



Maximising the participation of the Person in guardianship proceedings

**Guidelines for
Australian Tribunals**

FINAL REPORT, JUNE 2019

Final Report, June 2019

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Foreword

Australian Boards and Tribunals vested with authority to make decisions about whether a person lacks decision-making capacity, and, if so, whether a substitute decision-maker should be appointed for that person, have at their core a common statutory requirement – to take into account that person’s views, wherever possible. It is so abundantly evident that it should not need be stated that any legal process which can impact upon a person’s autonomy and freedom to make decisions, must ensure that that person’s voice is heard, and that they are supported, as required, to be heard. As general principles these are easy concepts to understand and promote, but what does it actually mean to implement these concepts in practice? The guidelines set out in this report, *Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings*, endeavour to provide some answers to that question.

The genesis of these guidelines was the Australian Law Reform Commission Report 131: *Elder abuse – a national legal response*. The ALRC recommended that best practice guidelines on the participation of proposed represented persons in guardianship and financial management/administration hearings across Australia be developed.

The Australian Guardianship and Administration Council (AGAC), with the support of the Attorney-General’s Department (Commonwealth), undertook to develop the guidelines as recommended by the ALRC. AGAC is a national body comprised of twenty-five organisations from all States and Territories in Australia, namely the Public Guardians, Adult Guardians and Public Advocates, the Boards and Tribunals who deliberate upon applications under guardianship and administration legislation, and the State Trustees or Public Trustees.

These guidelines have been developed through the work and commitment of many organisations and individuals. On behalf of AGAC I would particularly like to acknowledge and thank: the Attorney-General’s Department (Commonwealth) for supporting the project; the members of the Governance Group established to oversee the project; the NSW Civil and Administrative Tribunal for managing the project on behalf of AGAC under the capable leadership of Anne Britton and Christine Fougere; and the many organisations and individuals who took the time to comment on the proposed guidelines during the consultation phase. It has been a privilege to have been associated with this important project.

Malcolm Schyvens

Chair, AGAC

Sydney

20 June 2019

Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings

These *Guidelines for Australian Tribunals* (the Guidelines) are designed to facilitate and maximise the participation of the Person in guardianship proceedings.

The Guidelines recognise that to achieve this objective, it is necessary to have regard to all stages of the proceedings, including pre-hearing case management. Pre-hearing case management and support for the Person provide an opportunity to maximise participation by the Person.

The Guidelines are not binding on Tribunals. They are intended to provide a model of best practice to inform and guide/assist Tribunal members in their work in this important jurisdiction.

GUIDELINE 1: Promptly, but no later than 10 days from the date the application was lodged, the Tribunal should give, or require the applicant to give, a copy of the application and any supporting documents to the Person and the other parties. Where the applicant is required to give to the Person and the other parties, a copy of the application and any supporting documents, the Tribunal should require the applicant to provide evidence that this occurred. The Tribunal will determine how this evidence should be provided.

GUIDELINE 2: The Tribunal should give to the Person and the other parties, written notice of the hearing no later than 7 working days before the hearing except in special circumstances, such as where there are reasonable grounds to conclude that the Person will be at risk if determining the application is delayed. Registry staff should consider whether any additional steps need to be taken to ensure that the Person is

informed of the details of the hearing, unless otherwise ordered by the Tribunal.

GUIDELINE 3: Pre-hearing processes should ensure that:

- the Person is made aware of the application
- information is provided to assist the Person to understand what the application and hearing are about
- the Person's participation is encouraged and facilitated
- any further information that may assist the Tribunal is obtained from the Person
- the Person is provided with information about representation including advocacy (if any)
- information is given to the Person about Tribunal practice and procedure and to assist in addressing any confusion or anxiety
- the Person has an opportunity to ask questions about any of these matters
- information is sought as to whether any communication supports are required by the Person, for example, interpreting services, visual, auditory or communication aids.

GUIDELINE 4: The listing of a hearing should take into account:

- whether the Person requires a hearing at certain times of the day (for example, a morning rather than afternoon hearing to accommodate the likely effects of medication on the Person)
- an estimate of how long the Person needs to give their views to the Tribunal, having regard to their communication needs
- any need for breaks during the hearing
- any additional time likely to be required for the use of an interpreter.

GUIDELINE 5: Information about various aspects of the Tribunal's practice and procedure (both in hard copy and online) should be made available to the Person in formats that are accessible to people:

- from culturally and linguistically diverse backgrounds
- with a vision and/or hearing impairment
- with cognitive disabilities.

GUIDELINE 6: Where practicable, hearings should be listed in a location that allows the Person to participate in the hearing in-person.

GUIDELINE 7: If a face-to-face hearing is not possible, then other means to enable the Person to participate in the hearing should be explored. This may include:

- measures similar to those undertaken by the South Australian Civil and Administrative Tribunal involving a "Visit to the Person" by a Tribunal member
- the views of the Person being provided by way of a representative
- video-conferencing
- telephone participation.

GUIDELINE 8: Tribunals should collect data and report publicly on:

- the participation rates of Persons in hearings, broken down into in-person participation, hearings by video-conference and hearings by telephone
- the rate of appointment of representatives, broken down into the appointment of public representatives and private representatives
- the number of appointments of representatives that are revoked, varied, or reviewed.

GUIDELINE 9: Tribunals should collect data and report publicly on the rate of appointment of legal representatives, separate representatives and guardians ad litem to represent the Person in proceedings.

