



people with disability

ABN 98 879 981 198

April 22 2016

The Secretariat  
General Purpose Standing Committee No. 2  
Parliament House  
Macquarie St  
Sydney NSW 2000

**People with Disability Australia Incorporated**

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NGO in Special Consultative Status with the  
Economic and Social Council of the United Nations

Dear Ms Rahme,

Thank you for the opportunity to respond to the following question on notice for the  
Legislative Council Inquiry into Elder Abuse.

**Ms JAN BARHAM:** *Many people with disabilities have decisions made for them by the  
Public Guardian. Can you provide any insight into how the Public Guardian decides what is  
in the best interests of those people? How does that work? How do they know what is in the  
best interests?*

PWDA has concerns regarding substitute decision-making and the concept of 'best interests'  
that is inherent to guardianship. Our view is underpinned by the rights contained in Article  
12 of the Convention on the Rights of Persons with Disabilities (CRPD) which asserts that  
people with disability must be recognised as having legal capacity, and must have the  
supports to exercise this capacity, and to express their will and preference.

The CRPD requires a shift from a substitute decision-making to supported decision-making  
regime. The Public Guardian in NSW recognises this shift and has been engaged in a  
supported decision-making pilot to explore this further.

'Best interests' and 'will and preferences' are distinctly different. The former focuses on the  
substitute decision-maker determining the 'best interests' of the person, while the latter is  
focused on providing the necessary supports for a person to articulate or express their own  
'will and preference'. In a supported decision-making regime, a representative would only be  
appointed where supports are not sufficient for an individual to express their 'will and  
preference'. A representative would need to investigate, based on the previous opinions,  
views and preferences of the person what might be the individual's 'will and preference' in a  
particular area, and if this was not possible, then a representative would need to use human  
rights principles to make decisions.

Although the Public Guardian is working on pilots to assist in moving closer to a supported  
decision-making methodology, it is still operating within a substitute decision-making  
framework. While public guardians may be required to consult with the person themselves to  
ascertain what is happening in their life and what they think or feel about certain decisions,  
and also ask family members, carers and advocates for their opinions, they are still making  
'best interests' decisions on behalf of the person.

In addition, PWDA individual advocates have indicated that consultation conducted by guardians can be cursory. For instance, individual advocates are aware of many cases in which appointed public guardians have made decisions based on information provided by Ageing, Disability and Home Care, other agencies and service providers, without any consultation with the person with disability themselves.

The guardianship system is currently contrary to the CRPD. Nonetheless, as mentioned in the public hearing, we are hopeful that there will be substantial reform in the area of guardianship legislation, particularly relating to legal capacity through the current Review, and that this will support the recognition of the legal capacity of people with disability and the shift to supported decision-making.

Thank you again for the opportunity to contribute to this Inquiry. PWDA welcomes any further consultation on the matters covered in our response.

Sincerely,

Therese Sands  
CO-CHIEF EXECUTIVE OFFICER



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Economic and Social Council of the United Nations

Dear Ms Rahme,

Thank you for the opportunity to respond to the following supplementary questions for the Legislative Council Inquiry into Elder Abuse.

*Question 1. What is your view of the current Supported Decision Making projects under Ageing, Disability and Home Care?*

([http://www.adhc.nsw.gov.au/individuals/inclusion\\_and\\_participation/supported-decision-making/sdm-projects](http://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making/sdm-projects))

The supported decision-making pilot under Ageing, Disability and Home Care was of very small scale. It only involved 26 people, and we are unsure whether any of these were older people. The independent evaluation of the supported decision-making pilot stated that three quarters of the participants had changed how they made decisions since engaging with the pilot program. People also stated they were more confident in making their own decisions throughout the pilot. However, a number of participants expressed they felt they had less control over their lives, or more or less the same amount of control. This indicates that more needs to be done to support people with disability to make their own decisions, and to ensure that all people with disability are aware that they have a right to be provided with adequate and appropriate decision-making supports.

In relation to supported decision-making, we direct you to our submission on reform of the Guardianship Act, which explains our view on supported decision-making in NSW in further detail. This submission is available

at: [http://www.pwd.org.au/documents/Submissions/SUB\\_180316\\_Law\\_Reform\\_Commission\\_Guardianship\\_Act\\_1987.doc](http://www.pwd.org.au/documents/Submissions/SUB_180316_Law_Reform_Commission_Guardianship_Act_1987.doc). We would recommend that NSW build upon the supported decision-making pilot and these recommendations to develop a supported decision-making regime that acknowledges the role of informal and formal decision-making supports.

Additionally, we would like to draw your attention to the work of the Legal Services Council regarding power of attorney, whether these should be registered and how lawyers approach these situations. The Legal Services Council and Commissioner for Uniform Legal Services Regulation held a consultative forum in November 2015. Together, the Council and Commissioner oversee the operation of the Legal Profession Uniform Law scheme, which regulates lawyers and law firms in New South Wales and Victoria.

For more information, particularly regarding the outcomes of the consultation and how work in this area is progressing, we would recommend you contact Sarah Clark  
or Maureen Shaw

*Question 2: Do you think mandatory reporting requirements for physical and sexual assault in aged care facilities should be expanded to include other forms of abuse? If so, what kinds of abuse should be included?*

Any form of violence perpetrated within a residential or institutional setting should be reported and appropriately investigated. This includes physical violence, sexual violence, financial violence, emotional violence, neglect and exploitation.

One of the key problems with mandatory reporting regimes is that criminal conduct is not necessarily responded to appropriately by the police, especially when the reports involve people with disability. The police may make judgements regarding the capacity of people with disability to participate in criminal processes, and may not believe them to be 'reliable' witnesses. As such, reports may not be investigated or may not result in convictions, which means that mandatory reporting requirements become little more than a service oriented procedure.

While it's important that there are service based responses in existence, particularly responses targeted at keeping people safe, we would be concerned if mandatory reporting regimes were seen to be replacing the appropriate criminal justice processes.

Keeping these concerns in mind, we would like to be sure that any expansion to the compulsory reporting of assaults outlined in the *Aged Care Act 1997* would not be understood to be replacing criminal processes.

Thank you again for the opportunity to contribute to this Inquiry. We welcome any further consultation on the matters covered in our response.

Sincerely,

Therese Sands  
CO-CHIEF EXECUTIVE OFFICER