AUSTRALIAN GUARDIANSHIP & ADMINISTRATION COUNCIL

C/- AGAC
GPO Box 7
Sydney NSW 2000
Phone 1300 320320
Email info@agac.org.au
Web www.agac.org.au
ABN: 59 619 104 906

Royal Commission into Violence, Abuse, Neglect
and Exploitation of People with Disability

By email: DRCPolicy@ag.gov.au

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Dear Commissioners,

Response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability's paper 'Supported decision-making and guardianship: proposals for reform'.

Thank you for the opportunity to provide a response to the reform proposals contained in the 16 May 2022 paper entitled 'Supported decision-making and guardianship: proposals for reform'. As Commissioners know, nine Australian Guardianship and Administration Council (AGAC) members were present, or were represented, either in-person or online at one or both roundtables hosted by the Royal Commission on 31 May (supported decision-making) and 1 June (guardianship).

I have consulted with AGAC's members about this response. I do want to note at the outset that AGAC's Tribunal members do not publicly express views about matters that are policy decisions for governments (and please note that the President of QCAT, who previously worked with the Royal Commission, specifically sequestered herself from responding to the paper). In addition, this letter does not necessarily reflect a consensus view among all AGAC members on all matters, given the differences that exist in guardianship and administration legislation and arrangements throughout Australia. Further, some AGAC members will have additional points they wish to make directly with the Royal Commission. With those qualifications in mind, I am happy for this letter to be treated as a submission and made public on the Royal Commission's website.

In this letter I address the key points that AGAC wishes to make about the reform proposals. Rather than provide a response to each of the 20 reform proposals, I will focus here on the most significant contributions that AGAC wishes to make to this important stage in our reform of supported decision-making and guardianship laws and practices. Many of these points were made by AGAC members or other participants at one or both of the roundtables.

I will address the topics of supported decision-making and then guardianship in turn, beginning each section with comments about proposals that directly involve AGAC.

Before doing that, it is worth briefly outlining some details about AGAC.

About AGAC

The Australian Guardianship and Administration Council (AGAC) is the peak body for all Public Advocates, Public Guardians, Public or State Trustees and tribunals with guardianship jurisdiction. AGAC is a voluntary organisation of these people, all of whom are appointed under state and territory laws and all of whose funding comes from state and territory governments.

AGAC, which has the legal status of a company limited by guarantee, might best be described as a community of practice. It has no formal governance function, and has no staff members as such (secretariat support is provided on a rotating basis, with the NSW Trustee and Guardian currently assisting in this regard).

AGAC members meet twice a year and host a conference every two or three years (this year's conference will be in Melbourne on 20-21 October 2022. See further https://agacconference.com.au/).

AGAC occasionally produces national submissions, guides and statistics (see: https://www.agac.org.au/publications). These include:

- Annual tribunal-authorised adult sterilisation statistics (the result of a project funded by the Commonwealth Attorney-General's Department and acquitted in 2015);
- Annual adult guardianship and administration (financial management) statistics (largely compiled with the assistance of state and territory guardianship tribunals).

In the wake of the Australian Law Reform Commission report *Elder Abuse – A National Legal Response* (2017) AGAC members were funded by the Commonwealth Attorney-General's Department to undertake projects that resulted in three publications (see: https://www.agac.org.au/publications):

- 'Maximising the participation of the person in guardianship proceedings: Guidelines for Australian Tribunals' (2019)
- 'Elder Abuse National Projects: Enduring powers of attorney (financial) options paper' (concerning the achievement of nationally consistent financial enduring powers of attorney laws, 2018)
- 'You Decide Who Decides: Making an enduring power for financial decisions' (2019).

AGAC members have also put together two documents concerning the standards of public guardianship and public administration (or financial management) which are available via https://www.agac.org.au/publications:

- National Standards of Public Guardianship (2016), including an Easy English version
- National Standards for Financial Managers (2018), including an Easy English version.

