

WAI S and PWdWA agrees with investing in building the capacity of decision makers and any form of decision supporters (informal, formal, health, education, legal etc).

Our experiences tell us that supported decision making capacity building (especially to decision makers) has not been consistent or wide spread across Australia, and the lack of understanding about people exercising their legal and human rights as part of decision making is extremely limited.

It is also important to note that whilst capacity building, education and training is helpful, this can be thwarted by the culture, values and assumptions of decision supporters, organisations, systems etc.

The issue of culture change in relation to supported decision making is a much more complex challenge to address but a necessary one.

How and by whom, this education, training and capacity development is facilitated is a key concern. WAI S and PWDWA would guard against any training being made to be a formal requirement only provided by a registered training provider. Qualifications and accreditation do not necessarily equate to quality support.

Like with any system, education, training and capacity development cannot be reduced and oversimplified to simply tools and frameworks. As mentioned already, what is more critical is work on cultural, values and attitudinal shifts.

**Reform proposal 13: Establishing a governance body**

WAI S and PWDWA supports this, in principle, if it is a genuine independent body, and not a government run entity/ department. WAI S would have some fundamental concerns with the creation of another white, paternalistic government body overseeing supported decision making.

WAI S and PWDWA believes local, capacity building community organisations, who are already offering some of these supports, are best placed for this type of service.

## **Part 2: Guardianship - Response of PWdWA and WAiS and to Reform Proposals**

### **Reform proposal 14: National ‘best practice’ model of guardianship**

State and territory governments should reform guardianship and administration legislative frameworks to be consistent with the proposed national ‘best practice’ model of guardianship, implementing the supported decision-making principles outlined in Reform proposal 1 and the supported decision-making model in Reform proposal 8.

All Australian jurisdictions should adopt the model to provide greater consistency in approaches to guardianship and administration.

The Australian Guardianship and Administration Council should coordinate implementation of a national ‘best practice’ model of guardianship that:  
is based on a presumption of decision-making ability;  
incorporates features and methods of supported decision-making;  
maintains the role of informal supported decision-making.

### **PWdWA and WAiS response:**

#### **Current issues with the guardianship model in Western Australia**

Australia has made a commitment to enact legislation to put in place the principles of the United Nations Convention on the Rights of People with Disabilities (CRPD).<sup>1</sup> This includes:

#### Article 3 – General principles:

- requiring respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons with disabilities; and
- mandating full and effective participation and inclusion in society.

#### Article 12 – Equal recognition before the law:

- reaffirming that persons with disabilities have the right to recognition everywhere as persons before the law;
- requiring appropriate measures to be taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity; and
- requiring all appropriate and effective measures to be taken to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit,
- and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

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<sup>1</sup> Australian Government Law Reform Commission, ‘Legislative and regulatory framework: United Nations Convention on the Rights of Persons with Disabilities’ (November 2013) viewed 30 June 2022 at <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-ip-44/equality-capacity-and-disability-in-commonwealth-laws/legislative-and-regulatory-framework/>>

#### Article 16 – Freedom from exploitation, violence and abuse

- requiring all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse; and
- to prevent the occurrence of all forms of exploitation, violence and abuse, assurance that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

#### Article 21 – Freedom of expression and opinion, and access to information:

- requiring that all appropriate measures to be taken ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

For people with disabilities, these rights are enshrined in Australian law and are the foundation of relevant policy - as exemplified by the relevant provisions of the NDIS Quality and Safeguarding Framework (**NDIS Framework**); National Disability Insurance Scheme Act 2013 (Cth) (**NDIS Act**) and the National Disability Insurance (Code of Conduct) Rules 2018 (Cth) (**NDIS Code of Conduct**); NDIS Practice Standards and Quality Indicators:<sup>2</sup>

- presumption that all people with disabilities have the capacity to make decisions and exercise choice and control;<sup>3</sup>
- freedom of self - determination;<sup>4</sup> and to determine a person's own interests;<sup>5</sup>
- freedom of expression, and opinion;<sup>6</sup>
- right to exercise control in pursuit of a person's own goals;<sup>7</sup> and
- right to engage as an equal partner in decisions that will affect a person's life, to the full extent of the person's capacity;<sup>8</sup>
- access to supports that promote, uphold and respect the person's right to freedom of expression, self-determination and decision making.<sup>9</sup>

These rights are reinforced by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which has stated:<sup>10</sup>

A fundamental principle of Australia's rule of law is that all adults, and to some extent minors, have a right to make decisions that affect their lives and to have those decisions respected.

United Nations Committee on the Rights of Persons with Disabilities (**Committee on the Rights of Persons with Disabilities**):

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<sup>2</sup>See: NDIS Framework; NDIS Code of Conduct; NDIS Act; NDIS Practice Standards and Quality Indicators

<sup>3</sup> NDIS Framework, Item 1.5, pg 11

<sup>4</sup> NDIS Code of Conduct, s 5(2)

<sup>5</sup> NDIS Act, s 3; s 4(8)

<sup>6</sup> NDIS Code of Conduct s 5(2)

<sup>7</sup> NDIS Act, s 4(8)

<sup>8</sup> NDIS Act, s 3; s 4(8)

<sup>9</sup> NDIS Practice Standards and Quality Indicators, pg 5

<sup>10</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Issues Paper' (26 May 2020) [para 4.1]

- has in agreement stated that support with decision making must be made available to everyone and that the government has the responsibility for facilitating the creation and availability of this support in the community; <sup>11</sup> yet
- has expressed concern about the possibility of maintaining a regime in Australia of substitute decision-making and an absence of detailed and viable framework for supported decision-making in the exercise of legal capacity.<sup>12</sup>

The Committee on the Rights of Persons with Disabilities has called for substitute decision making regimes, which amount to discrimination on the basis of disability, to be replaced with a supported decision making regime that contains key provisions to ensure compliance with Article 12 of the CRPD.<sup>13</sup>

These key provisions include but are but not limited to:<sup>14</sup>

- a wide range of measures which respect a person’s autonomy, will and preferences;
- respect for a person's right, in his or her own capacity, to: give and withdraw informed consent for medical treatment; access justice; vote; marry and work;
- all forms of support in the exercise of legal capacity (including more intensive forms of support) being based the ‘will and preference’ of the person, not on what is perceived as being in that person’s objective best interests;
- relevant governments must ensure that supported decision making is available at no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of their legal capacity; and

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<sup>11</sup> The Committee on the Rights of Persons with Disabilities, General Comment No. 1; Article 12: equal recognition before the law, 11th sess, UN Doc CRPD/C/GC/1/, 19 May 2014, [27]

<sup>12</sup> Australian Government Australian Law Reform Commission, ‘Supported and substituted decision-making’ (2014); Citing: United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law

<sup>13</sup> CRPD/C/AUS/CO/1 Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session’ (2-13 September 2013) viewed 25 June 2022 at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7tjZ6g%2FxlBVYsYEv6iDyTXyNk%2BsAB%2FHgrVpAKHcEYTB%2B1t%2FH3HX1F%2F%2Bo%2Bk3O4KhxfhPoTQZ3LeS75n8PHidYHE3>>; Committee on the Rights of Persons with Disabilities, ‘General comment on Article 12: Equal recognition before the law’ (25 December 2013) viewed 25 June 2022 at <

<https://digitallibrary.un.org/record/779679?ln=en>>; See also: Craigie J et al, ‘Legal capacity, mental capacity and supported decision – making: Report from a panel event’ (2019) International Journal of Law and Psychiatry, viewed 26 June 2022 at <<https://www.sciencedirect.com/science/article/pii/S0160252718301547>>

<sup>14</sup> CRPD/C/AUS/CO/1 Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session’ (2-13 September 2013) viewed 25 June 2022 at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7tjZ6g%2FxlBVYsYEv6iDyTXyNk%2BsAB%2FHgrVpAKHcEYTB%2B1t%2FH3HX1F%2F%2Bo%2Bk3O4KhxfhPoTQZ3LeS75n8PHidYHE3>>; Committee on the Rights of Persons with Disabilities, ‘General comment on Article 12: Equal recognition before the law’ (25 December 2013) viewed 25 June 2022 at <

<https://digitallibrary.un.org/record/779679?ln=en>>; See also: Craigie J et al, ‘Legal capacity, mental capacity and supported decision – making: Report from a panel event’ (2019) International Journal of Law and Psychiatry, viewed 26 June 2022 at <<https://www.sciencedirect.com/science/article/pii/S0160252718301547>>

- a person must have a right to refuse support and terminate or change the support relationship at any time.

The full list of the key provisions advised by the Committee on the Rights of Persons with Disabilities to be incorporated in a supported decision-making regime is contained at **Appendix 2** of this Submission.

Nevertheless:

- at clear odds with the obligations and intent of the: CRPD; the NDIS Act; the NDIS Code of Conduct; the NDIS Framework; and the NDIS Practice Standards and Quality Indicators;<sup>15</sup> and
- despite the expression recommendations of the Committee on the Rights of Persons with Disabilities,<sup>16</sup>

Western Australia continues to operate under a substitute decision making model where a guardian and / or administrator is granted the legal right to make decisions on another person's behalf based on their perceived best interest.

The Guardianship and Administration Act 1990 (WA) (**Guardianship and Administration Act**) allows for the State Administrative Tribunal (SAT) to appoint a Guardian/Administrator to make decisions on behalf of a represented person. The Office of the Public Advocate can be appointed guardian should there be no one else suitable, and likewise the Public Trustee can be appointed Administrator.

Additionally, the framework of the Guardianship and Administration Act, unlike its counterpart legislation in Victoria and Queensland,<sup>17</sup> and despite sections 4, 44 and 51 that requires:

- SAT orders, for limited guardians / administrators, to impose the least restrictions possible; and
- guardians / administrators to take into account the wishes of the represented person and to act in a manner that is least restrictive for the represented person, does not explicitly include supported decision-making rights or processes.

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<sup>15</sup> CRPD Articles 3; 12; 21; NDIS Act, s 3, s 4, s 4(8); Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

<sup>16</sup> CRPD/C/AUS/CO/1 Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session' (2-13 September 2013) viewed 25 June 2022 at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsnzSGolKOaUX8SsM2PfxU7tjZ6g%2FxBVYsYEv6iDyTXyNk%2BsAB%2FHgrVpAKHcEYTB%2B1t%2FH3HX1F%2F%2Bo%2Bk3O4KxhfhPoTQZ3LeS75n8PHidYHE3>>; Committee on the Rights of Persons with Disabilities, 'General comment on Article 12: Equal recognition before the law' (25 December 2013) viewed 25 June 2022 at <<https://digitallibrary.un.org/record/779679?ln=en>>; See also: Craigie J et al, 'Legal capacity, mental capacity and supported decision – making: Report from a panel event' (2019) International Journal of Law and Psychiatry, viewed 26 June 2022 at <<https://www.sciencedirect.com/science/article/pii/S0160252718301547>>

<sup>17</sup> Royal Commission into Violence, Neglect and Exploitation of People with Disability, 'Supported decision-making and guardianship: proposals for reform roundtable' (16 May 2022) pg 8; Citing: Guardianship and Administration Act 2000 (Qld) ss 5, 6, 11B; Guardianship and Administration Act 2019 (Vic) ss 4, 7, 8. Victoria also provides for the appointment of supportive guardians and supportive administrators: Victoria Guardianship and Administration Act 2019 (Vic) pt 4

This means that people with disabilities in Western Australia are not afforded the substantial protections and rights available to them pursuant to the CRPD, the NDIS Act; the NDIS Code of Conduct; the NDIS Framework; and the NDIS Practice Standards and Quality Indicators.<sup>18</sup>

Additionally, the inclusion of the guardian / administrator acting according to his “opinion” using his “reasonable judgement” and “best interest”<sup>19</sup> in the current guardianship model in Western Australia - as opposed to the use of the ‘best interpretation of will and preferences’ - allows for subjective, white, paternalistic value judgements being made.<sup>20</sup>

The result has been an applicant's values-based opinion of the ‘reasonableness’ of a person's decisions being used to trigger an unnecessary application, with resulting guardianship / administration orders about how a person with a disability should live their own lives.

