

# Council for Intellectual Disability

## Position Statement on Supported Decision Making and NSW Guardianship Law Reform

July 2023

### Our goal

People with intellectual disability are respected as capable decision makers and get the support and adjustments<sup>1</sup> they need to assist them to make their own decisions.

**Decision making capability = the individual person + supporters + adjustments.**

We need more people to provide support for decision making. Supported decision making is when someone helps you make your own decisions.

When people with intellectual disability receive decision support and adjustments in the decision making process, their capability to make their own decisions is enhanced.

### What Council for Intellectual Disability (CID) wants to happen

- State and federal governments take advice from people with intellectual disability about the way forward on supported decision making.
- NSW Government legislates the right to supported decision making and reforms current guardianship laws.
- NSW Government and non-government agencies adopt and embed in policy and practice the principles of supported decision making.
- Governments and the community see support for decision making as a reasonable adjustment under anti-discrimination laws.
- The Australian Human Rights Commission develops a new Disability Standard for reasonable adjustments including support for decision making.
- Tertiary institutions develop coursework that promotes disability and human rights, self-determination and supported decision making for future workforces.

<sup>1</sup>Adjustments: changing something around a person to include them in their own decisions.

- State education departments ensure teachers and educational leaders nurture decision making in young people with disability from an early age.
- The Commonwealth Government provides specific funding to enhance support for decision making through Tier 2 of the NDIS and in individual plans.
- The Commonwealth Government reviews NDIS nominee rules and processes to a) clarify roles between nominees and state appointed guardians and b) prevent the risk of nominees exceeding their necessary role.

## **Where things stand**

“When you make decisions for yourself, that is it, you are free.” CID employee with intellectual disability.

Far too often, people with intellectual disability are not given assistance to make their own decisions. They are made for people with intellectual disability rather than by them and are based on other people’s views about a person’s “best interests” rather than a person’s will and preferences.

A person’s will represents who they are and self-belief in what they want for their own life. A person’s preferences are their everyday choices.

The situation continues despite multiple drivers of reform.

### **TONY** (not his real name)

Tony has missed paying some major bills and often runs out of money a few days after he receives his Centrelink payment. His mother used to support him with financial decisions and bill paying, but she is no longer able to do this.

Tony’s support workers make an application to the NSW Civil and Administrative Tribunal (NCAT) for financial management through the NSW Trustee, although this is not what Tony wants.

Under current legislation, there is a high chance of the NSW Trustee and Guardian being appointed as Tony’s financial manager, reducing Tony’s agency.

<sup>2</sup> United Nations. (2006). Convention on the Rights of Persons with Disabilities, Article 12: Equal recognition before the law.

<sup>3</sup> Australian Law Reform Commission. (2014). Equity, Capacity and Disability in Commonwealth Laws (ALRC Report 124). National Decision-Making Principles-Recommendation 3.

## How could a change to the law help Tony?

Under an Act that legislated supported decision making, there would be more pressure for other options to be considered before an application was made. Tony's will and preference would be supported to manage his own affairs and his choice of supporter would be given greater status.

Under this new Act, if a financial management order were made, the NSW Trustee would have a responsibility to support Tony to make and be involved in financial decisions. A financial management order would be more easily reviewable.

## Drivers of reform – legislative and policy context

Under international law, people with intellectual disability have the same right as everyone else to make their own decisions. Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), says people with disability have the right to equal recognition before the law, legal capacity, and access to support to make decisions.<sup>2</sup> Australia ratified the CRPD in 2008.

In 2014, the Australian Law Reform Commission's report, [Equality, Capacity and Disability in Commonwealth Laws](#) recommended these National Decision Making Principles<sup>3</sup>.

**Principle 1:** All people have an equal right to make decisions and have them respected.

**Principle 2:** People who need decision making support must be provided with support to make their own decisions if they want or need it.

**Principle 3:** The rights, will and preferences of people who may need decision making support must direct decisions that affect their lives.

**Principle 4:** Laws must include safeguards for people who use supported decision making or who have a substitute decision maker. Safeguards aim to stop others influencing a person's decision making or the person causing harm to themselves or others.

Successive federal governments have not replied to the Commission's recommendations. Some States and Territories have reformed parts of their guardianship and financial management laws, such as:

- [Victoria's Guardianship and Administration Act 2019](#)
- [Queensland's Guardianship and Administration Act 2000](#)

<sup>4</sup> New South Wales Law Reform Commission. (2018). Review of the Guardianship Act 1987. NSW Government. <sup>5</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/policy-and-research/research-program>

In 2018, the NSW Law Reform Commission recommended the NSW Guardianship Act 1987 be replaced with an Assisted Decision Making Act. They recommended a framework including:

- a clear message that people with intellectual disability have equal rights in decision making
- a person's will and preferences being the key focus rather than best interests
- a definition of decision making ability and a guide to assessing what supports a person may want and need to make decisions
- informal and formal supported decision making to be considered first with substitute decision making as a last resort
- recognition of the customary law, culture, values and beliefs of Aboriginal and Torres Strait Islander peoples
- an independent statutory body that educates people about decision making and supports people with disability who do not have family and other around them.

The NSW Government has not acted on the report's recommendations around law reform and a new supported decision making framework. Prior to the recommendations they had funded several short-term projects in the 2010's.

Recent national progress includes

- Hearing evidence at the Disability Royal Commission, and a [research report](#)<sup>5</sup>
- Release of the [NDIA's Supported Decision Making policy](#).

### **Reasonable adjustments under the Disability Discrimination Act 1992**

The Disability Discrimination Act 1992 makes it unlawful to discriminate against a person with disability in many areas of public life, including employment, education, and accessing services, housing and public places. The Act calls for reasonable adjustments to be made to prevent discrimination.

Reasonable adjustments can assist a person to make their own decisions.

#### **SALLY (not her real name)**

Sally has intellectual disability. Her service provider made a guardianship application. Sally will need to attend and participate in her own tribunal hearing.

#### **How can adjustments help include Sally?**

The State tribunal should have a process for working out Sally's communication needs and adjustments so she can share her views. Sally should receive information in a form that works for her, for example Easy Read, and have regular breaks in the hearing.

## What CID has done

Since the 1980s, CID has had a major focus on law and practice respecting the rights and wishes of people with intellectual disability. Key activities have included:

- Advocacy for reform of NSW and Commonwealth laws and practices dealing with guardianship and decision making.
- Three major projects on advancing supported decision making practices.
- My Rights Matter program, providing a Supported Decision Making Hub, training, grants, practice leadership and advocacy related to supported decision making.
- Co-leading a Roundtable on Supported Decision Making with the NSW Ageing and Disability Commission.
- Disability Royal Commission input including Hearing 30, Day 4 and a submission.
- Published Easy Read research journal article 'Equal Right to Decide'.

## What CID has achieved

CID has had a central role in:

- The development of the then very progressive NSW Guardianship Act 1987.
- Guardianship Tribunal practice in NSW being inclusive of the participation and voice of people with disability.
- Preserving key features of the Guardianship Tribunal when it was absorbed into the NSW Civil and Administrative Tribunal.
- Obtaining the Labor Government's 2023 commitment to establish a working party to progress NSW Guardianship law reform.
- Co-producing CID's [Supported Decision Making Framework](#) and [Easy Read Framework](#).