GUIDELINE 10: Hearing venues should:

- be wheelchair accessible
- have drop-off zones for people with mobility restrictions
- have easily accessible parking
- be accessible by public transport
- provide accessible toilets.

GUIDELINE 11: Tribunals should consider the amenity of waiting room spaces, given the impact this can have on the Person's anxiety levels leading up to the hearing and their ability to participate in the hearing.

GUIDELINE 12: Tribunals should consider the amenity and configuration of hearing rooms. Hearing rooms should:

- provide the option of a more informal setting than a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the Person at ease
- provide hearing induction loop facilities, and
- provide video conference and tele-conference facilities.

GUIDELINE 13: The Person may be accompanied by a support person during the hearing unless the Tribunal determines that the proposed support person is acting, or is likely to act, in a manner contrary to the Person's interests. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.

GUIDELINE 14: In those jurisdictions that require the leave of the Tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the Person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the Person and their legal representative have adequate time to prepare.

GUIDELINE 15: In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the Person, consideration of whether such an appointment should be made should occur at the earliest opportunity.

GUIDELINE 16: Tribunal members need to be trained in the use of communication supports that a Person may require to participate in the hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.

GUIDELINE 17: Given the centrality of the Person who is the subject of guardianship and/or administration proceedings, the Person should have a genuine opportunity to participate in an oral hearing before a determination is made.

GUIDELINE 18: Original applications should be determined after an oral hearing.

GUIDELINE 19: Reviews of existing orders should ordinarily be determined after an oral hearing. Where reviews of orders are determined without an oral hearing, before making a determination the Tribunal should make reasonable attempts to obtain the views of the Person, up-to-date medical information about whether the Person continues to have a decision-making disability and the Person's current circumstances.

GUIDELINE 20: Acknowledging that some jurisdictions are constrained by their enabling legislation regarding composition of panels, consideration should be given to using multi-member panels to ensure that the Tribunal has the breadth of skills and experience relevant to the circumstances of the Person

and the issues to be determined in the particular matter.

GUIDELINE 21: Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.

GUIDELINE 22: Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be used in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community-based experience.

GUIDELINE 23: Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.

GUIDELINE 24: Training for members and registry staff about strategies to involve the Person in guardianship proceedings is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.

GUIDELINE 25: Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members and staff with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.

GUIDELINE 26: Members and registry staff should be given training which promotes awareness of cultural considerations relevant to Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people.

Definitions

In these Guidelines:

APPLICANT means the Person who makes an application for a Guardianship order.

APPLICATION means a request made to a Tribunal for a guardianship order.

GUARDIANSHIP means the concept of substitute decision-making whereby a court or tribunal authorises a person(s) to make decisions on behalf of the Person, in relation to decisions about the Person's personal affairs. For convenience, in these Guidelines, guardianship is given an extended meaning and includes decisions made on behalf of the Person, in relation to, among other things, the Person's estate (income, property and assets).

GUARDIANSHIP ORDER means an order made by a Tribunal appointing a person to make substitute decisions on behalf of the Person.

THE PERSON means the Person who is the subject of an application for a Guardianship order or the Person who is the subject of a review by the Tribunal of a Guardianship order.

TRIBUNAL means a statutory body vested with power to, among other things, make and/or review Guardianship orders.

1. Summary

1.1 In May 2019, the Australian Guardianship and Administration Council (AGAC)¹ endorsed “Guidelines for maximising the participation of the Person in guardianship proceedings” (the Guidelines). This report sets out the background to these Guidelines.

1.2 AGAC prepared the Guidelines in response to a recommendation made by the Australian Law Reform Commission (ALRC) proposing the development of

“best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible.”²

Noting that AGAC’s functions include “developing consistency and uniformity, as far as practicable, in respect of significant issues and practices” and “encouraging dialogue at a national level, and across relevant jurisdictions” the ALRC considered AGAC “well placed” to “develop a best practice model to facilitate maximum participation of the represented person in the process of determining whether to appoint a guardian or financial administrator”.³

The Guidelines have been developed following consultation with individuals and organisations, including community organisations representing and/or advocating

on behalf of, people with a decision-making disability.⁴ The Guidelines are designed to provide practical guidance to tribunals about measures they can take to enable the participation of the Person who is the subject of an application for a guardianship order, or a review of an existing guardianship order (the Person). AGAC is indebted to the many people and organisations who have assisted with the development of these Guidelines.

1.3 This report should be read together with two papers prepared by AGAC in the course of developing the Guidelines: *Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian Tribunals* (Issues Paper, 2018) (Issues Paper)⁵ and *Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian Tribunals* (Interim Report, February 2019) (Interim Report).⁶

¹ The Australian Guardianship and Administration Council is a peak organisation whose members have a role in protecting adults in Australia who have a disability that impairs their capacity to make decisions. AGAC’s members include statutory public advocates, public and adult guardians, boards and tribunals and public and state trustees or their equivalents throughout Australia. In April 2018, AGAC established a governance group to develop the Guidelines (the AGAC Governance Group).

² Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) (‘ALRC, Report 131’) [10-2].

³ Ibid, [10.36].

⁴ The methodology used to develop the Guidelines is set out in *Maximising the participation of the person in guardianship proceedings – Draft guidelines for Australian tribunals* (Issues Paper, 2018), Annexure C.

⁵ Annexure 1 to this report.