Often what is considered to be a ‘reasonable judgement’ is actually the ‘professional judgement’ of a medical professional with concerns about personal liability, as opposed to the will and preference of the person with a disability.

People with intellectual disabilities are perceived as not being able to make their own decisions. Guardians and supporters are also more likely to have more negative perceptions of a person with a severe or profound disability, including their decision-making capabilities, which negatively affects how they treat and support that person.<sup>21</sup>

Moreover, people with disabilities have stated that guardians have difficulties supporting their dignity of risk because as one participant remarked “...they have a habit of protecting me”.<sup>22</sup>

Examples demonstrating a need to consider best interpretation of a person’s will and preferences is attached at **Appendix 1** of this Submission.

People without disabilities have the right to endanger themselves and others without state intervention – unless and until they violate criminal laws. To deny legal capacity and dignity of

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<sup>18</sup> CRPD Article 12; NDIS Act, s 3, s 4, s 4(8); Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

<sup>19</sup> Guardian and Administration Act s 51 and s 70

<sup>20</sup> See: Royal Commission into Violence, Neglect and Exploitation of People with Disability, ‘Overview of responses to the Rights and attitudes Issues Paper’ pg 8 (April 2021) viewed 25 June 2022 at <<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fdisability.royalcommission.gov.au%2Fsyste m%2Ffiles%2F2022-03%2FOverview%2520of%2520responses%2520to%2520the%2520Rights%2520and%2520attitudes%2520Issues%2520paper.docx&wdOrigin=BROWSELINK>>

<sup>21</sup> Donald Beasley Institute Office for Disability Issues, ‘Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review’ (2016) pg 73 viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>; Citing: Watson, J. (2016a). The Right to Supported Decision-Making for People Rarely Heard. (Doctoral thesis, Deakin University, Victoria, Australia). Retrieved from <https://www.researchgate.net/publication/258997358>.

<sup>22</sup> Mental Health Australia, ‘Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme’ (February 2016), pg 23; Citing: Interviews between Kate Rea and project participants for Self Determination and Cultural Change Project.

risk to people with disabilities, when they have broken no laws, is the type of anti-disability discrimination that the CRPD was drafted to address.<sup>23</sup>

Dignity of risk is an important part of the of human experience that must not be denied to a person because they have a disability.<sup>24</sup> Dignity of risk is required to be supported by disability service providers as a fundamental part of the NDIS Practice Standards and Quality Indicators.<sup>25</sup>

Pursuant to and in line with:

- Australia’s obligations pursuant to the CRPD;<sup>26</sup>
- the legislated mandates of the NDIS Act and the NDIS Code of Conduct;<sup>27</sup>
- the policy requirements of the NDIS Framework and the NDIS Practice Standards and Quality Indicators,<sup>28</sup>
- a best practice model of guardianship must also prioritise the right for a person with a disability to make a restrictive practice consent decision - through supported decision-making process - over a right for a guardian to make a restrictive practice consent decision for them.

Consent must be required from the person with a disability themselves for the carrying out of a restrictive practice (regardless of deemed capacity and/or guardianship in place), through a supported decision - making process, and if they so desire with the aid of a decision supporter of their choice (**Decision Supporter**).

The role of the Decision Supporter is to assist a person with a disability to realise their will and preferences, through a decision-making process.<sup>29</sup> The Decision Supporter must make a commitment to understanding and achieving the core values and preferences of the person with a disability, even when this is difficult or uncomfortable to do.<sup>30</sup>

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<sup>23</sup> Craigie J et al, ‘Legal capacity, mental capacity and supported decision – making: Report from a panel event’ (2019) *International Journal of Law and Psychiatry*, viewed 26 June 2022 at <<https://www.sciencedirect.com/science/article/pii/S0160252718301547>>

<sup>24</sup> Donald Beasley Institute Office for Disability Issues, ‘Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review’ (2016) pg 38 viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>; Citing Flynn, E., & Arstein-Kerslake, A. (2014). Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity. *International Journal of Law in Context*, 10(1), 81–104. doi:10.1017/S1744552313000384

<sup>25</sup> NDIS Practice Standards and Quality Indicators, pg 6

<sup>26</sup> CRPD Article 12

<sup>27</sup> NDIS Act, s 3; s 4(8); Code of Conduct s 5(2)

<sup>28</sup> NDIS Practice Standards and Quality Indicators, pg 5; NDIS Framework, Item 1.5, pg 11

<sup>29</sup> Donald Beasley Institute Office for Disability Issues, ‘Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review’ (2016) pg 35 viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>; Citing Series, L. (2015). Relationships, autonomy and legal capacity: Mental capacity and support paradigms. *International Journal of Law and Psychiatry*, 40, 80–91 <<http://doi.org/10.1016/j.ijlp.2015.04.010>>

<sup>30</sup> Donald Beasley Institute Office for Disability Issues, ‘Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review’ (2016) pg 38 viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>;

A best practice model of guardianship needs to include the continuum of supported decision-making levels and who is recommended the Decision Maker for that level. The recommended levels are:<sup>31</sup>

Legally independent:<sup>32</sup> The person with a disability needs little support and make decisions relatively independently. The person with a disability may refer to family or close friends to help them to explore an issue in depth or to assist them to get more information to inform their decision.

Supported decision-making:<sup>33</sup> More assistance is required for a person and a third party may become involved to assist a person with a disability to exercise their legal capacity to the greatest extent possible by means of explanation, representation, decision-making or communicative aids, and/or other assistance.

Facilitated decision-making:<sup>34</sup> This level is intended for only exceptional situations, where the will and preferences of a person with a disability are not able to be communicated by the person themselves at a certain point in time. This level of support requires a representative / agent (e.g., in some cases a guardian / administrator) to execute the person's legal agency on

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Citing Flynn, E., & Arstein-Kerslake, A. (2014). Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity. *International Journal of Law in Context*, 10(1), 81–104. doi:10.1017/S1744552313000384

<sup>31</sup> Donald Beasley Institute Office for Disability Issues, 'Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review' (2016) pg 52 viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>;

<sup>32</sup> Devi, N., Bickenbach, J., & Stucki, G. (2011). Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities. *ALTER European Journal of Disability Research*, 5(4), 249–264. <http://doi.org/10.1016/j.alter.2011.07.002>; Keeling, A. (2016). Supported decision making: the rights of people with dementia. *Nursing Standard*, 30(30), 38–44. Retrieved from <http://dx.doi.org/10.7748/ns.30.30.38.s45>

<sup>33</sup> Devi, N., Bickenbach, J., & Stucki, G. (2011). Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities. *ALTER European Journal of Disability Research*, 5(4), 249–264. <http://doi.org/10.1016/j.alter.2011.07.002>; Keeling, A. (2016). Supported decision making: the rights of people with dementia. *Nursing Standard*, 30(30), 38–44. Retrieved from <http://dx.doi.org/10.7748/ns.30.30.38.s45>

<sup>34</sup> Devi, N., Bickenbach, J., & Stucki, G. (2011). Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities. *ALTER European Journal of Disability Research*, 5(4), 249–264. <http://doi.org/10.1016/j.alter.2011.07.002>; Keeling, A. (2016). Supported decision making: the rights of people with dementia. *Nursing Standard*, 30(30), 38–44. Retrieved from <http://dx.doi.org/10.7748/ns.30.30.38.s45>;

Bach, M., & Kerzner, L. (2010). A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Ontario, Canada: Law Commission of Ontario. Retrieved from <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>; Arstein-Kerslake, A., & Flynn, E. (2015). The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law. *The International Journal of Human Rights*, 20(4), 471–90. doi:10.1080/13642987.2015.1107052.;

Bach, M., & Kerzner, L. (2010). A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Ontario, Canada: Law Commission of Ontario. Retrieved from <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>;

their behalf, consistent with that person's will and preferences and on the basis of the understanding and knowledge of the person.

### **Response regarding a best practice model of guardianship**

Currently, the model of guardianship contained in the Guardianship and Administration Act WA (1990) (**Guardianship and Administration Act**) is neither a best practice model as described by the Royal Commission in the Background Paper,<sup>35</sup> nor compliant with Australia's local and international legal obligations.<sup>36</sup>

To be both a best practice model and legally compliant, the guardianship model in Western Australia must incorporate the following elements:

- to ensure compliance with Article 12 of the CRPD, the model must incorporate the key provisions advised by the Committee on the Rights of Persons with Disabilities (attached to this Submission as **Appendix 2**);
- the model must support a right to self – determination<sup>72</sup> and dignity of risk<sup>73</sup> whereby the person with a disability can take reasonable risks so their personal growth, self-esteem and overall quality of life is not impeded;
- a person with a disability must have the sole authority to appoint or revoke a Decision Supporter, with the ability to specify the limitations of that support, retaining ultimate decision making authority;
- the role of the Decision Supporter will be to assist a person with a disability to realise their will and preferences in decision-making processes;
- the Decision Supporter must make a commitment to understanding and achieving the core values and preferences of the person with a disability;
- a decision making continuum, which includes a person with a disability:
  - a) being legally independent;
  - b) requiring supported decision making; or
  - c) requiring facilitated decision making.
- facilitated decision making, for example by a guardian / administrator, would only occur in exceptional situations, where:
  - a) the will and preferences of a person with a disability cannot be determined even after significant efforts, including through the provision of support; and / or
  - b) there is a demonstrable significant immediate risk to the person with a disability, and either / both of these limbs have been clearly evidenced in the guardianship / administration application;
- the 'best interpretation of a person's will and preferences' must be the basis of decisions that need to be made in relation to the person with a disability. A commitment to the will and preference paradigm places all persons on an equal footing in terms of their right to make self-determined choices - irrespective of the perceived

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<sup>35</sup> Royal Commission Background Paper, pg 42 to pg 45

<sup>36</sup> CRPD Articles 3; 12; 21; NDIS Act, s 3, s 4, s 4(8); Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

wisdom of those choices, or whether these choices accord with previously held interests and values;

- prioritised must be the right for a person with a disability to make a restrictive practice consent decision through supported decision-making process with the aid of a Decision Supporter, over a right for their guardian to make a restrictive practice consent decision for them;
- informed consent must be required from the person with a disability themselves through a supported decision - making process with the aid of a Decision Supporter, for the carrying out of a restrictive practice - regardless of deemed capacity and / or any guardianship order in place.
- in line with current evidence regarding the preferences of people with disabilities about who their decision supports should be, the best practice guardianship model should include provision that:
  - a person with a disability has a right to choose a Decision Supporter to assist them in a supported decision-making process; and
  - the Decision Supporter:
    - would not have to be legally appointed by the person with a disability;
    - would not have to be their legally appointed guardian;
    - could be family, friends and /or informal supports.

#### **Reform proposal 15: ‘Best practice’ safeguards in guardianship**

States and territories should provide adequate safeguards in relation to guardianship and administration. This may require reform to include:

- access to alternative dispute mechanisms for people involved in guardianship matters. This may be achieved by granting Public Guardians or Public Advocates broad mediation functions improvements to monitoring and review, such as through the introduction of monitors and a registration system or further resourcing for existing oversight mechanisms enhanced investigation powers for Public Guardians and Public Advocates in cases of suspected abuse, neglect or exploitation
- the introduction of offence and compensation provisions in legislation
- mandatory independent legal representation for all adults who are the subject of guardianship and administration orders
- the NDIA and the NDIS Quality and Safeguards Commission taking a greater role in oversight of NDIS service providers that initiate guardianship and administration applications.

