

## Submission to Australian Guardianship and Administration Council on draft best practice guidelines-participation of the proposed represented person

### Contact

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### About DDWA

Developmental Disability WA was established in 1985 and is a trusted source of independent information, advocacy, education and support for people with intellectual and other developmental disability, their families and the people who support them.

### Background relating to this submission

DDWA has had capacity to provide advocacy services in recent years and this has resulted in involvement in Guardianship and Administration matters before the State Administrative Tribunal (SAT). Other advocacy has been provided to parents seeking to understand the issues underlying Guardianship and the role of this in their support for adult family members with intellectual disability. DDWA is also developing self advocacy initiatives for people with intellectual disability including supported decision making and communication support for people without language. Finally, DDWA has provided advocacy in relation to the Child Protection system and this has revealed some issues of concern in respect to the possible misuse of Guardianship where capacity issues are present or perceived to be present for young people leaving care.

### WA-specific issues impeding participation

#### Inaccessible application process

The SAT in WA requires applications for review of orders or new orders to be made exclusively by electronic means with no capacity to draft an application in a paper-based process. Submission requires registration through the e-courts portal which is a cumbersome process and completely inaccessible for anyone without internet skills or access. If a person cannot apply or be supported to apply then there is no way to access a tribunal process.

#### Skills of SAT members

There is variable capacity among Tribunal members to engage with a person with intellectual disability in respect to interpersonal skills and adjustment of pace, including modification of the presentation of information to support understanding. This can result in failure to properly enable a person to demonstrate their true understanding of the issues relevant to them.

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### **Policy-based exclusion of independent advocates**

WA SAT has a policy to not inform known interested parties of the details of tribunal hearings if they deem these parties to be 'professionals'. SAT relies upon the represented person or the person the subject of a new application, to inform the independent advocate of the details. This administrative policy can directly limit the involvement of independent parties such as advocates.

### **Limited availability of independent advocacy**

Availability of advocates with the skill and confidence to support people in tribunal processes impacts on access to such support when needed. The policies and practices of the State agencies of SAT, Office of the Public Advocate and the Public Trustee can foster or impede the involvement of independent advocates. There is no active support for independent advocacy for this particular population and so availability is ad hoc and not occurring in the context of any community of practice or funded program.

### **Endorsement of related submission**

DDWA endorses the comments made in the submission of the NSW Council of Intellectual Disability

### **Comment specific to the Draft Guidelines**

#### **Independent Advocacy referenced as a specific Guideline**

**Draft Guideline:** Tribunals should support the involvement of independent advocacy for the subject person

- Hold and keep current information about the advocacy services available in their jurisdiction
- Have an effective system for providing this information to the person and others supporting them

### **Rationale**

#### **Independence is a critical and particular quality of support**

Independent advocates meet a person specifically relating to the issue at hand and unencumbered by vested interests or pre-conceived views about capacity. An advocate with knowledge of the tribunal process can prepare a person for the practical aspects of attendance and provide explanations of processes and concepts in a neutral setting without the pressures of the tribunal setting. In the hearing, the advocate can support participation from an independent standpoint, without a vested interest in the outcome. Advocates can support the introduction of evidence to the hearing that supports an understanding of the person, including

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use of witnesses and alternative testimony. Advocates can support a person after a hearing has concluded, in their process of reconciling or adjusting to the outcomes of the hearing.

**Good advocacy is a matter of Natural Justice**

Advocates are not necessarily synonymous with ‘support persons’ in the technical setting of a statutory hearing. While not an adversarial process per se, tribunals do test and balance information and evidence, with the person themselves being a critical informant and an ‘embodied’ form of evidence. A strong, supportive presence in the form of an independent advocate can dramatically empower a person to speak on their own behalf. An advocate has a duty to not be intimidated by the setting as well as to intervene when they judge that this is necessary. The significance of statutory involvement of the state in a person’s life justifies the role of formal support for participation in hearings.

Representation is also not synonymous with advocacy however in the Guidelines this is suggested in the following example.

**Draft Guideline 4:** Pre-hearing processes should seek to ensure that:

...

the person is provided with information as required about representation including advocacy

...

Representation by a lawyer at a hearing effectively substitutes a person’s self advocacy, where an advocate promotes a person speaking on their own behalf. The Guidelines need to distinguish clearly between both forms of independent support in hearing processes.

7 January 2019

