

Maximising the participation of the person in guardianship proceedings: Draft guidelines for Australian tribunals

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Introduction

Thank you for the opportunity to comment on the draft guidelines for Australian tribunals, developed as a result of a recommendation of the Australian Law Commission in its report, *Elder Abuse – A National Legal Response*.

I have also distributed the draft guidelines for comment to key stakeholders across Queensland who play a role in protecting the rights of adults who experience impaired decision-making capacity.

As the Public Advocate for Queensland and a member of the Australian Guardianship and Administration Council (AGAC), it is pleasing to see this project close to finalisation. The completed guidelines will provide tribunals across the country with a clear and consistent approach that places the person subject to an application for guardianship or financial management 'at the centre' of proceedings, and will ensure the recognition and facilitation of their rights to be fully informed, be in attendance, be heard, and meaningfully participate.

General comments

Scope

The guidelines should apply to all applications, irrespective of whether the tribunal is making a final or interim order, it should apply the same principles and have regard to the same considerations in both circumstances.

Tribunal operations

It is important for the guidelines to be realistic and workable in the resource-constrained environments in which most Australian guardianship and administration tribunals operate. With this in mind, it should be acknowledged that while the implementation of good practices at certain stages of the process may appear onerous (particularly if not previously implemented by a tribunal) they may result in resource savings in later stages of the process.

Pre-hearing guidelines

Draft guidelines 1-6 are associated with notification processes and the support provided to a person prior to a hearing. The guidelines consider a wide range of practices to ensure, as far as possible, that the person is notified of the hearing, is aware of the application content and its implications, and is supported to participate.

Case management

In relation to the pre-hearing process generally, the introduction of more extensive case management by tribunals following the receipt of applications is supported. The allocation of applications to a case manager can improve efficiency and effectiveness, and ensure a stronger focus on the participation of the person subject to the application from the outset.

The case management process can ensure that:

- Each application is completed in full (which includes the provision of administrative support to applicants if required).
- All relevant, appropriate and correct documentation to support an application is provided.
- Communication with the applicant and the person subject to the application may identify a less restrictive response to the issue (e.g. decision-making support) that is identified and explored. This may result in the application and associated hearing not being necessary.



- Additional consideration is given to the process or processes required to inform the person the subject of the application about the application and what it means for the person.
- The process associated with informing the person of the application is co-ordinated and documented.
- Any supports necessary to facilitate participation of the person at the hearing can be organised.
- Any change in the circumstances of the person who is the subject of the application occurring between the issuing of the notice and the hearing date (which can often be a number of months) can potentially be identified and appropriately responded to.

Draft guideline 3

This guideline could be strengthened by proposing an ideal and a minimum timeframe for the provision of a written notice. The guideline could be expressed as '... well in advance of, but no later than 7 days prior to, the hearing'. Of course, whether this could be adopted would depend on the legislative requirements of notice in each jurisdiction. Consideration should also be given to extending this guideline to incorporate the active monitoring of achieved timeframes, with a view to continual minimisation of timeframes.

Draft guideline 4

In addition to the person subject to the application being informed of the application, the tribunal should inform the person of the identity of the applicant and provide them with a copy of the application. This is consistent with the notification process followed in other legal processes, is a basic requirement of natural justice and is compatible with the person-centred objective of the guidelines. In circumstances where the provision of a full copy of the application and the disclosure of the identity of the applicant is not appropriate, then an application for a confidentiality order should be submitted with the original application.

The second bullet point under this guideline could be strengthened by specifying that the person who is the subject of the application should also be provided with information explaining the potential effect or impact of the application for the person (i.e. the appointment of a substitute decision-maker). Such information should include a clear, easy to understand explanation of what matters the application covers and, just as importantly, what matters it does not. This will ensure that the person is fully informed regarding the application, its potential impact on them and their right to participate, rather than just being informed about a hearing at which they need to be present.