⁶ Annexure 2 to this report.

2. Development of the Guidelines

1.4 In developing the Guidelines, AGAC:

- reviewed current participation rates of the Person in guardianship proceedings in Australian tribunals;
- examined “best practice”⁷ initiatives employed by Australian tribunals to encourage participation of the Person in guardianship proceedings;
- examined best practice initiatives in comparable Australian and overseas jurisdictions;
- formulated *Draft Guidelines for Australian Tribunals: Maximising the Participation of the Person in Guardianship Proceedings* (“Draft Guidelines”);⁸
- invited over 150 groups and individuals to comment on the Draft Guidelines and posted an open invitation on the AGAC website;
- prepared and distributed an issues paper which outlined the barriers to participation in guardianship proceedings faced by people with decision-making disabilities, and practices employed by Australian tribunals and tribunals in comparable overseas jurisdictions to encourage the participation of the Person in guardianship proceedings;
- commissioned the production of an Easy English version of the Draft Guidelines and gave a copy of that version to each of the groups and individuals invited to comment on the Draft Guidelines. In addition, AGAC posted the Easy English version of the Draft Guidelines on its website;
- gave a presentation on the Draft Guidelines at AGAC’s biennial conference, *Upholding rights, preventing abuse and promoting autonomy*, (Canberra, 14–15 March 2019);
- engaged social work academics, Dr Margaret Spencer and Mr Francis Duffy, to conduct focus group discussions on the Draft Guidelines with people who are the subject of guardianship orders;
- after considering the 39 written submissions received in response to the Draft Guidelines, together with a report prepared by Dr Spencer and Mr Duffy, revised the Draft Guidelines.⁹

⁷ The Issues Paper notes at [1.17] that although “best practice” is the language used in the ALRC, Report 131, the research conducted in the preparation of the Draft Guidelines indicates that there appears to be limited, if any, evaluation of the success or otherwise of efforts to maximise the participation of people about whom guardianship and/or administration applications are made.

⁸ Issues Paper, [3.6].

⁹ On 8 March 2019, the AGAC Heads of Tribunal (HoTS) Group considered the submissions received about the Draft Guidelines and endorsed a series of amendments to those Guidelines. The AGAC Governance Group adopted those amendments and made several additional amendments at a meeting on 15 March 2019. The final version of the Guidelines was adopted by the Governance Group at a meeting on 28 May 2019.

3. Amendments to the Draft Guidelines

1.5 In February 2019, AGAC reported to the Commonwealth Government on the responses to the Draft Guidelines received from the groups and individuals who responded to AGAC's invitation to comment.¹⁰ In addition, AGAC gave the Government the report prepared by Dr Spencer and Mr Duffy about the feedback received from the focus group discussions on the Draft Guidelines (the Spencer Duffy report).¹¹

1.6 In reviewing the Draft Guidelines, AGAC considered the written submissions received about those Guidelines, the Spencer Duffy report, the Issues Paper and the Interim Report.

1.7 While contributors were critical of aspects of the Draft Guidelines, all welcomed the introduction of national guidelines designed to maximise the participation of the Person in guardianship proceedings. This report does not address separately each of the submissions made by contributors, except where necessary to explain the amendments made to the Draft Guidelines.¹²

1.8 We set out below the key amendments made by AGAC to the Draft Guidelines. The numbering of the draft guidelines does not match the numbering of the final guidelines.

Pre-hearing stage (Draft Guidelines 1, 2, 3, 4, 5 and 6)

DRAFT GUIDELINE 2: *The Person and other parties should be promptly notified of an application being made.*

¹⁰ Interim Report, *Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian tribunals*, February 2019.

¹¹ See Annexure E to the Interim Report.

¹² See the Interim Report for a summary of the main issues and concerns raised by contributors about the Draft Guidelines.

1.9 Several contributors contended that Draft Guideline 2 was deficient because it lacked specificity. They pointed out that this Draft Guideline failed: (i) to prescribe who was responsible for notifying the Person that an application had been made; (ii) to require the person responsible for notifying the Person, to provide evidence that they complied with the notification requirement; (iii) to require that the Person be given a copy of the application and supporting documents; and (iv) to specify when the Person must be notified that an application had been made.

1.10 Many contributors gave examples of cases where the Person had not been notified that an application had been made. Dr Spencer and Mr Duffy reported that one third of the participants in the focus group discussions reported that they had not been told about the hearing of the application. Others reported "not [being] told the full story" or feeling "hoodwinked".

1.11 Reflecting these concerns, AGAC amended Draft Guideline 2 by:

- specifying that the Tribunal should give, or require the applicant to give, a copy of the application and supporting documents to the Person;
- where the applicant is required to give a copy of the application to the Person, requiring the applicant to provide evidence that they had complied with this requirement; and
- requiring that the Person be given a copy of the application and supporting documents "promptly but no later than 10 days from the date the application was lodged".

DRAFT GUIDELINE 3: *Written notice of hearing should be given to the Person and other parties well in advance of the hearing. Registry staff may need to consider whether any additional steps need to be taken to ensure that the Person is informed of the hearing details.*

1.12 Contributors were generally supportive of Draft Guideline 3. There were mixed views about whether the Guidelines should prescribe a minimum period of notice of the hearing, and, if so, the appropriate period of notice. There was strong support for the proposal that registry staff be required to consider whether, in addition to giving the Person written notice of the hearing, additional steps should be taken to ensure that the Person is informed of the hearing.

