



***Maximising the
participation of the
Person in guardianship
proceedings***

**Guidelines for
Australian Tribunals**

FINAL REPORT, JUNE 2019

Final Report, June 2019

Contents

Foreword	3
Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings	4
Definitions	7
1. Summary	7
2. Development of the Guidelines	8
3. Amendments to the Draft Guidelines	9
<i>Pre-hearing stage (Draft Guidelines 1, 2, 3, 4, 5 and 6)</i>	9
<i>At the hearing (Draft Guidelines 7, 8, 11, 13)</i>	11
<i>Support and representation (Draft Guidelines 14, 15, 16)</i>	12
<i>Oral hearings (Draft Guidelines 19, 20)</i>	14
<i>Composition of the Tribunal (Draft Guidelines 21, 22, 23, 24)</i>	15
<i>Training of members and registry staff (Draft Guidelines 17, 25)</i>	15
<i>Participation of Aboriginal and Torres Islander people (Draft Guideline 26)</i>	16
<i>Data collection (Draft Guidelines 9, 10)</i>	16
4. Data on the participation rates of the Person: a snap shot	16
Data	17
Glossary	19
Annexure 1: Interim Report	20
Annexure 2: Issues Paper	21

Foreword

Australian Boards and Tribunals vested with authority to make decisions about whether a person lacks decision-making capacity, and, if so, whether a substitute decision-maker should be appointed for that person, have at their core a common statutory requirement – to take into account that person’s views, wherever possible. It is so abundantly evident that it should not need be stated that any legal process which can impact upon a person’s autonomy and freedom to make decisions, must ensure that that person’s voice is heard, and that they are supported, as required, to be heard. As general principles these are easy concepts to understand and promote, but what does it actually mean to implement these concepts in practice? The guidelines set out in this report, *Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings*, endeavour to provide some answers to that question.

The genesis of these guidelines was the Australian Law Reform Commission Report 131: *Elder abuse – a national legal response*. The ALRC recommended that best practice guidelines on the participation of proposed represented persons in guardianship and financial management/administration hearings across Australia be developed.

The Australian Guardianship and Administration Council (AGAC), with the support of the Attorney-General’s Department (Commonwealth), undertook to develop the guidelines as recommended by the ALRC. AGAC is a national body comprised of twenty-five organisations from all States and Territories in Australia, namely the Public Guardians, Adult Guardians and Public Advocates, the Boards and Tribunals who deliberate upon applications under guardianship and administration legislation, and the State Trustees or Public Trustees.

These guidelines have been developed through the work and commitment of many organisations and individuals. On behalf of AGAC I would particularly like to acknowledge and thank: the Attorney-General’s Department (Commonwealth) for supporting the project; the members of the Governance Group established to oversee the project; the NSW Civil and Administrative Tribunal for managing the project on behalf of AGAC under the capable leadership of Anne Britton and Christine Fougere; and the many organisations and individuals who took the time to comment on the proposed guidelines during the consultation phase. It has been a privilege to have been associated with this important project.

Malcolm Schyvens

Chair, AGAC

Sydney

20 June 2019

Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings

These *Guidelines for Australian Tribunals* (the Guidelines) are designed to facilitate and maximise the participation of the Person in guardianship proceedings.

The Guidelines recognise that to achieve this objective, it is necessary to have regard to all stages of the proceedings, including pre-hearing case management. Pre-hearing case management and support for the Person provide an opportunity to maximise participation by the Person.

The Guidelines are not binding on Tribunals. They are intended to provide a model of best practice to inform and guide/assist Tribunal members in their work in this important jurisdiction.

GUIDELINE 1: Promptly, but no later than 10 days from the date the application was lodged, the Tribunal should give, or require the applicant to give, a copy of the application and any supporting documents to the Person and the other parties. Where the applicant is required to give to the Person and the other parties, a copy of the application and any supporting documents, the Tribunal should require the applicant to provide evidence that this occurred. The Tribunal will determine how this evidence should be provided.

GUIDELINE 2: The Tribunal should give to the Person and the other parties, written notice of the hearing no later than 7 working days before the hearing except in special circumstances, such as where there are reasonable grounds to conclude that the Person will be at risk if determining the application is delayed. Registry staff should consider whether any additional steps need to be taken to ensure that the Person is

informed of the details of the hearing, unless otherwise ordered by the Tribunal.

GUIDELINE 3: Pre-hearing processes should ensure that:

- the Person is made aware of the application
- information is provided to assist the Person to understand what the application and hearing are about
- the Person's participation is encouraged and facilitated
- any further information that may assist the Tribunal is obtained from the Person
- the Person is provided with information about representation including advocacy (if any)
- information is given to the Person about Tribunal practice and procedure and to assist in addressing any confusion or anxiety
- the Person has an opportunity to ask questions about any of these matters
- information is sought as to whether any communication supports are required by the Person, for example, interpreting services, visual, auditory or communication aids.

GUIDELINE 4: The listing of a hearing should take into account:

- whether the Person requires a hearing at certain times of the day (for example, a morning rather than afternoon hearing to accommodate the likely effects of medication on the Person)
- an estimate of how long the Person needs to give their views to the Tribunal, having regard to their communication needs
- any need for breaks during the hearing
- any additional time likely to be required for the use of an interpreter.

GUIDELINE 5: Information about various aspects of the Tribunal’s practice and procedure (both in hard copy and online) should be made available to the Person in formats that are accessible to people:

- from culturally and linguistically diverse backgrounds
- with a vision and/or hearing impairment
- with cognitive disabilities.

GUIDELINE 6: Where practicable, hearings should be listed in a location that allows the Person to participate in the hearing in-person.

GUIDELINE 7: If a face-to-face hearing is not possible, then other means to enable the Person to participate in the hearing should be explored. This may include:

- measures similar to those undertaken by the South Australian Civil and Administrative Tribunal involving a “Visit to the Person” by a Tribunal member
- the views of the Person being provided by way of a representative
- video-conferencing
- telephone participation.

GUIDELINE 8: Tribunals should collect data and report publicly on:

- the participation rates of Persons in hearings, broken down into in-person participation, hearings by video-conference and hearings by telephone
- the rate of appointment of representatives, broken down into the appointment of public representatives and private representatives
- the number of appointments of representatives that are revoked, varied, or reviewed.

GUIDELINE 9: Tribunals should collect data and report publicly on the rate of appointment of legal representatives, separate representatives and guardians ad litem to represent the Person in proceedings.

GUIDELINE 10: Hearing venues should:

- be wheelchair accessible
- have drop-off zones for people with mobility restrictions
- have easily accessible parking
- be accessible by public transport
- provide accessible toilets.

GUIDELINE 11: Tribunals should consider the amenity of waiting room spaces, given the impact this can have on the Person’s anxiety levels leading up to the hearing and their ability to participate in the hearing.

GUIDELINE 12: Tribunals should consider the amenity and configuration of hearing rooms. Hearing rooms should:

- provide the option of a more informal setting than a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the Person at ease
- provide hearing induction loop facilities, and
- provide video conference and tele-conference facilities.

GUIDELINE 13: The Person may be accompanied by a support person during the hearing unless the Tribunal determines that the proposed support person is acting, or is likely to act, in a manner contrary to the Person’s interests. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.

GUIDELINE 14: In those jurisdictions that require the leave of the Tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the Person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the Person and their legal representative have adequate time to prepare.

GUIDELINE 15: In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the Person, consideration of whether such an appointment should be made should occur at the earliest opportunity.

GUIDELINE 16: Tribunal members need to be trained in the use of communication supports that a Person may require to participate in the hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.

GUIDELINE 17: Given the centrality of the Person who is the subject of guardianship and/or administration proceedings, the Person should have a genuine opportunity to participate in an oral hearing before a determination is made.

GUIDELINE 18: Original applications should be determined after an oral hearing.

GUIDELINE 19: Reviews of existing orders should ordinarily be determined after an oral hearing. Where reviews of orders are determined without an oral hearing, before making a determination the Tribunal should make reasonable attempts to obtain the views of the Person, up-to-date medical information about whether the Person continues to have a decision-making disability and the Person's current circumstances.

GUIDELINE 20: Acknowledging that some jurisdictions are constrained by their enabling legislation regarding composition of panels, consideration should be given to using multi-member panels to ensure that the Tribunal has the breadth of skills and experience relevant to the circumstances of the Person

and the issues to be determined in the particular matter.

GUIDELINE 21: Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.

GUIDELINE 22: Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be used in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community-based experience.

GUIDELINE 23: Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.

GUIDELINE 24: Training for members and registry staff about strategies to involve the Person in guardianship proceedings is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.

GUIDELINE 25: Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members and staff with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.

GUIDELINE 26: Members and registry staff should be given training which promotes awareness of cultural considerations relevant to Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people.

Definitions

In these Guidelines:

APPLICANT means the Person who makes an application for a Guardianship order.

APPLICATION means a request made to a Tribunal for a guardianship order.

GUARDIANSHIP means the concept of substitute decision-making whereby a court or tribunal authorises a person(s) to make decisions on behalf of the Person, in relation to decisions about the Person's personal affairs. For convenience, in these Guidelines, guardianship is given an extended meaning and includes decisions made on behalf of the Person, in relation to, among other things, the Person's estate (income, property and assets).

GUARDIANSHIP ORDER means an order made by a Tribunal appointing a person to make substitute decisions on behalf of the Person.

THE PERSON means the Person who is the subject of an application for a Guardianship order or the Person who is the subject of a review by the Tribunal of a Guardianship order.

TRIBUNAL means a statutory body vested with power to, among other things, make and/or review Guardianship orders.

1. Summary

1.1 In May 2019, the Australian Guardianship and Administration Council (AGAC)¹ endorsed "Guidelines for maximising the participation of the Person in guardianship proceedings" (the Guidelines). This report sets out the background to these Guidelines.