These national standards seek to provide national statements on what guardians and administrators (financial managers) do. The production of these standards sought to provide a national statement of the roles of public guardians and financial managers, drawing on the largely consistent, though locally nuanced, state and territory legislation that governs these roles. The standards don't have binding force, since AGAC members' binding obligations are contained in the state and territory legislation that establishes the relevant offices and sets out members' responsibilities.

Supported decision-making

As a general comment, AGAC is buoyed by the prospect that greater encouragement and assistance will likely be provided to enable supported decision-making to be practised as a result of the Royal Commission's work. AGAC members are very supportive of initiatives that will enable people with cognitive disabilities to play greater roles in the decisions that affect their lives. The reform proposals will help Australia to take some significant steps forward in recognition of the human rights of adults with impaired decision-making ability, in particular in relation to the consistency of our laws and practices with the Convention on the Rights of Persons with Disabilities.

It is also worth commenting that all AGAC members would wish for there to be less usage made of the adult guardianship system than is currently the case, and that supported decision-making initiatives provide one mechanism by which this may occur.

While the focus of the 'proposals for reform' document is largely on promoting and better regulating supported decision-making, and on limiting the length of time that people are on guardianship orders, AGAC would also encourage the Royal Commission to examine several service sector developments that, somewhat unintendedly, are resulting in increased use being made of the adult guardianship system. In the body of this letter, I point to features of the National Disability Insurance Scheme (NDIS) and recent aged care regulatory changes that are having this effect. AGAC members, for instance, observe that guardianship applications are

regularly now made in relation to uncontroversial procedural steps associated with the operation of the NDIS. Likewise, recent changed authorisation requirements for the use of restrictive practices in aged care facilities are resulting in significant numbers of new guardianship applications. In addition to promoting supported decision-making alternatives to guardianship, AGAC members would encourage the Royal Commission to consider other recommendations that would result in less use being made of the adult guardianship system for these purposes.

Supported decision-making proposals directly concerning AGAC

One supported decision-making reform proposal directly concerns AGAC. Reform Proposal 13 ('Establishing a governance body') provides that:

> 'The Australian government, together with state and territory governments, should establish an independent body to oversee and monitor the implementation of the national supported decision-making framework. This body should:
>
> • be led by people with disability and their representative organisations
>
> • promote the development of supported decision-making models across different settings and contexts, including for different cohorts and groups of people
>
> • provide leadership and facilitate the sharing of best practices and research
>
> • provide training on supported decision-making
>
> • support government agencies and organisations in developing supported decision-making resources, tools and materials
>
> • build community capacity in supported decision-making.
>
> This body should consult and work with the Australian Guardianship and Administration Council to ensure coordination across relevant state and territory-based service systems.'

AGAC would be very happy to be consulted on the workings of the proposed body that would 'oversee and monitor the implementation of the national supported decision-making framework'.

The body would have a potentially enormous breadth – in promoting supported decision-making, training in supported decision-making, providing secondary consultations and supporting the development of resources. The breadth indeed might be a little too large.

The suggestion that the body provide training would constitute a particularly enormous undertaking that would be very difficult to organise and roll out at a national level (given the sheer potential breadth of such an undertaking and the jurisdictional legal variabilities that exist).

In addition, requiring the body to monitor the implementation of the framework would constitute a very considerable undertaking for a national body. In addition to needing to have visibility over the enormous breadth of what might be termed formal and informal supported decision-making practices, the body would need to have extensive knowledge of practices undertaken pursuant to state and territory legislation in the fields of guardianship, enduring powers of attorney, enduring powers of guardianship, and medical decision-making. The body would then potentially be asked to assess the consistency of these practices with the framework.

As an alternative (and in addition to the body providing practice leadership and overseeing the development of resources), AGAC would suggest that the body's monitoring role might more feasibly be limited to it acting as an **Implementation Monitor** of the Royal Commission's supported decision-making reform

recommendations (for a set period of time – such as four years). This would likely be a significantly more manageable task.

