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Mr Cameron Murphy AM
Chair, Committee on Ageing and Disability
Parliament of New South Wales
6 Macquarie Street
SYDNEY NSW 2000

By e-mail: ageingdisability@parliament.nsw.gov.au

Dear Mr Murphy,

INQUIRY INTO SUPPORTED DECISION-MAKING

Thank you for the opportunity to make a submission to the Committee on Ageing and Disability's inquiry on supported decision-making in NSW. The Law Society's Elder Law, Capacity and Succession, Indigenous Issues, and Human Rights Committees contributed to this submission.

We note this inquiry was self-referred pursuant to s 28B(1)(e) of the *Ageing and Disability Commissioner Act 2019* (NSW) (**Act**), for the Committee to conduct an inquiry into and report on supported decision-making for adults with disability and older people in NSW.

The absence of a legislative framework for supported decision-making in NSW

Supported decision-making is mandated by the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), to which Australia became a signatory in 2009.¹ As noted by Professor Cameron Stewart in a recent paper prepared for the Parliamentary Research Service (**Parliamentary Research Service Paper**):

There are many different approaches to supported decision-making, but at its core, supported decision-making is a model that requires decision-makers to provide support to people living with dementia so that they either have the capacity to make their own decisions, or, when capacity is no longer achievable, they will have decisions that reflect their will and preferences made for them by others.²

While the Parliamentary Research Service Paper concerned supported decision-making for people living with dementia, the above definition is equally applicable to other cases of adults with decision-making support needs.

¹ See *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 320 (entered into force 3 May 2008) art 12.

² Cameron Stewart, 'Supported decision-making for people living with dementia' (Research Paper No 6, Parliamentary Library, Parliament of New South Wales, 16 October 2025) 10 ('**Parliamentary Research Paper**'): <https://www.parliament.nsw.gov.au/researchpapers/Documents/Supported-decision-making-for-people-living-with-dementia-in-NSW.pdf>.

At the current time, there is no legislative framework for supported decision-making in NSW. The existing legislative frameworks dealing with decision-making are predominantly found in the *Guardianship Act 1987* (NSW) and the *Powers of Attorney Act 2003* (NSW). These rely on a combination of the best interests test and substituted judgment model, and do not incorporate the principles of supported decision making.³

We note, however, that the concept of supported decision-making has been included to some extent in NSW Government policies. For example, both the NSW Public Trustee and Guardian and the Public Guardian, in their public-facing communications to family, friends and service providers, offer resources on supported decision-making.⁴ Further, the Australian Guardianship and Administration Council has published guidelines on supported decision making but, as noted in the Parliamentary Research Service Paper, these are typically not referred to in NCAT decisions on decision-making capacity as a matter of course.⁵

While policy approaches may go some way to the implementation of supported decision-making in NSW, in our view, they fall short of what is required to ensure that the will and preferences of people with decision-making support needs are consistently recognised in a way contemplated by the CRPD. As such, the Law Society considers that it would be appropriate for NSW to consider legislative responses for decision-making in NSW law.

The idea of a legislative framework for this purpose in NSW is not novel. It was canvassed in detail as part of a review by the NSW Law Reform Commission (**NSWLRC**) on the *Guardianship Act 1987* (NSW). In that review, the NSWLRC consulted on draft proposals to introduce a new Act to provide for supported decision-making and substitute decision-making, which was called the “Assisted Decision-Making Act”. The new legislation was contemplated to replace the *Guardianship Act 1987* (NSW) and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW) and, among other matters, included:

- Principles to guide the assessment of decision-making ability.
- Assisted decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointments, court and tribunal appointments and default arrangements.
- Principles to guide supported decision-making.
- Safeguards that ensure accountability of decision-makers, including monitoring and review of orders and decisions.⁶

The recommendations of the NSWLRC were premised on the existence of the following entities: the NSW Trustee (currently called the NSW Trustee and Guardian), the Public Representative (currently called the Public Guardian), the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (currently called the Guardianship Division), and a new entity called the Public Advocate.⁷ The role of the Public Advocate would be to ‘advocate for people in need of decision-making assistance, mediate decision-making disputes, provide

³ See Parliamentary Research Paper (n 2), 6–13.

⁴ See NSW Public Trustee and Guardian, Public Guardian, *Supported Decision Making* (Factsheet, April 2024): <https://www.nsw.gov.au/sites/default/files/noindex/2024-06/NSW-trustee-guardian-supported-decision-making.pdf>.