1.2 AGAC prepared the Guidelines in response to a recommendation made by the Australian Law Reform Commission (ALRC) proposing the development of

*"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."*²

Noting that AGAC's functions include "developing consistency and uniformity, as far as practicable, in respect of significant issues and practices" and "encouraging dialogue at a national level, and across relevant jurisdictions" the ALRC considered AGAC "well placed" to "develop a best practice model to facilitate maximum participation of the represented person in the process of determining whether to appoint a guardian or financial administrator".³

1.3 The Guidelines have been developed following consultation with individuals and organisations, including community organisations representing and/or advocating on behalf of, people with a decision-making disability.⁴ The Guidelines are designed to provide practical guidance to

¹ The Australian Guardianship and Administration Council is a peak organisation whose members have a role in protecting adults in Australia who have a disability that impairs their capacity to make decisions. AGAC's members include statutory public advocates, public and adult guardians, boards and tribunals and public and state trustees or their equivalents throughout Australia. In April 2018, AGAC established a governance group to develop the Guidelines (the AGAC Governance Group).

² Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) ('ALRC, Report 131') [10-2].

³ *Ibid*, [10.36].

⁴ The methodology used to develop the Guidelines is set out in *Maximising the participation of the person in guardianship proceedings – Draft guidelines for Australian tribunals* (Issues Paper, 2018), Annexure C.

tribunals about measures they can take to enable the participation of the Person who is the subject of an application for a guardianship order, or a review of an existing guardianship order (the Person). AGAC is indebted to the many people and organisations who have assisted with the development of these Guidelines.

1.4 This report should be read together with two papers prepared by AGAC in the course of developing the Guidelines: *Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian Tribunals* (Issues Paper, 2018) (Issues Paper)⁵ and *Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian Tribunals* (Interim Report, February 2019) (Interim Report).⁶

2. Development of the Guidelines

2.1 In developing the Guidelines, AGAC:

- reviewed current participation rates of the Person in guardianship proceedings in Australian tribunals;
- examined “best practice”⁷ initiatives employed by Australian tribunals to encourage participation of the Person in guardianship proceedings;
- examined best practice initiatives in comparable Australian and overseas jurisdictions;
- formulated *Draft Guidelines for Australian Tribunals: Maximising the Participation of the Person in Guardianship Proceedings* (“Draft Guidelines”);⁸

- invited over 150 groups and individuals to comment on the Draft Guidelines and posted an open invitation on the AGAC website;
- prepared and distributed an issues paper which outlined the barriers to participation in guardianship proceedings faced by people with decision-making disabilities, and practices employed by Australian tribunals and tribunals in comparable overseas jurisdictions to encourage the participation of the Person in guardianship proceedings;
- commissioned the production of an Easy English version of the Draft Guidelines and gave a copy of that version to each of the groups and individuals invited to comment on the Draft Guidelines. In addition, AGAC posted the Easy English version of the Draft Guidelines on its website;
- gave a presentation on the Draft Guidelines at AGAC’s biennial conference, *Upholding rights, preventing abuse and promoting autonomy*, (Canberra, 14–15 March 2019);
- engaged social work academics, Dr Margaret Spencer and Mr Francis Duffy, to conduct focus group discussions on the Draft Guidelines with people who are the subject of guardianship orders;
- after considering the 39 written submissions received in response to the Draft Guidelines, together with a report prepared by Dr Spencer and Mr Duffy, revised the Draft Guidelines.⁹

⁵ Annexure 1 to this report.

⁶ Annexure 2 to this report.

⁷ The Issues Paper notes at [1.17] that although “best practice” is the language used in the ALRC, Report 131, the research conducted in the preparation of the Draft Guidelines indicates that there appears to be limited, if any, evaluation of the success or otherwise of efforts to

maximise the participation of people about whom guardianship and/or administration applications are made.

⁸ Issues Paper, [3.6].

⁹ On 8 March 2019, the AGAC Heads of Tribunal (HoTS) Group considered the submissions received about the Draft Guidelines and endorsed a series of amendments to those Guidelines. The AGAC Governance Group adopted those amendments and made several additional

3. Amendments to the Draft Guidelines

3.1 In February 2019, AGAC reported to the Commonwealth Government on the responses to the Draft Guidelines received from the groups and individuals who responded to AGAC's invitation to comment.¹⁰ In addition, AGAC gave the Government the report prepared by Dr Spencer and Mr Duffy about the feedback received from the focus group discussions on the Draft Guidelines (the Spencer Duffy report).¹¹

3.2 In reviewing the Draft Guidelines, AGAC considered the written submissions received about those Guidelines, the Spencer Duffy report, the Issues Paper and the Interim Report.

3.3 While contributors were critical of aspects of the Draft Guidelines, all welcomed the introduction of national guidelines designed to maximise the participation of the Person in guardianship proceedings. This report does not address separately each of the submissions made by contributors, except where necessary to explain the amendments made to the Draft Guidelines.¹²

3.4 We set out below the key amendments made by AGAC to the Draft Guidelines. The numbering of the draft guidelines does not match the numbering of the final guidelines.

Pre-hearing stage (Draft Guidelines 1, 2, 3, 4, 5 and 6)

DRAFT GUIDELINE 2: *The Person and other parties should be promptly notified of an application being made.*

3.5 Several contributors contended that Draft Guideline 2 was deficient because it

lacked specificity. They pointed out that this Draft Guideline failed: (i) to prescribe who was responsible for notifying the Person that an application had been made; (ii) to require the person responsible for notifying the Person, to provide evidence that they complied with the notification requirement; (iii) to require that the Person be given a copy of the application and supporting documents; and (iv) to specify when the Person must be notified that an application had been made.

3.6 Many contributors gave examples of cases where the Person had not been notified that an application had been made. Dr Spencer and Mr Duffy reported that one third of the participants in the focus group discussions reported that they had not been told about the hearing of the application. Others reported "not [being] told the full story" or feeling "hoodwinked".

3.7 Reflecting these concerns, AGAC amended Draft Guideline 2 by:

- specifying that the Tribunal should give, or require the applicant to give, a copy of the application and supporting documents to the Person;
- where the applicant is required to give a copy of the application to the Person, requiring the applicant to provide evidence that they had complied with this requirement; and
- requiring that the Person be given a copy of the application and supporting documents "promptly but no later than 10 days from the date the application was lodged".

amendments at a meeting on 15 March 2019. The final version of the Guidelines was adopted by the Governance Group at a meeting on 28 May 2019.

¹⁰ Interim Report, *Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian tribunals*, February 2019.

¹¹ See Annexure E to the Interim Report.

¹² See the Interim Report for a summary of the main issues and concerns raised by contributors about the Draft Guidelines.

DRAFT GUIDELINE 3: *Written notice of hearing should be given to the Person and other parties well in advance of the hearing. Registry staff may need to consider whether any additional steps need to be taken to ensure that the Person is informed of the hearing details.*

3.8 Contributors were generally supportive of Draft Guideline 3. There were mixed views about whether the Guidelines should prescribe a minimum period of notice of the hearing, and, if so, the appropriate period of notice. There was strong support for the proposal that registry staff be required to consider whether, in addition to giving the Person written notice of the hearing, additional steps should be taken to ensure that the Person is informed of the hearing.

3.9 Draft Guideline 3 was amended by:

- requiring that the Person be given written notice of the hearing at least 7 working days before the hearing; and
- waiving that requirement in “special circumstances”, such as where there are reasonable grounds to conclude that the Person will be at risk if the determination of the application is delayed.

DRAFT GUIDELINE 4: *Pre-hearing processes should seek to ensure that:*

- *the Person is made aware of the application*
- *information is provided to assist the Person to understand what the application and hearing is about*
- *the Person’s participation is encouraged (unless to do so would be detrimental to the Person)*
- *any further information that may assist the Tribunal is obtained from the Person*
- *the Person is provided with information as required about representation including advocacy*
- *information is given to the Person about Tribunal practice and procedure and to*

assist in addressing any confusion or anxiety where possible

- *the Person has an opportunity to ask questions about any of these matters*
- *information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids.*

3.10 Contributors expressed conflicting views about the exemption from the requirement that “pre-hearing processes should seek to ensure that ... the Person’s participation is encouraged” in circumstances where to “do so would be detrimental to the Person”: (Draft Guideline 4, dot point 3). While there was some support for this exemption, most contributors who commented on Draft Guideline 4 opposed this exemption. Some contributors urged AGAC to remove the exemption in its entirety. Others favoured retaining some form of exemption, providing that the party asserting that it is likely to be detrimental to the Person to participate in proceedings is required to provide the Tribunal with firm evidence to support that assertion.

3.11 After detailed consideration, AGAC decided to delete the exemption in its entirety. AGAC concluded that the risk of any detriment to the Person is likely to be outweighed by the risk that the exemption might be used by parties to prevent the Person from participating in proceedings because of misplaced paternalism or some ulterior motive. In addition, AGAC concluded that the proposed exemption could significantly delay the determination of the application or review, by requiring the Tribunal to determine at the pre-hearing stage whether, as alleged, it would be to the detriment of the Person to participate in proceedings.

3.12 In response to concerns raised by contributors, several amendments have been made to strengthen Draft Guideline 4, including the deletion of the words “seek to” from the opening sentence.

3.13 Several contributors suggested that other types of communication supports be added to those listed in dot point 8. AGAC considered this unnecessary because the listed communication supports are given by way of example and are neither stated as, nor intended to be, exhaustive.

3.14 Draft Guideline 4 was amended by:

- deleting the words “seek to” from the opening sentence;
- deleting from dot point 3 the words “unless to do so would be detrimental to the Person”;
- inserting in dot point 3 after the word “encouraged” the words “and facilitated”;
- deleting from dot point 5 the words “as required” and including after the word “advocacy” the words “if any”; and
- deleting from dot point 6 the words “where possible”.

DRAFT GUIDELINE 5: *Optimally, the listing of a hearing should take into account: whether any particular needs of the Person require a hearing at certain times of the day (for example, a morning hearing rather than the afternoon, or taking into account the effects of medication) an estimate of the length of time the Person may need to give their views to the Tribunal, having regard to their communication needs any need for breaks during the hearing any additional time required for the use of an interpreter.*

3.15 The only amendment of substance made to this Draft Guideline was the removal of the word “optimally” from the opening sentence. That amendment was made in response to strong concerns expressed by many contributors.

DRAFT GUIDELINE 6: *Information about various aspects of the Tribunal’s practice and procedure (both in hard copy and online) should be made available to the Person in formats that are accessible to people:*

- from culturally and linguistically diverse backgrounds
- with a vision and/or hearing impairment
- with cognitive disabilities.

