

18 January 2019

Attn: AGAC Project
Guardianship Division
NCAT
PO Box K1026
HAYMARKET NSW 1240

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

Dear Ms Britton

Thank you for the opportunity to provide comment on the Australian Guardianship and Administration Council's Draft Guidelines on the participation of the proposed represented person in guardianship and financial management/administration hearings.

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, belonging, contribution, potential and diversity of all people with disability are recognised, respected and celebrated with pride. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

PWDA is a NSW and national peak organisation and founding member of Disabled People's Organisations Australia (DPO Australia) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. Disabled Peoples Organisations (DPOs) are

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organisations that are led by, and constituted of, people with disability. The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities.

General comments

Overall, the Draft Guidelines, if adopted by State and Territory government agencies, would represent positive changes to the current ways in which tribunals across Australia conduct guardianship hearings. We understand that the Guidelines may inform changes to the current laws regarding guardianship and financial management, in order to ensure greater participation from people subject to applications. We also recognise that the Guidelines may support a shift away from the current model where substitute decision-making is the primary outcome of tribunal hearings, where decisions are based on what is deemed to be the “best interests” of the person.

While the Draft Guidelines represent attempts to move towards best practice in terms of participation of ‘represented persons’, we note that the guidelines do not meet in full Articles 12-14 of the Convention on the Rights of Persons with Disabilities (CRPD) regarding legal capacity, and, in particular, supported decision-making, access to justice and liberty and security of the person. We hope that the AGAC will continue to advocate to State and Territory Governments to develop legislation, policies and practice that meet Australia’s human rights obligations under the CRPD.

We also hope that the AGAC will support our proposed changes in the notification of applications or reviews. Currently, in most states and territories, persons subject to the application are notified via written communication. However, this creates barriers for people with disability, in particular, for people with intellectual disabilities.

We note that Western Australia has a current policy where a tribunal service officer presents the notification in person. While this system can be resource intensive, it ensures that the subject person is able to communicate with the tribunal service officer in relation to the notification and have an understanding of the process prior to the hearing. Furthermore, the tribunal officer is then able to relay information regarding the subject person’s needs to participate in the hearing. It is important to note that tribunal service officers should be trained in various communication methods to ensure greater likelihood that the subject person is able to discuss the notification with the tribunal service officer. All documentation should be provided in easy read format.

We support the AGAC’s proposal in the guidelines to use of case managers in the pre-hearing stages. However, we believe it would be beneficial for case management to continue throughout proceedings, and post proceeding if an order is made. Having case management throughout the entire hearing process will continue to encourage and enable the person subject to the application to participate in the proceedings due to greater supports being available throughout the hearing process.



PWDA is aware that NSW Council of Intellectual Disability (NSW CID) has provided AGAC with their comments on the Draft Guidelines. We would like to acknowledge that we endorse NSW CID's submission.

Below are our comments on specific guidelines and our recommendations to strengthen participation of 'proposed represented persons'.

Recommendations on specific guidelines

The draft Guidelines should remove language where the capacity of the person is questioned and where it denies the person to participate in the hearings as an equal person before the law.

In Guidelines 4 and 26, the words "seek to" should be removed. All tribunals must ensure that the person subject to the application is not removed from the process prior to the hearing taking place.

In Guidelines 5 and 7, the word "optimally" should be removed. Not taking into account the person's needs to be able to participate in the hearings is in violation of Article 12.

In Guideline 8, the word "practicable" should be removed. A person's right to have equal access to hearings should not be determined on the inability of the tribunal to ensure accessibility.

In Guidelines 12 and 13, the words "give consideration" should be replaced with "guarantee".

Guideline 4: The third bullet point, where it reads "the person's participation is encouraged (unless to do so would be detrimental to the person)" should stop after the word 'encouraged'.

All documents provided to the person subject to the application should be in accessible format. This ensures that the person subject to the application is able to participate throughout the process.

Guideline 9: All data should be provided and published in accessible format.

Guideline 10: All data should be provided and published in accessible format.

Guideline 13: The first sentence should read: "Tribunals should guarantee that the amenity and configuration of hearings are held in informal settings, unless circumstances for a person subject to the application has different requirements".

PWDA's experience is that for many people with disability, attending hearings in formal settings, such as courthouses, can imply that they are in trouble. This would be exacerbated by the fact that hearing notifications contain legal language, which a person with disability may not be able to understand, therefore potentially reinforcing the idea that they are in "trouble".



Guideline 14: This guideline should be reworded to: “Tribunals should, where it is beneficial for the person subject to the application, have support, if they desire, from a person where there is no conflict of interest”.

The tribunal should provide the person subject to application with a list of disability advocacy organisations as support during proceedings. The list should be accompanied with the notification of application.

Guideline 15: The following statement should be added: “The person subject to application should not be denied a representative if the person wishes to have this representation. If the nominated person has a conflict of interest, then there must be allowances for a separate representative, if this is the desire of the person subject to application”.

Guideline 20: The guideline should be reworded to: “All review orders must be conducted via oral hearings in order to allow full participation from the person subject to the review”.

The person subject to the review has the same right in the review proceedings as they do in initial proceedings. To deny the person subject to the review an oral hearing would deny the person’s right to full participation as indicated in Article 13.1 in the CRPD. Furthermore, reviews conducted based solely on written information from outside parties may not be indicative of the person’s capacity and potentially see that a continuation of an order is enforced.

All review hearings must be conducted by a multi-person panel to ensure that there are tribunal members with varied expertise rather than allow one person, who may not have the relevant qualifications or experience, to determine the outcome.

Guideline 22: This guideline should be reworded to: “All tribunal and administration proceedings should be seen to be by a multi-disciplinary panel where tribunal members include people with various experiences and knowledge”.

Guideline 24: This guideline should add the following statement: “All tribunal members should ensure that they undergo extensive training in varied communication methods in order to facilitate maximum participation with the person subject to the application during proceedings”.

Furthermore, tribunals should go to extra lengths to recruit people with disability experience. This experience should be first-hand, such as someone who has an immediate family member with disability. In having a person with lived experience of disability, there is a greater chance the member can encourage the person subject to the application to participate in the proceedings.

We thank you for the opportunity to provide comment on the Draft Guidelines. We would be willing to participate in any further consultations on the development of the final Guidelines and any other related matters.



Should you have any questions or require further information, please contact me at romolah@pwd.org.au or on 0431 988 273.

Yours sincerely

Romola Hollywood

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Director Policy and Advocacy