It is good to see in the first dot point that people with disability would be central to the operation of such a body. It will be important, of course, that this includes people with lived experience of disabilities that impact on decision-making. AGAC would expect to see, for instance, that people with intellectual disabilities, acquired brain injuries, dementia and mental illness are well represented in this regard.

National supported decision-making principles

The proposed national supported decision-making principles (Reform Proposal 1) look good.

An obvious query in relation to Principle 5 (access to support) will be how such support, if it is to be provided on a funded basis, will be funded. One experience that stems from supported decision-making trials is that people who have rarely played key roles in making the decisions that affect them will need to establish a relationship with a supporter and explore potential decisions that they may make; they will not necessarily be in the position where they have a particular decision in mind when the relationship begins. The developmental nature of supported decision-making arrangements and relationships will need to be borne in mind when it comes to the funding, and limits of funding, of such initiatives.

Principle 6 requires a person's 'will, preferences and rights' to direct decision-making that affects them. AGAC notes here that the use of the term 'rights' is not particularly instructive and could be removed. One option here (taken by Victoria, for instance) is to use another term to guide decision-makers where a person's will and preferences are unable to be determined. Victoria requires, for instance, the promotion of the individual's 'personal and social wellbeing' in such situations (and a variation of this phrase exists elsewhere in the reform proposals - e.g. Reform Proposal 10, eighth dot point).

Principle 7 is important but begs the question of what the appropriate safeguards will be (this is discussed further later).

Principle 8 requires 'People with disability and their representative organisations' to be 'involved in the reform and development of laws, policies and legal frameworks'. This is an important requirement, and AGAC would want to ensure that the people who are most important to be consulted in this regard are people with cognitive disabilities which potentially or actually impact on their decision-making capabilities, including, for instance, people with intellectual disability, people with acquired brain injuries, people with mental illness and people with dementia. It will also be important for culturally specific consultations to occur with, for instance, First Nations people with disability and people from culturally and linguistically diverse communities, for whom the reform proposals will need to take account of existing methods by which these communities currently provide support for the decision-making of their fellow community members.

Safeguards

In addition to bringing considerable benefits to the people who are supported to make their own decisions, supported decision-making practice and legal reforms carry with them the risk that people will be exploited by the unscrupulous or negligent provision of support.

A key concern in developing safeguards around the promotion and extension of supported decision-making arrangements is the model of accountability that would apply to supporters.

The existence of proposed guidelines (Reform Proposal 4) makes sense, but key questions here will be:

- Who monitors and reviews supported decision-making arrangements?
- Against what standards will monitoring be conducted?
- How will monitoring be conducted?

- What will be the regulatory tools to enforce compliance with any accepted supported decision-making standards?

The challenge here is to provide appropriate levels of accountability and oversight, without creating a regulatory burden that will act as a disincentive for people to become supporters (especially informal, or unpaid, supporters).

As indicated above, the promotion of supported decision-making also carries a risk in relation to unscrupulous or negligent behaviour by supporters. Safeguarding mechanisms need to address this risk, and such mechanisms will need to extend considerably beyond, for instance, administrative reporting requirements. Indeed, while a requirement, for instance, for supporters to lodge written reports may constitute an element of a safeguarding framework, such administrative steps will likely contribute little to knowledge about the nature of the decision-making arrangements in place, and in cases of unscrupulous behaviour will easily be 'gamed'.

Clearly significant further work is required in this regard.

AGAC also makes here a couple of observations about the detail of some of the safeguarding suggestions.

Requiring supported decision-making arrangements to be free from conflicts of interest and undue influence also makes sense. But in the realm of informal decision-making support, this can be complex. Parents of adult children with cognitive disability will inevitably have thoughts on what they consider to be best for their child. One helpful suggestion at the guardianship roundtable was to use the term 'bias' in this regard (and to encourage and educate people to be aware of their own biases when supporting the decisions of others), which AGAC thinks is worthy of further consideration.