3.16 No amendments of substance were made to this Draft Guideline.

At the hearing **(Draft Guidelines 7, 8, 11, 13)**

DRAFT GUIDELINE 7: *Optimally, hearings should be listed in a location that allows the Person to participate in the hearing in-person.*

3.17 Contributors expressed strong support for hearings being held in locations accessible to the Person including in rural and regional Australia. Many contributors urged that where the Person is unable to travel, hearings should be conducted in “outreach locations”, such as hospitals, aged care facilities and the Person’s home.

3.18 Several contributors contended that the word “optimally” should be deleted from Draft Guideline 7, arguing that conducting a hearing in a location that is inaccessible to the Person effectively denies the Person the opportunity to participate in the proceedings. Speech Pathology Australia, for example, pointed out that even a mild cognitive impairment can make it difficult, if not impossible, for a person to participate in

a hearing conducted by telephone, especially where there are multiple participants.¹³

3.19 AGAC acknowledges that holding a hearing in a location that is accessible to the Person is more likely to achieve the objective of maximising the participation of the Person in guardianship proceedings. However, there will be occasions, such as where the Person lives in a remote and isolated community, or where there is a need for an urgent hearing because of a real and imminent risk to the Person’s safety, where it would be impractical to hold a hearing in a location that allows the Person to participate in the hearing in-person.

3.20 AGAC has decided that the requirement that hearings be conducted in a location that allows the Person to participate in a face-to-face hearing cannot be unqualified. Draft Guideline 7 was amended by deleting the word “optimally” and substituting the words “where practicable”.

DRAFT GUIDELINE 8: *If a face-to-face hearing is not possible or practicable, then other means by which the Person can participate in the hearing should be explored. This may include:*

- *measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a “Visit to the Person” by a Tribunal member*
- *the views of the Person being provided by way of a representative*
- *videoconferencing*
- *telephone participation.*

3.21 No material amendment was made to this Draft Guideline.

DRAFT GUIDELINE 11: *Hearing venues should:*

- *be wheelchair accessible*
- *have drop-off zones for people with mobility restrictions*
- *have easily accessible parking*

- *be accessible by public transport*
- *provide accessible toilets.*

DRAFT GUIDELINE 12: *Tribunals should give consideration to the amenity of waiting room spaces, given the impact this can have on the Person’s anxiety levels, leading up to the hearing, and their ability to participate in the hearing.*

DRAFT GUIDELINE 13: *Tribunals should give consideration to the amenity and configuration of hearing rooms.*

Hearing rooms should:

- *provide the option of a more informal setting that is distinct from a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the Person at ease;*
- *provide hearing induction loop facilities; and*
- *provide videoconference and teleconference facilities.*

3.22 Contributors expressed strong support for Draft Guidelines 11, 12 and 13, which are designed to ensure that the hearing room is accessible to the Person and that the physical environment in which the hearing is conducted is conducive to enabling the Person to participate in proceedings.

3.23 No material amendments were made to these Draft Guidelines.

Support and representation (Draft Guidelines 14, 15, 16)

DRAFT GUIDELINE 14: *Tribunals should, wherever beneficial for the subject Person, allow the Person to be accompanied by a support person during the hearing. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.*

¹³ Issues Paper [5.17].

3.24 Many contributors criticised the use of the words “wherever beneficial” in Draft Guideline 14. Professor Terry Carney,¹⁴ for example, argued that giving the Tribunal power to exclude a support person from accompanying the Person to a hearing on the ground that their attendance might not be beneficial for the Person is “very paternalistic”. While agreeing with the sentiments expressed by Professor Carney, the Council for Intellectual Disability (CID) and others¹⁵ contended that the Tribunal should have power to exclude a support person from a hearing where the Tribunal is satisfied that the interests of that person are in conflict with those of the Person.

3.25 These legitimate concerns are difficult to resolve. While it is unarguable that the Person should have the right to determine whether a support person should or should not accompany them to a hearing, there will be cases where the Person is unable or unwilling to communicate their wishes. The proposal that a support person be automatically barred from accompanying the Person to a hearing in circumstances where their interests conflict with those of the Person, while superficially attractive, fails to acknowledge that it is not uncommon for there to be an actual or potential conflict between the interests of the Person and the interests of their support person. For example, there may be a conflict of interest where the subject application is for a financial management order and the support person is a beneficiary of the Person’s estate, resides in the Person’s home, and/or is engaged by the Person to provide services. In our view, it would be inappropriate to automatically deny the Person the right to be accompanied to a hearing by the support person of their choice, especially where there

is no reasonable basis to conclude that the support person is likely to seek to influence the Person, to promote their own interests.

3.26 After exploring several options, AGAC decided to amend Draft Guideline 14 by deleting the words “wherever beneficial” and giving the Tribunal the discretion to exclude a support person from a hearing if it determines that the Person is “acting, or is likely to act, in a manner contrary to the Person’s interests”.

DRAFT GUIDELINE 15: *In those jurisdictions that require the leave of the Tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the Person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the Person and their legal representative have adequate time to prepare.*

3.27 While welcoming a requirement that where it is necessary to apply for leave to represent the Person, the Tribunal must determine that application at the earliest possible opportunity, the Law Council of Australia and several organisations representing legal practitioners,¹⁶ urged AGAC to amend the Guidelines to give legal practitioners an automatic right to represent the Person, without leave of the Tribunal.

3.28 In several jurisdictions,¹⁷ it is a statutory requirement that leave of the Tribunal is required for the Person, and any other party, to be legally represented. The Guidelines cannot override this or any other statutory requirement. Legislative amendment is required. The Guidelines are intended to cover matters of practice and procedure which tribunals can control. For that reason no material amendment was made to this guideline.

¹⁴ Interim Report [5.55].

¹⁵ Interim Report [5.56].

¹⁶ See Interim Report [5.58]–[5.62].

¹⁷ Issues Paper [5.43]; see, for example, *Civil and Administrative Tribunal Act 2013* (NSW), s 45; *Victorian Civil and Administrative Act 1998* (Vic), s 62.

DRAFT GUIDELINE 16: *In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the Person, consideration of whether such an appointment should be made should occur at the earliest opportunity.*

3.29 No material amendments were made to Draft Guidelines 15 and 16.

Oral hearings (Draft Guidelines 19, 20)

DRAFT GUIDELINE 19: *As a matter of good practice, original applications should be determined after an oral hearing.*

DRAFT GUIDELINE 20: *As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of orders are determined without an oral hearing, tribunals should consider their respective statutory obligations about considering the views of the Person before making a determination.*

3.30 The view expressed by the Australian Law Reform Commission that oral hearings provided an “important mechanism to maximise the participation of the represented person”,¹⁸ was shared by all contributors who commented on Draft Guidelines 19 and 20. Contributors expressed strong support for oral hearings (also referred to as “face-to-face hearings”) being conducted to both determine applications for guardianship orders and to review existing guardianship orders. As discussed at [3.18] above, many contributors consider face-to-face hearings to be the best method to facilitate the genuine participation of the Person in the Tribunal’s decision-making processes.

3.31 Many contributors were critical of the practice of some tribunals of conducting

reviews of guardianship orders “on the papers”, that is without an oral hearing, and urged AGAC to amend the Draft Guidelines to require that oral hearings be conducted in all cases. The Intellectual Disability Rights Service (IDRS), for example, contended that the practice of conducting a review on the papers “effectively exclude[s] participation by the Person the subject of the order”.¹⁹ Several contributors asserted that determining applications for and conducting reviews of guardianship orders without an oral hearing places a Person with communication difficulties at a great disadvantage.

3.32 AGAC accepts that as a general rule, a face-to-face hearing is more likely to achieve the objective of facilitating the participation of the Person. However, AGAC decided not to amend the Guidelines to require oral hearings to be conducted in all cases because of, among other things, the significant resource implications for tribunals which service remote and rural communities spread over large geographical areas, such as the Northern Territory Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal. Nonetheless, AGAC decided to strengthen Draft Guidelines 19 and 20 by:

- deleting from Draft Guidelines 19 and 20 the words “as a matter of good practice”; and
- requiring that where reviews are determined without an oral hearing, before making a determination the Tribunal should make reasonable attempts to obtain the views of the Person, up-to-date medical information about whether the Person continues to have a decision-making disability and the Person’s current circumstances: Draft Guideline 20.

¹⁸ ALRC, Report 131 [10.45].

¹⁹ Interim Report [5.65].

Composition of the Tribunal (Draft Guidelines 21, 22, 23, 24)

DRAFT GUIDELINE 21: *Acknowledging that some jurisdictions are constrained regarding composition of panels (such as WA), consideration should be given to the composition of tribunal panels that hear guardianship and administration matters.*

DRAFT GUIDELINE 22: *Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.*

DRAFT GUIDELINE 23: *Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be utilised in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community based experience.*

DRAFT GUIDELINE 24: *Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.*

3.33 Contributors expressed strong support for the statement in Draft Guideline 22 that “multi-disciplinary panels constituted by members with relevant and different areas of expertise are optimal”.²⁰

3.34 AGAC acknowledges that there are many advantages in using multi-member panels to determine applications for guardianship orders and to review existing orders. As noted by the ALRC, these include being better able to engage with the Person.²¹

3.35 As noted in the Issues Paper, the use of multi-member panels to determine applications and reviews varies throughout

Australia.²² No jurisdiction routinely uses multi-member panels to conduct reviews of existing guardianship orders. To mandate that multi-member panels be used in all proceedings would have significant cost implications. For that reason, AGAC decided not to amend the Guidelines by requiring multi-member panels to be used in all cases.

However, AGAC decided to amend the Draft Guidelines by:

- strengthening Draft Guideline 21; and
- adding to Draft Guideline 22 the words “multi-disciplinary panels should at least be used in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community-based experience”.

Training of members and registry staff (Draft Guidelines 17, 25)

DRAFT GUIDELINE 17: *Tribunal members need to be trained in the use of communication supports that a person may require in order to participate in the hearing, including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.*

DRAFT GUIDELINE 25: *Training for members and registry staff about strategies to involve Persons who are the subject of applications is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.*

3.36 Contributors expressed strong support for Draft Guidelines 17 and 25. No material amendments were made to these Draft Guidelines.

²⁰ See for example the submissions made by the Seniors Rights Service; Julia Casey; Cheryl McDonnell; CID; IDRS; PWDA; Macquarie Law School and the Australian Research Network on Law and Ageing, Darwin Community Legal Service.