1.13 Draft Guideline 3 was amended by:

- requiring that the Person be given written notice of the hearing at least 7 working days before the hearing; and
- waiving that requirement in “special circumstances”, such as where there are reasonable grounds to conclude that the Person will be at risk if the determination of the application is delayed.

DRAFT GUIDELINE 4: *Pre-hearing processes should seek to ensure that:*

- *the Person is made aware of the application*
- *information is provided to assist the Person to understand what the application and hearing is about*
- *the Person’s participation is encouraged (unless to do so would be detrimental to the Person)*
- *any further information that may assist the Tribunal is obtained from the Person*
- *the Person is provided with information as required about representation including advocacy*
- *information is given to the Person about Tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible*
- *the Person has an opportunity to ask questions about any of these matters*
- *information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids.*

1.14 Contributors expressed conflicting views about the exemption from the requirement that “pre-hearing processes should seek to ensure that ... the Person’s participation is encouraged” in circumstances where to “do so would be detrimental to the Person”: (Draft Guideline 4, dot point 3). While there was some support for this exemption, most contributors who commented on Draft Guideline 4 opposed this exemption. Some contributors urged AGAC to remove the exemption in its entirety. Others favoured retaining some form of exemption, providing that the party asserting that it is likely to be detrimental to the Person to participate in proceedings is required to provide the Tribunal with firm evidence to support that assertion.

1.15 After detailed consideration, AGAC decided to delete the exemption in its entirety. AGAC concluded that the risk of any detriment to the Person is likely to be outweighed by the risk that the exemption might be used by parties to prevent the Person from participating in proceedings because of misplaced paternalism or some ulterior motive. In addition, AGAC concluded that the proposed exemption could significantly delay the determination of the application or review, by requiring the Tribunal to determine at the pre-hearing stage whether, as alleged, it would be to the detriment of the Person to participate in proceedings.

1.16 In response to concerns raised by contributors, several amendments have been made to strengthen Draft Guideline 4, including the deletion of the words “seek to” from the opening sentence.

1.17 Several contributors suggested that other types of communication supports be added to those listed in dot point 8. AGAC considered this unnecessary because the listed communication supports are given by way of example and are neither stated as, nor intended to be, exhaustive.

1.18 Draft Guideline 4 was amended by:

- deleting the words “seek to” from the opening sentence;
- deleting from dot point 3 the words “unless to do so would be detrimental to the Person”;
- inserting in dot point 3 after the word “encouraged” the words “and facilitated”;
- deleting from dot point 5 the words “as required” and including after the word “advocacy” the words “if any”; and
- deleting from dot point 6 the words “where possible”.

DRAFT GUIDELINE 5: *Optimally, the listing of a hearing should take into account: whether any particular needs of the Person require a hearing at certain times of the day (for example, a morning hearing rather than the afternoon, or taking into account the effects of medication) an estimate of the length of time the Person may need to give their views to the Tribunal, having regard to their communication needs any need for breaks during the hearing any additional time required for the use of an interpreter.*

1.19 The only amendment of substance made to this Draft Guideline was the removal of the word “optimally” from the opening sentence. That amendment was made in response to strong concerns expressed by many contributors.

DRAFT GUIDELINE 6: *Information about various aspects of the Tribunal’s practice and procedure (both in hard copy and online) should be made available to the Person in formats that are accessible to people:*

- *from culturally and linguistically diverse backgrounds*
- *with a vision and/or hearing impairment*
- *with cognitive disabilities.*

1.20 No amendments of substance were made to this Draft Guideline.

At the hearing ***(Draft Guidelines 7, 8, 11, 13)***

DRAFT GUIDELINE 7: *Optimally, hearings should be listed in a location that allows the Person to participate in the hearing in-person.*

1.21 Contributors expressed strong support for hearings being held in locations accessible to the Person including in rural and regional Australia. Many contributors urged that where the Person is unable to travel, hearings should be conducted in “outreach locations”, such as hospitals, aged care facilities and the Person’s home.

1.22 Several contributors contended that the word “optimally” should be deleted from Draft Guideline 7, arguing that conducting a hearing in a location that is inaccessible to the Person effectively denies the Person the opportunity to participate in the proceedings. Speech Pathology Australia, for example, pointed out that even a mild cognitive impairment can make it difficult, if not impossible, for a person to participate in a hearing conducted by telephone, especially where there are multiple participants.¹³

1.23 AGAC acknowledges that holding a hearing in a location that is accessible to the Person is more likely to achieve the objective of maximising the participation of the Person in guardianship proceedings. However, there

¹³ Issues Paper [5.17].

will be occasions, such as where the Person lives in a remote and isolated community, or where there is a need for an urgent hearing because of a real and imminent risk to the Person's safety, where it would be impractical to hold a hearing in a location that allows the Person to participate in the hearing in-person.

1.24 AGAC has decided that the requirement that hearings be conducted in a location that allows the Person to participate in a face-to-face hearing cannot be unqualified. Draft Guideline 7 was amended by deleting the word "optimally" and substituting the words "where practicable".

