

**15 February 2023**

Mr Ray Griggs AO CSC  
Secretary  
Department of Social Services  
GPO Box 9820  
Canberra ACT 2601

By email: [sector.engagement@dss.gov.au](mailto:sector.engagement@dss.gov.au)

Dear Secretary

### **Consultation Paper: A New Act to Replace the Disability Services Act 1986**

The Law Council of Australia thanks the Department of Social Services (**Department**) for the opportunity to make a submission in response to its 'Consultation Paper: A New Act to Replace the Disability Services Act 1986' (**Consultation Paper**).

The Law Council is grateful to its constituent body, the Law Institute of Victoria (**LIV**), for raising the issues addressed in this correspondence. It also thanks its National Elder Law and Succession Law Committee, and National Human Rights Committee for their input.

### **Executive Summary**

1. The Law Council strongly supports the key objective<sup>1</sup> of the consultation to ensure the new Act that will replace the *Disability Services Act 1986* (Cth) (**Disability Services Act**) aligns with Australia's obligations under the Convention on the Rights of Persons with Disabilities (**CRPD**).<sup>2</sup>
2. The rights, principles and obligations recognised by the CRPD are relevant to many questions in the Consultation Paper, including the questions relating to the objects of the Act, the definition of the 'target group' who may receive the services funded under the Act, a definition of disability, and the quality and safeguarding arrangements made under the Act.<sup>3</sup>
3. In the time available, the Law Council has not applied the rights, principles, and obligations within the CRPD to each of the seven questions set out in the Consultation Paper. Instead, it recommends that consideration be given to underpinning the new Disability Services Act with a supported decision-making framework, consistent with article 12 of the CRPD.

---

<sup>1</sup> Consultation Paper 1.

<sup>2</sup> Convention on the Rights of Persons with Disabilities (entry into force 3 May 2008; entry into force for Australia 16 August 2008).

<sup>3</sup> Questions 1, 2, 4 and 5 respectively.

4. Further, in light of the endorsement of supported decision-making principles under *Australia's Disability Strategy 2021–31*, and multiple ongoing reform projects in relation to such frameworks, the Law Council suggests that now may be a good opportunity for a broader discussion as to how that consistency may be achieved. It has long recognised both the need for greater consistency across a range of Commonwealth, state and territory legal frameworks concerning individual decision-making and the significance of that task, in light of complexities and different traditions underpinning each of those frameworks and the costs involved.<sup>4</sup>

### Supported decision-making principles

5. The Law Council considers that it is a fundamental principle of the rule of law that states comply with their international legal obligations.<sup>5</sup> Under international law, every treaty to which Australia is party is binding upon it and must be performed by it in good faith and implemented domestically.<sup>6</sup>
6. The CRPD 'consolidates existing international human rights obligations and clarifies their application to persons with disabilities'.<sup>7</sup> The obligation to ensure supported decision-making where needed arises from the obligation on states parties in article 12 of the CRPD. That article reaffirms that persons with disabilities enjoy legal capacity on an equal basis with others, and obligates states parties to take appropriate measures to support those persons to exercise their legal capacity and make their own decisions where such support is needed.
7. The United Nations Committee on the Rights of Persons with Disabilities' (**UNCRPD**) describes the 'support' obligation which forms part of article 12(3) as follows:<sup>8</sup>

*Article 12, paragraph 3, recognizes the right of persons with disabilities to support in the exercise of their legal capacity. States must refrain from denying persons with disabilities their legal capacity, and instead must provide persons with disabilities access to the support that may be necessary to enable them to make decisions that have legal effect.*

8. In relation to the 'safeguards' provision, article 12(4), the UNCRPD states:<sup>9</sup>

*... [Article 12(4)] requires States parties to create appropriate and effective safeguards for the exercise of legal capacity. The primary purpose of these safeguards must be to ensure the respect of the person's rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.*