²¹ Issues Paper [7.5].

²² Issues Paper [7.6]–[7.13].

Participation of Aboriginal and Torres Islander people (Draft Guideline 26)

DRAFT GUIDELINE 26: *Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members and staff with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.*

3.37 Contributors expressed strong support for Draft Guideline 26. No material amendment was made.

Data collection (Draft Guidelines 9, 10)

DRAFT GUIDELINE 9: *Tribunals should collect data and report publicly on the participation rates of persons in hearings, broken down into in-person participation, hearings by videoconference, and hearings by telephone.*

DRAFT GUIDELINE 10: *Tribunals should also collect data and report publicly on the rate of appointment of representatives.*

3.38 Contributors expressed strong support for Draft Guidelines 9 and 10. No material amendments were made to these Draft Guidelines.

4. Data on the participation rates of the Person: a snap shot

4.1 In developing the Guidelines, AGAC analysed “current participation rates of proposed represented persons in guardianship and financial management/administration hearings in Australia’s state and territory jurisdictions”.²³

4.2 This task proved difficult as there is no readily available Australia-wide information

about the participation rates of the Person in guardianship hearings. Few participating tribunals collect that information on a regular basis. Those that do use different methods to collect and collate that information.²⁴

4.3 Given the lack of available and reliable data on the participation rates of the Person, the AGAC Governance Group decided to request participating tribunals to collect data for a specific period, that is October and November 2018. The Tribunals were requested to provide information on participation rates broken down into type of hearing, application or review, and method of participation, in-person, by phone or by video-conference.

4.4 All but one participating tribunal provided the requested data.²⁵

4.5 The collected data reveals:

- a wide variation in participation rates of the Person between jurisdictions;
- a less than 50% participation rate of the Person in most jurisdictions;
- a higher participation rate of the Person in original application hearings as compared to review hearings; and
- where participants participated in the hearing, most attended in-person.

4.6 Given the length of the period surveyed, care must be taken in drawing conclusions from the collected data. A longer survey period might have produced a different result. Nonetheless, the collected data indicates that the participation rates of the Person in many jurisdictions is low and points to the desirability of Guidelines designed to facilitate the participation of the Person.

²³ See Issues Paper [1.12].

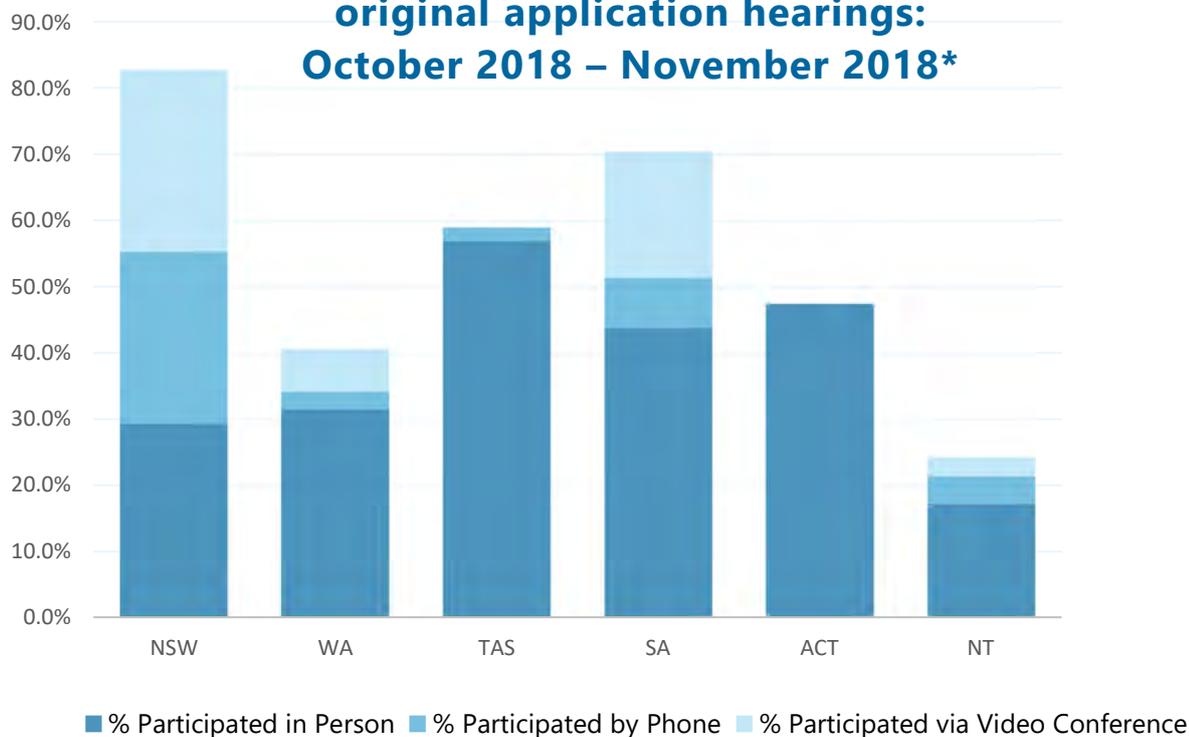
²⁴ See Guideline 9, requiring tribunals to collect data and report publicly on the participation rates of persons in hearings.

²⁵ The Queensland Civil and Administrative Tribunal was unable to provide data that distinguished between review

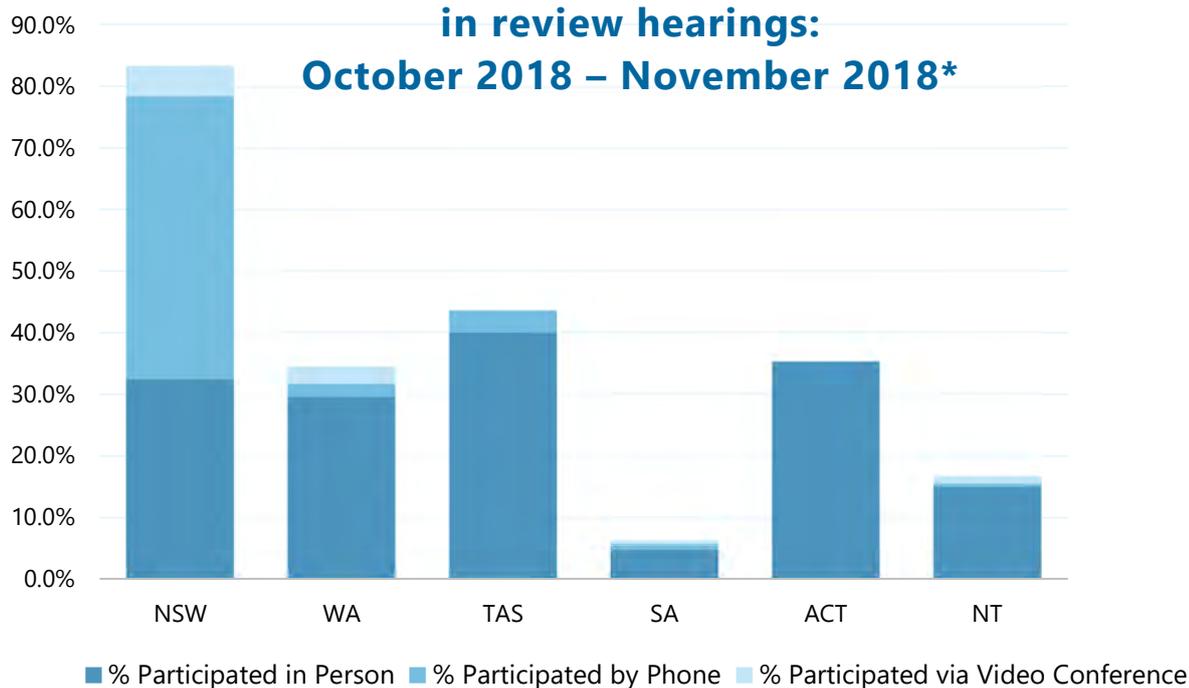
and original hearings. The data provided by the South Australian Civil and Administrative Tribunal included reviews conducted “on the papers”, that is, without a hearing. The Victorian Civil and Administrative Tribunal collected the data but because of a systems error was unable to provide the data to AGAC.

Data

Participation of the Person in original application hearings: October 2018 – November 2018*



Participation of the Person in review hearings: October 2018 – November 2018*



**Combined participation of
the Person in original and review hearings:
October 2018 – November 2018****



*Qld was not able to provide separate data for original applications and reviews.

** Vic was not able to provide the data collected due to a systems error.

Glossary

In this report:

APPLICANT means the person who makes an application for a guardianship order.

APPLICATION means a request made to a Tribunal for a guardianship order.

GUARDIANSHIP means the concept of substitute decision-making whereby a court or tribunal authorises a person(s) to make decisions on behalf of the Person, in relation to decisions about the Person's personal affairs. For convenience, in the Guidelines and this report, guardianship is given an extended meaning and includes decisions made on behalf of the Person, in relation to, among other things, the Person's estate (income, property and assets).

GUARDIANSHIP ORDER means an order made by a tribunal appointing a person to make substitute decisions on behalf of the Person.

REVIEW OF EXISTING ORDER means a review conducted by a tribunal of an existing guardianship order to determine whether it should be renewed, revoked or varied.

THE PERSON means the Person who is the subject of an application for a guardianship order or the Person who is the subject of a review by the Tribunal of a guardianship order.

TRIBUNAL means a statutory body vested with power to, among other things, make and/or review guardianship orders.

