



ADACAS

A D V O C A C Y

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

FINAL

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Introduction: ACT Disability, Aged and Carer Advocacy Service (ADACAS)

ADACAS is an independent community organisation which for 27 years has provided free advocacy and information to people with disability, people who experience mental health issues, older people, and carers in the ACT. We have recently added Support Coordination for participants of the National Disability Insurance Scheme (NDIS) to our range of services, and extended our advocacy to the NSW South Coast. Our extensive coverage over time has broadened our knowledge and awareness of the range of issues that confront our client group, and ADACAS has developed skills in addressing and overcoming barriers, and assisting people to practice strategies that will enable them to advocate for themselves.

ADACAS has been undergoing action research about supported decision making for the past seven years. During this time ADACAS has worked with individuals who require support to make decisions, carers, service providers and ACT Government with the goal of implementing supported decision making as a tool to uphold rights and enable equitable access to the community and services. Throughout our project work we have developed an expertise in supported decision making and a thorough understanding of the barriers faced by people who require support and those who support them. The Link and Learn project (2015-2017) was evaluated by Prof Paul Ramcharan at RMIT who described it as “innovative in its conceptualisation, aspirational in its objectives and both successful and innovative in its execution”. ADACAS contributed to ACT Health’s new ‘My Rights, My Decisions’ forms which provide an opportunity for mental health consumers to make and record decisions, values and preferences for their mental health treatment and care.

ADACAS has an ongoing role in matters relating to guardianship and financial management. We create learning opportunities in the community to provide information about supported decision making and other alternatives to guardianship. We also provide advocacy and decision support to individuals at tribunal to ensure they have a voice and that their values, will and preference is respected.

1. Overall impressions and approach to the response

1.1. ADACAS welcomes the development of the guidelines, and the acknowledgement that there is an urgent need to review and improve practice within Australian tribunals to better enable the participation of individuals in guardianship proceedings. While the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) does provide a strong legislative reference point for more proactively ensuring that people with disability in Australia exercise their right to “equal recognition before the law”, the principle of ensuring the views and wishes of persons protected by guardianship has for many years been central to the expectation of the legislation, but clearly has not always been applied in practice. The draft guidelines address this and provide a starting point for better and more consistent practice in tribunals across the country. In the context of this report ADACAS would like to point out that UNCRPD Article 12 requires a focus on the

agency of individuals which in turn emphasises the need for our processes to ensure the “control” of the person within their participation, to the greatest extent that this is possible.

1.2. The discussion about the context that the UNCRPD provides for the draft guidelines also strongly asserts the principle of prioritising the participation of the person over the previous “best interests” approach which has predominated in many tribunals. ADACAS supports this, not only in the move away from substitute decision-making in favour of supported decision-making, but also as a principle which is much more assiduously pursued within guardianship proceedings.

1.3. The provision of an Easy English version of the guidelines is welcome. Some of the language used in this version, however, is not easy to comprehend, with complex and overly long sentences obscuring the explanation of the draft guidelines. More specifically the description of what a guardian can make decisions about is not full enough to be accurate, and the imagery of the conference table is not useful. ADACAS is certain other groups have already made comments on the content of the Easy English version, and that the next version of the guidelines will incorporate many of these critical comments, and we remain available to provide further assistance in this regard.

1.4. Statement about supported decision-making

One issue which is not clear from the guidelines is the extent to which the responsibility for diverting people from substitute decision-making to supported decision-making will be held and exercised by the tribunals and the bodies responsible for administering guardianship orders. Section 2.11 appears to suggest a role for tribunals in determining whether a supported decision-maker is required, and subsequently able to be utilised in place of a substitute decision-maker. This would appear to privilege one particular form of supported decision-making, one which is overtly contrived to be utilised in legal and judicial settings, over other more “organic” models of supported decision-making, which exist to support a person make a wide range of decisions that impact on their lives. **It is ADACAS’ contention that well-applied, individualised supported decision-making provides a suitable alternative to guardianship and does not require a judicial ruling to determine that it can (unless challenged through the normal avenues) nor to “appoint” someone in that role.**

2. Specific points of response to the Guidelines

This section will address the specific points of the draft guidelines in order, although additional comments will be attached once more to some of the guidelines in the sections below, as this is how the report was organised.