Personal contact close to hearing

An additional pre-hearing guideline could require the tribunal to make contact with the person immediately prior to the hearing to determine if their health, wellbeing and/or circumstances have changed since they were first provided with notice of the hearing (months can elapse between these two stages of the process). This will allow for the coordination of any new, fewer or additional supports that may be required to facilitate the person's participation or to make alternative arrangements for participation, such as telephone or video conferencing if the person is no longer able to attend the hearing in person. This need to contact people closer to the hearing was identified as a key concern in relation to the operation of the Queensland Civil and Administrative Tribunal in the *Decision-making support and Queensland's guardianship system* report published by my office in 2016¹.

¹ Office of the Public Advocate (Qld), *Decision making support and Queensland's guardianship system – A systemic advocacy report*, Brisbane, 2016.

Hearing guidelines

Draft guidelines 7-17 are associated with the processes and support provided to the person to maximise attendance and participation at hearings.

The process by which access to hearings is facilitated by tribunals is of particular importance to the achievement of fair and just outcomes. A strong process will maximise the opportunity for the person to express their will and preferences.

Draft guideline 8

The proposal to facilitate a person's participation in the hearing, either face-to-face or by other means is strongly supported in principle.

However, the suggestion that tribunals adopt the South Australian Civil and Administrative Tribunal 'Visit to a Person' practice raises issues of concern. A process involving a tribunal member taking evidence from the adult without other parties to the proceedings being present does raise questions regarding procedural fairness.

There are genuine and legitimate questions about the appropriateness of tribunal members meeting a party to a legal process in the absence of the other interested parties, taking information/evidence from the person and then presenting that information/evidence to itself and taking it into consideration in its determinations. There is an inherent conflict in such a process. The Queensland *Guardianship and Administration Act 2000* would only permit the tribunal to take evidence from a party to the proceedings in the absence of other interested parties after an adult evidence order is made.² Before such an order is made, each active party and entity that is affected by an order has standing to be heard before such an order is made.³ Accordingly, the first dot point of draft guideline 8 is inconsistent with the law in Queensland and should be removed. However, irrespective of this legislative impediment, there are legitimate concerns about such a process that should prompt a reconsideration of whether it should be recommended to other jurisdictions for adoption.

Draft guidelines 9 and 10

It is suggested that guidelines 9 and 10 be expanded to include additional data collection and reporting that would enhance monitoring of tribunal operations and performance in relation to the participation of people the subject of proceedings in the process. This could include the provision of that information according to the number of:

- private and public guardianship/administration appointments made;
- new and renewed guardianship and administration appointments;
- applications determined via oral hearings and on the papers;
- various matter types for which appointments are made (e.g. plenary, accommodation, health, service provision, restrictive practices etc.);
- interim and final orders issued; and
- broad demographic details of persons the subject of the application to identify correlations between people from particular groups or backgrounds and lower participation rates in hearings.

Draft guideline 14

In addition to the provision of a support person, this guideline should be extended to include this person being provided with sufficient time during the hearing to explain key concepts or evidence being presented to the person if required. This process could be facilitated by either having a small

² *Guardianship and Administration Act 2000* (Qld) s 106.

³ *Ibid* s 111.



break in proceedings or the presiding member allowing time for a conversation between the support person and the person to take place.

Oral hearing guidelines

Draft guidelines 18-20 focus on the importance and process associated with the conduct of oral hearings.

The importance of oral hearings maintaining a 'person centred' focus cannot be underestimated. This is supported by evidence from other tribunals such as the Queensland Mental Health Review Tribunal, demonstrating that a patient who attends their review hearing is ten times more likely to have their involuntary treatment order revoked compared with patients who do not attend a hearing.⁴

Draft guideline 18

Draft guideline 18, which notes the centrality of the person who is the subject of proceedings, having a genuine opportunity to participate in an oral hearing before a determination is made, is strongly supported. However to ensure that the person maximises their opportunity to fully engage with the process, it is suggested that the guideline also recognise the importance of them being supported to prepare and present evidence to support their views and wishes.