The proposed record-keeping and audit requirements (Reform Proposal 11) are reasonable in relation to paid or professional support arrangements, but their application to informal supported decision-making arrangements would at times be unduly burdensome and would risk formalising the 'informal' status of such relationships (and may dampen the interest of potential supporters in fulfilling the role of supporter).

Funding

A key challenge in the promotion of supported decision-making, as Commissioners know, is in identifying ways in which people without informal or natural supporters around them might be able to engage supporters who are funded to provide support. The reform proposals paper contains a brief section on this topic (at p. 33) but significantly more work will obviously be required here. The key questions here will include how support will be funded.

Reference is made to possible funding for NDIS participants through NDIS plans, and a decision would need to be made about whether such support would relate only to NDIS-related decision-making (and I note that such a requirement could lead to some quite arbitrary distinctions being made about NDIS-related and non-NDIS-related decisions).

For people not in receipt of NDIS funding, such as people in receipt (or potentially in receipt) of aged care services, one or more other funding streams would obviously be required.

A strong argument exists for the establishment of a funding mechanism that is not tied to an existing service system (enabling paid assistance to be provided to support the making of decisions that do not relate specifically to the delivery of funded services).

A further important consideration in designing possible funding models will be the need to avoid unnecessary complexity and duplication.

Another key question will concern how regulatory requirements will differ for funded providers of decision-making support as against informal (and unpaid) providers of support. One of the obvious dangers in the

development of any market for the provision of funded decision-making support will be ensuring that 'sharp business practices' do not take hold (something upon which the development of adequate safeguards will need to focus).

Support guideline

The proposed support guideline (Reform Proposal 2) contains (final dot point) the statement that supported decisions will be 'legally enforceable'. This will be important when it comes, especially, to financial decisions, though this may also require considerable parallel legislative reform (in the field of contract law, for instance) and the development of adequate safeguards for the person making decisions, for supporters and for third parties. In particular, thought will need to be given to the potential effects of such enforceability on parties to the transaction, on third parties, and on the liability of supporters (if, for instance, a significant financial transaction fails). It is worth noting that in Victoria 'supportive attorneys', 'supportive guardians' and 'supportive administrators' can give effect to decisions but not a 'significant financial transaction' (which equates to a transaction valued above $10,000: *Powers of Attorney Act 2014* Vic, s. 89; *Guardianship and Administration Act 2019* Vic, s. 93).

Will, preferences and rights guidelines

The proposed 'will, preferences and rights guidelines' (Reform Proposal 3) are largely sound, in AGAC's view, although the requirements regarding representative decision-making would require changes to the existing substitute decision-making legislation in force in those states and territories that do not have a substituted judgement ('will and preferences') requirement for substitute decision-makers (in guardianship, enduring powers of attorney, enduring powers of guardianship, and medical treatment legislation).

The second-last dot point requires representative decision makers, where they are unable to ascertain 'what the person would likely want … to promote and uphold the person's human rights and act in the way least restrictive of those rights'. AGAC reiterates the point made earlier that the use of the term 'rights' here is not particularly instructive. As mentioned earlier, an alternative is to use another term to guide decision-makers where a person's will and preferences are unable to be determined, such as requiring the promotion of the individual's 'personal and social wellbeing' instead (a variation of which exists in Reform Proposal 10, eighth dot point).

In Victoria substitute decision makers are required to follow the will and preferences of the person, unless to do so would cause 'serious harm' (another variation on this might be to require decision makers and supporters to support the will and preferences of the person unless to do so would pose an 'intolerable risk' to the person's wellbeing).

AGAC notes that the application of the term 'serious harm' – in particular in relation to financial decisions – is still being worked through in Victoria. There remains debate, for instance, about what constitutes serious financial harm such that a person's desire to make a particular financial decision might not be proceeded with, and the extent to which the harm in question concerns the immediate financial impact of a particular decision, or whether it concerns the person's longer-term financial situation (or indeed both).

Supported decision-making model

Reform Proposals 8 to 10 concern the establishment of a supported decision-making model and the role of supporters and representatives.

