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Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Delivered by email to legcon.sen@aph.gov.au

Dear Committee Secretary

Questions on Notice

We thank the Committee for the opportunity to provide further evidence at the public hearing of the Inquiry into the Administrative Review Tribunal Bills 2023 [Provisions] and related bills on 15 March 2024.

People with Disability Australia is Australia's peak cross-disability Disability Representative Organisation and is funded by the Australian Government to represent the 1 in 6 Australians with disability nationally. Our organisation is made up of, and led by, people with disability.

We provide the following responses to the two questions we took on notice:

1. Is there an example [of a supported decision-making litigation guardian] from another jurisdiction you can point to for the structure and wording?

General guardianship principles and legislation are applicable to all contexts where a guardianship like relationship may be found, such as in a Court or Tribunal setting with a litigation guardian.

In Australia the guardianship legislation considered most compliant with human rights principles and the *Convention on the Rights of Persons with Disabilities* is the Victorian *Guardianship and Administration Act 2019* (Vic) (the Act).¹ Several recommendations from

¹ See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) vol 6, 153.

the Disability Royal Commission directly reference the Victorian Act or otherwise reflect or are consistent with it.²

The Act includes a rebuttable presumption that people have decision-making capacity. It recognises a person has decision-making capacity if they can make decisions with support, and that supports *must* be provided.³ A person will only be placed on a guardianship order (what is increasingly commonly called a representation order) as a last resort, and after all efforts have been made to determine the person's 'will and preferences', including with supports. Where 'will and preferences' cannot be determined, any decision for that person must be based on promoting the person's personal and social wellbeing, and **not** what is considered their 'best interests'.

Part 3 of the Act sets out the requirements for guardianship and administration orders, while Part 4 of the Act establishes a formal framework for the appointment of a supportive guardian or supportive administrator who helps the person make their own decisions (formal supported decision making). The Act seeks to reduce the need for full representative orders by providing alternatives. It seeks to protect a person's autonomy, dignity and rights throughout the process even if an order is required.⁴

The Victorian scheme is comparable to progressive models in leading international jurisdictions, particularly Canada (from where the term 'representative decision maker' and 'representative orders' to replace the term 'guardian' originates).⁵ No jurisdiction has removed all guardianship/representative type relationships.

Where reform has been undertaken, such relationships are defined as being a measure of last resort and directed towards identifying and giving effect to a person's 'will and preferences' at the first instance, and the promotion of personal and social wellbeing and human rights in all others. '**Best interests**' is regarded as an inadequate mechanism to **safeguard** the human rights of a person.

While the Victorian Act is world-leading, we note implementation issues have been noted by others, most notably by the Victorian Office of the Public Guardian,⁶ particularly the need for more to be done to ensure people's right to autonomy is promoted to the fullest extent possible.⁷ These issues should be noted by the Committee.

² See e.g., Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Recommendations 6.4 - 6.10.

³ In terms of what type of Supported Decision-Making practice model can be used (i.e. in practice/how the parties actually interact) the legislation does not normally states this, though it is the case that generally, a supporter will have some kind of duties placed upon them. Some models are discussed at Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) vol 6 pp. 156-157.

⁴ See especially ss 5 - 9 regarding general principles and objects in the Act.

⁵ See eg, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) vol 6, 158.

⁶ See for example, Office of the Public Advocate (Victoria), *Reflections on guardianship: The law and practice in Victoria* (Report, February 2023) and Office of the Public Advocate (Victoria), Annual Report (2023)

⁷ Office of the Public Advocate (Victoria), *Reflections on guardianship: The law and practice in Victoria* (Report, February 2023), p.11

2. How important is the reinstatement of the Administrative Review Council (ARC) to your organisations, and what would you like to see that council look at in the space you occupy?

PWDA supports the reinstatement of the ARC in principle and emphasises the importance of engaging civil society in its work. In particular, we would like the ARC to look into how NDIA disputes could be resolved at an earlier stage, particularly at the internal review stage. We would also like the ARC to examine how the NDIA could assist in making the external merits review process more timely and less adversarial.

Thank you again for the opportunity to provide further evidence to the Committee. If you would like to discuss our responses further, please contact my Senior Manager of Policy, Mx Giancarlo de Vera

Yours sincerely

Sebastian Zagarella
Chief Executive Officer
People with Disability Australia