Annexure 1

Interim report

Maximising the participation of the Person in guardianship proceedings – Draft Guidelines for Australian Tribunals

February 2019

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

Interim report, February 2019

Table of Contents

1. Introduction	2
2. Background to Draft Guidelines.....	2
3. Consultation process.....	3
4. Overview of the Draft Guidelines.....	4
5. Response to Draft Guidelines	4
Pre-hearing stage (Draft Guidelines 1, 2, 3, 4, 5 and 6)	4
At the hearing (Draft Guidelines 7, 8, 11, 12, 13)	10
Support and representation (Draft Guideline 14, 15, 16)	12
Oral hearings (Draft Guidelines 19, 20)	14
Composition of the Tribunal (Draft Guidelines 21, 22, 23, 24)	14
Training of members and registry staff (Draft Guidelines 17, 25).....	15
Participation of Aboriginal and Torres Islander people (Draft Guideline 26).....	16
Data collection (Draft Guidelines 9, 10).....	16
Annexure A – The Draft Guidelines	
Annexure B – Groups and individuals invited to comment on the Draft Guidelines	
Annexure C – List of Contributors	
Annexure D – Easy Read AGAC Draft Guidelines on participation for consultation	
Annexure E – Report by Dr Spencer and Mr Duffy	
Glossary	

1. Introduction

- 1.1 In 2017, the Australian Law Reform Commission (ALRC) in its report *Elder Abuse – A National Legal Response*¹ recommended that the Australian Guardianship and Administration Council (AGAC)² develop:

[B]est 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

- 1.2 On behalf of AGAC, the NSW Civil and Administrative Tribunal (NCAT) is undertaking a project (the Project) designed to develop 'best practice' guidelines⁴ as recommended by the ALRC (the Guidelines).
- 1.3 This interim report details the feedback received from individuals and groups in response to draft guidelines endorsed by the AGAC Governance Group⁵ at its meeting in Darwin on 31 August 2018 (the Draft Guidelines).⁶ Amendments to the Draft Guidelines suggested by contributors are set out in this report. AGAC will review the issues raised by contributors and determine whether it is appropriate and desirable to amend the Draft Guidelines. The Project is due for completion by 30 June 2019.

2. Background to Draft Guidelines

- 2.1 As part of the Federal Government's 2016 election commitment to fund a national plan to prevent elder abuse, titled 'Protecting the Rights of Older Australians', the NCAT received funding to develop a set of "best practice guidelines" on behalf of AGAC.
- 2.2 Preparation of the Guidelines involves:
- analysis of current participation rates of proposed represented persons in guardianship and financial management/administration hearings in Australia's state and territory jurisdictions;
 - examination of the 'best practice' initiatives already in place to encourage participation; and

¹ Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) ('ALRC, Report 131') ALRC, Report 131 [10-1].

² Australian Guardianship and Administration Council is a peak organisation whose members have a role in protecting adults in Australia who have a disability that impairs their capacity to make decisions. AGAC's members include Public Advocates, Public and Adult Guardians, Boards and Tribunals and Public and State Trustees or their equivalents throughout Australia.

³ ALRC, Report 131 [10-1].

⁴ The Background Paper noted at [1.17] that although 'best practice' is the language used in the ALRC, Report 131, the research conducted in the preparation of the Draft Guidelines indicates that there appears to be limited, if any, evaluation of the success or otherwise of efforts to maximise the participation of people about whom guardianship and/or administration applications are made.

⁵ On 20 April 2018, AGAC established a Governance Group to oversee the Project and in addition projects on development of a national 'best practice' resource for enduring appointments and completion of an options paper concerning possible harmonisation of enduring appointment laws and practices.

⁶ See Annexure A.

- where appropriate, drawing on practices in place in comparable jurisdictions overseas and in other relevant judicial and quasi-judicial hearings in Australia.
- 2.3 The methodology of the Project is described in Annexure B to a paper prepared for the Project: Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings – Draft Guidelines for Australian Tribunals* (Issues Paper, 2018) (Issues Paper).

3. Consultation process

- 3.1 In November 2018, AGAC invited over 150 groups and individuals⁷ to make submissions in response to the Draft Guidelines.⁸ In addition, AGAC posted an invitation on its website inviting comment on the Draft Guidelines. The invitations were accompanied by an Issues Paper that outlined:
- the genesis of the Project;
 - information gathered in the literature review of ‘best practice’ initiatives already in place to encourage participation in Australia and comparable jurisdictions; and
 - the rational for each Draft Guideline.
- 3.2 In an effort to reach a wide audience and to elicit the views of people with decision-making disabilities, AGAC prepared and provided to each party invited to make submissions an Easy English version of the Draft Guidelines.⁹ That version was also posted on the AGAC website.
- 3.3 AGAC received 39 submissions in response to the Draft Guidelines.¹⁰
- 3.4 AGAC is indebted to the contributors for their interest in the Project and their assistance and suggestions.
- 3.5 In addition to the formal consultation process, AGAC requested social work academics and members of NCAT’s Guardianship Division, Dr Margaret Spencer and Mr Francis Duffy to consult with people who have been the subject of applications for guardianship and/or financial management. AGAC is unaware of any similar type of consultation conducted in Australia. It provides invaluable information which will assist AGAC in reviewing the Draft Guidelines. Regrettably, given the timing of receipt of their report, the recommendations made by Dr Spencer and Mr Duffy are not detailed in this report. AGAC will consider those recommendations in the context of its review of the Draft Guidelines.¹¹

⁷ The groups and individuals invited to comment on the draft guidelines are listed in Annexure B to this report.

⁸ The list of the contributors and a link to their submissions are listed in Annexure C to this report.

⁹ The Easy English version of the Draft Guidelines is reproduced in Annexure D to this report.

¹⁰ The deadline for submissions was 11 January 2019. Ten parties were given a short extension to provide submissions.

¹¹ The report prepared by Dr Spencer and Mr Duffy is at Annexure E to this report.

4. Overview of the Draft Guidelines

- 4.1 The ALRC determined that the key elements of a model to facilitate the participation of the Subject Person in the process of determining whether to appoint a guardian or financial manager could include:
- case management and support during the pre-hearing stage;
 - composition of the tribunal for the purposes of a particular proceeding;
 - ensuring an oral hearing is held for all substantive applications; and
 - alternative methods for participation.¹²
- 4.2 The Draft Guidelines focus on these elements.

5. Response to Draft Guidelines

- 5.1 While contributors proposed a number of amendments to the Draft Guidelines, there was unanimous support for the introduction of guidelines designed to maximise the participation of the Subject Person in guardianship, financial management/administration proceedings.
- 5.2 For convenience, we consider the responses to the Draft Guidelines under the following headings.
- pre-hearing stage;
 - at the hearing;
 - support and representation;
 - composition of the Tribunal;
 - training of members and registry staff;
 - participation of Aboriginal and Torres Strait Islander people; and
 - data Collection

Pre-hearing stage (Draft Guidelines 1, 2, 3, 4, 5 and 6)

- 5.3 Contributors acknowledged the critical role that pre-hearing processes and support play in enabling the Subject Person to participate in the determination of an application. Strong support was voiced for the approach taken in the Draft Guidelines of prescribing that the Subject Person be provided with a minimum level of support during the pre-hearing stage.

¹² ALRC, Report 131 [10-1].

- 5.4 The issues raised by contributors about the Draft Guidelines relating to the pre-hearing stage include:

Who should provide pre-hearing support?

- 5.5 Various suggestions were made about who should be responsible for providing, or assisting the Tribunal to provide, pre-hearing support to the Subject Person. It was submitted that support be provided by “peer workers” (Mental Health Review Tribunal (MHRT of NSW)), carers or a “person of trust” (Professor Terry Carney), advocates or agents (ACT Disability, Aged and Carer Advocacy Service), or a body similar to the Victorian Public Advocate (Eastern Health (Vic)).

Who should be required to notify the Subject Person that an application had been made?

- 5.6 Contributors raised the question of *who* should notify the Subject Person that an application had been made (Draft Guideline 2). Some suggested that Draft Guideline 2¹³ be amended to clarify who has responsibility for notifying the Subject Person and other parties that an application had been made (Helen Creasy; Seniors Rights Service; Aged and Disability Advocacy Australia (ADA Australia)).
- 5.7 A number of contributors pointed to the potential danger of the applicant being the only person responsible for notifying the Subject Person and other parties that an application had been made. The Seniors Rights Service recommended that while the applicant should retain responsibility for serving notice of the application, as a safeguard the Tribunal should also be required to notify the Subject Person and other parties that an application had been made. The Service stated that it had encountered matters where applicants had failed to notify parties, such as the Subject Person’s partner who they believed should not be involved in the application.¹⁴
- 5.8 Cheryl McDonnell¹⁵ contended that carers, family members and service providers had the potential to act as gatekeepers, blocking notice of the application being given to the Subject Person. Similar concerns were raised by ADA Australia.
- 5.9 The Law Council of Australia recommended that the Tribunal be required to contact the Subject Person by telephone to confirm that they had received a copy of the application.

When should the Subject Person and the other parties be notified that an application had been made?

- 5.10 There was broad support for Draft Guideline 2 which requires the Subject Person and other parties to be given timely notice that an application had been made. A number of contributors were critical of the use of the term ‘promptly’ in Draft Guideline 2 and advocated the use of a definite time frame (Mental Health Commission of NSW; Australian Association of Developmental Disability Medicine).

¹³ Dr Helen Creasey (geriatrician, neurologist and former Senior (professional) member of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT); Cheryl McDonnell; Seniors Rights Service; Aged and Disability Advocacy Australia; Office of the Public Advocate (Qld).

¹⁴ For example where the Subject Person’s children were the applicant and the Subject Person had re-partnered.

¹⁵ Cheryl McDonnell has been a participant in Tribunal proceedings.

Should the Guidelines prescribe a minimum period of notice of the hearing?

- 5.11 There was strong support for the requirement in Draft Guideline 3 that the Subject Person and other parties be given written notice “well in advance” of the hearing.
- 5.12 Many contributors recommended that the Guidelines prescribe that the Subject Person be given a minimum period of notice of the hearing. It was submitted that the period of notice must be sufficient to enable a Subject Person with cognitive impairment to receive and process information (Ms McDonnell; Mental Health Commission of NSW). The Office of Public Advocate (Qld) advocated that the parties and the Subject Person be given at least seven days’ notice of the hearing. ADA Australia submitted that at least 14 days’ notice be given to enable the Subject Person to approach agencies and enable advocates and the lawyers to meet.
- 5.13 ADA Australia pointed to the dangers of listing applications too quickly after an older person was admitted to hospital. ADA Australia argued that this may result in applications being made before the Subject Person recovered from the condition, for which they were admitted. In turn, this may result in guardianship and financial management orders being made and a premature discharge into aged care.
- 5.14 Legal Aid Victoria stated that it sees many clients who were not present at the hearing at which the subject order was made because they were unaware of the hearing, had not received their notice with sufficient time, could not open the notice when it arrived or had not received sufficient support to attend or otherwise meaningfully participate in the hearing.

Should the Guidelines prescribe the form of written notice of the hearing and the manner of service?

