

Position Statement

Guardianship, substitute and supported decision-making

Position

Australia should transition away from guardianship and substitute decision-making models and practices and move towards a national supported decision-making model, consistent with Australia's obligations under the United Nations *Convention on the Rights of Persons with Disabilities* (UN CRPD) and other international human rights treaties.

Background

Article 12(3) of the UN CRPD requires that States Parties provide people with disability access to the support that they may require to exercise their legal capacity.¹ The CRPD Committee's General Comment No.1 explains that 'support' includes both informal and formal support arrangements.²

Rationale

As part of the move towards a national supported decision-making model consistent with Australia's obligations under the UN CRPD, government must evaluate existing supported decision-making models already functioning in other jurisdictions and countries. Australia must commission co-designed and co-delivered research and evaluation of existing supported decision-making models including those of Victoria (Australia), Peru and Ireland, as well as examining current substitute decision-making systems in all Australian jurisdictions.

The research must explore barriers and enablers to progress the necessary change, including supported decision-making awareness and capacity building for parents, peers and professionals such as allied health workers, and embedding supported decision-making principles in public and private settings, such as banks and hospitals.

Recommendations

In recognition that a national overhaul of Australia's guardianship and financial management framework will be a lengthy process and acknowledging the complexities and barriers to moving from a long-standing model to a new framework, PWDA recommends the following interim measures to improve current systems. These interim measures include:

¹ [CRPD Article 12](#)

² [CRPD Committee's General Comment No.1](#)

1. An increase in funding and training to increase access to support for decision-making
2. Access to individual advocacy and a requirement that a person with disability and their support person are included in all guardianship and financial management order applications
3. Training and improved guidance for hospital staff who make guardianship and financial management applications
4. All decisions to be directed by the will and preferences of the person with disability or the best interpretation of their will and preferences where all support options to determine the person's will and preference have been exhausted
5. Reform of state and territory governments guardianship legislation and/or policy documents to give primacy to the choice of guardian of the person with disability, subject to safeguards, and
6. Increased opportunities for people with disability to build their decision-making capacity.

Although these interim measures will reduce some of the negative impacts of current guardianship and financial management regimes, they are insufficient to fully uphold the rights of people with disability.

To fully uphold the human rights of people with disability, and comply with the UN CRPD, Australia must replace current substitute decision-making regimes with a supported decision-making framework that includes the following CRPD-compliant key features:

1. Supported decision-making is available to everyone and should not depend on mental capacity assessments
2. All forms of support to exercise legal capacity must be based on the will and preference of the person with disability, rather than their 'best interests'
3. The Australian Government must fund and facilitate the creation of support, particularly for isolated people with disability
4. There must be a mechanism for the verification of the support person's identity and a mechanism for third parties to challenge actions of the support person where they do not align with the will and preference of the person with disability
5. People with disability must have the right to refuse support, change support or terminate support relationships

6. Safeguards must be established to ensure the will and preferences of the person with disability are respected
7. Where all support options have been exhausted and it is not possible to determine the will and preferences of a person with disability, a representative decision-maker (rather than substitute decision-maker) may be appointed
8. The representative should make decisions based on the 'best interpretation' of the will and preferences of the person with disability, based on all information available
9. If it is still not possible to determine the best interpretation of will and preferences of the person with disability, the representative should make a decision with reference to the person's human rights
10. Fully funded independent supported decision-makers, which could include independent advocates, and;
11. Legal recognition of the role of supported decision-makers.

Instead of placing people with disability under guardianship and financial management orders, people should receive the support they need and want to make their own decisions.

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