#### **PWdWA and WAIIS response:**

#### **Abuses of people with disabilities due to the current model of guardianship in WA**

As stated by the Law Commission of Ontario in its 2020 discussion paper, ‘The Problem of Abuse and Misuse of Substitute Decision - Making Power’:<sup>37</sup>

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<sup>37</sup> Law Commission of Ontario, ‘The Problem of Abuse and Misuse of Substitute Decision -Making Power’ (2020) viewed 15 June 2022 at <<https://www.lco-cdo.org/en/our-current-projects/legal-capacity-decision-making-and->

'...because legal capacity, decision-making and guardianship laws give some people power over others, the laws themselves may create opportunities for abuse....The corollary of trust and power is that it always creates a potential for abuse. Thus, ironically, the very instruments designed to protect a person from some forms of abuse also create an opportunity for mistreatment.'

This is the case in Western Australia, where:

- guardianship / administration has become the default position for dealing with people with disabilities who have problem behaviours or who require high levels of support to engage with NDIA processes;
- disability service providers are using guardianship / administration orders to retain clients;
- SAT is being used as an extension of the Family Court / in place of Family Court processes;
- SAT processes and funding do not support advocacy to deny an application for guardianship / administration;
- guardianship orders are often too broad for the relevant situation;
- guardianship orders have led to human rights abuses; and
- guardianship orders and processes to procure them have caused trauma, harm and loss for people with disabilities.

Guardianship / administration the default position in WA:

An application for guardianship / administration for a person with a disability is becoming a default decision where there is insufficient consideration regarding why the application should be made and if it is necessary. For many applicants, it's about what is easiest for them, without fully understanding the serious implications for the person with a disability.

Applicants for guardianship / administration orders are concerned about their duty of care and the legal ramifications - for example a claim in negligence - if a person with a disability is harmed because that person has been allowed to make decision for themselves based on his/her own will and preferences.<sup>38</sup>

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[guardianship/legal-capacity-decision-making-and-guardianship-discussion-paper-2/i-the-problem-of-abuse-and-misuse-of-substitute-decision-making-powers/>](#); citing The Vanguard Project Report

<sup>38</sup> Royal Commission into Violence, Neglect and Exploitation of People with Disability, 'Overview of responses to the Rights and attitudes Issues Paper' pg 8 (April 2021) viewed 25 June 2022 at <<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fdisability.royalcommission.gov.au%2Fsyste m%2Ffiles%2F2022-03%2FOverview%2520of%2520responses%2520to%2520the%2520Rights%2520and%2520attitudes%2520Issues%2520paper.docx&wdOrigin=BROWSELINK>>

In denouncing the overuse of guardianship for people with a disability, the Northern Territory Office of the Public Guardian has stated that:<sup>39</sup>

Guardianship can be used as a means to reduce the liability and exposure of health care providers, service providers and financial institutions who may be reluctant to rely upon the consent or instructions of a person with disability.

However, a robust system to monitor and report human rights abuses - and supported decision making processes to ensure informed consent - provide a proactive way to mitigate risks. This may be done without resorting to making a guardianship / administration order that takes away the fundamental human right of the person with a disability to make decisions that determine the course of their life.<sup>40</sup>

Some people with a disability may never see or talk to the guardian / administrator who makes decisions about their lives - or be consulted about their will and preferences.

The Albany Community Legal Centre has reported that:

- there is no face-to-face contact with substitute decision makers from the Office of the Public Advocate or the Public Trustee for regionally based represented persons in Western Australia;
- there is irregular or no contact via telephone with the Office of the Public Advocate or the Public Trustee with the person who is the subject of guardianship / administration;
- there is an allocation to a “team” of guardians / administrators with no actual knowledge or understanding of the individual the subject of the guardianship / administration order;
- there is no understanding of this team of guardians / administrators of limitations of services in regional areas, including access to medical specialists or therapists, travel requirements, distances, accommodation, etc.;
- there is a systematic refusal to change Trust Manager when relationship broken down with the person the subject of the guardianship / administration order.

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<sup>39</sup> Royal Commission into Violence, Neglect and Exploitation of People with Disability, 'Overview of responses to the Rights and attitudes Issues Paper' pg 8 (April 2021) viewed 25 June 2022 at <<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fdisability.royalcommission.gov.au%2Fsyste m%2Ffiles%2F2022-03%2FOverview%2520of%2520responses%2520to%2520the%2520Rights%2520and%2520attitudes%2520Issues%2520paper.docx&wdOrigin=BROWSELINK>>

<sup>40</sup> Donald Beasley Institute Office for Disability Issues, 'Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review' (2016) pg 54 viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>

Instead of being the required least restrictive option for a person with disabilities to exercise their decision-making rights,<sup>41</sup> in practice guardianship / administration orders have in practice become the most restrictive manner of exercising available decision – making rights,<sup>42</sup> due to:

- unacceptable lack of communication between guardians / administrators and the represented person; and
- resulting inability of the represented person to be a part of decisions that affect their lives.

Additionally, grossly overused guardianship / administration orders have become a band aid approach in complicated situations, even though it is not in line with the legal obligations of Australia or Western Australia to put in place supported decision-making decision frameworks, as required due to agreed compliance with the CRPD; the NDIS Act; the NDIS Code of Conduct; the NDIS Framework; and the NDIS Practice Standards and Quality Indicators.<sup>43</sup>

PWdWA, WAiS and its sector partner Developmental Disability WA (DDWA) have experienced a disturbing trend around the application for guardianship / application orders involving NDIA staff and support providers.

This includes guardianship / administration orders being recommended by NDIA staff and Support Coordinators as a matter of routine for people with intellectual, cognitive or psychosocial disability who have limited family support.

As a result, between 2017 and 2018 in Western Australia, the number of people with intellectual disability under a guardianship order overtook those with dementia for the first time in 11 years.<sup>44</sup> Between 2020 and 2021, in Western Australia, people with intellectual disability still made up the second largest percentage of people with guardianship orders against them being 27%, or 759 people in just one 12-month period.<sup>45</sup>

Parents / family members who play a significant role in supporting the decisions of their loved one are also being strongly encouraged by NDIA staff and disability support providers to apply for guardianship. In some situations, NDIA staff have specifically stated if a person requires a high level of support to make decisions then someone else should be making those decisions for them. Additionally, support providers in WA are known to seek guardianship / application orders with the intent of keeping people with disability safe and managing conflicts with them.

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<sup>41</sup> Guardian and Administration Act 1990 s 51 and s 70

<sup>42</sup> CRPD Article 12; NDIS Act, s 3, s 4, s 4(8); NDIS Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

<sup>43</sup> CRPD Article 12; NDIS Act, s 3, s 4, s 4(8); NDIS Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

<sup>44</sup> Government of Western Australia Department of Justice, 'Office of the Public Advocate: Protecting the human rights of adults with a decision – making disability: Annual Report 2017 / 2018' pg 6 (September 2018) viewed 26 June 2022 at <<https://www.wa.gov.au/system/files/2022-01/OPA-Annual-Report-2017-2018.pdf>>

<sup>45</sup> Government of Western Australia Department of Justice, 'Office of the Public Advocate: Protecting the human rights of adults with a decision – making disability: Annual Report 2020 / 2021' pg 9 (September 2018) viewed 26 June 2022 at <<https://www.wa.gov.au/system/files/2022-01/OPA-Annual-Report-2017-2018.pdf>>

However, despite the requirements of the CRPD, NDIS Act, NDIS Code of Conduct; NDIS Framework and the NDIS Practice Standards and Quality Indicators,<sup>46</sup> it is rare for the person with a disability to be consulted when an application for guardianship / administration is made.

Examples demonstrating guardianship / administration orders are the default position in WA are attached to this Submission at **Attachment 1**.

### **Disability service providers use guardianship / administration orders to retain clients**

Dignity of risk must be supported by disability service providers as a fundamental part of the NDIS Practice Standards and Quality Indicators.<sup>47</sup>

Each participant's right to the dignity of risk in decision-making is supported. When needed, each participant is supported to make informed choices about the benefits and risks of the options under consideration.

Despite this, in breach of Article 16 of the CRPD – Freedom from Violence, Exploitation and Abuse; Section 47 of the SAT Act; and Section 4 of the Vexatious Proceedings Restriction Act 2022 (WA), there have been a substantial number of examples of service providers in Western Australia using guardianship and administration orders in WA to retain a person with a disability as a client who was seeking to change their services provider.

Examples demonstrating that disability service providers use guardian / administration orders to retain clients are provided in **Appendix 1** of this Submission.

### **SAT being used as an extension of the Family Court / in place of Family Court processes**

SAT has been used by some parents / family members as an extension of the Family Court when they have not been satisfied with the outcome provided by that court and seek an alternative forum to have their case heard.

An example of this has been where one opposing family member believed that the person with a disability was being manipulated or abused by the other one. The family members had already gone through a drawn-out Family Court matter which was not resolved to either of their satisfaction. Once the person with disability turned 18, the family members then went to SAT to seek guardianship over the person with a disability.

Even in situations where there has not been a Family Court matter it is common for parents who are separated and not on good terms to use SAT to try to seek individual guardianship over an adult child with a disability.

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<sup>46</sup> CRPD Article 12; NDIS Act, s 3, s 4, s 4(8); NDIS Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

<sup>47</sup> NDIS Practice Standards and Quality Indicators, pg 6

Examples demonstrating SAT is being used as an extension of the Family Court / in place of Family Court processes are provided in **Appendix 1** of this Submission.

**SAT processes and funding do not support advocacy to deny an application for guardianship / administration**

People with disabilities, against whom an application for guardianship / administration order has been made have a fundamental right to a fair hearing and natural justice, as provided through the International Covenant on Civil and Political Rights, State Administrative Tribunal Act 2004 (WA) and relevant legal authority.

Pursuant to:

**Article 14 of the International Covenant on Civil and Political Rights (ICCPR)** (of which Australian is a party)<sup>48</sup> - a person with a disability is guaranteed a right to a fair and public hearing in relation to a guardianship / administration order before SAT, which must be competent, independent and impartial;

**Article 14(1) of the ICCPR and Section 32 of the State Administrative Tribunal Act 2004 (WA) (SAT Act)** - all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings;

**Article 14(1) of the ICCPR, Section 32 of the SAT Act and relevant legal authority**<sup>49</sup> SAT is required not to pre-judge a matter, and to bring an impartial and unprejudiced mind to bear on the issues raised;

**Section 32 of the SAT Act and relevant legal authority**<sup>50</sup> SAT is required to do the following:

- inform the person the subject of the guardianship / administration order of the matters, including any critical issue, to be considered by a tribunal and allowed adequate time to prepare submissions on these matters;
- if it proposes to rely on material adverse to the case of the person, to disclose the substance of the material and give the person the opportunity to explain and rebut the material;
- if an oral hearing is to be held, give the parties given reasonable notice of the time and place of the hearing

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<sup>48</sup> Australian Government Department of Foreign Affairs and Trade, 'International Covenant on Civil and Political Rights' viewed 30 June 2022 at <<https://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E>>; Australian Government Attorney-General's Department, 'Fair trials and fair hearing rights: Public sector guidance sheet' (nd) viewed 30 June 2022 at <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/fair-trial-and-fair-hearing-rights>>

<sup>49</sup> See: Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507; Re Refugee Review Tribunal; ex parte H (2001) 179 AR 425 per Gleeson CJ, Gaudron and Gummow JJ at [27]

<sup>50</sup> See: SZBEL v MMIA [2006] HCA 63

To ensure that the parties to the proceeding before it understand the nature of the assertions made in the proceeding and the legal implications of those assertions;

- to ensure that the parties have the opportunity in the proceeding<sup>51</sup>
  - to call or give evidence; and
  - to examine, cross-examine or re-examine witnesses; and
  - to be heard or otherwise have their submissions considered.