2.1. Section 3 – Draft Guidelines

3.2 – determination of whether a person can or cannot participate in proceedings. There is insufficient consideration of the reasons that various parties argue for the exclusion of the person in hearings, and no acknowledgement that in some instances (and many in the experience of ADACAS) this is sought by family members to

deliberately exclude or discredit the views and wishes of the person, as it opposes their own. The continued reliance upon the views of “independent health professional(s)” to rule on the fitness or otherwise of the person to participate appears limited in the context of a study which is about maximising participation, as it is the health profession which regularly overrules the preferences of people with cognitive impairment in practice in primary health settings.

ADACAS recommends that the guidelines focus establishing safeguards to enable the individual to participate in the proceedings rather than protecting them based on the judgement of others. This may include but is not limited to giving the individual more time to prepare, having someone they trust support them through the proceedings or allowing them to participate from a safe space.

3.3 – emergency hearings. There is obviously a need for the continuation (and standardisation) of the practice of holding emergency tribunal hearings when a person is in danger or under some other circumstances which demand a prompt response. Again, given the focus of this project it would be good to consider when the person themselves can trigger this response based on concerns they have, rather than them being called, in the main, to address the concerns of professionals and families.

3.4 – exclusion of persons on grounds of wellbeing. ADACAS is very supportive of seeking alternative ways to include persons in hearings, if it is unavoidable that the hearing will be contentious and problematic, and that this is likely to cause significant stress and distress to the person and/or prevent their ability to participate in a manner which would benefit their cause. On the other hand we believe that perhaps not enough note has been made of the tendency to give “equal weighting” to participants who are routinely invited, most often families, when it has already been alleged that there is some form of abuse being perpetrated by those people on the person concerned. Whilst mindful of the need for judicial fairness, the presence of alleged abusers in hearings can serve as a major impediment to a person being able to participate effectively, and excluding the person can, we believe, prejudice the view of the tribunal members and offers the opportunity to the alleged abusers to persuade the members of the validity of their claims. Some thought should be given to excluding these parties rather than the person subject to guardianship.

Summary of Draft Guidelines – There is no explicit mention of advocates or agents who can assist in supported decision-making who are independent of the judicial system, and ADACAS believes that the full array of options to support a person, beyond “pre-hearing case management” (Draft Guideline 1) needs to be canvassed or at least referred to more explicitly. Advocacy should be mentioned in Draft Guidelines 3 and throughout Draft Guideline 4, especially when “the person has an opportunity to ask questions”, the right to have an advocate present and to assist in this task should be stated more emphatically. “Disability advocate(s)” are referred to in Draft Guideline 14, but as one option, and not offered in combination (ie not a family member or disability advocate), and the specification of disability advocate appears to unwittingly preclude the attendance and involvement of older persons advocates. This needs to be worked on to include a wider array of advocates and to include the possibility that they can be in addition to other support people for the person.

The examples of current practice across jurisdictions are particularly useful. The intent of Draft Guidelines 13 should give cause to consider the co-location of hearing room alongside other tribunals and/or courts.

ADACAS agrees that communication is vital, as is respect for and enabling the use of diverse communication styles, and supports the thrust of Draft Guideline 17 to provide training to tribunal members in the use of communication supports. This training needs to address not just an understanding of diverse communication styles, so that tribunals are able to make available a range of communication supports, but also a deeper understanding by tribunal members of how to utilise these to enable the person to participate in hearings.

ADACAS believes that if (Draft Guidelines 20) “good practice” allows for determinations about reviews of existing orders to be made in some circumstances without the participation of the person, then we should move toward “best practice” where this is simply not acceptable, and even if participation is not possible at hearing, some level of participation must be enabled prior to the determination being made.

2.2. Section 4 – Pre-hearing

The general view of ADACAS is that not enough attention has been paid to the efforts that need to be made to seek effective alternatives to guardianship, including but not exclusive to supported decision-making, before the option to go to tribunal is finalised. More information should be provided to the person, their support network and the applicant about the alternatives to guardianship for that particular domain during the pre-hearing support stage. Some discussion about the relative benefits of having this process in the hands of the tribunal, the departments which administer guardianship, or an alternative independent and/or related body would have been beneficial, as would have some data about the current level of resourcing that is put into this activity in the various jurisdictions across Australia.

