

Submission to

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



Australian Guardianship and Administration Council (AGAC)

About Darwin Community Legal Service (DCLS)

DCLS is a multi-disciplinary service consisting of a general legal service, a tenancy service, and a specialised Seniors and Disability Rights Service. We work to promote understanding of laws, create awareness and empower our community, support access to services and rights, and to advocate for change that promotes fairness and justice.

Our Seniors and Disability Rights Service provides advocacy support and empowers those in the areas of ageing and disability. This service has recently played host to an Elder Abuse Prevention Project aimed at raising awareness of elder abuse and identifying strategies to protect senior Territorians from experiencing elder abuse. We work closely with clients who are subject to guardianship orders and also advocate for carers and families who support them.

Executive Summary

Adult guardianship represents one of the most important decisions in respect to a person's life, freedoms and basic liberties. It is vital that regulation and practice in guardianship is based on human rights principles and should be consistently applied across all Australian jurisdictions so that no person is prejudiced simply by where they live.

We commend the AGAC for their proposed guidelines for the Represented Person's involvement in the process within Australia.

Whilst we endorse the guidelines, we wish to take the opportunity to point to some aspects of the guidelines that could be strengthened. It is important that the guidelines, while setting minimum standards, recognise the differences across Australia.

We would also like to see further recommendations in relation to the adoption and implementation of the guidelines, so they are not considered advisory only.

Northern Territory Context

The circumstances of the Northern Territory, and recent changes to the law which have had profound impacts on Represented Persons, highlight the importance of the introduction of guidelines and clarity about appropriate practice.

The NT faces specific challenges in relation to culture, disadvantage and lack of services:

- The Northern Territory has the highest per capita guardianship orders with the majority (75%) under public guardianship;
- Aboriginal people are disproportionately represented (over 50% of new applications vs 26% of the population);
- Most Aboriginal representation is often under state guardianship (78%);
- High incidence of disability and profound disability, particularly among the Aboriginal population;
- Existing high levels of vulnerability and disadvantage with special needs groups comprising 43% of the population, more than 10 times the national average.¹

In July 2016, the NT commenced a new legislative scheme for adult guardianship. Under the new law, guardianship is now dealt with at the Northern Territory Civil Administrative Tribunal (NTCAT) and a new guardian of last resort has been established. It is acknowledged that some positive impacts have flowed from the new model, however there are some fundamental flaws in both the regulation and the practice. These issues are outlined as follows:

- The Office of the Public Guardian (OPG) now has conflicting functions, a statutory role as agent of the NTCAT in gathering information, as well as guardian of last resort. This has often resulted in a direct conflict of interest and influenced its independence (both actual and perceived).
- Section 4 of the new *Guardianship of Adults Act 2016* (NT) adopts the 'best interests' test as the guiding principle in determining outcomes for Represented Persons. Previously, the priority consideration was that powers were to be exercised in the manner least restrictive of the Represented Person's freedom of decision and action. This is a reversal of the trend in other jurisdictions towards a supported decision-making model rather than a substitute decision-making model..

¹ Alternative Law Journal Article – The Northern Territory's adult guardianship scheme: Depriving the vulnerable of a voice – Alistair McLaren, Sage, ALJ 2018 43(2), 113-119.

- Legal representation of the person is no longer supported before the Tribunal and often even their attendance is considered unnecessary. The process is increasingly paternal rather than recognising the adversarial principle. Again this is out of step with human rights principles and trends to support the fundamental interests of the Represented Person and decision making of that person as far as is possible.

Case Studies

The following case studies provide some insight into how these issues are reflected in practice.

Case Study 1 – Greater need for access to justice, legal representation and genuine participation

An applicant (sister of the Represented Person) and Represented Person (RP) were participants in a guardianship review hearing. The applicant and RP both live in a remote community. The RP has severe disabilities. His condition of cerebral palsy includes global development delay and severe language delay, which means he has hearing impairment and is non-verbal, highlighting the importance of physical attendance at a meeting if he is to be involved in his matter.

The matter had been subject to numerous delays. The Office of Public Guardian (OPG) actively opposed the joint guardianship application of the sister but, despite a number of opportunities, did not produce any evidence to support their application either before or during the hearing of the matter. They have not had face-to-face contact with the person for 2 years.

The RP did not 'participate' in the hearing nor was his freedom of decision or action supported because:

- He was unrepresented;
- He was unable to attend the hearing because he lacked the funds to do so and yet his non-attendance was not considered a significant impediment to administering justice
- A video conference was organised through the local council. The link failed on the day preventing the RP and his sister from seeing the other participants.
- An audio-link by phone was used as a backup. The sister reported background noise prevented her hearing any of the discussion about the reassessment of the guardianship. She did not participate and could not explain proceedings to the RP.
- The tribunal provided for an audio tape of the hearing to be made available to the RP and his sister after the event. An audio tape is not a substitute for procedural fairness, Without the opportunity to ask questions or engage in a dialogue it is likely that the discussion and concepts may have eluded these two Aboriginal people who speak English as best as a second language and who were effectively denied participation.

Case Study 2 –The need for supported decision making over ‘best interests’ model and for culturally appropriate engagement

An elderly indigenous man under the guardianship of the OPG was being treated in a regional hospital. The man was dying, and the hospital could only provide limited services for him. There are no aged care facilities or services in his community. The man wished to spend his remaining time back on country with his community.

The OPG would not allow him to return to country because family members would ‘humbly’ him to access his pension and the carer’s payments. The OPG was concerned that the man would not be cared for appropriately on country. No onsite investigations were made within his community to properly assess the potential living conditions and carer support.