---

<sup>4</sup> Law Council of Australia (**Law Council**), submission to the Department of Social Services, 'National Disability Strategy (30 October 2020) (**Law Council's National Disability Strategy submission**) [92]-[100] <<https://www.lawcouncil.asn.au/publicassets/65659bed-f61e-eb11-9435-005056be13b5/3907%20-%20National%20Disability%20Strategy.pdf>>; Law Council of Australia, submission to the Australian Law Reform Commission (ALRC), 'ALRC Elder Abuse Issues Paper' (17 August 2016) [122] <[https://www.lawcouncil.asn.au/publicassets/d5d74075-f4b4-e611-80d2-005056be66b1/3178\\_-\\_ALRC\\_Elder\\_Abuse\\_Issues\\_Paper.pdf](https://www.lawcouncil.asn.au/publicassets/d5d74075-f4b4-e611-80d2-005056be66b1/3178_-_ALRC_Elder_Abuse_Issues_Paper.pdf)>.

<sup>5</sup> Law Council of Australia, 'Policy Statement – Rule of Law Principles' (March 2011) Principle 8 <https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.

<sup>6</sup> Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331(entered into force 27 January 1980) art 26.

<sup>7</sup> Australian Law Reform Commission (**ALRC**), 'Equality, Capacity and Disability in Commonwealth Laws', ALRC Report 124 (August 2014) [2.4] (**ALRC Report 124**).

<sup>8</sup> United Nations Committee on the Rights of Persons with Disabilities (**UNCRPD**), General comment No. 1 (2014), CRPD/C/GC/1, Eleventh Session, 31 March–11 April 2014, [16]-[17].

<sup>9</sup> *Ibid*, [20]-[21].

9. Article 12 of the CRPD has been described by the Australian Law Reform Commission (**ALRC**) as marking a ‘paradigm shift’ in recognising the right of people with disabilities as persons before the law and to make choices for themselves.<sup>10</sup>
10. In 2014, the ALRC formulated four National Decision-Making Principles,<sup>11</sup> which provide a practical manifestation of article 12, and recommended the introduction of a Commonwealth decision-making model that encourages supported decision-making, which it considered should be introduced into relevant Commonwealth laws and legal frameworks.<sup>12</sup>
11. The ALRC National Decision-Making Principles continue to be an influential and relevant framework which is well aligned with the CRPD in recent policy development work relating to the rights of persons with disabilities.
12. In January 2023, a research team funded by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability published the ‘Research Report: Diversity, dignity, equity and best practice: a framework for supported decision-making’ (**Research Report**).<sup>13</sup>
13. The Research Report proposes a ‘Diversity, Dignity, Equity and Best Practice Framework for Supported Decision-Making’ (**Supported Decision-Making Framework**) to ‘guide all supported decision-making legislation, policy, programs and practice across all jurisdictions, service systems, people with cognitive disabilities, types of decisions and contexts in Australia’.<sup>14</sup> The Supported Decision-Making Framework is underpinned by nine universal principles, which endorse the ALRC’s four National Decision-Making Principles, and add principles relating to how supported decision-making may operate in practice (principles 5–7) and to guide reforms (principles 8–9). The nine universal principles of the Supported Decision-Making Framework are set out in the **Attachment A**.
14. The principle of supported decision-making has been endorsed in *Australia’s Disability Strategy 2021–31*, to which the Commonwealth government, and all state and territory governments, have committed,<sup>15</sup> and which conceptually underpins the present reform.<sup>16</sup> Within the Strategy, governments committed to apply a set of eight Guiding Principles when developing policies, programs, services and systems to ensure these reflect the ‘General principles’ of the CRPD, as set out in article 3 of the CRPD,<sup>17</sup> the first of which is:<sup>18</sup>

*Principle (a): Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.*

---

<sup>10</sup> ALRC Report 124 [1.5].

<sup>11</sup> Ibid recommendation 3.

<sup>12</sup> Ibid Chapter 4.

<sup>13</sup> Bigby, C., Carney, T., Then, S-N., Wiesel, I., Sinclair, C., Douglas, J., & Duffy, J., (2023). Diversity, dignity, equity and best practice: a framework for supported decision-making. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability <<https://disability.royalcommission.gov.au/system/files/2023-01/Research%20Report%20-%20Diversity%2C%20dignity%2C%20equity%20and%20best%20practice%20a%20framework%20for%20supported%20decision-making.pdf>> (Royal Commission’s Research Report).