Draft guideline 20

The first sentence of draft guideline 20, '[A]s a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing', is strongly supported. However, this Office has significant reservations about guidelines to maximise the participation of the person in guardianship and administration proceedings supporting reviews of orders 'on the papers' irrespective of the practical constraints of 'legislation and resources' for Australian tribunals. We could support reviews being conducted on the papers where the tribunal is intending to revoke a guardianship or administration order. However, where the tribunal is intending to continue or extend an order, the participation of the person in the proceedings cannot meaningfully occur if the proceedings are conducted on the papers.

If we do not aspire to what are only the basic requirements of natural justice in tribunal proceedings that have such potential to impact people's rights and lives, we will never make any progress towards these goals.

Tribunal composition guidelines

Draft guidelines 21-24 are associated with the composition of tribunal panels for the conduct of hearings.

The Public Advocate strongly supports the concept of multi-person and multi-disciplinary tribunals for guardianship and administration hearings, particularly those that are dealing with complex and special matters. Where ever possible, and as detailed in draft guidelines 23 and 24, the composition of panels should include members from diverse backgrounds with particular experience in communicating with people with disabilities, as well as with relevant and wide-ranging areas of expertise.

⁴ Ibid.

Registry staff training guideline

Draft guideline 25 is concerned with training for members and registry staff about strategies to involve people who are subject to applications in those proceedings. For tribunals to operate an effective case management system and ensure that the person remains central to proceedings, the provision of role-specific training for staff is critical.

It is suggested that this guideline be expanded from simply the 'communication needs' of people with particular disabilities to training that will assist the staff and members to understanding what supports a person requires to meaningfully participate and engage in the pre-hearing and hearing processes.

As noted in the guidelines, the delivery of registry services in a trauma-informed way has the potential to improve the experience of people who have experienced trauma and abuse (e.g. domestic violence, elder abuse, sexual assault etc.).

Guidelines for the participation of Aboriginal and Torres Strait Islander People

Draft guidelines 26-27 encourage tribunals to increase the number of tribunal members and staff who are Aboriginal and/or Torres Strait Islander, as well as providing access to training which promotes awareness of specific cultural considerations relevant to Aboriginal and Torres Strait Islander people.

These draft guidelines are fully supported by the Public Advocate (Queensland). Aboriginal and Torres Strait Islander people are vastly over-represented in Queensland's guardianship and administration system. The latest figures available in the Queensland Office of the Public Guardian's Annual Report 2017-18 note that 15% of all adult guardianship clients identify as Aboriginal and Torres Strait Islander⁵, while Aboriginal and Torres Strait Islander people comprise only 4% of the overall population of Queensland.⁶

Strategies are urgently required to redress this imbalance and maximise the opportunity, when an Aboriginal or Torres Strait Islander is the person subject to an application, for participation and engagement in proceedings. Increasing the representation of Aboriginal and Torres Strait Islander people on tribunals will be a first step in achieving positive change.

Accessibility of the guidelines

The Public Advocate commends the AGAC project team on publishing an easy read version of the draft guidelines. It is of critical importance that the guidelines are presented in an accessible way to people with impaired decision-making capacity and their families and supporters.

Conclusion

The development of good practice guidelines on the participation of the person (who is the subject of a guardianship and/or administration application) in tribunal hearings is welcomed. The draft guidelines align with contemporary thinking and research in relation to upholding the rights of

⁵ Queensland Office of the Public Guardian, *Annual Report 2017-18*, Brisbane, November 2018, 48.

⁶ Australian Bureau of Statistics, *2016 Census Quickstats* (2018)
<http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/3?opendocument>.

people with impaired decision-making capacity. Various aspects of the guidelines are supported by research undertaken by the Public Advocate in Queensland.

We look forward to Australian tribunals adopting the final guidelines, and monitoring their impact on tribunal processes and practices to support the meaningful participation of people the subject of applications in tribunal processes.

