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Hon Nick Goiran MLC
Chairman
Select Committee into Elder Abuse
Legislative Council Committee Office
Parliament House
WEST PERTH WA 6005

Dear Mr Goiran

SUPPORTED DECISION MAKING

Thank you for your letter dated 24 May 2018 regarding the Committee's further enquiry into specific aspects of elder abuse and seeking my view on the concept of supported decision making in relation to guardianship matters, compared to substituted decision making.

Given your enquiry directly relates to guardianship matters and not financial administration I am confident the Public Advocate will have a more expansive response. I would simply make a few observations.

As was outlined in my submission to the Inquiry, there has been a shift in some countries away from substituted decision making to supported decision making related to guardianship. This shift resulted from those countries honouring the requirement of Article 12 of the 2006 United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).

Australia signed the CRPD in March 2007 and ratified it in July 2008.

The Australian Law Reform Commission (ALRC) in its 2014 report "Equality, Capacity and Disability in Commonwealth Laws" recommended that State and Territory governments review their laws with a view to adopting supported decision making. The ALRC believed an individual should not be assumed to lack the ability to make decisions on the basis of having a disability. All individuals who require support should be supported to participate in decisions affecting their lives.

The call by many advocates in the disability sector has been for the repeal of substituted decision making regimes, such as adult guardianship and administration, and replaced with a supported decision making model - a 'human rights' approach that treats people with dignity and recognises people with disabilities as persons equal before the law with the right to make informed choices for themselves.

The supported decision making model places an emphasis on ensuring that the will and preferences of the person drives decisions that they make and that others make on their behalf. Canada and the UK have been at the forefront of putting in place these

new supported decision making models. Fundamentally the model provides people with a decision making disability access to the necessary resources and supporters to assist them to make their own authentic decisions.

Western Australia, like the rest of Australian States and Territories, presently operates as a 'best interests' jurisdiction. In Western Australia the relevant legislation is the *Guardianship and Administration Act 1990* ("the GA Act"). In Western Australia, people with a decision making disability who have a guardianship or administration order made by the State Administrative Tribunal ("the SAT") have a substituted decision maker appointed to act in their 'best interests'.

A guardian or administrator is appointed to act on behalf of the person subject to the Order because the represented person has been found to lack the mental capacity to make their own decisions. The guardian or administrator must act according to their opinion of the best interests of the represented person and are accountable for the decisions they make.

The GA Act already requires that an administration order is not to be made when there is a less restrictive alternative available. In some limited cases, a less restrictive alternative may even be a person managing their own finances with the support of another person; in effect an informal supported decision making arrangement.

The SAT generally appoint the Public Trustee as an administrator (a substitute decision maker) as a last resort where they have determined the person has a mental disability, is vulnerable to abuse and are unable to identify a family member willing and able to do the job. The GA Act indicates that one of the factors an administrator should consider when determining the best interests of person is that person's wishes.

The sad reality is that the vast majority of the Public Trustee's clients have a profound decision making disability that prevents them from being able to verbalise or communicate their will or preferences on important matters. Many clients are in aged care facilities with dementia or acquired brain injuries. There is also the fact that many clients may like to spend their limited funds on certain products or activities, but it is not appropriate to do so as it may be illegal, detrimental to their health and wellbeing, or the funds are needed for life's basics such as rent, food and clothing. Evidence of a person's past wishes at a time when they had greater capacity may be taken into consideration but may be unreliable and self-serving.

As outlined in my answers to earlier supplementary questions, a recent decision of the Court of Appeal is noteworthy. That decision was *The Public Trustee v Baker* [2014] WASCA 23. The Court (at paragraph [30]), when considering section 70(2) of the *Guardianship and Administration Act 1990*, said: 'There will inevitably be many cases where the mental capacity of the represented person is such that consultation would be impossible. There will also inevitably be cases where the circumstances are such that the wishes of the represented person cannot be acted upon.'

The other factor to consider when contemplating a change from a substituted decision making model to a supported decision making model is the cost. Governments have finite resources. Although not every individual needs the same level of support, it is clear there would be a substantial cost in providing all necessary resources and

support to accurately determine a person's will and preferences in making day to day decisions. This high cost has been borne out from the limited Australian pilot studies examining supported decision making.

Another factor to seriously consider would be how you adequately safeguard the person with the disability being supported from abuse, undue influence and exploitation by the very person appointed to be their supporter. If there is an allegation of abuse by a supporter or a supporter is alleged to be acting against the interests of the person with the disability, who will be responsible for resolving conflicts between the parties or conducting investigations of such allegations?

I consider that the high cost and an inability to identify trustworthy supporters or representatives ready, willing and able to assist those persons with a decision making disability are indeed contributing factors explaining the glacial pace towards supported decision making in the decade since Australia ratified the CRPD.

That said I believe a shift in Australia towards a supported decision making framework is inevitable. There is an unstoppable momentum for reform. It will be welcome reform. However, in my view there will remain circumstances where substituted decision making remains appropriate. There will always be people with such profound cognitive impairments that it would be impossible to determine their will and preferences or for them to be effectively supported to make their own valid decisions.

The two different types of decision making models will need to co-exist along a continuum depending on the severity of the decision making disability of the individual.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brian Roche', with a large, stylized initial 'B'.

Brian Roche
PUBLIC TRUSTEE
15 June 2018