<sup>14</sup> Ibid 3.

<sup>15</sup> Commonwealth of Australia, *Australia’s Disability Strategy 2021-31* (2021) 2-3 (**Australia’s Disability Strategy 2021-31**) <<https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-11/1786-australias-disability.pdf>>.

<sup>16</sup> Consultation Paper 1.

<sup>17</sup> *Australia’s Disability Strategy 2021-31*) 38.

<sup>18</sup> Ibid 57.

15. Guiding Principle 1 contained in *Australia's Disability Strategy 2021–31*, which reproduces the language of CRPD General Principle (a), is underpinned by the following two 'prompting questions':<sup>19</sup>

*Does the policy/program/service/system (proposal) allow people with disability to make their own choices in the same way as people without disability?*

*Does the proposal give access to supported decision making as required?*

16. For completeness, the General Principles in article 3 of the CRPD and the Guiding Principles in *Australia's Disability Strategy 2021–31* respectively, which are almost identical, are set out in **Attachment B**.

### **The relevance of supported decision-making to the Disability Services Act**

17. The following overview of the Disability Services Act helps to demonstrate the way in which it engages with decision-making principles. The Act supports:

- the provision of employment services, advocacy services, rehabilitation programs and other 'eligible services'<sup>20</sup> to some persons with disabilities;<sup>21</sup> and
- the undertaking of research and development activities for a broad range of matters relating to the provision of such services.

18. The Disability Services Act supports these matters by:

- authorising the approval of grants of financial assistance to these services (other than rehabilitation programs) and research and development activities;<sup>22</sup>
- providing for the Commonwealth to itself provide for rehabilitation programs;<sup>23</sup>
- obliging the Minister to formulate guidelines to be complied with by entities receiving grants or by the Commonwealth itself;<sup>24</sup>
- authorising the Minister to determine standards to be observed in the provision of services or rehabilitation programs undertaken under the Act;<sup>25</sup> and
- providing for a framework under which an 'authority' may be approved to accredit 'certification bodies', which in turn may certify that a State or eligible organisation is providing employment or advocacy services, or rehabilitation programs, consistent with standards.<sup>26</sup>

---

<sup>19</sup> Ibid.

<sup>20</sup> An 'eligible service' accommodation support services; independent living training services; information services; print disability services; recreation services; respite care services; and other services approved by the Minister: Disability Services Act section 7.

<sup>21</sup> Referred to in the Disability Services Act as the 'target group': see sections 8 and 18.

<sup>22</sup> Disability Services Act Part II.

<sup>23</sup> Ibid Part III.

<sup>24</sup> Ibid subsection 5(1).

<sup>25</sup> Ibid section 5A.

<sup>26</sup> Ibid Part 1A.

19. There are presently two standards determinations:
- the *Disability Services Act (National Standards for Disability Services) Determination 2014 (Cth) (National Standards)* determines standards for the provision of employment services (other than by States or organisations which have registered under National Disability Insurance Scheme (NDIS)),<sup>27</sup> rehabilitation programs and advocacy services; and
  - the *Disability Services (Eligible Service Standards) Determination 2020 (Cth) (Eligible Service Standards)* determines standards in relation to ‘eligible services’.
20. Each of these instruments determines standards in relation to supports provided to assist decision-making by recipients of the program.
21. Standard 1 of the National Standards relates to ‘Rights’ and provides:<sup>28</sup>
- The service or program promotes individual rights to freedom of expression, self-determination and decision-making and actively prevents abuse, harm, neglect and violence.*
- Indicators of Practice**
- ...
- 1.3 *The service or program supports active decision-making and individual choice, including the timely provision of information in appropriate formats to support individuals, families, friends and carers to make informed decisions and understand their rights and responsibilities.*
22. Standard 3 of the Eligible Service Standards is titled ‘decision making and choice’ and provides the following lead standard, under which sits several supporting standards:<sup>29</sup>
- Each person with disability has the opportunity to participate as fully as possible in making decisions about the events and activities of their daily life in relation to the services they receive.*
23. The Law Council has not, in the time available, analysed the extent to which these decision-making standards are consistent with article 12 of the CRPD or the nine universal principles, which the Research Report suggests should inform the development of supported decision-making frameworks.
24. In any event, it is intended that the new Disability Services Act include ‘updated quality and safeguard standards arrangements and requirements, including compliance, reporting, review and complaints mechanisms that align with the best practice for disability services’.<sup>30</sup> The development of the Act, and its framework for authorising the making of updated standards, provides an opportunity to consider a supported decision-making approach.

