



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

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### Contact

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### Who we are

Council for Intellectual Disability (CID) is a NSW based disability rights organisation led by people with intellectual disability. For more than 60 years we have been working to ensure a community where all people with intellectual disability are valued.

We speak up on the big issues, we provide information and learning opportunities, we empower individuals and communities.

### This submission has national endorsement

This submission has been endorsed by Inclusion Australia, the national peak representative group for people with intellectual disability and their families.

The state members of Inclusion Australia are:

- Victorian Advocacy League for Individuals
- South Australian Council on Intellectual Disability
- Development Disability Western Australia
- Parent to Parent Queensland
- Speak Out Tasmania
- Council for Intellectual Disability

### Fundamental principles

We applaud the considerable research and thought that obviously has gone into preparing these draft guidelines. We also appreciate the historical and financial constraints that often impede tribunals from ensuring maximum participation by a proposed represented person. Australian guardianship tribunals were established in an era that did acknowledge the voice of people with disability but placed primary focus on a person's best interests.

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We argue that the proposed guidelines need to be substantially strengthened if they are to represent “best” or even “good” practice. Substantial investments may be required by state and territory governments to give effect to good practice.

In our view, 21<sup>st</sup> century tribunals have a very heavy responsibility to ensure that a proposed represented person has maximum involvement in the tribunal proceedings and that the person's views are maximally obtained. We take this view in light of the United Nations Convention on the Rights of Persons with Disability in particular articles 12-14 and measures required if a proposed represented person is to receive a fair hearing. In considering these issues, it is vital to emphasise that, whilst guardianship and administration proceedings are aimed to benefit a proposed represented person, guardianship and administration orders also take away fundamental rights and liberties from the person.

We make the following comments on the draft guidelines and on further matters which are not currently covered by the guidelines.

### Recommended changes to draft guidelines

First, if the guidelines are to be “best” or “good” practice guidelines, qualifying words need to be deleted in various places:

- the words “seek to” should be deleted in the first line of guidelines 4 and 26,
- the word “optimally” should be deleted in the first line of guidelines 5 and 7,
- the words “or practicable” should be deleted in the first line of guideline 8,
- the words “give consideration to” should be replaced by the word “ensure” in the first lines of guidelines 12 and 13.

**Guideline 4** - the third bullet point should simply read: “The person's participation is encouraged.” That is, delete the qualification, “unless to do so would be detrimental to the person”.

The issue for the tribunal should be not whether the person should participate but how to make the participation work for the person. In our experience, there are great dangers in relying on family or professional views that participation would be detrimental to the person due to anxiety or the person not being able to understand what is happening. The views of family and professionals in these circumstances can be motivated by an overly protective approach, a lack of understanding of the importance of the person's views notwithstanding their disability, a lack of understanding of how the tribunal members can tailor the proceedings to the person's needs and the convenience of professionals.

**Guideline 13** - The first line of the first bullet point should be reworded to “Unless the circumstances of the case require otherwise, provide an informal setting that is distinct from a traditional court room....”.

Our experience is that people with intellectual and other disabilities find formal hearing rooms, in particular in courthouses, intimidating and implying that the person is in trouble.

**Guideline 14** - The first sentence of this guideline should be reworded as follows: “Tribunals should, whenever desired by or beneficial to the subject person, facilitate the person being accompanied by a support person during the hearing. A support person should not have a conflict of interest.”

**Guideline 15** - The following sentence should be added: “If the person subject to the application wishes to be represented, this should be allowed unless there is a specific reason not to, in particular conflict of interest for the proposed representative.”

**Guideline 20** - The guideline should be amended to read, "Reviews of existing orders should be determined after an oral hearing".

The liberty of the person and their right to full participation are equally relevant in review hearings as initial hearings. There is also a great danger in the tribunal relying on written information from others and not verbally questioning that information and hearing directly from the person with disability.

**Guideline 22** - This guideline should be reworded as follows: "All guardianship and administration proceedings should be heard by multidisciplinary panels constituted by members with relevant and different areas of expertise."

Guardianship and administration proceedings involve deprivation of fundamental rights from a person with generally limited capacity to put their own case. A single member is an inadequate safeguard on this process.

**Guideline 24** - The following sentence should be added: "All tribunal members should have established skills in communicating with and maximising the participation of proposed represented persons".

### **Procedures in the hearing**

There should be an additional guideline along the following lines: "Tribunal members should conduct hearings in a way that maximises the participation of the proposed represented person including through using plain English, avoiding formal legalistic and courtroom language, having breaks as needed and regularly bringing the discussion back to the person".

### **Reasons for decisions**

There should be an additional guideline along the following lines: "Both verbal and written reasons for decision should be provided in plain English, avoid formal legalistic language and be provided in a manner to maximise their understanding by the proposed represented person, taking into account the person's communication and cultural and linguistic needs."

For people with intellectual disability, this should include an Easy Read summary of the tribunal decision and what it means for the person.