The OPG made a decision based on a perception of the man’s best interests rather than his express wishes. No culturally appropriate consultation or engagement was made in the decision-making process. The man’s wishes, and views were not properly considered in determining what was in his ‘best interests’ and the significant concept of wellbeing seems not to have been considered at all.

Response to the Draft Guidelines

Pre-Hearing (guidelines 1-6)

We support the guidelines in respect to the prehearing recommendations. Of particular importance, given the geographical challenges of the Northern Territory, is the focus on making parties aware, as far in advance as possible, of when a hearing will be conducted. This allows for appropriate transport options to be organised or where transport is not viable, appropriate consideration and exploration of multimedia options that best enhance the person’s ability to participate meaningfully.

To this end, the way in which notice is provided is of great importance. In remote parts of the Territory, simply sending a letter or a telephone call is often ineffective in reaching people living out on community. We strongly support Queensland’s model of requiring notice to be given to a person in the way that the Tribunal considers most appropriate having regard to the person’s needs.² We advocate for this requirement to go further, and that a hearing should not proceed unless the Tribunal is satisfied the person has actually received notice of the hearing and there is evidence in support of that fact. Given the impact decisions in relation to guardianship have on a person’s life, it is vital that every effort is made to ensure the person has full awareness of the process.

Moreover, we strongly support taking into account the particular needs of the Represented Person and ensuring enough time is made to appropriately respond to cultural and linguistic needs. We support and encourage the best practice guidelines produced by the Anti-Discrimination Commission NT (ADC NT) which provide resources to describe the steps designed to suit the parties represented (For

² Maximising the participation of the person in guardianship proceedings – Draft guidelines for Australian tribunals, Australian Guardianship and Administration Council (AGAC), 13.

example; information in graphics with minimal text; information in plain English; information in selected Indigenous languages; videos, posters and YouTube).

To ensure the guidelines are implemented, we believe the guidelines should insist that dedicated funding and training is provided to all personnel involved in the process.

At the Hearing (guidelines 7-17)

We strongly support all guidelines set out for participation at the hearing. As previously noted however, specific provision needs to be made to overcome obstacles for people to participate at hearings in person. Without special funding set aside to facilitate this process this is unrealistic. As the case study 1 above highlights, while different forms of technology can be available, all technology has its limitations. This is particularly so when cultural differences and nuances are added into the mix.

We support the recommendation that data on rates of face-to-face participation in hearings as opposed to via multimedia should be meticulously collected and publicly reported. This encourages accountability and a measure of effectiveness of current processes and adherence to guidelines.

We strongly recommend that a legal representative be funded and appointed for the person in all cases. Experience in the Territory dictates that having a legal representative can often bring to light the very circumstances listed in 5.44 of the guidelines. Experience has shown that Aboriginal persons may not be comfortable raising particular issues that may be critical with respect to a guardianship decision, without first having established trust in persons supporting them and so this representation can not be secured at the court door.

Oral Hearings (guidelines 18-20)

We support the guidelines to encourage oral hearings. We draw specific attention to the need to provide Represented Persons a *genuine* opportunity to participate. To be genuine a number of different variables must first be satisfied.

Consideration needs to be given to:

- cultural background;
- an ability to express views;
- language barriers or other barriers affecting a person's ability to express their views;
- medications and the impact of medications; and
- other external factors such as domestic violence, elder abuse or family pressures that may be affecting a genuine expression of views.

The reality in the NT is that natural justice has often been sacrificed to the budget bottom line. To prevent this, the guidelines should make clear that genuine participation is of paramount importance to the hearing process.

Composition of Tribunal (guidelines 21-24)

We strongly support the imposition of multi-disciplinary panels. It is crucial given the vulnerability and limited capacity of the Represented Person and also taking into

account the NT context of multiple layers of disadvantage which need to be identified and unpacked in order to make good decisions.

We recommend as a minimum requirement that multi-member panels consist of a membership of a lawyer, a member who has specific experience with people with disabilities and/or cognitive impairments and, if the represented adult is Aboriginal at least one Aboriginal member, preferably from a similar location as the Aboriginal adult. For all the reasons specified in 7.12 of the guidelines, we consider a multi-disciplinary panel to be paramount to achieving a fair hearing to enable supported decision making.

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Recommendations

1. Guidelines should underpin the delivery of natural justice in guardianship matters through adoption by each jurisdiction of practice directions and procedural regulations.
2. Guidelines should specifically mandate that principles of natural justice and proper process should not be sacrificed to frugality or convenience.
3. The guidelines and trends in other jurisdictions should be used as a framework to guide review of outliers' legislation and practice.
4. Guidelines should include a requirement for expert medical evidence to be provided on the capacity of the Represented Person to be involved in proceedings and the specific supports required to enable participation.
5. Guidelines should include a clear recommendation that the Represented Person should have real access to legal representation at both the pre-hearing and hearing stage. It should be clear that this is of absolute necessity in cases of public guardianship.
6. Guidelines should go further, requiring all Tribunal members to satisfy themselves that the Represented Person has been given a genuine opportunity to participate in the process. A Tribunal should both decide on this element as a threshold issue and cite reasons for their decision.
7. Guidelines should provide that where the represented adult is Aboriginal, every attempt should be made to have another Aboriginal person from the same background sit on the multi-disciplinary panel. Where this is not possible, at the very least, one panel member needs to be Aboriginal.
8. Guidelines should encourage Tribunals to move outside urban centres to better accommodate rural and remote persons subject to guardianship hearings.