DRAFT GUIDELINE 8: *If a face-to-face hearing is not possible or practicable, then other means by which the Person can participate in the hearing should be explored. This may include:*

- *measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a "Visit to the Person" by a Tribunal member*
- *the views of the Person being provided by way of a representative*
- *videoconferencing*
- *telephone participation.*

1.25 No material amendment was made to this Draft Guideline.

DRAFT GUIDELINE 11: *Hearing venues should:*

- *be wheelchair accessible*
- *have drop-off zones for people with mobility restrictions*
 - *have easily accessible parking*
 - *be accessible by public transport*
 - *provide accessible toilets.*

DRAFT GUIDELINE 12: *Tribunals should give consideration to the amenity of waiting room spaces, given the impact this can have on the Person's anxiety levels, leading up to the hearing, and their ability to participate in the hearing.*

DRAFT GUIDELINE 13: *Tribunals should give consideration to the amenity and configuration of hearing rooms.*

Hearing rooms should:

- *provide the option of a more informal setting that is distinct from a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the Person at ease;*
- *provide hearing induction loop facilities; and*
- *provide videoconference and teleconference facilities.*

1.26 Contributors expressed strong support for Draft Guidelines 11, 12 and 13, which are designed to ensure that the hearing room is accessible to the Person and that the physical environment in which the hearing is conducted is conducive to enabling the Person to participate in proceedings.

1.27 No material amendments were made to these Draft Guidelines.

Support and representation (Draft Guidelines 14, 15, 16)

DRAFT GUIDELINE 14: *Tribunals should, wherever beneficial for the subject Person, allow the Person to be accompanied by a support person during the hearing. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.*

1.28 Many contributors criticised the use of the words "wherever beneficial" in Draft Guideline 14. Professor Terry Carney,¹⁴ for example, argued that giving the Tribunal power to exclude a support person from accompanying the Person to a hearing on the ground that their attendance might not be beneficial for the Person is "very paternalistic". While agreeing with the sentiments expressed by Professor Carney, the Council for Intellectual Disability (CID) and

¹⁴ Interim Report [5.55].

others¹⁵ contended that the Tribunal should have power to exclude a support person from a hearing where the Tribunal is satisfied that the interests of that person are in conflict with those of the Person.

1.29 These legitimate concerns are difficult to resolve. While it is unarguable that the Person should have the right to determine whether a support person should or should not accompany them to a hearing, there will be cases where the Person is unable or unwilling to communicate their wishes. The proposal that a support person be automatically barred from accompanying the Person to a hearing in circumstances where their interests conflict with those of the Person, while superficially attractive, fails to acknowledge that it is not uncommon for there to be an actual or potential conflict between the interests of the Person and the interests of their support person. For example, there may be a conflict of interest where the subject application is for a financial management order and the support person is a beneficiary of the Person's estate, resides in the Person's home, and/or is engaged by the Person to provide services. In our view, it would be inappropriate to automatically deny the Person the right to be accompanied to a hearing by the support person of their choice, especially where there is no reasonable basis to conclude that the support person is likely to seek to influence the Person, to promote their own interests.

1.30 After exploring several options, AGAC decided to amend Draft Guideline 14 by deleting the words "wherever beneficial" and giving the Tribunal the discretion to exclude a support person from a hearing if it determines that the Person is "acting, or is likely to act, in a manner contrary to the Person's interests".

DRAFT GUIDELINE 15: *In those jurisdictions that require the leave of the Tribunal for a party to*

¹⁵ Interim Report [5.56].

be legally represented at the hearing, any application made by or on behalf of the Person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the Person and their legal representative have adequate time to prepare.

1.31 While welcoming a requirement that where it is necessary to apply for leave to represent the Person, the Tribunal must determine that application at the earliest possible opportunity, the Law Council of Australia and several organisations representing legal practitioners,¹⁶ urged AGAC to amend the Guidelines to give legal practitioners an automatic right to represent the Person, without leave of the Tribunal.

1.32 In several jurisdictions,¹⁷ it is a statutory requirement that leave of the Tribunal is required for the Person, and any other party, to be legally represented. The Guidelines cannot override this or any other statutory requirement. Legislative amendment is required. The Guidelines are intended to cover matters of practice and procedure which tribunals can control. For that reason no material amendment was made to this guideline.

DRAFT GUIDELINE 16: *In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the Person, consideration of whether such an appointment should be made should occur at the earliest opportunity.*

1.33 No material amendments were made to Draft Guidelines 15 and 16.

¹⁶ See Interim Report [5.58]–[5.62].

¹⁷ Issues Paper [5.43]; see, for example, *Civil and Administrative Tribunal Act 2013* (NSW), s 45; *Victorian Civil and Administrative Act 1998* (Vic), s 62.

Oral hearings (Draft Guidelines 19, 20)

DRAFT GUIDELINE 19: *As a matter of good practice, original applications should be determined after an oral hearing.*

DRAFT GUIDELINE 20: *As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of orders are determined without an oral hearing, tribunals should consider their respective statutory obligations about considering the views of the Person before making a determination.*

1.34 The view expressed by the Australian Law Reform Commission that oral hearings provided an “important mechanism to maximise the participation of the represented person”,¹⁸ was shared by all contributors who commented on Draft Guidelines 19 and 20. Contributors expressed strong support for oral hearings (also referred to as “face-to-face hearings”) being conducted to both determine applications for guardianship orders and to review existing guardianship orders. As discussed at [3.18] above, many contributors consider face-to-face hearings to be the best method to facilitate the genuine participation of the Person in the Tribunal’s decision-making processes.