Despite the express provisions of the ICCPR, the SAT Act, and relevant legal authority, the experience of the advocates for people the subject of guardianship / administration orders is that SAT Members may sometimes be adversarial in relation to disputes about application for guardianship / administration.

This is exemplified by the following SAT actions and processes that deny the rights of a person with a disability to natural justice and a fair hearing:

- advocates for a person disputing a guardianship application have to regularly remind SAT members, Guardians and Investigator Advocates that as per section 4 of the Guardianship and Administration Act, the SAT when order appointing a limited guardian or an administrator for a person shall be in terms that, in the opinion of the SAT, impose the least restrictions possible in the circumstances on the represented person's freedom of decision and action;
- during guardianship / administration order hearings, advocates and person with a disability are not given access to copies of reports provided to the SAT to support orders for guardianship / administration;
- the person with a disability and their advocate are only being allowed to make limited statements / provide limited information about the person's will and preferences in hearings that are not long enough to appropriately address the issues – such hearings often limited to 1 hour at most;
- advocates only have a very limited opportunity to cross-examine the applicant or test evidence provided in support of an application for guardian / administration.

Also, bedside SAT hearings are not uncommon and may take place when the individual is still acutely unwell and / or has just commenced a new medication regime. This may result in the person with a disability presenting at the hearing with diminished capacity, which may not be the case once their condition has stabilized.

Additionally, the Office of the Public Advocate is underfunded and does not have enough time or capacity to adequately perform its advocacy and investigation functions for people against whom a guardianship / administration order is being sought. There is also not enough funding provided by the government for independent representation for this cohort.

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<sup>51</sup> SAT Act s 36(6)(c)

Despite the express provisions of the ICCPR, the SAT Act, and relevant legal authority, the experience of the advocates for people the subject of guardianship / administration orders is that the application process for such orders is both:

- unfair; and
- inaccessible / difficult / expensive,

for people with disabilities and their advocates to navigate.

This is exemplified by the following processes:

- anyone can make an application for guardianship / administration over a person with a disability – without first evidencing they have standing and a case to answer;
- applications for a guardianship / administration order can be made without any medical evidence of the decision-making capacity of the person in question and will go to hearing if the applicant insist on one;
- when SAT does require a decision-making capacity assessment, there is no clarity on who can provide such an assessment, a limited availability of specialists in regions who can do such assessment, and lack of knowledge from GPs about who may be available to do an assessment about how to do one and the required content;
- SAT's preferred process is for individuals to use the application wizard on the eCourt portal, though information is not presented in plain English / Easy Read and many people do not have devices or data to access the eCourt portal;
- a person doesn't need to be informed if an application for guardianship / administration has been made against them. Often individuals are not aware that an application has been made until they are served with a notice of hearing. There is no right of reply and no way to appeal a decision until after orders are made;
- there is provision on the application to recommend that the person with a disability should not attend the hearing on the grounds that it may cause that person harm. There is no vigorous process to establish if harm would occur. Often individuals are told by family or service providers that they do not need to attend the SAT hearing. This can result in the SAT Member not hearing what the individual wants and only hearing the applicant's version of the need for a guardian / administration order;
- if a notice regarding an order for guardianship / administration is served on a person, they report that they do not understand the notice. They feel scared and intimidated by the process and incorrectly believe that if they do not attend the hearing then nothing will happen. This means that they have no input into a decision that may remove their decision-making rights from them;
- SAT has the final determination of whether someone can be listed as an interested party despite what the individual wants;
- parties to an application are not updated in a timely way, resulting in previously Interested parties (e.g. service providers), in breach of relevant the SAT Privacy Policy,<sup>52</sup> having information about individuals who no longer want contact with them

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<sup>52</sup> State Administrative Tribunal, 'Privacy Policy' (1 August 2017) viewed 30 June 2022 at <[https://www.sat.justice.wa.gov.au/\\_misc/privacy.aspx](https://www.sat.justice.wa.gov.au/_misc/privacy.aspx)>

- an application for a review of orders is a difficult, administratively burdensome process that is most often not accessible to people with disabilities without the assistance of advocates;
- in Western Australia, despite the requirement of Article 21 of the CRPD and Section 32(6)(a) of the SAT Act:
  - much information in guardianship / administration orders is provided in medical jargon / complex legal terms;
  - there is very limited, accessible digital, plain English and Easy Read information from SAT, Office of the Public Advocate or the Public Trustee in relation to;
- processes in relation to applications for guardianship / administration order; and
- applications being able to be made by the person with disability – in relation to a guardianship / administration order - to protect their rights when a victim of coercion, or to revoke an order that they disagree with or is inappropriate.

In addition to concerns regarding a lack of support for people who oppose guardianship / administration orders is a need for SAT and Public Trust administration processes to be made more accessible and without charge / at a reduced cost.

In relation to the Public Trustee:

- it charges fees from the time section 65 of the Guardian and Administration Act is invoked until the related SAT hearing. In many cases orders are not made and so the individual has paid fees sometimes for 3 months for a service that they did not want nor agree to;
- it charges fees based on the level of contact with the individual. However, many individuals do not understand the processes and do not receive timely responses from the Public Trust. This results in frustration which results increased calls and emails to Public Trustee Trust Managers and the individual is financially penalised for this inefficient loop of communication.

Prior to 2021, there was no dedicated advocacy to support people who were the subject of guardian / administration applications or orders. Lack of appropriate notice, or lack of knowledge meant people with disabilities would attend hearings without adequate support or knowledge of their rights. In many cases this led to an unnecessary order which was later withdrawn with the support of an advocate.

The experience of PWDWA during 18 months of having a dedicated SAT advocate has overwhelmingly been that access to an advocate increases the likelihood of no orders, or existing orders are that are further limited or revoked.

This highlights that people with disabilities unfortunately may not have equal access to due process in the SAT without the assistance of a dedicated, funded advocate. If representation is available at the time of the original application, then unnecessary orders are prevented, the experience is less traumatic and the individual feels that they will be listened to and afforded the natural justice they are entitled to.

Examples demonstrating SAT processes and funding do not support advocacy to deny an application for guardianship / administration are attached at **Appendix 1** of this Submission.

### **Guardianship / administration orders are often too broad**

There is concern from legal advocates that guardianship orders are broader than necessary, being 'excessively used and misapplied', because of their accessibility and low cost.<sup>53</sup>

In Western Australia, guardianship orders are rarely decision specific and often lead to guardians / administrators having overarching control of a person's affairs. For example, if a person requires support with a type of medical decision often all medical decisions are included under the guardianship order. If a person requires support with one financial decision then often an order is provided for a guardian / administrator to have oversight over all that person's finances.

This kind of 'broad brush' guardianship order carries an inherent risk of the person appointed as guardian / administrator abusing their power to make decisions that are in their own self - interest and the person with a disability losing control over their personal affairs.

Examples demonstrating guardianship / administration orders are often too broad are attached at **Appendix 1** of this Submission.

### **Guardianship orders have led to human rights abuses in WA**

Guardianship laws were originally enacted to protect people with disabilities who were considered too vulnerable to protect themselves. However, these laws do not guarantee protection for people with disabilities but instead put in place a regime where people with disabilities are subject to human rights abuses.<sup>54</sup>

People with disabilities in Western Australia have a right to independent decision making, to exercise their legal capacity, to express themselves, and to have access to information about their legal rights.<sup>55</sup>

They also have a right to live free of abuse and exploitation.<sup>56</sup>

Despite this, guardianship / administration orders in Western Australia have become a:

- systematic response to problem behaviour from people with disabilities; and / or

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<sup>53</sup> Australian Government Australian Law Reform Commission, 'Supported and substituted decision-making' (2014), Item 2.83: Citing; Office of the Public Advocate (Qld), Submission 05

<sup>54</sup> Craigie J et al, 'Legal capacity, mental capacity and supported decision – making: Report from a panel event' (2019) International Journal of Law and Psychiatry, viewed 26 June 2022 at <<https://www.sciencedirect.com/science/article/pii/S0160252718301547>>

<sup>55</sup> CRPD Articles 3; 12; 21

<sup>56</sup> CRPD Articles 16

- to mitigate potential liability for support providers, family and carers.

In the experience of DDWA, there have also been situations where disability support organisations in Western Australia have vexatiously used a guardianship application to punish a person with a disability for non-compliance or for changing service providers - in clear violation of: Article 16 of the CRPD – Freedom from Violence, Exploitation and Abuse; Section 47 of the SAT Act; and Section 4 of the Vexatious Proceedings Restriction Act 2022 (WA).

These are examples of breaches of the fundamental rights of people with disabilities in this state.

Examples demonstrating guardianship / administration orders have led to human rights abuses are attached at **Appendix 1** of this Submission.

### Guardianship orders in WA have caused trauma, harm and loss for people with disabilities

Legal capacity is an inalienable right available to people with disability, protected by the rule of law, through the CRPD.<sup>57</sup> For this reason the United Nations Committee on the Rights of Persons with Disabilities, a body of independent experts that monitors the CRPD by States Parties (including Australia),<sup>58</sup> has stated the following about the harmful effects of substitute decision making in legal regimes - including guardianship - pertaining to people with disabilities:<sup>59</sup>

Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

Substitute decision-making is a form of emotional neglect and willful deprivation of human rights. Supported decision-making and support with decision-making has positive effects on life outcomes and the relationship disabled people have with relevant stakeholders.<sup>60</sup>

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<sup>57</sup> CRPD, Article 12; Australian Government Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws', Item 2.17 (August 2014)

<sup>58</sup> See: United Nations Human Rights Office of the High Commissioner, 'Committee on the Rights of Persons with Disabilities', Item 2.60 (viewed August 2021) at <<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>>

<sup>59</sup> Committee on the Rights of Persons with Disabilities, General comment No.1 (2014), Eleventh Session, 31 March – 11 April 2014, pg 10; Citing: Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws' (2014) available at <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_dp81.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_dp81.pdf)>

<sup>60</sup> See: WAIIS, 'Supported Decision Making' (2022) viewed 30 June 2022 at <<https://waindividualisedservices.org.au/resources/supported-decision-making/>>

In contrast, substitute - decision making deprives a person with a disability a fundamental right to have autonomy in decision making and to be in control of their own life<sup>61</sup> - which are necessary for that person's wellbeing.<sup>62</sup>

When a guardianship order, a form of substitute decision making, removes legal capacity from a person with a disability - that person is being told they are a legal non-entity. They are being told their human rights are not being upheld on a national or state level in Australia, and so that person does not matter. This has caused trauma for people with disabilities.

This is particularly so for people from Aboriginal backgrounds who have experienced, and continue to experience, intergenerational trauma from the effects of being considered legal non-entities in Australia, non-citizens and incapable of determining their own affairs.<sup>63</sup>

In Western Australia, the current adversarial stance of the SAT towards people with disabilities and their advocates who argue against guardianship orders has caused people with disabilities to feel systematic intimidation and significant distress. This has been documented by organisations like PWdWA, DDWA and the Albany Community Legal Centre. Examples in point are documented in the Examples in **Appendix 1** of this Submission.

Guardianship orders in Western Australia, and the process to obtain them, has caused compensable trauma and loss for a people with disabilities in this state. This is exemplified by the recent case of *S v State Administrative Tribunal (WA) (No 2)*,<sup>64</sup> attached in full as **Appendix 3** of this Submission.

In this case, as a result of a guardianship / administration order the person was 'aggrieved about the decisions of the Public Advocate and the Public Trustee to sell her family home, to allow her personal possessions to be lost or dissipated and to use most of her money to purchase an accommodation bond in the residence in which she is presently located, the rent for which consumes most of the income derived from the person's pension'.<sup>65</sup>

This was done in breach of Article 12(4) of the CRPD – which:

- requires all appropriate and effective measures to be taken to ensure the equal right of persons with disabilities to own or inherit property; and
- ensures that persons with disabilities are not arbitrarily deprived of their property.