- 5.15 Many contributors emphasised the need to tailor the notice of hearing in a format that is accessible to the Subject Person. In addition, there was strong support for all material provided by the Tribunal to the Subject Person to be in an accessible format. (See also comments re Draft Guideline 6).
- 5.16 It was proposed that the Tribunal be required to arrange for the Subject Person to be personally served with the application and notice of hearing.¹⁶ The Tribunal should also contact the Subject Person by telephone to ensure that they had received a copy of the application and accompanying material (Law Council).
- 5.17 In addition, it was submitted that written notice of the hearing be:
- in simple language (Mental Health Commission of NSW; Maria Berry);¹⁷
 - in the language used by the Subject Person (if required) (Michelle Butler); and
 - in a form accessible to the Subject Person (Intellectual Disability Rights Service (IDRS); Law Council of Australia; Darwin Community Legal Service).
- 5.18 The Mental Health Coordinating Council recommended that the Subject Person be sent an SMS reminder of the hearing, asserting that it is not uncommon for participants in tribunal proceedings not to open their mail.

¹⁶ ADA Australia, Cheryl McDonnell and Dr Creasy endorse the approach taken by the WA State Administrative Tribunal, whereby a tribunal officer serves the application on the Subject Person and explains the application and the determination process. See Issues Paper at [4.11].

¹⁷ Maria Berry has participated in tribunal proceedings.

- 5.19 The ACT Disability, Aged and Carer Advocacy Service argued that a notice of hearing without explanation and reassurance about the hearing process can cause distress and lead to the Subject Person needing more pre-hearing support. Dr Creasy echoed that concern.
- 5.20 Many contributors considered the second sentence in Draft Guideline 3 (“Registry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details”) as being critical to ensuring that the Subject Person receives notice of the hearing. Purple Orange and the South Australian Council of Social Service (SACOSS) submitted that Draft Guideline 3 should be strengthened and amended to read: “Registry staff *should* consider whether any additional steps need to be taken ...”

Should the words “unless to do so would be detrimental to the person” be deleted from Draft Guideline 4?

- 5.21 A number of contributors advocated that Draft Guideline 4 dot point 3 (“Pre-hearing processes should seek to ensure that ... the person’s participation is encouraged (unless to do so would be detrimental to the person) ...”) be amended by deleting the words “unless to do so would be detrimental to the person”.
- 5.22 ADA Australia asserted that many jurisdictions follow an “opt out” participatory model whereby the Subject Person rarely participates in hearings, regardless of their capacity to do so. ADA Australia argued that the question of whether participation is likely be detrimental to the Subject Person should not be determined by the applicant, whose interests may be in conflict with the interests of the Subject Person.
- 5.23 Purple Orange and SACOSS submitted that neither the Tribunal nor the parties to proceedings should determine whether it would be detrimental to the Subject Person to participate in the hearing. Purple Orange and SACOSS asserted that a participation model which did not encourage the participation of the Subject Person, on the purported ground that participation would be detrimental to them, offends the requirement in Article 13 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as ... participants...”
- 5.24 The Council for Intellectual Disability (CID) made a similar submission, writing that in its experience, there are great dangers in relying on the views expressed by family members or professionals about whether participation is likely to be detrimental to the Subject Person. CID contends that the views of family members and professionals may be motivated by an overly protective approach, a lack of understanding of the importance of the Subject Person’s views, a lack of understanding of how Tribunal members can tailor the proceedings to the Subject Person’s needs and the convenience of professionals.¹⁸
- 5.25 The NSW Ombudsman recommended that if a view is expressed that “participation in the hearing may be detrimental to the physical or mental health or well-being of the person”, timely action be taken to:

¹⁸ The submission prepared by the Council for Intellectual Disability (CID) has been endorsed by Inclusion Australia, the national peak representative group for people with intellectual disability and their families. State members of Inclusion Australia are the Victorian Advocacy League for Individuals, South Australian Council on Intellectual Disability, Development Disability Western Australia, Parent to Parent Queensland, Speak Out Tasmania, and Council for Intellectual Disability.

- clarify the basis of this view, the source of the expected detriment and the supporting evidence;
 - understand the factors involved (such as whether the view has been promoted by a party that is the subject of allegations); and
 - explore options for facilitating the Subject Person's participation and minimising any adverse impact and risks.
- 5.26 Dr Creasy pointed out that Draft Guideline 4 does not specify who should be responsible for determining whether participation is likely to be detrimental to the Subject Person. The Australian Association of Developmental Disability Medicine argued that care should be taken not to place over-reliance on the opinion of health professionals in determining whether participation is likely to be detrimental to the Subject Person. The Association asserted that many health professionals are not familiar with the nature of guardianship and financial management proceedings and, therefore, their opinion about the Subject Person's capacity to attend and contribute to the proceedings may be misleading. The Association recommended that it should be presumed that if the Subject Person is able to attend their general practitioner, then they will be able to participate in a hearing.
- 5.27 Dr Piers Gooding argued that a decision not to seek the views of the Subject Person must be supported by evidence from an independent health professional.¹⁹
- 5.28 The Law Council pointed to the Victorian Guardianship and Administration Bill 2018, which requires the Subject Person to attend a hearing unless VCAT is satisfied that:
- 29 Participation of proposed represented person at hearing
- (a) The proposed represented person does not wish to attend the hearing in person; or
- (b) The personal attendance of the proposed represented person at the hearing is impracticable or unreasonable, despite any arrangement that VCAT may make.
- 5.29 While supportive of this provision, the Law Council voiced concern about the potential for misuse of para (a), arguing that it could be used against the Subject Person if a person who is not acting in the Subject Person's interest encourages them to say they do not want, or do not need to attend the hearing.

Should further amendments be made to Draft Guideline 4?

- 5.30 Contributors suggested a number of amendments to Draft Guideline 4. In no particular order, they include:
- that the words "seek to" in Draft Guideline 4 be deleted (People With Disability Australia (PWDA); CID);
 - that the words "as required" in dot point 5 be deleted (IDRS);

¹⁹ Dr Gooding argued that a decision that the Subject Person be excused from participating on the grounds of alleged detriment raised several questions: How should independence be assessed? Are there grounds to challenge evidence from an independent medical professional? What are the grounds used by doctors when determining it is not appropriate to seek the views of the person? Is it likely that seeking such views would cause harm, or is it a perception that the person simply could not offer any views to speak of? Do the reasons for such a conclusion need to be provided to and recorded by Tribunals?

- that dot point 4 be amended to read: “Pre-hearing processes should seek to ensure that further information that may assist the Tribunal is obtained from the person and the other parties including information as to the relationship between the parties and the Subject Person”. Macquarie Law School and the Australian Research Network on Law and Ageing (Macquarie) argued that information about the relationship between the Subject Person and the other parties is nearly always relevant in guardianship proceedings; and
- the inclusion of an additional dot point: “The person is provided with information as required about representation including advocacy” (Developmental Disability WA). Developmental Disability WA argued that the Guidelines should require the Tribunal to notify the Subject Person of the existence of, and to facilitate, independent advocacy. It contended that an advocate and a legal representative are not one and the same thing, asserting that the role of an advocate is to assist the Subject Person to speak on their own behalf, while a legal representative “substitutes a person’s self-advocacy”.

Should the word “optimally” be deleted from Draft Guideline 5?

- 5.31 While strong support was expressed for Draft Guideline 5, a number of contributors advocated that the word “optimally” be removed from this guideline (TASSCOSS; Cheryl McDonnell; IDRS; ADACAS (ACT); PWDA).
- 5.32 A number of contributors suggested that in addition to the considerations listed in Draft Guideline 5, when listing an application for hearing, the Tribunal should take into account the need to allocate sufficient time for a hearing when an interpreter is involved (Michelle Butler, La Trobe Regional Hospital; Senior Rights Service; MHRT of NSW). Further, “cultural safety” considerations must be taken into account when arranging an interpreter (Michelle Butler).
- 5.33 The Law Council welcomed Draft Guideline 5, pointing out that the Justice Project concluded that accommodating individual needs through flexible measures such as additional time, breaks and other reasonable adjustments was critical to ensure that individuals with additional needs can understand and meaningfully participate in legal proceedings..²⁰

Should Draft Guideline 6 be amended to broaden the class of persons who must be provided with material in accessible formats?

- 5.34 There was strong support among contributors for Draft Guideline 6 which requires material about a Tribunal’s practice and procedure to be made available in formats accessible to people:
- from culturally and linguistically diverse backgrounds;
 - with a vision or hearing impairment; or
 - with cognitive disabilities.
- 5.35 Many contributors suggested that the class of persons listed in Draft Guideline 6 be extended to include people:
- with communication disabilities (Julia Casey, member of Queensland Civil and Administrative Tribunal, (QCAT)); or

²⁰ Law Council of Australia, *Justice Project: Final Report* (2018), para [20].

- with low literacy skills (Law Council).
- 5.36 In addition, it was suggested that the requirement to provide material in accessible formats should not be restricted to material relating to a tribunal’s practice and procedure but should extend to all material made available to the Subject Person by the Tribunal.

At the hearing (Draft Guidelines 7, 8, 11, 12, 13)

Should the word “optimally” be removed from Draft Guideline 7?

- 5.37 Strong support was expressed for the requirement in Draft Guideline 7 that hearings be held in a location which allows the Subject Person to participate.
- 5.38 Many contributors urged the deletion of the word “optimally” from Draft Guideline 7 (Cheryl McDonnell, TASCROSS, IDRS, Purple Orange and South Australia Council of Social Service, PWDA).
- 5.39 The Seniors Rights Service asserted that a face-to-face hearing provides the best opportunity for an older person to communicate their views to the Tribunal. The Service submitted that it is particularly difficult for a person with even mild cognitive difficulties to follow a telephone conversation, especially where there are many participants. The Service recommended that the Guidelines be amended to require tribunals to hold hearings outside capital cities, to facilitate the attendance of Subject Persons living in regional Australia. Pointing out that many older people are unable to travel, the Service submitted that tribunals should conduct “outreach hearings” in hospitals, hospices and aged care facilities. Julia Casey, Cheryl McDonnell and the Law Council made similar submissions.
- 5.40 While acknowledging the resource implications, the MHRT of NSW submitted that “there is no doubt that face-to-face hearings are more likely to facilitate greater participation of Subject Persons ... than alternatives”. The MHRT of NSW argues that videoconferencing or telephone hearings should be used as a last resort for urgent matters where it is impracticable to arrange a face-to-face hearing.
- 5.41 The Law Council welcomed the Draft Guidelines’ stated preference for face-to-face hearings. The Council pointed out that the Justice Project²¹ found that face-to-face hearings were generally preferable for groups experiencing disadvantage, including older people and regional, rural and remote residents, many of whom are “digitally excluded”. Legal Aid Victoria shared this view.