1.35 Many contributors were critical of the practice of some tribunals of conducting reviews of guardianship orders “on the papers”, that is without an oral hearing, and urged AGAC to amend the Draft Guidelines to require that oral hearings be conducted in all cases. The Intellectual Disability Rights Service (IDRS), for example, contended that the practice of conducting a review on the papers “effectively exclude[s] participation by the

Person the subject of the order”.¹⁹ Several contributors asserted that determining applications for and conducting reviews of guardianship orders without an oral hearing places a Person with communication difficulties at a great disadvantage.

1.36 AGAC accepts that as a general rule, a face-to-face hearing is more likely to achieve the objective of facilitating the participation of the Person. However, AGAC decided not to amend the Guidelines to require oral hearings to be conducted in all cases because of, among other things, the significant resource implications for tribunals which service remote and rural communities spread over large geographical areas, such as the Northern Territory Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal. Nonetheless, AGAC decided to strengthen Draft Guidelines 19 and 20 by:

- deleting from Draft Guidelines 19 and 20 the words “as a matter of good practice”; and
- requiring that where reviews are determined without an oral hearing, before making a determination the Tribunal should make reasonable attempts to obtain the views of the Person, up-to-date medical information about whether the Person continues to have a decision-making disability and the Person’s current circumstances: Draft Guideline 20.

¹⁸ ALRC, Report 131 [10.45].

¹⁹ Interim Report [5.65].

Composition of the Tribunal (Draft Guidelines 21, 22, 23, 24)

DRAFT GUIDELINE 21: *Acknowledging that some jurisdictions are constrained regarding composition of panels (such as WA), consideration should be given to the composition of tribunal panels that hear guardianship and administration matters.*

DRAFT GUIDELINE 22: *Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.*

DRAFT GUIDELINE 23: *Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be utilised in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community based experience.*

DRAFT GUIDELINE 24: *Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.*

1.37 Contributors expressed strong support for the statement in Draft Guideline 22 that “multi-disciplinary panels constituted by members with relevant and different areas of expertise are optimal”.²⁰

1.38 AGAC acknowledges that there are many advantages in using multi-member panels to determine applications for guardianship orders and to review existing orders. As noted by the ALRC, these include being better able to engage with the Person.²¹

1.39 As noted in the Issues Paper, the use of multi-member panels to determine

²⁰ See for example the submissions made by the Seniors Rights Service; Julia Casey; Cheryl McDonnell; CID; IDRS; PWDA; Macquarie Law School and the Australian Research Network on Law and Ageing, Darwin Community Legal Service.

²¹ Issues Paper [7.5].

applications and reviews varies throughout Australia.²² No jurisdiction routinely uses multi-member panels to conduct reviews of existing guardianship orders. To mandate that multi-member panels be used in all proceedings would have significant cost implications. For that reason, AGAC decided not to amend the Guidelines by requiring multi-member panels to be used in all cases.

However, AGAC decided to amend the Draft Guidelines by:

- strengthening Draft Guideline 21; and
- adding to Draft Guideline 22 the words “multi-disciplinary panels should at least be used in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community-based experience”.

Training of members and registry staff (Draft Guidelines 17, 25)

DRAFT GUIDELINE 17: *Tribunal members need to be trained in the use of communication supports that a person may require in order to participate in the hearing, including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.*

DRAFT GUIDELINE 25: *Training for members and registry staff about strategies to involve Persons who are the subject of applications is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.*

1.40 Contributors expressed strong support for Draft Guidelines 17 and 25. No material amendments were made to these Draft Guidelines.

²² Issues Paper [7.6]–[7.13].

Participation of Aboriginal and Torres Islander people (Draft Guideline 26)

DRAFT GUIDELINE 26: *Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members and staff with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.*

1.41 Contributors expressed strong support for Draft Guideline 26. No material amendment was made.

Data collection (Draft Guidelines 9, 10)

DRAFT GUIDELINE 9: *Tribunals should collect data and report publicly on the participation rates of persons in hearings, broken down into in-person participation, hearings by videoconference, and hearings by telephone.*

DRAFT GUIDELINE 10: *Tribunals should also collect data and report publicly on the rate of appointment of representatives.*

1.42 Contributors expressed strong support for Draft Guidelines 9 and 10. No material amendments were made to these Draft Guidelines.

4. Data on the participation rates of the Person: a snap shot

1.43 In developing the Guidelines, AGAC analysed “current participation rates of proposed represented persons in guardianship and financial management/administration hearings in Australia’s state and territory jurisdictions”.²³

1.44 This task proved difficult as there is no readily available Australia-wide information about the participation rates of the Person in guardianship hearings. Few participating tribunals collect that information on a regular basis. Those that do use different methods to collect and collate that information.²⁴

1.45 Given the lack of available and reliable data on the participation rates of the Person, the AGAC Governance Group decided to request participating tribunals to collect data for a specific period, that is October and November 2018. The Tribunals were requested to provide information on participation rates broken down into type of hearing, application or review, and method of participation, in-person, by phone or by video-conference.

1.46 All but one participating tribunal provided the requested data.²⁵

1.47 The collected data reveals:

- a wide variation in participation rates of the Person between jurisdictions;

- a less than 50% participation rate of the Person in most jurisdictions;
- a higher participation rate of the Person in original application hearings as compared to review hearings; and
- where participants participated in the hearing, most attended in-person.