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<sup>61</sup> CRPD, Article 3; Article 12

<sup>62</sup> University College London, 'Status Syndrome: how your social standing directly affects your health and life expectancy' (June 2004) viewed 26 June 2022 at <<https://www.ucl.ac.uk/news/2004/jun/status-syndrome-how-your-social-standing-directly-affects-your-health-and-life-expectancy>>; Citing Marmot M, 'Status Syndrome' (2004)

<sup>63</sup> See: Australians Together, 'Intergenerational Trauma' (6 August 2021) viewed 30 July 2022; Citing: Atkinson, J. Nelson, J and Atkinson, C. 2010, "Trauma, Transgenerational Transfer and Effects on Community Wellbeing", in Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice, Purdie, N. Dudgeon, P. and Walker, R. (eds.), accessed 14th April; Healing Foundation, 2013, Growing our children up strong and deadly: healing for children and young people, pg. 3, viewed 14 April 2015

<sup>64</sup> [2021] WASC 306

<sup>65</sup> [2021] WASC 306 at [221]

Also, a person the subject of the guardianship / administration order may have a right to legal redress if they can prove on the balance of probabilities that they have been the victim of a Tort of Trespass to Land or Goods / Tort of Conversion of Goods as a result of the order.<sup>66</sup>

Notably, the person the subject of the guardianship / administration in *S v State Administrative Tribunal (WA) (No 2)* sought adequate compensation or restitution of property,<sup>67</sup> to which Heenan J remarked:

There would obviously be a right to restitution with interest or other compensation for property which has been lost by Ms S or its value.<sup>68</sup>

Additional Examples demonstrating guardianship / administration orders have caused trauma, harm and loss are attached at **Appendix 1** of this Submission.

### **Recommended best practice safeguards**

In response to the abuses with disabilities, stated above, due to the current model of guardianship in WA, PWDWA and WAiS request the best practice safeguards be put in place in relation to the guardianship / administration model for Western Australia.

1. Robust internal policies and guidelines must be implemented so that:
  - a) as required in a court of law, all applicants for guardianship / administration orders should be required to evidence 'standing' and a 'case to answer' in relation to an application for guardianship / administration, including credible medical evidence from an appropriate specialist,<sup>69</sup> of the decision-making capacity of the person with a disability;
  - b) NDIA and disability support provider staff cannot recommend or make applications for guardianship and/or administration orders unless clear evidence and rationale are available, including that it is a last resort. In this regard, mental incapacity would not be a sufficient rationale for recommending an application;
  - c) applications for review of orders is streamlined, with information and forms in relation to process provided in accessible forms for people with disabilities including Easy Read, video form and clear English;

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<sup>66</sup> Australian Government Australian Law Reform Commission, 'The right to sue in tort' (December 2014) [para 16.6 and 16.7] viewed 39 June 2022 at <<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/16-authorising-what-would-otherwise-be-a-tort/the-right-to-sue-in-tort/>>

<sup>67</sup> [2021] WASC 306 at [122]

<sup>68</sup> [2021] WASC 306 at [222]

<sup>69</sup> Note in *S v State Administrative Tribunal (WA) (No 2)* at [87] the criticism of J Heenan for the 'checkbox' approach of the doctor in question to the decision-making capacity assessment, noting 'There was simply no medical evidence to support the existence of a medical disability. No person with medical qualifications was called or gave evidence. No report from a competent medical expert addressing the critical issues was ever sought, obtained or acted on.' The full judgement is attached at Appendix 3 of this Submission.

- d) when facilitated decision making is put in place, there must be face-to-face contact with the relevant representative / agent –including face-to-face contact required from the Office of the Public Advocate or the Public Trustee for regionally based represented persons in Western Australia;
  - e) when the relationship with a facilitated decision maker (e.g. an appointed guardian / administrator) and the represented person breaks down, this must be formally reviewed with the overarching will and preferences of the person taking precedence regarding who they want their facilitated decision maker to be.
2. Amendments to the Family Court Act 1997 (WA) and the Guardian Administration Act must be made to void matters resolved in the Family Court from being given a ‘second hearing’ in the SAT under the guise of a guardianship / application order by providing additional training to Office of the Public Advocate investigators around coercive control and the use of Family Court and SAT to prolong controlling / abusive relationships between the parents of adult children with disabilities.
  3. The Guardian and Administration Act must be significantly amended. The legislation is over 30 years old and needs to be updated to meet societal expectations regarding the treatment of people with disabilities, and to ensure it meets Australia’s international and national obligations in relation to a right for people the subject of a guardianship / administration orders to supported decision making, a fair hearing and natural justice.<sup>70</sup>

Amendments to the Guardianship and Administration Act should include the following:

- a) in accordance with fundamental principles of natural justice and fair trial,<sup>71</sup> a person against whom an application for guardianship / administration has been made against them must be informed of the application and provided a right of response before a hearing is scheduled;
- b) as per Section 32(6)(c) of the SAT Act, advocates for a person opposing a guardianship / administration order must be allowed sufficient opportunity to cross-examine the applicant and test evidence provided in support of an application;
- c) as basic principle, guardianship / administration orders may only applied for / granted as a last resort and when put in place, and such orders must include mandated supported decision making processes;

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<sup>70</sup> Including but not limited to: NDIS Framework, Item 1.5, pg 11; NDIS Code of Conduct, s 5(2); NDIS Act, s 3; s 4(8); ICCPR Article 14; SAT Act s 32

<sup>71</sup> ICCPR Article 14; SAT Act s 32

- d) SAT may only make limited guardianship orders that are situation / context specific, to mitigate against a risk of a guardian taking undue control over a person's affairs;
- e) clear definitions of the concepts of 'conflict of interest', 'bias' and 'undue influence' as they apply to guardians / administrators and develop policies and guidelines to manage these issues based on best practice, including the use of independent mediation;
- f) dispute-resolution procedures in circumstances where 'best interpretations' of a disabled person's will and preference' between relevant stakeholders are in conflict;<sup>72</sup>
- g) a government funded advocate / lawyer for people who oppose guardianship / administration orders needs to be based in the SAT, in line with the model of duty lawyers in other jurisdictions, to ensure rights to a fair hearing and natural justice are upheld and to guard against breaches of human rights caused by inappropriate / vexatious / overly broad orders.
- h) the government funded advocate / lawyer would provide the following services:
  - immediate advice in simple matters and seek adjournments for more complex matters that require more intensive advocacy involvement;
  - assisting the represented person in understanding the process, including understanding any guardianship / administration order in place, understanding their options and rights if they are not happy with the order or with the Guardian and/or Administrator;
  - support with an application to revoke or limit a guardianship / administration order;
  - attendance at SAT hearings in support of proposed represented person;
  - liaison / negotiation with statutory authorities;
  - resolution of communication issues / conflict between the represented person and their guardian / trust manager;
  - facilitating meetings via Teams or phone, and writing to the Public Trustee;
- i) to ensure due process and a fair hearing for the person the subject of the guardianship / administration order, advocates must be put on the record and have access to written copies of all documents – including reports, policies, submissions – submitted to support the application. Advocates must be afforded an opportunity to prepare reply submissions and secure all supporting evidence to support such reply submissions;
- j) a complaint system - in relation to SAT processes regarding guardianship orders - that does not require the application for a formal and costly appeal to overturn a SAT decision;

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<sup>72</sup> Donald Beasley Institute Office for Disability Issues, 'Exploring Article 12 of the Convention on the Rights of Persons with Disabilities: An Integrative Literature Review' pg 54 (2016) viewed 26 June 2022 at <<https://www.odi.govt.nz/assets/Whats-happening-files/exploring-article-12-literature-review-october-2016.pdf>>

- k) a yearly audit of SAT processes and orders in relation to guardianship / administration to ensure people who oppose applications for guardianship orders are afforded their fundamental rights to due process and natural justice;
- l) offence provisions for people and institutions who infringe upon the rights of people with disabilities to have supported decision making put in place instead of guardianship orders – including service providers in Western Australia who use guardianship and administration orders to retain a person with a disability as a client who is seeking to change their services provider;
- m) an explicit right to compensation for people with disabilities for trauma, harm and loss caused to them due to the effects of guardianship / administration orders;
- n) an audit of previous SAT decisions and processes in relation to guardianship to determine the exact quantum of compensation payable, and how to provide such compensation, to people with disabilities who have experienced trauma and loss due to guardianship orders and the processes used to obtain them;
- o) to ensure that a fair hearing and natural justice are afforded to people with disabilities, in compliance with Article 21 of the CRPD, Section 32 of the SAT Act, and in line with the SAT Privacy Policy,<sup>73</sup> amendments to SAT processes relating to responses to applications for guardianship / administration orders, including:
  - a. information about SAT, Office of the Public Administrator and the Public Trustee administration processes, and notices and orders regarding applications for guardianship / administration, must be accessible to the person the subject of the order including plain English, Easy Read - and when necessary explained by relevant personnel over the phone;
  - b. the person the subject of the application / their advocate / lawyer must be able to submit a reply to the order in person or over the phone when physical attendance at SAT is not possible;
  - c. the preference of people the subject of the application about who should be an interested party taking precedence over the opinions of other interested parties;
  - d. the private information (e.g. e-mail address, home address, telephone number) of the person of the subject of the application not being made available by SAT to the applicant for the guardianship / administration order or any interested party;
- p) SAT bedside hearings only taking place when there is no other alternative, in order to allow the person the subject of the guardianship / administration order to present their case while not in diminished mental or physical capacity;

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<sup>73</sup> State Administrative Tribunal, 'Privacy Policy' (1 August 2017) viewed 30 June 2022 at <[https://www.sat.justice.wa.gov.au/\\_misc/privacy.aspx](https://www.sat.justice.wa.gov.au/_misc/privacy.aspx)>

- q) SAT and Public Trust administration processes must be made more accessible, without charge / at a reduced cost, to people opposing guardianship / administration orders;
- r) Easy Read, plain English, video information regarding all administrative processes must be available from SAT, the Office of the Public Advocate and the Public Trustee. This must include information about applications being able to be made by the person with disability – in relation to a guardianship / administration order - to protect their rights when a victim of coercion, or to revoke an order that they disagree with or is inappropriate.

Examples of Easy Read procedural documents that describe legal processes, which have been developed in Australia, include:

- UN Conventions (Easy Read Guide);<sup>74</sup>
- Disability Discrimination Act 1992 (Cth) Easy Read Guide;<sup>75</sup>
- The Queensland Human Rights Act: an easy read guide;<sup>76</sup>
- About the Disability Act 2006 (Vic) Easy Read;<sup>77</sup> and
- National Standards for Disability Services Easy Read Version.<sup>78</sup>

### **Reform proposal 16: Safeguards for restrictive practices within guardianship**

If states and territories seek to authorise restrictive practices within the guardianship system, robust safeguards should be included in legislation to ensure appropriate oversight and monitoring. Safeguards should enable improvements in practice, including reducing and eliminating the use of restrictive practices.

