



11 January 2019

Ms Jacqui Rugless
South Australian Civil and Administrative Tribunal
GPO Box 2361
ADELAIDE SA 5001

via email: Anne-Marie.Holland@sa.gov.au

Dear Ms Rugless

Maximising the participation of the person - Draft Guidelines for Australian Tribunals

1. I refer to your letter of 20 November 2018 in relation to the Australian Guardianship and Administration Council (AGAC) Draft Guidelines for Australian Tribunals on maximising the participation of the person ("the Draft Guidelines").
2. The Society notes that the genesis for the Draft Guidelines was a recommendation made by the Australian Law Reform Commission in its report, *Elder Abuse – A National Legal Response*, that the AGAC should develop 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.
3. The Society understands that the purpose of the Draft Guidelines is to provide practical guidance to tribunals on how to maximise the participation of the proposed protected person in their decision-making processes.
4. The Society has considered the Draft Guidelines and provides the following comments below with respect to how the Draft Guidelines could be further improved to ensure that those persons who are subject to an application are afforded natural justice and provided with adequate information prior to a hearing.

Current practice

5. The Society is informed by practitioners who appear in guardianship jurisdictions in South Australia, that it is common (in most instances) for the person who is the subject of the application to be given a copy of the application for the order(s), but it is rare for the person the subject of the application to be given details of the materials upon which the application is based. These include hospital case notes and/or the community team case notes and other written materials.

6. The applicant may be the treating team either in the hospital or in the community, or the applicant may be a family member or associate, all of whom will attend the hearing either with the medical case notes or accompanied by the medical team who will have the medical case notes which will then be relied upon to make the case for the orders sought.
7. If the person the subject of the orders has legal representation, the legal representative will more than likely have sought to access the case notes and other materials and will be able to take instructions as to their content, which can then be put to the applicant and their supporters during the hearing.
8. However, the Society notes that a significant amount of people who find themselves before the South Australian Civil and Administrative Tribunal (SACAT) on an application for guardianship, detention, administration, community treatment or an order for electro convulsive therapy (ECT) are unrepresented. The Society is informed that it is extremely rare for unrepresented persons to have had access to the background materials which will be relied upon by the applicant in the hearing.
9. In practice, at the hearing, the applicant and the medical team will present their case first. As such, the protected person will often hear the evidence for the first time at the hearing. This practice is inappropriate and breaches one of the core components of natural justice, the hearing rule. The hearing rule provides that where an order is being made which will deprive a person of some right or interest or the legitimate expectation of a benefit, they are entitled to know the case sought to be made against them and to be given an opportunity of replying to it.¹
10. In this context, the provision of natural justice would include that a person is given prior notice of the case against them; a fair opportunity to answer this case; and the opportunity to present their own case.
11. As the hearing progresses the protected person may interject to dispute the evidence being given and will usually be told that they will get a chance to present their case later. It is important to note that persons appearing in this jurisdiction are often vulnerable and for many reasons (i.e. mental illness etc.) are limited in their ability to dispute evidence (on the spot during a hearing) and present their case.
12. The Society considers that there may be aspects of the evidence which could be disputed given prior notice. There may be witnesses who would have been called to present an opposing scenario. There may be documents or other materials which could be relied upon by the person the subject of the application to present a counter argument to the contents of the case notes and other materials. None of this can occur without prior knowledge of the evidence which will be relied upon in the tribunal hearing.

¹ *Kioa v West* (1985) 159 CLR 550, 582 (Mason J)

13. The *Guardianship and Administration Act 1993 (SA)* provides safeguards which enable the person the subject of the proceedings to give evidence, examine or cross examine witnesses and make submissions to the tribunal.² However, these safeguards become meaningless if the person the subject of the proceedings is unaware until the tribunal hearing of the case which will be made against them and is therefore unable to prepare their case.
14. As noted above, the vast majority of people who come before the SACAT with respect to guardianship, detention, administration, community treatment and ECT orders are unrepresented. This further exacerbates the inequity between the parties and puts the person subject to an order at further disadvantage.
15. The Society notes the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, specifically Principle 18 which provides:

The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.
16. Regrettably, in the South Australian jurisdiction, legal representation is not provided free of charge to the person subject to an order. The Society considers legal representation is essential in these matters. Given that many persons are therefore unable to be represented at a hearing, the need for natural justice and the provision of relevant information/material prior to the hearing is even greater.

Draft Guideline 4

17. Draft Guideline 4 provides that pre-hearing processes should seek to ensure that:
 - 17.1 the person is made aware of the application
 - 17.2 information is provided to assist the person to understand what the application and hearing is about
 - 17.3 the person's participation is encouraged (unless to do so would be detrimental to the person)
 - 17.4 any further information that may assist the tribunal is obtained from the person

² Section 14(6)

- 17.5 the person is provided with information as required about representation including advocacy
 - 17.6 information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible
 - 17.7 the person has an opportunity to ask questions about any of these matters
 - 17.8 information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids.
18. While the Society supports Draft Guideline 4, it considers the Draft Guidelines could be further developed to address the issue outlined above to ensure those persons who come before tribunals such as the SACAT are afforded natural justice and provided with relevant information prior to the hearing.
19. Such measures are critical in this jurisdiction, given the nature of the applications and the gravity of the orders available, which significantly affect a person's rights, including forced medical treatment (i.e. ECT) and removing the ability to manage one's own finances.
20. The Society suggests that the Guidelines should be amended to require the tribunal to:
- 20.1 provide the person the subject of the proceedings with a copy of the Application in sufficient time prior to the hearing to enable the person the subject of the application to prepare their case;
 - 20.2 require the Applicant and any supporting persons to file a brief of evidence comprising all material from the medical and community team case notes and any other materials which will be relied upon in the tribunal hearing (the brief of evidence); and
 - 20.3 provide the person the subject of the proceedings or their legal representative with a copy of the brief of evidence in sufficient time prior to the hearing to enable the person the subject of the application to prepare their case.
21. The Society considers that a brief of evidence would also be of assistance to legal practitioners, who often have to review many volumes of case notes in preparation for a hearing to anticipate what information might be relied upon by the treating team.

22. Furthermore, the brief of evidence would also address any concerns that medical and community teams may have about patients accessing materials in the medical case notes that are not relevant to the hearing.
23. The Society notes that the impetus behind the Draft Guidelines is to provide state and territory tribunals with guidelines as to how they 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. The Draft Guidelines provide a prudent opportunity to review and refine current practices.
24. The Society is informed by its Members who practice within this jurisdiction that those who are subject of an application are not being provided with all relevant information prior to a hearing, and are subsequently being denied natural justice. Not only is this unfair, particularly in a jurisdiction where many of these people are unrepresented, but is contrary to objective of the Draft Guidelines which is maximising the participation of such persons in their decision-making processes.

I trust these comments are of assistance. We would be pleased to provide further comment or assistance.

Yours sincerely



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