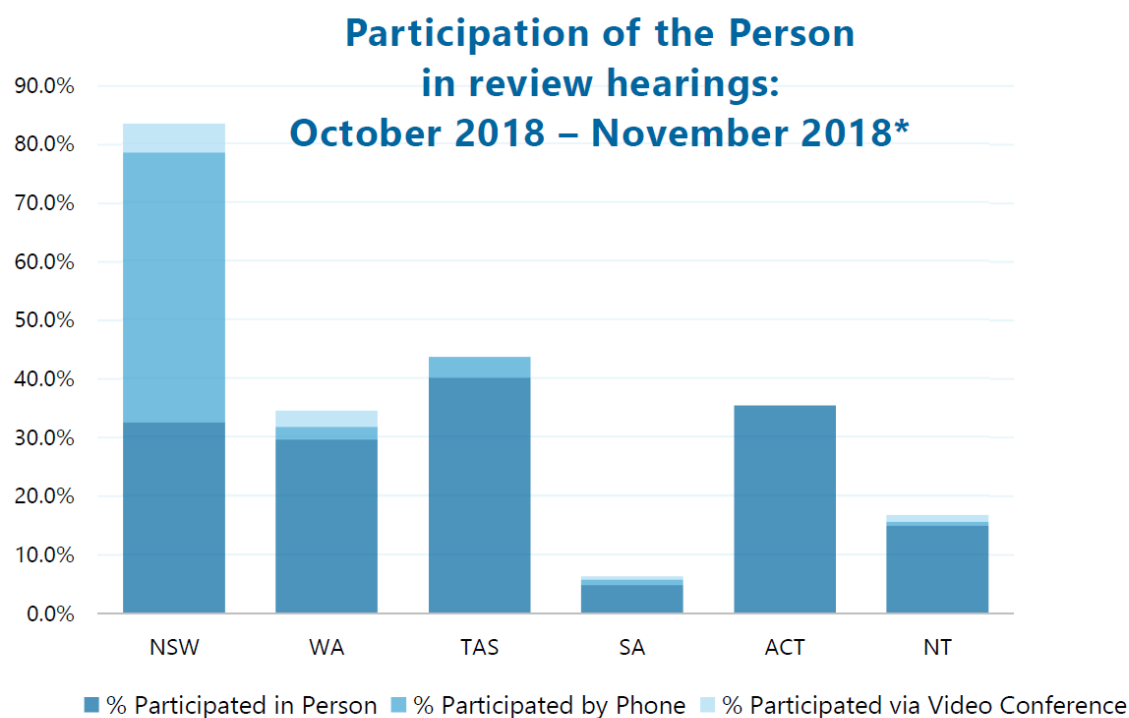
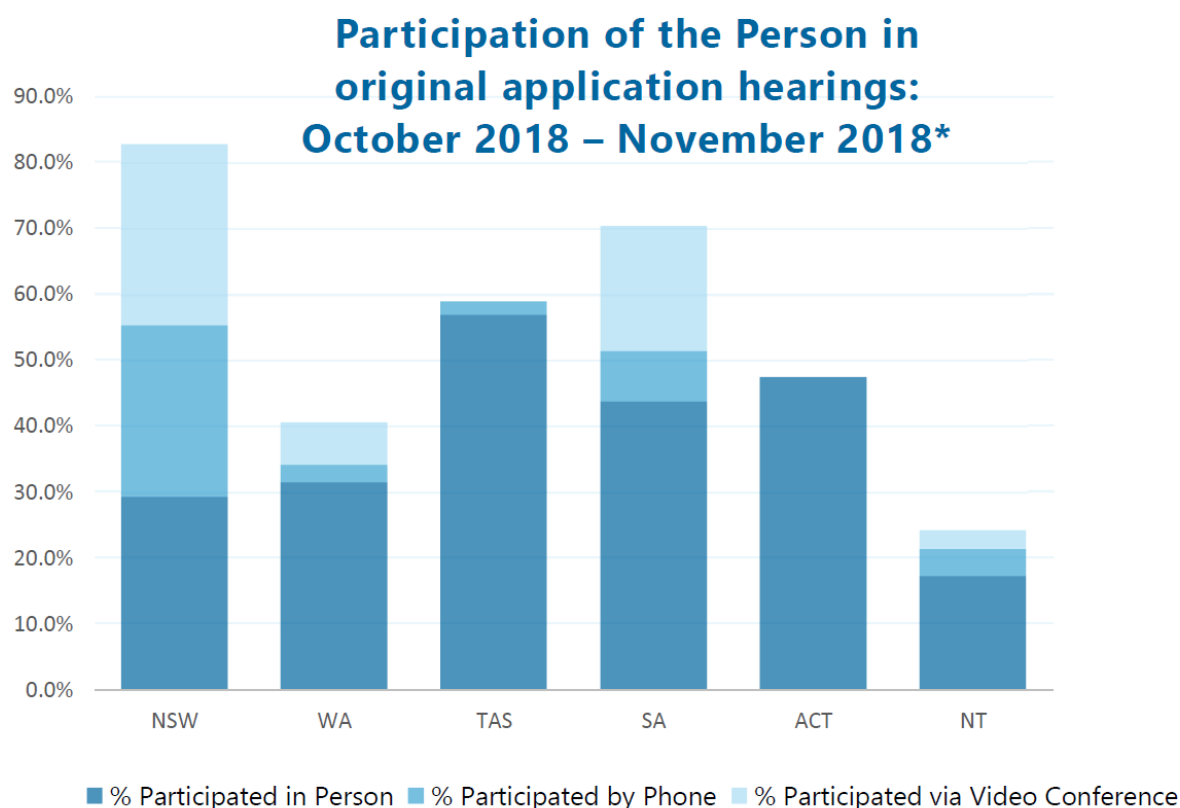
1.48 Given the length of the period surveyed, care must be taken in drawing conclusions from the collected data. A longer survey period might have produced a different result. Nonetheless, the collected data indicates that the participation rates of the Person in many jurisdictions is low and points to the desirability of Guidelines designed to facilitate the participation of the Person.