If it is not “possible or practicable” to conduct a face-to-face hearing, what other hearings options should be made available?

- 5.42 While acknowledging that there will inevitably be circumstances where the Subject Person cannot attend a face-to-face hearing, the consensus was that alternative options should be used as a last resort. PWDA, for example, urged that the word “practicable” be deleted from Draft Guideline 7 arguing that a person’s right to “equal access” should not be determined by the Tribunal’s inability to ensure accessibility.

²¹ See generally, Law Council of Australia, *Justice Project: Final Report* (2018), pp 41–43. The Project analysed the pros and cons of various alternatives to face-to-face court and tribunal processes, cautioning against the adoption of a ‘one size fits all’ approach, at pp 73-81.

5.43 Macquarie submitted that where it is asserted that the Subject Person is unable to participate in a hearing, the Tribunal must assess the veracity of that claim. Macquarie urged that care be taken not to conflate the question of whether the Subject Person has capacity to make decisions (the substantive hearing issue) with the question of whether the Subject Person has the capacity to participate in the hearing process (the procedural hearing issue).

(i) Visit to the Subject Person

5.44 Considerable support was expressed for the ‘Visit to the Person’ option used by the South Australian Civil and Administrative Tribunal.²² See for example, Purple Orange and SACOSS; Julia Casey; Eastern Health (Vic).

5.45 The Office of the Public Advocate (Qld) expressed a cautionary note, asserting that the Tribunal taking evidence from the Subject Person in the absence of the other parties raises issues of procedural fairness.²³

(ii) Participation by phone or videoconferencing

5.46 Dr Creasy submitted that there are “major limitations” to older people attending hearings by telephone without assistive devices that are uniform across all users. The Seniors Rights Service made a similar point arguing that participation by video conference is generally a better option than participation by telephone. The Service argued against the use of “informal video conferencing arrangements” such as Skype, asserting that technical problems are likely to impede the participation of the Subject Person.

5.47 The Law Council recommended that where a face-to-face hearing cannot be held, a visit to the Subject Person is the preferable alternative because the use of videoconferencing and other technologies may exacerbate existing barriers to communication. The Council argued that technological alternatives should be considered with reference to the needs and circumstances of the Subject Person.

(iii) The views of the Subject Person being provided by way of a representative

5.48 A number of contributors raised concerns about the proposal to permit the views of the Subject Person to be expressed by a representative.

5.49 ADA Australia stressed the need for the representative to be independent and pointed to the risk of an interested party claiming to be the representative of the Subject Person.

5.50 Purple Orange and SACOSS submitted that providing the views of the Subject Person by way of a representative should be a last resort. Voicing similar concerns to those expressed by ADA Australia, Purple Orange and SACOSS submitted that the Tribunal must strive to ensure that the representative provides an accurate account of the views of the Subject Person or, where the Subject Person’s views cannot be ascertained, that the representative is voicing what the Subject Person’s views are likely to be, based on all available information, including consultation with family members, carers and other significant people in their life. Cheryl McDonnell expressed a similar view.

²² The ‘Visit to the Person’ option used by the South Australian Civil and Administrative Tribunal is described in the Issues Paper at [5.22].

²³ The Office of the Public Advocate (Qld) explained that the *Queensland Guardianship and Administration Act 2000* (Qld) permits the Tribunal to take evidence from a party to the proceedings in the absence of other interested parties, only after an adult evidence order is made (*Guardianship and Administration Act 2000* (Qld) s 106). Before such an order is made, each party has a right to be heard about whether such an order should be made (*Guardianship and Administration Act 2000* (Qld) s 111).

Should Draft Guidelines 11, 12 and 13 be amended?

- 5.51 Contributors expressed strong support for Draft Guidelines 11, 12 and 13. Suggested amendments included:
- waiting rooms be designed so that parties in dispute can sit apart (Seniors Rights Service; Maria Berry);
 - the design of waiting and hearing rooms to be “trauma informed” (MHRT of NSW);
 - respect be communicated for Aboriginal people, CALD communities, LGBTIQ+ people through the use of “inclusive” posters (Mental Health Commission of NSW);
 - the requirement to provide “accessible toilets” in Draft Guideline 11 be amended to include “and suitable change rooms for use by adults with disability” (Cheryl McDonnell);
 - hearing venues be located near to where food and drink can be purchased (Cheryl McDonnell);
 - appropriate security be provided in hearing venues, including waiting rooms (Australian Unity); and
 - provision be made to enable parties to bring therapeutic companion animals to hearing venues (Mental Health Commission of NSW).
- 5.52 Some contributors questioned the desirability of guardianship hearings being conducted in court rooms (CID; PWDA; Cognitive Decline Partnership Centre). PWDA submitted that for many people with disability, attending hearings in a formal setting, such as a courthouse, can imply that they are “in trouble”. The Cognitive Decline Partnership Centre submitted that many older people associate courts with criminal proceedings and therefore are daunted by the prospect of “appearing in court”.
- 5.53 A number of contributors recommended that Draft Guideline 13 be strengthened by replacing the words, “Tribunals should give consideration to ...” with the words, “Tribunals must ensure hearing rooms are designed and configured in a way that ...”
- 5.54 The Law Council supported hearings being conducted in an informal setting and maintaining a flexible approach to adducing information from people with complex communication needs and Indigenous people. However, the Council submitted that care should be taken to ensure that creating a less formal hearing environment does not lead to “slackness” with respect to the conduct of the proceedings, asserting this can lead to injustice.

Support and representation (Draft Guideline 14, 15, 16)

Should Draft Guideline 14 be amended by deleting the words “whenever beneficial to the subject person” and mandate that an accompanying support person must not have a conflict of interest with the Subject Person?

- 5.55 Professor Terry Carney submitted that giving the Tribunal power to exclude a support person from a hearing, on the grounds that their attendance would not be “beneficial for the subject person” is “very paternalistic”.

- 5.56 CID recommended that Draft Guideline 14 be amended to read: “Tribunals should, whenever desired by or beneficial to the Subject Person, facilitate the person being accompanied by a support person during the hearing. A support person should not have a conflict of interest.”
- 5.57 A number of contributors, including PWDA, Macquarie and IDRS, supported CID’s suggestion that the Tribunal should not allow the Subject Person to be accompanied by a support person who has a conflict of interest with that person.

Should the Draft Guidelines be amended to give the Subject Person a right to legal representation?

- 5.58 The Law Council recommended that the Guidelines be amended to permit the Tribunal to allow legal representation. The Council submitted that the Guidelines should promote access to legal representation for vulnerable people and existing practical barriers restricting legal representation be removed. The Council asserted that the involvement of legal practitioners in proceedings can significantly enhance the efficiency and fairness of proceedings and improve the Subject Person’s experience.²⁴
- 5.59 The Council asserted that where legal representation is denied, there is a serious risk of unfairness or injustice for vulnerable parties.
- 5.60 The Law Society of South Australia (the Society) supported this view. The Society stated that its members report that it is “extremely rare” for a self-represented Subject Person to be given access to the material relied upon by the applicant before the hearing. Members of the Society report that the Subject Person often hears the evidence relied upon by the applicant and the medical team for the first time at the hearing. The Society contends that the Subject Person is often ill equipped to test or dispute that evidence.
- 5.61 The Darwin Community Legal Service recommends that in all cases, a legal representative be appointed for the Subject Person and funding be made available for that purpose. The Northern Territory Legal Aid Commission argues that the Tribunal should have the power to appoint a legal representative to represent the Subject Person and that any appointment be funded.²⁵
- 5.62 CID recommends that Draft Guideline 15 be amended by adding: “If the person subject to the application wishes to be represented, this should be allowed unless there is a specific reason not to, in particular conflict of interest for the proposed representative.” The IDRS suggested that guidelines be developed on legal representation and that requests for representation be given favourable consideration by the Tribunal.

²⁴ The Council pointed to “strong indications” that self-represented people face worse outcomes in proceedings, citing Elizabeth Richardson, Tania Sourdin and Nerida Wallace, Australian Centre for Justice Innovation, *Self-Represented Litigants – Gathering Useful Information: Final Report* (2012) 11.

²⁵ Northern Territory Legal Aid Commission points out that s 131 of the *Mental Health and Related Services Act* (NT), requires the Tribunal to appoint a legal practitioner to represent a person subject to a review or involuntary detention application if the person is unrepresented and “the Tribunal considers the person should be represented at the hearing”. If the Tribunal appoints a legal practitioner, it may order that the reasonable costs of the legal practitioner representing the person are to be covered by the Northern Territory Government: s 131(4). That provision does not apply to proceedings in the Guardianship Division of NTCAT.

Oral hearings (Draft Guidelines 19, 20)

- 5.63 Contributors expressed strong support for applications and reviews of existing orders not being determined until after the conduct of an oral hearing. As detailed above, many contributors considered face-to-face hearings to be the best method of facilitating the genuine participation of the Subject Person in the Tribunal's decision-making processes. The Law Council pointed out that the Australian Law Reform Commission in its report *Elder Abuse – A National Legal Response* considered that oral hearings provided an "important procedural safeguard".
- 5.64 The Council expressed concern that any original application might be determined "on the papers". IDRS echoed this view and advocated the deletion of the words "as a matter of good practice" from Draft Guideline 19, so that it reads, "Original applications should be determined after an oral hearing".
- 5.65 In addition, IDRS argued that the Tribunal should only review existing orders after conducting an oral hearing. IDRS contended that conducting a review on the papers will "effectively exclude participation by the person the subject of the order". PWDA shared this view, asserting that denying a person, who is the subject of an existing order, the opportunity to participate in an oral hearing offends Article 13 of the CRPD. QCAT member, Julia Casey agreed, contending that in her experience as a Tribunal member, determining existing orders "on the papers" places a Subject Person with "communication difficulties" at a great disadvantage. She argued that conducting a review of existing orders on the papers may operate to deny a Subject Person the opportunity to present material to the Tribunal in support of their claim that they have regained capacity to manage their personal/financial affairs.
- 5.66 Legal Aid Victoria supported reviews of existing orders only being determined after an oral hearing. Legal Aid Victoria stated that it has seen cases of existing orders being reassessed and confirmed on the papers despite an apparent lack of evidence that the statutory criteria for renewing an existing order had been satisfied. The Office of the Public Advocate (Qld) expressed "significant reservations" about reviews of existing orders being conducted on the papers. The Office contended that the participation of the Subject Person cannot meaningfully occur without an oral hearing.
- 5.67 The Law Council noted that members of the Law Institute of Victoria had expressed concern that tribunals do not necessarily seek up-to-date medical information when reviewing existing orders and instead rely on historical information. The Council recommended that Draft Guideline 20 be amended to require that reviews of orders be based on current medical evidence.