### **PWdWA and WAiS response:**

#### **Current issues regarding restrictive practices and guardianship in WA**

The NDIS Quality and Safeguards Commission’s Positive Behaviour Support Capability Framework states that practitioners are expected to comply with their state’s laws or policies. This includes a requirement to meet any state and territory requirements to obtain consent for

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<sup>74</sup> See: <https://oursite-easyread.wwda.org.au/your-rights/united-nations-conventions/what-are-the-un-conventions/>

<sup>75</sup> Women with Disabilities Australia, ‘Australian Human Rights Commission Disability Discrimination Act 1992 – Easy Ready Guide’ (2020) viewed August 2021 at <<https://oursite.wwda.org.au/resources/australian-human-rights-commission-disability-discrimination-act-1992-easy-read-guide>>

<sup>76</sup> Queensland Human Rights Commission, ‘Fact Sheet: The Queensland Human Rights Act: an easy read guide’ (June 2021) viewed August 2021 at <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/25448/QHRC\\_factsheet\\_HRA\\_easyreadguide.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/25448/QHRC_factsheet_HRA_easyreadguide.pdf)>

<sup>77</sup> Victoria State Government, ‘Disability Act 2006’ viewed August 2021 at <<https://services.dffh.vic.gov.au/sites/default/files/2017-05/Disability-Act-2006-easy-read.doc>>

<sup>78</sup> Australian Government Department of Social Services, ‘National Standards for Disability Services Easy Read Version’ (nd) viewed August 2021 at <[https://www.dss.gov.au/sites/default/files/documents/07\\_2015/1500-02-15dss\\_-\\_disability\\_service\\_standards\\_booklet\\_v5r\\_web\\_2.pdf](https://www.dss.gov.au/sites/default/files/documents/07_2015/1500-02-15dss_-_disability_service_standards_booklet_v5r_web_2.pdf)>

service provision and the use of restrictive practices and consultation with the person with disability, their family, carers, guardian or other relevant person.<sup>79</sup>

According to the Western Australia Department of Communities, where a person with disability is judged to not have capacity to give consent in relation to restrictive practices, consent may only be provided by a substitute decision-maker.<sup>80</sup>

As per the Department of Communities, in WA the only mechanism to appoint a substitute decision-maker for a person over the age of 18 years, to consent to restrictive practices on the person's behalf, is primarily through a legally appointed guardian.<sup>81</sup>

As a result of this position, there has been a trend for guardianship applications in Western Australia to consider a need for consent in relation to authorised restrictive practice decision making.

This is particularly so for people who have a psycho – social disability. However, the majority of these individuals do not have a NDIS plan in place at the time of the application hearing, let alone a behaviour support plan that contains, or requires consent from a guardian for, restrictive practices.

Reasons given by SAT Members to include powers for guardians to make restrictive practice decisions / provide restrictive practice consent on behalf of the person with a disability are the following:

- if consent is required quickly, the individual would be disadvantaged due to the current long lead time for urgent hearings to be listed;
- it would do more harm to make the individual go through the SAT process again, just to determine authorised decision making authority;
- due to the high workload of the Office of the Public Advocate, guardians do not have the capacity to bring matters back to consider inclusion of authorised decision making;
- it doesn't matter if the authority of authorised decision making is granted to a guardian, instead of the individual, because if the authority is not required it will not be used.

This practice is:

- a) at odds with the obligations and intent of the: CRPD; the NDIS Act; the NDIS Code of Conduct; the NDIS Framework; and the NDIS Practice Standards and Quality Indicators;<sup>82</sup> because it denies the rights of people with disabilities in Western Australia to be able to make decisions about their own lives– including opportunities to make decisions in relation to acts that deprive them of their rights and liberty;

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<sup>79</sup> Government of Western Australia Department of Communities, 'Consultation Paper: Authorisation of restrictive practices in disability services in Western Australia [para 3.4] (December 2021) viewed 20 June 2022 at <<https://www.wa.gov.au/system/files/2021-10/authorisation-of-restrictive-practices%20.pdf>>

<sup>80</sup> Government of Western Australia Department of Communities, 'Consultation Paper: Authorisation of restrictive practices in disability services in Western Australia [para 3.7] (December 2021) viewed 20 June 2022 at <<https://www.wa.gov.au/system/files/2021-10/authorisation-of-restrictive-practices%20.pdf>>

<sup>81</sup> Government of Western Australia Department of Communities, 'Consultation Paper: Authorisation of restrictive practices in disability services in Western Australia [para 3.7] (December 2021) viewed 20 June 2022 at <<https://www.wa.gov.au/system/files/2021-10/authorisation-of-restrictive-practices%20.pdf>>

<sup>82</sup> CRPD Articles 3; 12; 21; NDIS Act, s 3, s 4, s 4(8); Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

- b) contrary to Sections 4, 44, 51 and 70 of the Guardian and Administration Act that require:
  - a. SAT orders, for limited guardians / administrators, to impose the least restrictions possible; and
  - b. guardians / administrators to take into account the wishes of the represented person and to act in a manner that is least restrictive for the represented person.

Pursuant to Article 16 of the CRPD - Freedom from exploitation, violence and abuse - it is unacceptable for non-compliance with the CRPD and the Guardianship and Administration Act to be allowed for reasons of convenience or an overload of the current SAT case capacity.

Additionally, pursuant to and in line with:

- Australia's obligations pursuant to the CRPD;<sup>83</sup>
- the position of the UN Disability Committee;<sup>84</sup>
- the commitment and policy of the Western Australian government in relation to the authorisation process,<sup>85</sup> the Guardian and Administration Act must be amended to prioritise the right for a person with a disability to:
  - a) make a restrictive practice consent decision through supported decision-making process;
  - b) over a right for their guardian to make a restrictive practice consent decision for them.

This means that consent must be required from the person with a disability themselves – and not a guardian - for the carrying out of a restrictive practice (regardless of deemed capacity and/or guardianship in place) through a supported decision - making process.

An example demonstrating reforms being needed for restrictive practice within guardianship is attached at **Appendix 1** of this Submission.

In addition, a guardianship / administration order itself is a restrictive practice in Western Australia, according to the definition provided by the Western Australian Department of Communities and the National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission.<sup>86</sup>

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<sup>83</sup> UNCRPD Article 12

<sup>84</sup> United Nations Committee on the Rights of Persons with Disabilities, General comment No.1 (2014), Eleventh Session, 31 March – 11 April 2014, pg 10; United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law [23]

<sup>85</sup> Authorisation Policy, Item 5.1; Western Australian Government Department of Communities, 'Procedural Guidelines Procedural Guidelines for Authorisation or Restrictive Practices in Funded Disability Services: Stage 2' (Authorisation Guidelines Stage 2), pg 5 at Item 3.3; pg 7 at 3.3; Western Australian Government Department of Communities, 'Supported Decision Making: Authorisation of Restrictive Practices Information Sheet' pgs 2 and 2

<sup>86</sup> Western Australian Government Department of Communities, 'Procedural Guidelines Procedural Guidelines for Authorisation or Restrictive Practices in Funded Disability Services: Stage 2', 28 April 2021, pg 5; NDIS Quality and Safeguards Commission, 'Regulated restrictive practices' (nd) viewed 30 June 2022 at <<https://www.ndiscommission.gov.au/regulated-restrictive-practices>>

A restrictive practice is any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability,

- because a guardianship / administration order has the effect of restricting / eliminating a person's right to legal capacity,<sup>87</sup> and may also restrict that person's freedom of movement,<sup>88</sup> and
- when a person objects to a guardianship / administration order then that order would be considered a regulated restricted practice and authorisation should be required for it.<sup>89</sup>

This means that each time a person with a disability in Western Australia is subject to a guardianship / administration order, the applicant should be required to go through the authorisation process required for regulated practices in this state, including but not limited to:

- being a registered NDIS provider,<sup>90</sup> requiring compliance with (among other things) the NDIS Practice Standards, the NDIS Code of Conduct, the NDIS Complaints Management and Resolution Processes;
- compliance with the relevant authorisation policy of the Western Australian Department of Communities, including a behaviour support plan in relation to the guardianship / administration order;<sup>91</sup> and a quality assurance process to review the behaviour support plan in relation to the guardianship / administration order.<sup>92</sup>

### **Proposed safeguards for restrictive practices within guardianship**

In response to the current issues regarding restrictive practices and guardianship in WA, it is the position of PWdWA and WAiS that the Guardianship and Administration Act must be amended to:

- a) disallow the premature inclusion of the power for a guardian to provide consent for authorised restrictive practice(s) in guardianship orders;

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<sup>87</sup> Australian Government Australian Law Reform Commission, 'Supported and substituted decision-making' (2014); Citing: United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law

<sup>88</sup> See *S v S v State Administrative Tribunal (WA) (No 2)* where the individual was removed by force from her home into a hospice.

<sup>89</sup> Western Australian Government Department of Communities, 'Procedural Guidelines Procedural Guidelines for Authorisation or Restrictive Practices in Funded Disability Services: Stage 2', 28 April 2021, pg 6

<sup>90</sup> See: NDIS Quality and Safeguards Framework; A Service for One, 'What is NDIS registration and do you need to register' (nd) viewed 30 June 2020 at <<https://www.inclusionaustralia.org.au/services-for-one-project/registration/what-is-ndis-registration-and-do-you-need-to-register/>>

<sup>91</sup> Western Australian Government Department of Communities, 'Authorisation of Restrictive Practices in Funded Disability Services Policy' dated November 2020, Appendix 3 – viewed 30 June 2022 at <<https://www.wa.gov.au/system/files/2021-07/Authorisation-of-restrictive-practices-in-funded-Disability-Services-Policy.pdf>>

<sup>92</sup> Western Australian Government Department of Communities, 'Authorisation of Restrictive Practices in Funded Disability Services Policy' dated November 2020, Appendix 3 – viewed 30 June 2022 at <<https://www.wa.gov.au/system/files/2021-07/Authorisation-of-restrictive-practices-in-funded-Disability-Services-Policy.pdf>>

- b) prioritise the right for a person with a disability to make a restrictive practice consent decision through supported decision-making process, over a right for their guardian to make a restrictive practice consent decision for them;
- c) require that consent must be required from the person with a disability themselves – and not a guardian - for the carrying out of a restrictive practice (regardless of deemed capacity and/or guardianship in place), through a supported decision - making process;

and

- d) confirm that a guardianship / administration order is a restrictive practice and so subject to the relevant authorisation policy of the Western Australian Department of Communities, and NDIS requirements in relation to registered NDIS providers - for applicants of a guardianship / administration order.

### **Reform proposal 17: Reforms for cultural safety**

States and territories should reform their guardianship and administration system to better provide cultural safety for First Nations people. This should include requirements on tribunal members to:

- consider the specific circumstances of First Nations people and the systemic disadvantage they experience.
- have regard to regional cultural differences within jurisdictions, and cultural or linguistic factors specific to First Nations people when determining the decision-making ability of a First Nations person.
- consider kinship and customary understandings of concepts like ‘relative’ and ‘spouse’.

### **PWdWA and WAIIS response:**

#### **Current Situation Regarding Cultural Safety for First Nations People**

The terms “reasonable judgement” and “best interest”, used in Section 51 and Section 71 of the Guardianship and Administration Act, are often interpreted using white Anglo-Saxon Australian ideals.

For example, it is a cultural norm for Aboriginal communities to share resources. This includes income and supports. People who don’t appreciate or understand the importance of culture have viewed this as family / community taking advantage of a person with a disability. This is a white, Anglo-Saxon construct that does not acknowledge Aboriginal culture.

An application for guardianship that removes a person from their community / family / kinship ties imposes yet another white system which makes the person a legal non-entity, causes trauma to and harms the person with a disability.

This is of particular weight for Aboriginal people who also experience intergenerational trauma from the effects of being considered legal non-entities in Australia, non-citizens and incapable of determining their own affairs.<sup>93</sup>

Additionally, people from First Nations have been held to a higher level of financial scrutiny in SAT processes than their non-Indigenous counterparts, due to underlying racist assumptions on a systematic level about supposed mishandling of personal funds.

These issues must be addressed to overcome identified cultural and language barriers for First Nations people in this state's guardianship system.<sup>94</sup>

An example demonstrating reforms being needed for cultural safety is attached at **Appendix 1** of this Submission.