⁵ Parliamentary Research Paper (n 2) 23. See also Australian Guardianship and Administration Council, *National Public Guardianship Guidelines* (Fourth Edition, 2025).

⁶ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) 25 [4.1]: <https://lawreform.nsw.gov.au/documents/Current-projects/Guardianship/Report/Report%20145.pdf>,

⁷ *Ibid* xxii.

information, advice and assistance about decision-making and investigate cases of potential abuse, neglect and exploitation'.⁸ In its submission to the NSWLRC, the Law Society supported the establishment of this new entity.⁹

Current considerations in relation to supported decision-making

The Law Society continues to support legislative change to embed and, to the extent necessary, formalise supported decision-making in law. We suggest that it will be important for the Committee on Ageing and Disability to build on the work already undertaken by the NSWLRC in 2018, while looking to other Australian jurisdictions, in particular Victoria, who, since that time, have enacted comprehensive changes to give expression in law to supported decision-making. Under the *Guardianship and Administration Act 2019* (Vic), for example, VCAT is empowered to make a supportive order appointing a 'supportive guardian' or 'supportive administrator' who is subject to certain duties under law.¹⁰

In our view, any legislative reform in NSW should also be considered in the context of the commencement of the *Aged Care Act 2024* (Cth) (**Aged Care Act**), which is intended to promote a rights-based model of aged care. We consider that alignment between the NSW and the Commonwealth regimes is important, and that any proposal for legislative change in NSW must consider interaction with the relevant Commonwealth 'supporter' provisions.

Our responses to Terms of Reference (b) to (d) are set out below.

TOR (b): Barriers to implementing models for supported decision-making across legal, financial, health, education, employment and care systems in NSW

Inconsistent legislative approaches to supported decision-making, including across NSW and Commonwealth legislation and policy

The fact that supported decision-making is not embedded in NSW law has the potential to give rise to a lack of consistent supported decision-making practices across NSW. As pointed out in the Parliamentary Research Paper, while NSW Government policies take a favourable approach to supported decision-making, this is not consistently reflected in the processes related to substituted decision-making and the application of the best interests test found in existing legislation.¹¹

This barrier may be exacerbated in light of the introduction of new Commonwealth frameworks, including the Aged Care Act. This introduced a scheme for 'supporters', who are individuals registered as supporters by the System Governor, and are to act in accordance with principles of supported decision-making.¹² The function of the supporter under the Aged Care Act is to complement the role of the substitute decision-maker under state and territory regimes.¹³ At the current time, however, the practical interaction between these roles remains unclear and may give rise to confusion.

⁸ Ibid xxxiv.

⁹ The Law Society of NSW, Submission No GA164 to The NSW Law Reform Commission, *Review of the Guardianship Act 1987* (26 February 2018): <https://lawreform.nsw.gov.au/documents/Current-projects/Guardianship/Submissions%20DP/GA164.pdf>.

¹⁰ *Guardianship and Administration Act 2019* (Vic) Pt 4, Div 1.

¹¹ Parliamentary Research Paper (n 2).

¹² *Aged Care Act 2024* (Cth) s 6.

¹³ Ibid s 33.

Barriers to implementing models for supported decision-making for the most vulnerable members of the community

As noted above, policy approaches are useful in disseminating information about supported decision-making. These may help to ensure that people requiring assistance with decision-making are supported by family and close friends in a way that recognises their right to exercise their autonomy and express their needs and preferences. Such informal arrangements, which are widespread, are an essential part of community life.

However, barriers to implementing models for supported decision-making arise for persons where family and community supports are unavailable or not working as intended. These can include vulnerable groups experiencing homelessness, addiction and mental illness, or those subject to any kind of abuse. The fact that there is no legislative framework in NSW to apply for the appointment of a supporter (as occurs in Victoria), coupled with the fact that supported decision-making as a legal concept is not embedded in the existing guardianship and administration regimes, means that these cohorts may be subject to substituted decision-making where supported decision-making would be more appropriate. While specialised community legal centres provide legal assistance to some members of this cohort in exercising their legal rights, these services are not sufficiently resourced to meet the needs of vulnerable populations.

