

## Feedback to Australian Guardianship and Administration Council (ACAG)

### Maximising the participation of the person in guardianship proceedings – DRAFT guidelines for Australian tribunals

Relevant Guideline issue / Number	Comments
<b>Pre Hearing</b>	
<b>4.1 Draft Guideline 1:</b> Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person.	This is a great idea. For persons in hospital this is often undertaken by the social worker. Will this be in addition to already existing professional staff?
<p><b>Draft Guideline 4:</b> Pre hearing processes should seek to ensure that:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> the person is made aware of the application</li> <li><input type="checkbox"/> information is provided to assist the person to understand what the application and hearing is about</li>   <li><input type="checkbox"/> the person’s participation is encouraged (unless to do so would be to the detriment of the person)</li> <li><input type="checkbox"/> any further information that may assist the tribunal is obtained from the person</li> <li><input type="checkbox"/> the person is provided with information as required about representation including advocacy and</li> <li><input type="checkbox"/> information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible</li> <li><input type="checkbox"/> the person has an opportunity to ask questions about any of these matters</li> <li><input type="checkbox"/> information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids</li> </ul>	Some concern raised by hospital clinical staff that a copy of the application and all reports are to be given to all parties to a hearing. Sharing of information is agreed to in principle though clinical reports submitted to VCAT may contain sensitive information and it is requested that they not be distributed without the author’s permission.
<b>4.7</b> As noted in the ALRC Report on <i>Elder Abuse – A National Legal Response</i> , the number of applications for guardianship and administration is increasing. Among other things, this places greater time pressure on tribunal members hearing such applications. Expanding the role of pre-hearing support may therefore provide an opportunity to maximise the participation of the person in the hearing.	Expanding the role of pre-hearing support is important to help with navigating expectations on hearing process especially concerning people with literacy difficulties. Will pre-hearing support include support from the Office of the Public Advocate? For example, accessing advice on the justice system; and identifying and responding to situations of violence and abuse?
<b>4.25</b> Pre-hearing case management may also provide an effective tool in identifying ‘unmeritorious’ applications, that is, those that	Yes. Agree.

<p>have been lodged in circumstances where there are other measures available to support the person in their decision making. This can provide an early opportunity for the withdrawal of applications and the potential alleviation of stress and anxiety of the person who is the subject of the proceedings.</p>	
<p><b>5.18</b> A number of tribunals list hearings in locations apart from their principal registry. VCAT, for example, conducts many hearings in regional locations and is currently in the process, in partnership with government and community agencies, to develop hearing venues in metropolitan areas that are outside courts and more appropriate for guardianship hearings. VCAT also conducts regular hearings in six hospitals at least 80 days per year, and there are discussions in place with a seventh hospital. People who are in hospital attend these hearings at a far higher rate than hearings out of the hospital. Other jurisdictions also conduct hearings in locations away from their principal registries.</p>	<p>Eastern Health is among the health services in Victoria who provide regular hearings in the hospital. This has been beneficial for the person in hospital as well as the staff. Note though that this often has challenges associate with other clinical staff that need to be taken off the ward when the person requires an escort or supervision because of care needs.</p>
<p><b>5.22</b> In South Australia, if the person is physically or medically unable to attend a hearing in person, but is able to communicate their wishes, and a video conference cannot be conducted (for valid reasons), then consideration will be given to a tribunal member visiting the person prior to the hearing to take evidence. This visit may take place in a hospital, an aged care facility or in the person’s home and allows the Tribunal member to discuss the application, explain the medical evidence and ascertain the person’s wishes. Each visit must be authorised by a Presidential Member. As a matter of practice, the visit is only authorised if the person cannot participate in the hearing due to illness or infirmity (supported by medical evidence). The evidence taken during the visit to the person is audio recorded and a summary of the recording is documented in writing by the tribunal member. At the hearing the written summary is read out to all other parties and interested persons at the commencement of the hearing. The audio tape or a transcript of the audio tape is made available to other parties and interested persons on request.</p>	<p>A visit by a tribunal member if a person is physically or medically unable to attend a hearing in person, preceding the hearing would ensure the person’s wishes are noted. This is a common difficulty in hospital, despite having on-site hearings.</p>
<p><b>Waiting areas</b></p>	
<p><b>5.33</b> The configuration of waiting areas is not a matter that tribunals have a great deal of control</p>	<p>Yes, this can become challenging when parties waiting a hearing are in disagreement or conflict and are “forced”</p>