---

<sup>27</sup> Such organisations are subject to standards prescribed under the NDIS Act – see Disability Services Act (National Standards for Disability Services) Determination 2014 (Cth) clause 8.

<sup>28</sup> Disability Services Act (National Standards for Disability Services) Determination 2014 (Cth) Schedule 1 Standard 1.

<sup>29</sup> Disability Services (Eligible Service Standards) Determination 2020 (Cth) Schedule 2 Standard 3.

<sup>30</sup> Consultation Paper

## The need for a co-ordinated approach to supported decision-making

25. While the Law Council considers that supported decision-making principles should be considered in the development of the new Disability Services Act, this Act does not operate in a vacuum, and thought needs to be given as to how the Act interacts with other legal frameworks, including those underpinned by a substituted decision-making, as opposed to supported decision-making, approach.<sup>31</sup>
26. The Consultation Paper notes, for example, that some service providers, who also provide services under the NDIS are subject to sets of standards both under that scheme and the Disability Services Act.<sup>32</sup> The Royal Commission's Research Report notes that, in some respects, the NDIS provides for a substituted decision-making approach.<sup>33</sup>
27. The ALRC's Equality, Capacity and Disability Report and the Royal Commission's Research Report both address the complexities involved in adopting a supported decision-making framework across different jurisdictions and types of legislative schemes.
28. The ALRC noted that 'one of the major difficulties in applying the Commonwealth decision-making model is determining the appropriate interaction of supporters and representatives with other supporters and representatives, as well as state and territory appointed decisionmakers, such as guardians and administrators'.<sup>34</sup>
29. The Research Report expresses the view that 'supported decision-making must be connected to or embedded within existing service and legal systems, with different—at times contradictory—traditions of decision support'.<sup>35</sup> It notes that 'the shift to rights-based policies generally, and supported decision-making particularly, occurred much earlier and is much stronger in the physical, sensory and intellectual disability sectors than in aged care, health, mental health, and rehabilitation sectors that support people with acquired cognitive disabilities'.<sup>36</sup>
30. In its submission to the consultation on what became *Australia's Disability Strategy 2021–31*, the Law Council expressed that it supports, in principle, a move towards a model of supported decision-making in states and territories.<sup>37</sup> However, the Law Council noted that:
  - any reform will require ongoing consideration of the specific measures, reforms and practical supports which are needed across different jurisdictions to implement supported decision-making and must be grounded in an evidence-based framework in terms of what works;<sup>38</sup>
  - the development and implementation of supported decision-making will require significant cultural and attitudinal change within the community and should be accompanied by education and training for those engaged directly in

---

<sup>31</sup> For a background discussion on the differences between substituted decision-making and supported decision-making, see ALRC Report 124 [2.51]-[2.116].

<sup>32</sup> Consultation Paper 2.

<sup>33</sup> Royal Commission's Research Report 72 and 76. See also, in relation to the NDIS, Cukalevski, E. Supporting Choice and Control—An Analysis of the Approach Taken to Legal Capacity in Australia's National Disability Insurance Scheme. *Laws* 2019, 8. <https://doi.org/10.3390/laws8020008>.

<sup>34</sup> ALRC Report 124 [4.128].

<sup>35</sup> Royal Commission's Research Report 59.

<sup>36</sup> *Ibid* 62.

<sup>37</sup> Law Council's National Disability Strategy submission [93].