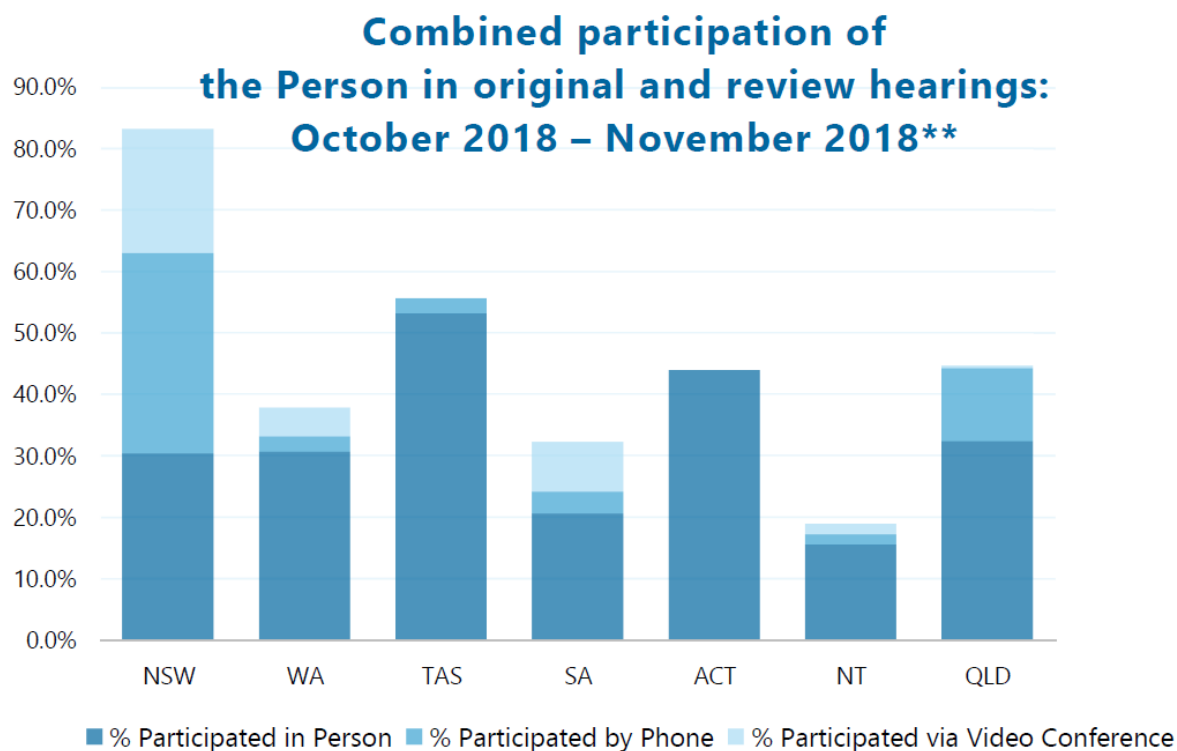
²³ See Issues Paper [1.12].

²⁴ See Guideline 9, requiring tribunals to collect data and report publicly on the participation rates of persons in hearings.

²⁵ The Queensland Civil and Administrative Tribunal was unable to provide data that distinguished between review and original hearings. The data provided by the South Australian Civil and Administrative Tribunal included reviews conducted “on the papers”, that is, without a hearing. The Victorian Civil and Administrative Tribunal collected the data but because of a systems error was unable to provide the data to AGAC.

Data





*Qld was not able to provide separate data for original applications and reviews.

** Vic was not able to provide the data collected due to a systems error.

Glossary

In this report:

APPLICANT means the person who makes an application for a guardianship order.

APPLICATION means a request made to a Tribunal for a guardianship order.

GUARDIANSHIP means the concept of substitute decision-making whereby a court or tribunal authorises a person(s) to make decisions on behalf of the Person, in relation to decisions about the Person's personal affairs. For convenience, in the Guidelines and this report, guardianship is given an extended meaning and includes decisions made on behalf of the Person, in relation to, among other things, the Person's estate (income, property and assets).

GUARDIANSHIP ORDER means an order made by a tribunal appointing a person to make substitute decisions on behalf of the Person.

REVIEW OF EXISTING ORDER means a review conducted by a tribunal of an existing guardianship order to determine whether it should be renewed, revoked or varied.

THE PERSON means the Person who is the subject of an application for a guardianship order or the Person who is the subject of a review by the Tribunal of a guardianship order.

TRIBUNAL means a statutory body vested with power to, among other things, make and/or review guardianship orders.

Annexure 1

Interim report

Maximising the participation of the Person in guardianship proceedings – Draft Guidelines for Australian Tribunals

February 2019

Annexure 2

Issues paper

Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian Tribunals

February 2019