It would be good to have a consistent supported decision-making model in national, state and territory legislation. This would need to extend beyond the areas specified in the proposal (including guardianship and administration laws) and be embedded in legislation concerning enduring powers of attorney, enduring powers of guardianship, and medical treatment decision-making. It would also need to be embedded in the practices of public, private, and community organisations (ranging from banks through to health care providers).

The proposed role of supporters (Reform Proposal 9) is largely sound, though further detailed guidance on the role of supporters is required. One possibility here would be to develop a **Code of Conduct** for supporters.

In addition to there needing to be safeguards to ensure that serious harm does not come to people as a result of decisions they are being supported to make, there also needs to be further work carried out on what might be termed the 'ethics' of the role of supporters.

The role of supporter will obviously involve, at times, assisting with the making and implementation of decisions that supporters themselves would not have made if it were simply up to them.

At present the proposed guidelines identify that in situations where supported decisions amount to a significant risk to the welfare of the person being supported, the supporter would (under Reform Proposal 7) be obliged to 'help the person understand the risk and how it could be managed'.

Supporters will need, however, to be given greater guidance than this on their responsibilities in situations where the likely harm from a decision is serious enough that they are ethically, and perhaps legally, bound not to support it.

In addition, supporters will need guidance on those situations that fall short of such a 'serious harm' threshold, but where supporters simply feel uncomfortable in supporting a decision, or where (in paid situations, for instance) they consider that their support of a decision could amount to a breach of their professional duty of care.

A considerable amount of further work needs to be done to be able to provide practical guidance to supporters in such circumstances. Such guidance would need to extend to the expectations regarding the lengths to which supporters might be required to go in implementing decisions. Consideration of the challenges experienced in implementing the legislative changes in Victoria in the fields of enduring powers of attorney, medical treatment decision-making and guardianship would likely be of considerable benefit here.

The proposed role of representatives (Reform Proposal 10) will of course require amendment of relevant state and territory legislation – primarily in the fields of guardianship, enduring powers of attorney, enduring powers of guardianship, and medical treatment decision-making – that does not already have these requirements, particularly the requirement that substitute decisions be made on a 'will and preferences' (substituted judgement) basis.

Guardianship

As indicated in the comments made earlier about supported decision-making, all AGAC members would wish for there to be less usage made of the adult guardianship system than is currently the case. One important way in which to reduce the numbers of people coming to adult guardianship will be to offer supported decision-making alternatives to guardianship where this is feasible.

One possibility would be to require applicants – especially institutional ones such as hospitals – to demonstrate that supported decision-making alternatives to guardianship have been attempted.

Another way to drive down usage of the adult guardianship system is to tighten up appointment criteria, limit the length of orders, and require earlier revocations. These are all areas in which reforms could occur.

In addition, AGAC would respectfully ask the Royal Commission to look to features of the current disability service system and other existing regulatory requirements (and related risk-avoidant professional practices) in cognate fields that impact on the number of adult guardianship orders.

In particular, AGAC observes that the operation of the National Disability Insurance Scheme has resulted in a rise in guardianship appointments to enable administrative or unproblematic steps to be taken.

As the report from the Victorian Office of the Public Advocate (*Decision Time: Activating the rights of adults with cognitive disability*, which I co-authored) noted (pp. 30-31):

> 'Evidence that the NDIA had insufficiently planned for the circumstances of people with significant cognitive disability has also been seen in the number of times participants' (or potential participants') access to the scheme or services under the scheme has been jeopardised by administrative questions associated with consent and agreement — in particular, where it has been impossible to take an administrative step because of the absence of consent by a person with adequate decision-making authority.
>
> There are three main situations in which administrative steps have stalled for this reason. One concerns the signing of access request forms, which constitute the first stage of a person's pathway to NDIS involvement. In the past a positive action of consent was all that was needed, including by a person's family or supporter, but OPA has become aware of an increase in the number of matters where more formal consent is being sought at this stage. Questions have also been asked about how consent to proceed should be sought from isolated people with significant cognitive impairment.
>
> The second situation in which concern has arisen involves plan preparation, where questions have been asked about whether isolated people with significant cognitive impairment need to have others acting on their behalf.
>
> The third situation relates to the signing of service agreements, under which an NDIS participant arranges and receives the services detailed in their plan.'

