

 telephone: (03) 9280 3713 fax: (03) 9269 0210
email: Sonia.Law@vla.vic.gov.au

21 January 2019

Malcolm Schyvens
Chair
Australian Guardianship and Administration Council

Melbourne Office

Level 9
570 Bourke Street
MELBOURNE VIC 3000
GPO Box 4380
MELBOURNE VIC 3001
DX 210646 MELBOURNE VIC
t: (03) 9269 0234
www.legalaid.vic.gov.au
ABN 42 335 622 126

By email: participation@justice.nsw.gov.au

Dear Mr Schyvens

Comment on draft guidelines on the participation of proposed represented persons

Victoria Legal Aid (**VLA**) welcomes the opportunity to provide comments on the draft best practice guidelines for the participation of proposed represented persons (**Draft Guidelines**). VLA commends the Australian Guardianship and Administration Council (**AGAC**) for preparing the Draft Guidelines.

We broadly support the Draft Guidelines which will improve processes to facilitate access to justice for people with mental illness and disability. Although some improvements require legislative change, we recognise the role that guidelines can play within a legislative framework to drive expectations of best practice for promoting meaningful participation of represented persons.

We confine our commentary to areas in which we have direct practice experience, as the primary provider of legal services to proposed and represented persons in Victoria. In the 2017-2018 financial year, for example, we provided nearly 500 advices to over 250 individual clients about administration orders; and legal information about administration orders in over 300 instances. We provided 150 advices to clients about guardianship orders; and legal information about guardianship orders in over 350 instances.

Our practice experience draws on our clients' stories. It is critical that AGAC directly consults consumers in relation to the Draft Guidelines.

Draft Guidelines 1 – 6: Pre-hearing processes to encourage proposed represented persons' attendance at hearings

We strongly support draft guidelines 1 – 6 which seek to improve pre-hearing processes to ensure proposed represented persons are adequately notified of hearings, and supported to attend and participate in hearings.

We see many clients who were not present at the hearing at which the order was made. Often these clients were unable to participate in the VCAT hearing of the application or at subsequent reassessments because they were unaware of the hearing, they did not receive their notice with sufficient time, they couldn't open the notice when it arrived,¹ or they did not receive sufficient support to attend or otherwise meaningfully participate in the hearing. Further, many clients are not made fully aware of the purpose of the hearing and that an order may be made in their absence.

If implemented, draft guidelines 1 – 6 would promote a proposed represented person's participation in a hearing before a decision is made to restrict, or maintain restrictions on, their decision-making autonomy.

In relation to draft guideline 4, we caution against an overly broad or paternalistic interpretation of 'detrimental' and reiterate the importance of meaningful engagement being supported and encouraged.

As many represented persons are not aware of or able to attend the hearing at which the order is made, often the reassessment hearing presents the first opportunity to engage with the Tribunal in relation to the restrictive order. As such, these guidelines should apply to both applications and reassessment hearings.

Draft Guidelines 7 – 17: Facilitating access and engagement at hearings

We broadly support draft guidelines 7 – 17.

In particular, we support draft guideline 9, that Tribunals should collect data and report on participation rates of persons in hearings. In addition, we consider that the introduction of measurable targets for participation and the publication of comparative data would assist in increasing participation and help to recognise the importance of Tribunal practice in achieving this.

Draft Guidelines 18 – 20: Recognising importance of oral hearings

We strongly support draft guidelines 18 – 20 which promote participation of proposed and represented persons in an oral hearing.

Currently in Victoria reassessment hearings regularly occur 'on the papers' and in the absence of updated evidence.

We have seen cases where clients' administration orders have been reassessed and confirmed 'on the papers' despite an apparent lack of evidence that the criteria under the *Guardianship and Administration Act 1986* (Vic) continue to apply. One such example, which is set out in the **enclosed** submission made by VLA to the Victorian Ombudsman's investigation into the State Trustees,² is the case of Ahmed. Under the Victorian legislation,

¹ Because of the form of notices in Victoria, which is a folded perforated page, rather than an envelope.

² VLA's submission to the Victorian Ombudsman's investigation into State Trustees' treatment of vulnerable people, 'State of Trust: Making sure State Trustees protects and promotes the rights of Victorians with disability' (September 2018) (available at: <http://www.legalaid.vic.gov.au/about-us/news/our-report-for-victorian-ombudsmans-investigation-into-state-trustees>).

administration orders must be reviewed by VCAT every three years. In Ahmed's case, his administration order appears to have been confirmed 'on the papers' at this review without VCAT opening the file to review the material relevant to the order.

The *Guardianship and Administration Bill 2018*, currently before the Victorian Parliament, includes a provision requiring the attendance of the represented person at reassessment hearings, unless the represented person does not wish to attend, or their attendance is impracticable or unreasonable, despite any arrangement that VCAT may make.

We recognise the role of these draft guidelines to set standards and expectations about what steps Tribunals are expected to take to satisfy themselves that the criteria are, and continue to be, met in relation a represented person.

For this reason, we recommend that draft guideline 20 be expanded to ensure a Tribunal not continue orders unless satisfied on the evidence before it that the criteria *continue* to apply to a represented person.

Draft Guidelines 26 – 27: Promoting participation of Aboriginal and Torres Strait Islander people

We support draft guidelines 26 – 27 which seek to promote participation of Aboriginal and Torres Strait Islander people.

It is important that Tribunal staff have access to training that not only promotes awareness of cultural considerations, but also ensures cultural competency and safety.

Please do not hesitate to contact Sonia Law, Program Manager, Mental Health and Disability Advocacy on (03) 9280 3713 if you wish to discuss our comments at all.

Yours faithfully



ROWAN MCRAE

Executive Director, Civil Justice, Access and Equity
Executive Director for Goulburn Region

Encl: Victoria Legal Aid, *State of Trust: Making sure State Trustees protects and promotes the rights of Victorians with disability*