### **Response Regarding Reforms for Cultural Safety**

We agree that there are different cultural needs that need to be considered for decision makers. A supported decision-making process which starts with the person being supported to identify and invite their preferred decision supporters will go some way to meeting their cultural needs in the context of building decision making capability.

A clear strategy needs to be developed in partnership with First Nations people and the CALD community to address the over representation of these communities in SAT matters.

This should include education and training for disability service providers, SAT Members and SAT staff to address cultural misconceptions and discrimination regarding financial inquiries related to applications for guardian / administration orders.

### **Reform proposal 19: Education and training**

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 and other stakeholders involved in guardianship and administration matters.

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<sup>93</sup> See: Australians Together, 'Intergenerational Trauma' (6 August 2021) viewed 30 July 2022; Citing: Atkinson, J. Nelson, J and Atkinson, C. 2010, "Trauma, Transgenerational Transfer and Effects on Community Wellbeing", in Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice, Purdie, N. Dudgeon, P. and Walker, R. (eds.), accessed 14th April; Healing Foundation, 2013, Growing our children up strong and deadly: healing for children and young people, pg. 3, viewed 14 April 2015

<sup>94</sup> N Clements, J Clapton and L Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity', (2010), vol 45(3), Australian Journal of Social Issues

## **PWdWA and WAIIS response:**

### **Issues with lack of education and training**

Due to poor community education provided through health and financial institutions, parents and families are often incorrectly advised that they need to obtain guardianship / administration orders in case the individual ever needs urgent medical care or needs to open a bank account. These issues can be dealt with in an informal means with a Hierarchy of Treatment<sup>95</sup> in the case of health decisions and the Marksman's Procedure in the case of a need to make financial decisions.

Due to a lack of education and training about supported decision making, formal decision makers (including families and service providers) often default to others to guide their decisions – without including the person with a disability.

This has meant that decisions about a person are being made from a place of self – interest and risk avoidance, instead of according to the will and preferences of that person.

SAT members and administrative staff are for the most part not trauma informed and have not had education and training in relation to supported decision making. This has contributed to their adversarial stance regarding advocacy for a people with disabilities against guardianship orders.

The Committee on the Rights of People with Disabilities recommended in 2013 that training in the legal capacity of persons with disability and the supported decision making to support legal capacity be provided to all relevant stakeholders – including civil servants and law makers.<sup>96</sup>

The Committee further recommends that the State party provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity

Despite this, and almost a decade later, government investment in training, education, and support related to supported decision making, including genuine person centred planning and

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<sup>95</sup> See for example: State of Victoria, Department of Health and Human Services, 'A guide to the Medical Treatment Planning and Decisions Act 2016' (September 2017) viewed 25 January 2022 at <<https://www.health.vic.gov.au/sites/default/files/migrated/files/collections/policies-and-guidelines/g/guide-to-mtpd-act-2016-doc.docx>>

<sup>96</sup> CRPD/C/AUS/CO/1 Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session' (2-13 September 2013) [para 25] viewed 25 June 2022 at <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsnzSGolKOaUX8SsM2PfxU7tjZ6g%2FxBVYsYEv6iDyTXyNk%2BsAB%2FHgrVpAKHcEYTB%2B1t%2FH3HX1F%2F%2Bo%2Bk3O4KxhfhPoTQZ3LeS75n8PHidYHE3>>;

communication, is still missing for people involved with the current guardian and administration system in Western Australia.

Training and education for stakeholders in the guardianship and administration system in Western Australia must be trauma informed.

Governments need to offer funding for the support elements which contribute to building decision making capability for people with disabilities, which is a long term, strategic investment.

### **Mandatory Education and Training on Supported Decision Making**

To ensure the capacity building for all relevant stakeholders in related to the legal capacity of persons with disabilities and the supported decision making to support legal capacity - related education and training must be made available for people with disabilities, their families and decision supporters.

This supported decision-making education and training must be mandatory for all relevant stakeholders, including NDIA staff and contractors, disability service providers and SAT Members and personnel, to ensure compliance with Australia's international and national obligations in relation to supported decision making.<sup>97</sup>

### **Education and Training Supplemented with Practice Direction**

People with disabilities have often experienced a lifetime of trauma. This needs to be recognised by the State Administrative Tribunal, The Office of the Public Advocate and The Public Trust.

Mandated, trauma informed education and awareness – supplemented by practice directions - will reduce the likelihood of the State Administrative Tribunal, the Office of the Public Advocate and the Public Trust retriggering existing trauma within people. This will lead to better outcomes for people who are the subject of guardianship / administration orders.

### **Existing Good Practice in Education and Training**

WAIIS have historically, over the last 10 years, supported learning, training and development opportunities for capacity building of Decision Makers, decision supporters, community and provider organisations, local and national government.

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<sup>97</sup> CRPD Articles 3; 12; 21; NDIS Act, s 3, s 4, s 4(8); Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

WAI S is currently funded for three (3) separate grants specific to Supported Decision Making. Two are funded nationally by Department of Social Services, and one is funded through WA Department of Communities, Disability Services.

There are many capacity building organisations across Australia, who have the experience, relationships and commitment to Supported Decision Making being a reality for all people with a disability, including for people with complex communication access needs. These organisations, like WAI S, are best placed to provide capacity building education and training.  
<https://supporteddecisionmaking.com.au/>  
<https://waindividualisedservices.org.au/resources/supported-decision-making/>

### **Education and training must be accessible to people with disabilities**

As per Article 21 of the CRPD, education and training on human rights and supported decision making must be made available for people with disabilities, in accessible formats for information – including plain English, Easy Read, First Nations and community languages.

Examples of Easy Read procedural documents that describe legal processes, which have been developed in Australia, include:

- UN Conventions (Easy Read Guide)<sup>98</sup>
- Disability Discrimination Act 1992 (Cth) Easy Read Guide<sup>99</sup>
- The Queensland Human Rights Act: an easy read guide<sup>100</sup>
- About the Disability Act 2006 (Vic) Easy Read<sup>101</sup>
- National Standards for Disability Services Easy Read Version<sup>102</sup>

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<sup>98</sup> See: <https://oursite-easyread.wwda.org.au/your-rights/united-nations-conventions/what-are-the-un-conventions/>

<sup>99</sup> Women with Disabilities Australia, 'Australian Human Rights Commission Disability Discrimination Act 1992 – Easy Ready Guide' (2020) viewed August 2021 at <<https://oursite.wwda.org.au/resources/australian-human-rights-commission-disability-discrimination-act-1992-easy-read-guide>>

<sup>100</sup> Queensland Human Rights Commission, 'Fact Sheet: The Queensland Human Rights Act: an easy read guide' (June 2021) viewed August 2021 at <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/25448/QHRC\\_factsheet\\_HRA\\_easyreadguide.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/25448/QHRC_factsheet_HRA_easyreadguide.pdf)>

<sup>101</sup> Victoria State Government, 'Disability Act 2006' viewed August 2021 at <<https://services.dffh.vic.gov.au/sites/default/files/2017-05/Disability-Act-2006-easy-read.doc>>

<sup>102</sup> Australian Government Department of Social Services, 'National Standards for Disability Services Easy Read Version' (nd) viewed August 2021 at <[https://www.dss.gov.au/sites/default/files/documents/07\\_2015/1500-02-15dss\\_-\\_disability\\_service\\_standards\\_booklet\\_v5r\\_web\\_2.pdf](https://www.dss.gov.au/sites/default/files/documents/07_2015/1500-02-15dss_-_disability_service_standards_booklet_v5r_web_2.pdf)>

## Appendix 1: Examples

### **Reform proposal 14: National 'best practice' model of guardianship**

Examples demonstrating a need to consider best interpretation of a person's will and preferences

Examples regarding best practice model needing to be based on the 'best interpretation of a person's will and preferences' vs external stakeholders using their 'reasonable judgement' to determine the 'best interests' of a person with a disability

**1. Example:** A parent was providing financial support to an adult child who had drug and alcohol issues and had recently exited prison. The service provider perceived this as exploitation and made an application to SAT for administration orders. There was no consideration given to is this something that most parents would do for their child. Because they had a disability their right to make this decision was scrutinized more closely than that of a person without a disability. As a result, they were subject to external stakeholders using their 'reasonable judgement' to determine their 'best interests' instead of their decision being based on the 'best interpretation of their own will and preferences'.

**2. Example:** A person with a disability found themselves homeless at the height of the COVID pandemic, unable to secure private rental accommodation due to the low vacancy rates. The individual's friends and informal networks loaned them the money to stay in hotel accommodation. This person had a history of trauma and abuse, and did not feel safe in shared accommodation such as backpackers, hostels or caravan park. These forms of accommodation created severe anxiety and the feeling of being unsafe for this individual.

Because the individual chose the more costly option, upon receiving an inheritance they repaid the loans to the informal network. As a result, they were perceived to be unable to manage a large sum of money and this was attributed to their disability.

The person's service provider made an application to SAT. The individual had to produce receipts for the accommodation and under close scrutiny had to justify their choice to stay in more expensive accommodation as being a 'reasonable judgement' pursuant to section 4(3) of the Guardianship and Administration Act 1990 (WA).

### **Reform proposal 15: 'Best practice' safeguards in guardianship**

Examples demonstrating guardianship / administration orders the default position in WA

**3. Example:** A recent example of guardianship being the default position in WA is a case of a man in his 20s with autism who is verbal, active and articulate. The State Administrative Tribunal of WA (SAT) determined he could not make decisions and he did not have reasonable judgement. SAT made a decision it was better for a guardian to make decisions about NDIS matters than for the young person to learn to make decisions about NDIS supports for himself.

- Source: Developmental Disability WA

**4. Example:** Since the roll out of NDIS in WA there has been an assumption that Service Decision making authority is required due to the need to sign Service Agreements. Service Providers have typically produced Service Agreements that are not written in plain or easy English and have favoured the provider. As the NDIS has further developed and become more complex to access and navigate it has led to an increase in substitute decision making as a direct result of these complexities. This is despite the premise that NDIS is based on providing “choice and control” to individuals with a disability.

Despite NDIS making accommodations for a less restrictive process (Plan Nominee) many NDIS planners and Local Area Coordinators (LACs) still advising parents and families that they would need to apply for Guardianship in order to navigate complex NDIS processes.

- Source: People with Disabilities WA

**5. Example:** In one instance a NDIS planner directed a Support Coordinator to make an application to SAT for an Administration order for an individual based on a quick look at that person’s back account. There was no discussion with the individual or the individual’s family member about the transactions being made.

Allegations were made that the family member was misappropriating the individuals’ funds. This was very distressing for the individual. The person experienced trauma as a result and developed a mistrust of people and became withdrawn.

However, bank statements clearly showed that the funds had been withdrawn from an everyday account to a savings account and that no undue malice had occurred. Orders were made by the SAT for a family member to be appointed Administrator and to formalise the existing support provided. No apology was provided to the individual or the family member from the NDIS and the Support Coordinator still believed that they had acted appropriately.

- Source: People with Disabilities WA

**6. Example:** The Department of Communities in Western Australia routinely make guardianship / administration applications to SAT as part of the leaving care process for minors who have been in their custody. It is then difficult for these individuals to demonstrate that they have or able to build capacity as often they have not had the same opportunity as other young people to learn to budget and save for example or demonstrate their decision-making capacity.

Due to this default system, these young people are under the perception that until 18 years of age Department of Communities has been in control of their life and so the Office of the Public Advocate and the Public Trustee should be the next institution in control of their life.

- Source: People with Disabilities WA

**7. Example:** SAT guardianship / administration applications have also become a routine part of hospital discharge plans. This is because medical professionals and service providers hold the belief that an Office of the Public Advocate Guardian will follow their advice and make the

decision that is recommended to them or accept the first options presented regarding out of hospital care.