A more recent development that has put increased pressure on adult guardianship systems has been the requirement for aged care facilities to obtain consent or substitute consent for the use of restrictive practices according to aged care subordinate legislation (the Quality of Care Principles). As I argued in a recent opinion piece in *Australian Ageing Agenda* ('Stopping the inappropriate use of restrictive practices', 17 May 2022), the consent model is problematic for a number of philosophical, legal and practical reasons.

In addition to these shortcomings, the requirement for aged care facilities to obtain consent or substitute consent for the use of restrictive practices is leading to a rise in instrumental guardianship applications and orders (a development that also happens to be accompanied by a considerable degree of legal uncertainty). As I argued in *Australian Ageing Agenda*:

> 'Decision-makers under state and territory laws – such as guardians, attorneys under enduring powers of attorney, and even automatically appointed medical treatment decision-makers – are being asked to authorise restrictive practices despite the fact that these individuals, in some Australian jurisdictions, may not have the power to do so under the laws that create their roles.
>
> These requirements are also causing a rise in what might be termed instrumental guardianship applications and orders, where there is no one to consent to a restrictive practice on the person's behalf.'

It would be good if the Royal Commission were able to turn its attention to these national service and regulation developments that themselves are resulting in increased usage of the adult guardianship system. This would ideally involve considerably more than, for instance, embedding supported decision-making requirements into NDIS and aged care governing legislation (as Proposal 8 recommends).

AGAC members, for instance, would encourage the Royal Commission to consider other recommendations that would ensure that adult guardianship is either not used as a means of ensuring the completion of uncontentious administrative steps concerning the operation of the NDIS, or as a feature of the moves to

better regulate the use of restrictive practices in aged care settings. A suggestion at the end of this letter points to how this might be done.

Guardianship proposals directly concerning AGAC

Two of the Royal Commission's proposed guardianship reforms directly concern AGAC.

Reform Proposal 14 includes the suggestion that:

> 'The Australian Guardianship and Administration Council should coordinate implementation of a national "best practice" model of guardianship that:
>
> • is based on a presumption of decision-making ability
>
> • incorporates features and methods of supported decision-making
>
> • maintains the role of informal supported decision-making.'

AGAC would be very happy to assist in the implementation of such a model, but as indicated at the start of this letter, AGAC does not have any governance function over the operation of its members, all of whom are appointed and operate under state and territory legislation and funding arrangements. AGAC's members are subject to the legislation that governs their operation, meaning that any national best practice model needs to account for these legislative requirements.

On this point it is worth noting that the two AGAC 'national standards' publications – the National Standards of Public Guardianship (2016) and the National Standards for Financial Managers (2018) – were drafted with the various existing state and territory legislative requirements in mind.

Reform proposal 20 is that:

> 'The Australian Guardianship and Administration Council should coordinate a consistent approach to the collection of data on guardianship and administration. This should include a requirement on state and territory tribunals to collect data on:
>
> • the age, gender, First Nation status, ethnicity and location of people under guardianship and administration
>
> • applications for guardianship and administration brought by service providers, and results of these
>
> • participation of people with disability in guardianship and administration proceedings
>
> • applications made in response to violence, abuse, neglect and exploitation
>
> • the nature and extent of any violence, abuse, neglect and exploitation experienced by people under guardianship and administration orders
>
> • the number of complaints, and outcomes of these, about guardians or administrators, including Public Guardians, Public Trustees or private guardians and trustees.
>
> The Australian Guardianship and Administration Council should publish this data annually.'

As Commissioners know, AGAC does currently publish annual adult guardianship statistics, which show the number of people subject to new guardianship orders each year. This is done by seeking data from state and territory guardianship tribunals (which largely operate as lists within each state and territory's civil and administrative tribunal).