Lack of specialised training on supported decision-making

While policy dissemination efforts help to provide information about supported decision-making, we note there is little specialised training for solicitors and other service providers to understand how to facilitate supported decision-making in line with evidence-based frameworks. We note that any changes to legislate for supported decision-making should be accompanied by broad education to all relevant stakeholders, including the aged care industry and the banking industry, to ensure that supported decision makers are able to assist the person in the way intended by the legislation.

TOR (c): The distinct experiences of and challenges faced by Aboriginal people and people from culturally and linguistically diverse backgrounds

Aboriginal and Torres Strait Islander peoples are overrepresented as the subjects of guardianship or administration orders.¹⁴ There have long been concerns around the cultural suitability of assessment tools and diagnostic criteria to determine their decision-making capacity, particularly where there is reliance upon assessments of language, behavioural cues, stimuli or normative data which are informed by cultural bias, meaning that there may be situations where such orders are imposed where a person does in fact have decision-making capacity.¹⁵

At the same time, Aboriginal and Torres Strait Islander people under guardianship or administration orders are often not afforded cultural safety, and experience harm from the consequent removal from their support network, Country, and cultural support, as was highlighted in the Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**).¹⁶

In this context, it is essential that the framework and principles for supported decision-making are culturally safe and tailored, noting in particular cultural differences in how decisions are understood, made and communicated in First Nations communities. This is consistent with the principles for supported decision-making that the

¹⁴ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report* (Final Report, September 2023) vol 4, 134–135 (*'Disability Royal Commission'*).

¹⁵ See Human Rights and Equal Opportunity Commission, *Indigenous young people with cognitive disabilities & Australian juvenile justice systems* (Report, December 2025) 26–29.

¹⁶ *Disability Royal Commission* (n 14) 146.

Disability Royal Commission recommended for adoption by federal, state and territory governments, including the following:

Principle 10 – Cultural safety

First Nations people and culturally and linguistically diverse people with disability are entitled to supported decision-making that is culturally safe, sensitive and responsive. This includes recognising the importance of maintaining a person's cultural and linguistic environment and set of values.¹⁷

Responding effectively to the significant and systemic barriers facing Aboriginal people with decision-making support needs requires culturally competent service design and delivery. For example, any framework should value kinship and community networks as legitimate supports, and recognise and make allowance for kinship structures specific to Aboriginal and Torres Strait Islander communities. We note that subsections 4(2)(e) and 4(3)(ii) direct the Commissioner, or any other person exercising a function under the Act, to take these matters into account for Aboriginal and Torres Strait Islander people.

To ensure that supported decision-making structures are culturally safe and appropriate, there must be co-design with Aboriginal and Torres Strait Islander communities. Crucially, cultural competence must also be integrated into all systems and services which intersect with decision making supports such as legal, health, financial and aged care services. We suggest that cultural competence and safety is best guaranteed by the inclusion of Aboriginal Community Controlled Organisations (**ACCOs**) into service design and delivery. ACCOs are trusted by, and highly connected with, Aboriginal and Torres Strait Islander communities. To do this important work, Aboriginal Community Controlled Health Organisations across urban, regional, and remote NSW must receive sustainable, long-term funding to increase the availability of culturally safe services.

Additionally, given the legal consequences of these processes, this should be complemented with commensurate funding to the Aboriginal Legal Service NSW/ACT, to enable access to culturally appropriate legal support.

We take this opportunity to note the obligations of Governments under the National Agreement on Closing the Gap, and the Targets set out in that Agreement, to address the determinants of the life expectancy gap between Aboriginal and Torres Strait Islander people and other Australians. The National Agreement recognises the need, and effectiveness, of an approach consistent with Aboriginal and Torres Strait Islander peoples' self-determination in addressing the particular challenges faced by Aboriginal and Torres Strait Islander peoples.

TOR d): the role and functions of the Ageing and Disability Commission (the Commission) in relation to supported decision-making; and e) possible changes to the functions of the Commission, including legislative amendments to the Act, to enhance supported decision-making

Current functions of the Ageing and Disability Commissioner

The functions of the Ageing and Disability Commissioner are set out in s 12 as follows:

- (a) to deal with allegations of abuse, neglect and exploitation of adults with disability and older adults, whether on the basis of a report made to the Commissioner or at the Commissioner's own initiative, including by referring matters to appropriate persons or bodies and by conducting investigations,
- (b) to take further action, following an investigation into an allegation of abuse, neglect or exploitation of an adult with disability or older adult, that the Commissioner considers necessary to protect the adult from abuse, neglect and exploitation, including by making an application to a court or tribunal in respect of the adult,

¹⁷ Ibid 174.