Another general comment is the force of the language used, which in our view should communicate a requirement to meet the guidelines rather than an option to do so. The use of the word “optimally” in Draft Guideline 5 is a case in point – this simply just needs to be removed.

4.4 – pre-hearing processes. At the second dot point there should be more details provided about the range of formats this information should be given in, and by which people ideally it should be conferred. At the third dot point some more clarity needs to be given to what is meant by “to the detriment of the person”, as this can be determined subjectively by parties other than the person, and not necessarily for their benefit. ADACAS would like to see a greater emphasis on the determination of supports being much more explicitly under the control of the person. At dot point eight, whilst the list of examples of communication supports is not meant to be exhaustive it does focus largely on technical aids and should mention the use of support persons (other than interpreting services) as part of the list.

4.7 and 4.8 – increase in number of applications for guardianship for older persons. ADACAS recommends that much more effort is made to look for and resource supported decision-making options for older persons as an alternative to substitute

decision-making orders, and notes that these options are not canvassed in the report.

4.11 – ADACAS has some concerns about the practices described that effectively “serve” persons with notices of hearings, given the public (mis)conception of what this actually entails, and the potential harm to the person as a result of being so served. It is ADACAS’ experience in assisting people through guardianship tribunal proceedings that they in most cases are a cause of anxiety, and in some result in such heightened levels of anxiety as to require significant amounts of support before during and after the proceedings. The tight timeframes are understandable from a procedural perspective, but can result in additional stress for the person who is supposed to be the beneficiary of the proceedings. ADACAS would like to see more examples and discussions about practices which engage more meaningfully with a person at this point in the process, so that it becomes a positive opportunity to explain and reassure them about what is about to transpire. This in turn gives rise to opportunities to engage advocates and other important people to assist the person through the process early on.

4.14 – Pre-hearing processes. ADACAS believes that advocacy and other forms of support are critical prior to hearing, and the guidelines need to identify this and mention specifically what these can offer to the person and how available they should be. ADACAS is also aware and broadly supportive of the use of intermediary witness schemes to better facilitate the participation of the person (mainly younger people who have experienced sexual assault, but also in some jurisdictions including adults deemed to have reduced capacity) in hearings, but recognises that these are ultimately court officers who are focused on making the proceedings work, whereas the advocate and other individual supports are there for the person beyond the scope of the proceedings.

4.24 and 4.25 – The jurisdictional examples are again useful throughout this section, and ADACAS notes that the fact sheet distributed by NCAT may benefit from the inclusion of information and its sources of supported decision-making. We note that this is the only clause which directly address alternatives to guardianship, and believe that these alternatives require greater emphasis throughout the draft guidelines.

4.29 – 4.32 – ADACAS believes that providing information in accessible formats is vital in enabling the participation of the person in guardianship proceedings. It is ADACAS’ experience that some people, regardless of specific diagnosis, require a support person to help them comprehend the content and its significance to them, in addition to, the accessible format in which the information is provided.

2.3. Section 5 – At the Hearing

5.5 – The stipulation for hearing venues should include reasonable accommodation to persons requiring sensorially calming/ not overly stimulating, quiet, or windowed rooms in consideration for the needs of people with cognitive and/or psychosocial disability.

5.8 – Draft Guideline 14 should indicate that the support person must be nominated by the individual, as otherwise it is questionable regarding for whose benefit the appointment is made.

5.11 – We have addressed the need for training of tribunal staff to more deeply engage with communication supports (see 2.1). It is as important for the tribunal members to ensure that the information is being understood as it is to ensure that it is provided in an accessible way for the benefit of the person. Draft guideline 17 appears to focus too much on technical aids and interpreting services rather than on how support persons can be used. It has been ADACAS' experience that where there has been a support person present to interpret the information to enhance understanding, there has been more meaningful participation of the person subject to guardianship in the proceedings.

5.13 and 5.18 – The guidelines described here would appear to preclude the inclusion of guardianship hearings within the current logistical arrangements offered by the general tribunals, based on how these are configured in most jurisdictions. Examples of good practice at 5.18 would appear to confirm this, while keeping the administrative functions within the scope of responsibility of the tribunals. In particular, the conduct of hearings in hospital greatly increases the opportunity for the person to participate in proceedings even in emergency guardianship situations.