<sup>38</sup> *Ibid* [94].

decision-making, as well as a national community awareness campaign to inform the public of change;<sup>39</sup> and

- different decision-makers for financial issues and personal issues can lead to conflicts with fundamental issues like accommodation, personal services, medical treatment and the provision of health services and paralysis, compounded by a lack of uniformity within jurisdictions.<sup>40</sup>
31. It concluded that greater consistency is required across a range of laws concerning individual decision-making.<sup>41</sup>
  32. The Law Council maintains this position, and suggests consideration be given to collaboration between state, territories and the Commonwealth on how such consistency can be achieved, in particular noting the challenges identified above.
  33. There are a number of reform projects on foot which relate to legislative frameworks conferring decision-making powers. These include two items on the current Standing Council of Attorneys-General agenda: the enduring power of attorney and access to digital records reforms.<sup>42</sup> The Final Report of the Royal Commission into Aged Care Quality and Safety endorsed the application of supported decision-making principles in the development of a new Aged Care Act.<sup>43</sup> The Law Council has suggested to the Department of Health and Aged Care that it address supported decision-making in the development of that Act.<sup>44</sup>

### Contribution by the Law Institute of Victoria

34. In the time available, the Law Council has not obtained the views of all constituent bodies on the extent to which decision-making frameworks (in particular, those that apply to persons with disabilities) have adopted a supported decision-making approach. However, the LIV has provided the following observations about, and analysis of, the position in Victoria:
  - Supported decision-making was first formalised in Victorian legislation through the *Mental Health Act 2014* (Vic) which previously emphasised substituted decision-making or supported decision-making. The new *Mental Health and Wellbeing Act 2022* (Vic) expressly promotes supported decision-making principles, with the views and preferences of the person receiving mental health and wellbeing services to be given priority.<sup>45</sup>
  - The *Guardianship and Administration Act 2019* (Vic) also reflects the goals of supported decision-making, by providing that '[a] person making a decision for a represented person ... should give all practicable and appropriate effect to the represented person's will and preferences, if known'.<sup>46</sup>

---

<sup>39</sup> Ibid [95].

<sup>40</sup> Ibid [98]-[99].

<sup>41</sup> Ibid [100].

<sup>42</sup> Standing Council of Attorneys-General, *Communiqué* (9 December 2022).

<sup>43</sup> Final Report of the Royal Commission into Aged Care Quality and Safety (Final Report, 26 February 2021) vol 1 (Final Report vol 3A) 9.

<sup>44</sup> Law Council, submission to the Department of Health and Aged Care, 'A new model for regulating Aged Care – Consultation Paper No. 1' (2 November 2022) [83] <https://www.lawcouncil.asn.au/publicassets/67ceb09a-375b-ed11-9475-005056be13b5/2022%2011%2002%20-%20S%20-%20A%20New%20Model%20for%20Regulating%20Aged%20Care.pdf>.

<sup>45</sup> *Mental Health and Wellbeing Act 2022* (Vic) sections 16, 19.

<sup>46</sup> *Guardianship and Administration Act 2019* (Vic) paragraph 9(1)(a).

- Implicit references to supported decision-making can also be found in certain parts of the Victorian Charter of Human Rights and Responsibilities, and the recently proposed Disability Inclusion Bill Exposure Draft.<sup>47</sup>

35. The LIV considers that Victoria is pioneering progress towards improving the rights of people with disabilities. However, noting the lack of a consistent national legislative framework, the LIV considers a new Disability Services Act to be an opportunity to enact transformative change through the introduction of supported decision-making principles.

### Contact

Please contact Mr Matthew Wood, Principal Policy Lawyer, on (02) 6246 3755 or [matthew.wood@lawcouncil.asn.au](mailto:matthew.wood@lawcouncil.asn.au) with any questions or comments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Luke Murphy', with a large, stylized flourish at the end.

**Luke Murphy**  
**President**  
**Enc. x 2**

---

<sup>47</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 8 and Disability Inclusion Bill Exposure Draft < <https://engage.vic.gov.au/disability-act> >.