- (c) to raise awareness and educate the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults,
- (d) to provide advice and general assistance to the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults, including referrals to independent advocacy services, where appropriate,
- (e) to inquire into and report on systemic issues relating to the protection and promotion of the rights of adults with disability and older adults or the abuse, neglect or exploitation of adults with disability or older adults,
- (f) to consult with the Board on matters relating to the abuse, neglect and exploitation of adults with disability and older adults that the Commissioner considers appropriate,
- (g) to advise, and make recommendations to, the Minister, at the Commissioner's own initiative or at the request of the Minister, on matters relating to the abuse, neglect and exploitation of adults with disability and older adults,
- (h) to monitor, assess and report on the New South Wales implementation of *Australia's Disability Strategy 2021–2031*.

While the Commissioner's functions are drawn broadly in terms of the way in which they encompass community prevention and responses to abuse, neglect and exploitation of adults with disability and older adults, as well as systemic investigations on these issues, there is no specific functions directed to supported decision-making.

It is arguable that the intersection between certain types of decision-making and abuse, neglect and exploitation of adults with disability and older adults, could mean that, absent legislative amendment, there is still a role for the Commissioner to play in providing guidance and education on supported decision-making in addition to that which has been produced by the NSW Public Trustee and Guardian and the Public Guardian.¹⁸

In our view, regardless of where the function vis-à-vis education and guidance on supported decision-making sits, it is essential that this work is coordinated so that consistent advice is given to the public on this issue. The organisation leading on this service must also be properly resourced. It would be helpful for individuals and service providers to be able to direct their questions around supported decision-making to a single source. This is especially relevant in the context of the recent implementation of the Aged Care Act, where federal frameworks of 'supporter' interact directly with the substituted decision-making functions of enduring guardians and attorneys, as well as in the context of interactions with the National Disability Insurance Scheme.

Possible changes to the functions of the Ageing and Disability Commissioner

We suggest that consideration of possible changes to the functions of the Ageing and Disability Commissioner will necessarily be informed by the nature and scope of any legislative amendments proposed for NSW i.e., whether the Commission's functions under the Act need to be expanded, or whether it would be preferable to establish a new statutory office in line with the "Public Advocate" entity proposed by the NSWLRC would, depend on the way in which any supported decision-making model is enacted in law. The adoption of a decision-making model that includes supported decision-making as a clear outcome available under legislation (similar to what is in place in other jurisdictions including Victoria), is a different outcome to changes that could be made to existing legislation to embed supported decision-making as a relevant principle in decision-making proceedings.

¹⁸ We note the Victorian Office of Public Advocate, *Supported Decision-Making in Victoria* (Guide, October 2020) as a good example of guidance for people with a decision-making disability, and their family members, carers and friends who have been appointed, or have been asked to be, a legally appointed decision-supporter in Victoria. As noted above, however, the legal framework for supported decision-making is more mature in Victoria, meaning that this type of guidance can be provided in a more definitive manner.

TOR f) measures to ensure that substitute decision-making is an alternative approach that is employed in appropriate and limited circumstances

Article 12 of the UN CRPD, which emphasises the primacy of a person's will and preferences in decision-making, notes that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making'.¹⁹

In our view, the introduction of a legislative framework for supported decision-making with a focus on enabling people to exercise their legal capacity and make decisions that impact them would be the best way to ensure substituted decision-making is only considered in limited circumstances. In this respect, we suggest that the decision-making principles adopted in the *Guardianship and Administration Act 2019* (Vic) offer a useful model on how to define supported decision-making in line with a human rights approach. In particular, we draw attention to the principle require that 'the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person'.²⁰

We note that any legislation should set out clear procedural steps to identify when and how the supportive decision maker function is activated and when, in limited circumstances as described above, a person can override the decision of a represented person.

If you have any queries about the items above, or would like further information, please contact Mimi Lee, Policy Lawyer, on 02 9926 0174 or mimi.lee@lawsociety.com.au.

Yours sincerely,



Ronan MacSweeney

President

¹⁹ See *Convention on the Rights of Persons with Disabilities* (n 1) art 12 [3.17].

²⁰ *Guardianship and Administration Act 2019* (Vic) s 9(1)(e).