- Source: People with Disabilities WA

Examples demonstrating service providers are using guardianship / administration orders to retain clients

**8.** See Example 18 and Example 21 below.

Examples demonstrating SAT being used as an extension of the Family Court / in place of Family Court Processes

**9. Example:** A young person who had a history of trauma did not want a guardianship order made. An application was made by one family member with the intent to exclude another family member from the young person's life. This family had had extensive dealings with the Family Court, believed the issues remained unresolved and looked to SAT to resolve the situation.

- Source: People with Disabilities WA

**10. Example:** A young adult was placed under guardianship orders due to the level of conflict between this person's separated parents. Initially, one parent claimed that the other had misappropriated the individuals' funds. This was disproven, and an administrator appointed to the Public Trust. The parent who had made the allegations was not satisfied with this outcome and removed a large sum of money from the individual's account on the same day the decision was made to appoint the Public Trust. The young person could make his own decisions and could utilise supported decision making for more complex decisions; however, guardianship orders were made as a result of the actions of this person's family members.

- Source: People with Disabilities WA

Examples demonstrating SAT processes and funding do not support advocacy to deny an application for guardianship / administration

**11. Example:** A report was entered during a guardianship hearing and at the hearing the DDWA advocate and person with disability were denied the right to read the report, seek any further evidence, or question the person who made the report. They were told by the SAT member that they needed to put an application - after the hearing - to see and respond to the evidence presented and could only provide a response then.

Unlike the applicant for the guardianship order, this denied the person with a disability and their advocate a right to in person present a fulsome case to SAT members or to test the arguments provided in support of the guardianship application.

- Source: Developmental Disability WA

**12. Example:** The ex-husband of a woman remained listed as an interested party, despite being his being separated from her for at least 2 years and not having seen the individual for over a year. There was also a well know history of family and domestic violence within the relationship. When the individual requested that the Member remove the ex-person from the hearing all of the other interested parties has to be consulted to see if they agreed with the removal of the ex-husband as an interested party.

- Source: People with Disabilities WA

**13. Example:** Ex-service providers are listed as interested parties receive notices of hearings and sometimes copies of orders. In many cases the individual has had a negative experience with the service provider which has led to them ceasing their services. It is distressing for an individual to learn that the service provider is still receiving private information about them. In certain cases, this situation has been further exacerbated when the individual is a refugee and has an inherit mistrust of government and authorities.

- Source: People with Disabilities WA

**14. Example:** An advocate had been informed by a case manager in a previous matter that advising of being an interested party via email was not sufficient and a “Notice of Legal Representation” form needed to be completed. When the Advocate questioned this as they were non-legal support, they were informed to list themselves as an advocate and the name of their advocacy agency. For each matter after this form was submitted until a Member directed a case manager to ask the advocate if they understood that they were not a lawyer and directed that the notice must be withdrawn in line with SAT’s policy. The advocate requested a copy of the policy, and this was declined.

- Source: People with Disabilities WA

Examples demonstrating guardianship / administration orders are often too broad

**15. Example:** A young person who had been a child refugee and then a child in care reacted during a hearing to what the Member was saying by yelling, ‘I will leave Australia and go back to [their country of origin].’

This resulted in the SAT member making the following additional orders regarding the guardianship application:

To seek and receive information regarding the represented person from the Department of Home Affairs and Border Protection and to decide on behalf of the represented person in relation to his citizenship of Australia and matters incidental thereto;

(e) To decide whether or not the represented person is to travel outside Western Australia and the Commonwealth of Australia;

(f) To decide the terms and conditions upon which the represented person is permitted to travel; (g) To take possession of all passports issued to the represented person;

(h) To notify the Australian Federal Police about the existence, nature and effect of this order; and

(i) To notify the Department of Foreign Affairs and Trade about the existence nature and effect of this order.

None of these orders were necessary as the individual did not have the means of travelling. However, the individual was retraumatized due to their passport being removed and not being able to leave the country.

Examples demonstrating need for dedicated, government funding for people who are the subject of guardianship / administration orders

**16. Example:** This case concerns a client with an intellectual disability in his 60s. He was not on income support and all income came from a family inheritance. His father managed all elements of the client's life, including a financial / life decision. Prior to the death of the client's father, an application to SAT was made for independent guardian and administrator to be appointed. The Office of the Public Advocate and the Public Trustee were appointed for these roles/

Following this, a support worker was employed through the client's personal funding (historical arrangement set up by parent and continued). The Public Trustee paid the support worker but was not employer. The Office of the Public Advocate had oversight of the worker's role and activity however this responsibility had not been transferred across when appointed guardian changed within the Office of the Public Advocate. The support worker had overstepped their role and was wielding control that was well intentioned but not welcomed by the client. The level of control from the support worker was impacting on the mental health and independence of the client. The client was not aware that he was paying the support worker.

The advocate from the Albany Community Legal Centre (Advocate) met with the client who agreed to liaison with the Office of the Public Advocate and the Public Trustee. The Advocate: met with Office of the Public Advocate and the Public Trustee to determine who the support worker was employed by and who directed his activities. arranged a meeting with client, Office of the Public Advocate and the Public Trustee to discuss his concerns about the support worker.

Client did not know the identity or role of the guardian or the administrator (Office of the Public Advocate and the Public Trustee), and so without the Advocate would not have known where to receive assistance from to change the situation.

The outcome of the situation is that the Office of the Public Advocate has clarified to role of the support worker with the client and oversees and directs the services of the support worker who reports to the guardian every fortnight. Office of the Public Advocate requests information from support worker as to their role and activities to ensure the situation does not occur again. The client meets with the Office of the Public Advocate every three months (by video), facilitated by the Advocate.

The client has more independence over their finances and what happens in his home and has managed to maintain their relationship with the support worker.

- Source: Albany Community Legal Centre - Regional provider of the Individual Disability Advocacy Service for Sussex Street Community Law Service

Examples demonstrating guardianship / administration orders have led to human rights abuses in WA and have caused trauma, harm and loss for people with disabilities

**17. Example:** See Appendix 3 - S v State Administrative Tribunal (WA) (No 2)<sup>103</sup>

- person with a house and land
- forcibly removed
- loss
- application for compensation

**18. Example:** Disability service providers will make guardianship / administration applications to SAT when individuals choose to cease their services and choose to go to a new provider, as a means to keeping that person as a client.

In one example, a service provider had already been working with a person for more than two years and had not made a guardianship order, despite that person being a minor and living in a house where drugs were being used.

Only when the individual turned 18 and was informed that they have the right to choose their providers and exercised this right did the service provider then apply to SAT for a guardianship and administration order.

When a complaint was made to the service provider about the inappropriate application, they sought to have SAT withdraw the application the staff member who made the application did not have the authority within the organisation to do so.

However, SAT would not allow the application to be withdrawn and the relevant Member stated that the concern from the service provider was welcomed.

An order under section 65 of the Guardianship and Administration Act 1990 (WA) was also enacted, and the individual had no access to their Jobseeker payments. The Public Trust did not follow up with Centrelink about an administrative mistake and did not pay any accommodation costs for the individual. The strain of this situation almost led to the breakdown of critical informal supports and in the end, no guardianship or orders were made. This experience resulted in the individual experiencing substantial trauma, whilst still grieving the loss of both parents.

- Source: People with Disabilities WA

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<sup>103</sup> [2021] WASC 306

**19. Example:** A service provider made an application to SAT based on the individual inheriting a large sum of money and when their adult child exited prison. Providing them with some financial support.

The application to SAT did not follow the service providers own policy regarding making applications to SAT. The Service provider did not discuss the application with the individual and clearly stated to them “nothing would change until after the hearing” as they had little knowledge of SAT or the Guardianship and Administration Act.

Upon the SAT receiving the application, an order under section 65 of the Guardianship and Administration Act 1990 (WA) was also enacted and control of the individuals’ finances was assumed by the Public Trust. This was 10 days prior to Christmas. Due to the notice of orders not being accessible by the individual (in large print, easy or plain English) the individual was not aware that they could contact SAT and express that this was an undue hardship and have the order removed.

Due to health issues of the individual and the large number of matters before SAT the Hearing was not held for 4 months. By this time, the individual’s relationship with the service provider was irrevocably damaged.

Despite having substantial private funds, and serious health issues, the person was forced to suffer through the hottest summer on record without an air conditioner as the Public Trust had delayed the approval of its purchase.

- Source: People with Disabilities WA

### **Reform proposal 16:** Safeguards for restrictive practices within guardianship

Examples demonstrating reforms being needed for restrictive practices within guardianship

**20. Example:** A young person who had trauma and post-traumatic stress disorder related issues due to the use of unauthorised and prohibited restrictive practices became very distressed when there was discussion in the SAT hearing as to whether authorised restrictive practice decision making powers should be included in the guardianship orders.

Whilst the SAT Member acknowledged the individuals negative experience and trauma, authorised restrictive practice decision making powers were still included in the orders on the basis it would be more harmful for the individual to come back to SAT if there was a need for the use of authorised restrictive practices, despite there not been a need for them previously.

## **Reform proposal 17: Reforms for cultural safety**

Examples demonstrating reforms being needed for cultural safety

**21. Example:** A service provider made an application to SAT for guardianship for a middle-aged Aboriginal man who they had been supporting for many years. This was due to his decision when the NDIS came into his area to choose another service provider.

Many judgements were made by the service provider who without any evidence about how the person spent his money. The service provider made the following statements below to the SAT member:

“He obtained a loan from Cash Converters 2 years prior”

“He was seen standing outside the local bottle shop”

“He shouldn’t be living in public housing when he is receiving so much money from native title trusts”.

After a final SAT hearing no guardianship / administration orders were made. However, for the several months it took to reach this conclusion, the individual was very concerned that their autonomy would be removed. It impacted his self-worth and independence. He was held to a higher level of financial scrutiny than other white anglo-saxon community members without a disability, despite being debt free, by having to explain where all his money was being spent and why.

- Source: People with Disabilities WA

**Appendix 2: Key Provisions to be Included in a Supported – Decision Making Regime, as Advised by the Committee on the Rights of Persons with Disabilities**

**From: Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session’ (2-13 September 2013)**

25. The Committee recommends that the State party effectively use the current inquiry to take immediate steps to replace substitute decision-making with supported decision-making and that it provide a wide range of measures which respect a person’s autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to a person’s right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry and to work.

**From: Committee on the Rights of Persons with Disabilities, ‘General comment on Article 12: Equal recognition before the law’ (25 December 2013)**

24. States’ obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

25. A supported decision-making regime comprises various support options which give primacy to a person’s will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, etc.). While supported decision-making regimes can take many forms, they should all incorporate certain key provisions to ensure compliance with article 12 of the Convention, including the following:

- (a) Supported decision-making must be available to all. A person’s level of support needs (especially where these are high) should not be a barrier to obtaining support in decision-making;
- (b) All forms of support in the exercise of legal capacity (including more intensive forms of support) must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;
- (c) A person’s mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;
- (d) Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and the State has an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring supports in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the decision of a support person if they believe that the support person is not acting based on the will and preference of the person concerned;

(e) In order to comply with the requirement set out in article 12, paragraph 3, of the Convention that States parties must take measures to “provide access” to the support required, States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;

(f) Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry (or establish a civil partnership) and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;

(g) The person must have the right to refuse support and terminate or change the support relationship at any time;

(h) Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person’s will and preferences are respected.

26. The right to equality before the law has long been recognized as a civil and political right, with roots in the International Covenant on Civil and Political Rights. As such, the rights provided for in article 12 apply as at the moment of ratification. States parties have an obligation to immediately realize the rights provided for in article 12, including the right to support in the exercise of legal capacity. Progressive realization (art. 4, para. 2) does not apply to legal capacity.