The first four dot-point elements of this proposal from the Royal Commission would require tribunals to collect and report on significantly more detailed data than is currently collected, and this would have resource implications. While AGAC could request such data from its tribunal members and would be happy to compile it into national figures, this proposal, AGAC respectfully submits, also requires a recommendation that state and territory governments require (and fund, where necessary) the collection of this information.

The last two dot-point elements of this proposal are more complex. Collecting data on 'the nature and extent of any violence, abuse, neglect and exploitation experienced by people under guardianship and administration orders' would require invigilation not only of the records of Public Advocates, Public Guardians and Public or State Trustees, but the experiences of adults under private guardianship arrangements.

Likewise the collection of data on 'the number of complaints, and outcomes of these, about guardians or administrators, including Public Guardians, Public Trustees or private guardians and trustees' would require analysis of complaints against people in private arrangements. Compiling this data would require collation of data from multiple sources, including:

- internal complaints to Public Guardians, Public Advocates, and Public or State Trustees;
- complaints made to other agencies, most notably to state and territory Ombudsman offices; and
- allegations raised in guardianship tribunal hearings about inappropriate practices of guardians and administrators (financial managers).

While such national data could feasibly be compiled, this would require dedicated resources, and the collecting body would need, ultimately, to have the authority to require production of the information. AGAC does not have the resources or, more importantly, the authority to require the collection of such data. While noting that there would be significant resource implications, State and territory governments, on the other hand, would have the authority to require the collection of this information, and the Royal Commission may wish to consider gearing a recommendation along these lines.

In considering such a move, AGAC would suggest that clarity is needed about why such data would be sought, and the anticipated use to which it would be put.

Best practice safeguards

The proposed best practice safeguards (Reform Proposal 15) make sense, but would obviously require, for their meaningful adoption, state and territory legislative amendments. The more extensive use of alternative dispute resolution mechanisms (first dot point) could be an important feature of an improved guardianship system, though care must be taken when applying such mechanisms to situations where there are either unequal power relationships (which is often the case in guardianship scenarios) or where there are concerns about at-risk adults being subjected to violence, abuse or exploitation.

The proposed 'enhanced investigation powers for Public Guardians and Public Advocates in cases of suspected abuse, neglect or exploitation' (third dot point) are consistent with numerous reports on this topic, including the following:

- Victorian Law Reform Commission, *Guardianship Final Report*, 2012, p. 447 and recs. 328-9;
- Chesterman, 'Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults', 2013 Churchill Fellowship report, pp. 72-4, 80-82 and rec. 2;
- General Purpose Standing Committee No. 2, NSW Parliament, *Elder abuse in New South Wales*, final report, 2016, rec. 11;
- NSW Ombudsman, *Abuse and neglect of vulnerable adults in NSW – the need for action*, November 2018, pp. 1, 3-4;
- NSW Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145, 2018, rec. 13.1; and
- Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)*, Final Report No. 26, December 2018, rec 16.3.

In particular, this is consistent with a key recommendation from the Australian Law Reform Commission in its report entitled *Elder Abuse – A National Legal Response.* In that report the ALRC recommended (Rec. 14–1) that 'Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting "at-risk adults"'.

In making this recommendation the Commission noted (par. 1.48) that 'Existing public advocates and public guardians … may be appropriate for this broader safeguarding function … However, some states or territories may prefer to give this role to another existing body or to create a new statutory body.'

As Royal Commissioners would know, one of the outcomes from the ALRC report was the development of the *National Plan to Respond to the Abuse of Older Australians [Elder Abuse] 2019-2023* (which satisfied Recommendation 3-1 of the report). That plan commits state and territory governments to 'Review state and territory legislation to identify gaps in safeguarding provisions'.

Two states – New South Wales and South Australia – have moved in recent years to establish new agencies with new legislative powers.

In July 2019 New South Wales created the office of the Ageing and Disability Commissioner, who has broad investigative powers. In South Australia from October 2019 an Adult Safeguarding Unit, with broad investigative powers, has been operating.