5.24 – ADACAS would recommend that people with “appropriate expertise” would include people outside the legal and medical profession.

5.32 – The Access to Premises Standard (AS1428.1) should be explicitly referenced here as the appropriate regulatory document that informs the design of premises where tribunal hearings and associated activities are conducted.

5.40 – 5.47 – This section falls short of making explicit the legitimate role of an advocate in proceedings, as a support for the person, what tasks could be performed and how these are distinguishable from other court support officers, and how beneficial this support can be in enabling the person to achieve their expectation of being equal before the law in the context of guardianship proceedings.

2.4. Section 6 – Oral hearings

6.3 – ADACAS believes that best practice for reviews includes always taking the views and values of the person into consideration prior to making a decision. Tribunals should always endeavour to actively include the person in the review process. ...

6.4 and 6.5 – ADACAS has some concerns about current practices of hearings when the person is potentially a victim of elder abuse, and some of our commentary on the draft guidelines to date are informed by our experiences of supporting and advocating for people and the concerns that have emerged from these experiences. The “discretion” and “nuance” that is referred to at these clauses, and exemplified in clauses throughout this section, whilst demonstrating a range of options to look at, for ADACAS render explicit the fact that by and large hearings for older people are done mainly with the convenience and efficiency of the tribunal in mind rather than with an overriding concern to enable the agency of the person. It is our preference that the issue of hearings for people who have or may have experienced elder abuse be dealt

with in the guidelines by specific recommendations that can deliver a consistency of approach that safeguards both the safety and the agency of the older person. 6.13 in our view exemplifies the principle of the interests of the tribunal over those of the person. 6.19 provides an example of where determination of reviews on papers is not good practice, so given this it should be possible to work out what would be best practice.

2.5. Section 7 – Composition of Tribunal

7.1 – 7.4 – The draft guidelines (21 – 24) regarding the composition of the tribunal do not, in our view, give clear enough direction as to what is best practice. Draft guideline 21 is largely superfluous, unless current practice is not to give consideration to the composition of specifically guardianship and administration matters (ie they are constituted in line with the rules of the other tribunals in the jurisdiction). ADACAS believes that the constitution of tribunals needs to be flexible and able to be adapted to the needs and circumstances of the person, and notes that, similar to the example in 7.9, we have found hearings held in hospitals in the ACT to be effective in ensuring the participation of the person who would otherwise have been excluded while they were hospitalised.

2.6. Section 8 – Training of members and registry staff

8.1 – ADACAS believes that the training of tribunal members and registry staff should focus primarily on how to identify and provide support to the person throughout the guardianship process. Meaningful participation in supported decision making training will give the staff the desired skills and understanding in order to address the support needs of the individual. Through these skills, strategies regarding communication supports will be gained in the context of providing individualised decision support. After participating in supported decision making training, staff will be confident to identify and provide the required supports for the individual without needing prior knowledge of specific diagnosis or disabilities. ADACAS has provided training about supported decision making to service providers, health professionals and informal supporters for four years and received positive feedback about the usefulness of this training in all situations. We have developed resources based on our years of research to provide basic skills and understanding to the community. An example of these resources can be found at <https://support-my-decision.org.au/>.

Conclusion

ADACAS has 27 years of experience supporting people through guardianship processes and welcomes these guidelines as an acknowledgement that the systems involved need to improve in order to meet our obligations under the UNCRPD and uphold the rights of people subject to guardianship. While the guidelines broadly represent a positive change, ADACAS believes that the guidelines should explicitly outline the agency of the person to determine who supports them through the proceedings and how they are supported. It is only when this occurs that the person will be able to meaningfully participate and engage with the proceedings as is the aim of these guidelines. More information needs to be provided to the person, their supporters and applicant in the pre-hearing stage about alternatives to guardianship

including supported decision making. It is vital that the focus is on safeguarding the person's participation in proceedings and not solely protecting them based on the views of others. Communication aids should include how support people can be used to aid comprehension of the information regarding the guardianship process and their rights, and staff training should focus on how to identify and provide individualised support rather than purely an understanding of technical communication aids or disability characteristics.

ADACAS submits this a constructive addition to a very important process, and is available to make further contributions in the future.