<p>over when they hold hearings outside their own premises including in court premises in regional areas or in hospitals. A lack of appropriate physical space, seating and the like can heighten tension, particularly if time is spent waiting for a hearing to commence. This can be exacerbated if parties leave a hearing upset about the outcome, which could affect those waiting for their hearing to commence.</p>	<p>to wait within very close proximity to one another in an open space.</p>
<p><b>7. Composition of the tribunal</b></p>	
<p><b>7.3 Draft Guideline 23:</b> 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.</p>	<p>Yes, strongly agree particularly in complex matters. Health professional expertise would for example assist with determinations around physical and cognitive functioning and their impact on the person's rights and wishes.</p>
<p><b>7.4 Draft Guideline 24:</b> Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.</p>	<p>Yes, strongly agree.</p>
<p><b>7.11</b> The Victorian Law Reform Commission's Final Report on Guardianship also considered the use of multi member panels. The VLRC recommended that the President of VCAT should retain a discretionary power in relation to the composition of the tribunal for guardianship matters but that VCAT should also consider making greater use of multi-member panels for more complex matters where a range of expertise would be beneficial.</p>	<p>Yes agree. See 7.3 above.</p>
<p><b>7.12</b> In a submission to the NSW Law Reform Commission's review of the <i>Guardianship Act 1987</i> (NSW),<sup>124</sup> NCAT noted that subject to certain specified exceptions, when hearing initial applications, the Tribunal must be constituted by three Division members as follows: a member who is an Australian lawyer, a member with a 'professional qualification', and a member with a 'community based qualification'. NCAT highlighted the advantages of the three-member panel model as follows: <b>1)</b> Members holding a professional qualification have expertise in a range of areas relevant to the guardianship jurisdiction, including medicine, psychiatry, psychology, social work and pharmacology. Those holding a community-based qualification generally have direct personal or professional experience with people</p>	<p>Yes, agree collective expertise will ensure that any decisions rest with more than one individual and is potentially a fairer process.</p>

<p>with disability.</p> <p><b>4)</b> This collective expertise also assists the Tribunal to discharge its obligation to ensure that all relevant material is disclosed by, for example, enabling it to identify any gaps in the evidence.</p>	
<p><b>7.18</b> Directly related to the issue of the composition of tribunal panels is that of ensuring that tribunals have available to them members with relevant expertise and from a diversity of backgrounds. In particular, recruiting members who have lived experience of disability and/or and other expertise in communicating with people with disabilities can be a crucial factor in ensuring that persons with communication difficulties are able to participate meaningfully in proceedings that are about them. The hearing of a matter in regional NSW in which both the person who was the subject of the application for guardianship and a tribunal member used speech generating communication devices provides a practical example of this.</p>	<p>Yes strongly agree with recruitment of members who have lived experience of disability.</p>
<p><b>8.11</b> Recognition of, and training in relation to, these issues has the potential to improve the ability of tribunals to better enable the participation of the person and for their views to be provided as well as reducing the potential for the hearing process to reinforce traumatic events. Strategies to assist people who have experienced torture and other traumatic experiences, albeit in the context of migration and refugee matters, have been specifically addressed by the Administrative Appeals Tribunal (AAT) in its <i>Guidelines on Vulnerable Persons</i> (July 2015) and recognises the vulnerability of people in these circumstances.</p>	<p>Agree with the suggested training. Will the training also include referral to appropriate services if they are not already involved?</p>