The Royal Commission's proposal here will need to take account of these significant developments.

Another element of Reform Proposal 15 (fifth dot point) is that there be 'mandatory independent legal representation for all adults who are the subject of guardianship and administration orders' (and I presume this would apply to all hearings where people are proposed to be subjects of guardianship orders).
As Royal Commissioners know, the modern adult guardianship system in Australia was originally established in the 1980s as a relatively informal system which, ground-breakingly, utilised a tribunal rather than an adversarial court process in the appointment of guardians and administrators (financial managers). The requirement for all subjects of guardianship hearings to be legally represented would inevitably see guardianship hearings becoming more formalised, and would also likely lead to longer, more legalistic hearings that, albeit unintendedly, would risk losing their focus on the person in question.

An alternative to this proposed requirement might be to entitle subjects of guardianship hearings to receive funded advocacy support during hearings, a proposal that was strongly put at the guardianship roundtable.

Safeguards for restrictive practices within guardianship

As Royal Commissioners know, only a small number of jurisdictions specifically empower guardians to authorise restrictive practices; and this model of restrictive practices authorisation is seen by many as sub-optimal for a variety of reasons (which include the lack of important technical knowledge about behaviour management strategies that private guardians, for instance, are likely to hold).

Queensland is one state that does currently empower guardians to authorise restrictive practices in disability settings, and it is important to note that a review process is currently underway to determine whether this model should continue into the future (see https://queenslandcommunities.engagementhub.com.au/pbsrp-review). (In my role as Queensland Public Advocate I have critiqued the ongoing place of substitute decision-making as an authorisation mechanism for the use of restrictive practices: see https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/697729/20211005-opa-restrictive-practices-reform-options-paper.pdf.)

The Royal Commission may wish to consider taking a strong stand on this matter.

Transitions out of guardianship

The proposals to assist people to transition out of guardianship arrangements (Reform Proposal 18) are sensible and could be illuminating.

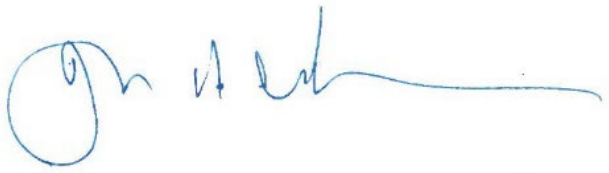
In addition to such measures, it is worth considering other ways that pressure might be placed on the 'front end' of guardianship, as it were, in reducing the number of adult guardianship appointments, as I have mentioned both in the introductory comments in this letter (pp. 2-3), and in the introductory remarks about the Royal Commission's guardianship reform proposals (pp. 7-8).

In particular, reforms that reduce instrumental guardianship appointments in relation to unproblematic NDIS service delivery decisions would be important, as would a change to the requirement that consent or substitute consent be provided for the use of restrictive practices in aged care settings.

In suggesting such reforms, the Commission may wish to make recommendations concerning the adoption of tighter criteria in each jurisdiction for the appointment of guardians and administrators (financial managers). The key guardianship appointment criterion across all jurisdictions tends to be the existence of the 'need' for such an appointment. **One reform (though I note that AGAC members have differing views about the feasibility of this) would be to require all jurisdictions to ensure that clearly-defined supported decision-making alternatives have been exhausted before a guardianship appointment is made. Another reform might be to clarify that the guardianship appointment criterion concerning the 'need' for an order can only be met where the person's immediate welfare is at-risk. That criterion would not be satisfied, for instance, where an applicant simply desired administrative certainty in relation to a person's support entitlements.**

AGAC looks forward to providing any further assistance that it and its members can give to the Royal Commission in its important ongoing work, and thanks the Royal Commission for receiving this submission and for involving AGAC members in the roundtables on proposed supported decision-making and guardianship reforms.

With thanks,



John Chesterman (Dr)
Chairperson, Australian Guardianship and Administration Council, and Queensland Public Advocate