Composition of the Tribunal (Draft Guidelines 21, 22, 23, 24)

Should applications and reviews be conducted by a multi-disciplinary panel?

- 5.68 There was general support for the proposition stated in Draft Guideline 22 that "multi-disciplinary panels" constituted by members with relevant and different area of expertise are optimal (Senior Rights Service; Julia Casey; Cheryl McDonnell; CID; IDRS; PWDA; Macquarie; Darwin Community Legal Service).
- 5.69 CID, IDRS, PWDA submitted that Draft Guidelines 21, 22 and 23 be strengthened by requiring all applications and reviews to be conducted by tribunals constituted by multi-disciplinary panels. CID, for example, argued that a single member tribunal is an inadequate safeguard given that the determination of an application or review of an

existing order can involve the “deprivation of fundamental rights [of] a person with generally limited capacity to put their own case”. IDRS submitted that Draft Guideline 23 be deleted.

- 5.70 A number of contributors urged that the Guidelines should require any panel to include a person with, or lived experience of, disability (PWDA; Cheryl McDonnell; Queensland Advocacy).
- 5.71 Darwin Community Legal Service submitted that where the Subject Person is Indigenous, given the “multiple layers of disadvantage”, that the Panel include at least one Indigenous member, preferably from the same area as the Subject Person.
- 5.72 In addition, a number of contributors stressed that members should be required to have established skills to be able to communicate with and maximise the participation of the Subject Person: see, for example, CID, Julia Casey.

Training of members and registry staff (Draft Guidelines 17, 25)

Should the Guidelines prescribe additional areas of training?

- 5.73 Contributors expressed strong support for registry staff and members receiving training to enable them to: use communication supports (Draft Guideline 17); employ strategies to involve the Subject Person in proceedings (Draft Guideline 24); identify the communication needs of persons with particular disabilities; and identify the characteristics associated with different disabilities (Draft Guideline 24).
- 5.74 Suggested additional areas of training included:
- working with witness intermediaries (NSW Ombudsman);
 - using effective communication techniques (Julia Casey);
 - identifying the particular supports that the Subject Person will require to participate meaningfully in pre-hearing and hearing processes (Office of Public Advocate (Qld));
 - understanding the needs of people with mental health issues (Mental Health Commission of NSW);
 - understanding the culture, needs and circumstances of people from CALD backgrounds and LGBTIQ+ people (Mental Health Commission of NSW); and
 - appropriate questioning techniques.²⁶
- 5.75 Citing a number of studies, Dr Piers Gooding²⁷ asserted that training delivered by trainers with disabilities is likely to be especially effective.

²⁶ NDIS Quality and Safeguards Commission recommended that Tribunal members be given training on appropriate questioning technique, in particular the use of leading questions, noting the “agreeable nature sometimes present in people with cognitive impairment”.

²⁷ See, for example, Bernadette McSherry, Eileen Baldry, Anna Arstein-Kerslake, Piers Gooding, Ruth McCausland, Kerry Arabena, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community*, Melbourne Social Equity Institute, 2017 <https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0006/2477031/Unfitness-to-Plead-Main-Project-Report.pdf>.

Participation of Aboriginal and Torres Islander people (Draft Guideline 26)

- 5.76 Contributors expressed strong support for Draft Guideline 26. PWDA submitted that it be made a mandatory requirement that tribunals employ Aboriginal and Torres Strait Island staff and members.
- 5.77 The Law Council contended that to effectively recruit and retain Aboriginal and Torres Strait Islander staff and membership, tribunals must provide culturally safe workplaces.

Data collection (Draft Guidelines 9, 10)

- 5.78 Contributors expressed strong support for Draft Guidelines 9 and 10, which require the Tribunal to collect and publish data on the participation rates of Subject Persons and the appointment of representatives.
- 5.79 The Law Council suggested that Draft Guideline 10 be amended to require tribunals to collect and report on:
- whether a private or public guardian was appointed;
 - what precise powers are given to the appointed guardian;
 - whether the Subject Person agreed to the appointment;
 - whether it is a new matter (first time appointment or reappointment); and
 - the nature of the Subject Person's disability.
- 5.80 Queensland Advocacy Inc recommended that the type of data required to be collected and reported by Draft Guideline 9 should not focus solely on quantitative information about the Subject Person's participation. It should include qualitative information about the Subject Person's subjective experience of the decision-making process.
- 5.81 Dr Piers Gooding welcomed Draft Guidelines 9 and 10, submitting that they are consistent with Article 31(2) of the CRPD. He recommended that tribunals collect disaggregated data that includes gender, race, and disability types, and perhaps the different forms of communication used by the Subject Person.

The Draft Guidelines – Annexure A

- **Draft Guideline 1:** Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person.
- **Draft Guideline 2:** The person and other parties should be promptly notified of an application being made.
- **Draft Guideline 3:** Written notice of hearing should be given to the person and other parties well in advance of the hearing. Registry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details.
- **Draft Guideline 4:** Pre-hearing processes should seek to ensure that:
 - the person is made aware of the application
 - information is provided to assist the person to understand what the application and hearing is about
 - the person's participation is encouraged (unless to do so would be detrimental to the person)
 - any further information that may assist the tribunal is obtained from the person
 - the person is provided with information as required about representation including advocacy
 - information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible
 - the person has an opportunity to ask questions about any of these matters
 - information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids
- **Draft Guideline 5:** Optimally, the listing of a hearing should take into account:
 - whether any particular needs of the person require a hearing at certain times of the day (for example, a morning hearing rather than the afternoon, or taking into account the effects of medication)
 - an estimate of the length of time the person may need to give their views to the tribunal, having regard to their communication needs
 - any need for breaks during the hearing
 - any additional time required for the use of an interpreter.
- **Draft Guideline 6:** Information about various aspects of the tribunal's practice and procedure (both in hard copy and online) should be made available to the person who is the subject of proceedings in formats that are accessible to people:
 - from culturally and linguistically diverse backgrounds

- with a vision or hearing impairment
 - with cognitive disabilities
- **Draft Guideline 7:** Optimally, hearings should be listed in a location that allows the person to participate in the hearing in person.
- **Draft Guideline 8:** If a face-to-face hearing is not possible or practicable, then other means by which the person can participate in the hearing should be explored. This may include:
 - measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a “Visit to the Person” by a Tribunal member
 - the views of the person being provided by way of a representative
 - videoconferencing
 - telephone participation
- **Draft Guideline 9:** Tribunals should collect data and report publicly on the participation rates of persons in hearings, broken down into in-person participation, hearings by videoconference, and hearings by telephone.
- **Draft Guideline 10:** Tribunals should also collect data and report publicly on the rate of appointment of representatives.
- **Draft Guideline 11:** Hearing venues should:
 - be wheelchair accessible
 - have drop-off zones for people with mobility restrictions
 - have easily accessible parking
 - be accessible by public transport
 - provide accessible toilets
- **Draft Guideline 12:** Tribunals should give consideration to the amenity of waiting room spaces, given the impact this can have on the person’s anxiety levels, leading up to the hearing, and their ability to participate in the hearing.
- **Draft Guideline 13:** Tribunals should give consideration to the amenity and configuration of hearing rooms. Hearing rooms should:
 - provide the option of a more informal setting that is distinct from a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the person at ease;
 - provide hearing induction loop facilities; and
 - provide videoconference and teleconference facilities.
- **Draft Guideline 14:** Tribunals should, wherever beneficial for the subject person, allow the person to be accompanied by a support person during the hearing. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.

- **Draft Guideline 15:** In those jurisdictions that require the leave of the tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the person and their legal representative have adequate time to prepare.
- **Draft Guideline 16:** In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the person, consideration of whether such an appointment should be made should occur at the earliest opportunity.
- **Draft Guideline 17:** Tribunal members need to be trained in the use of communication supports that a person may require in order to participate in the hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.
- **Draft Guideline 18:** Given the centrality of the person who is the subject of guardianship and/or administration proceedings, the person should have a genuine opportunity to participate in an oral hearing before a determination is made.
- **Draft Guideline 19:** As a matter of good practice, original applications should be determined after an oral hearing.
- **Draft Guideline 20:** As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of orders are determined without an oral hearing, tribunals should consider their respective statutory obligations about considering the views of the person before making a determination.
- **Draft Guideline 21:** Acknowledging that some jurisdictions are constrained regarding composition of panels (such as WA), consideration should be given to the composition of tribunal panels that hear guardianship and administration matters.
- **Draft Guideline 22:** Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.
- **Draft Guideline 23:** Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be utilised in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community based experience.
- **Draft Guideline 24:** Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.
- **Draft Guideline 25:** Training for members and registry staff about strategies to involve persons who are the subject of applications is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.
- **Draft Guideline 26:** Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members and staff with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.

- **Draft Guideline 27:** Members and registry staff should have access to training which promotes awareness of specific cultural considerations relevant to Aboriginal and Torres Strait Islander people.

Groups and individuals invited to comment on the Draft Guidelines – Annexure B

Aboriginal Legal Services (NSW/ACT)

Aged and Community Services Australia

Aged and Disability Advocacy Australia (ADA Australia)

Aged Care Complaints Commissioner

Aged Care Crisis Inc. (ACC)

Ageing, Disability, and Homecare – Department of Family and Community Services

Australasian Society for Intellectual Disability (ASID)

Australian Aged Care Quality Agency

Australian Association of Developmental Disability Medicine (AADDM)

Australian Council of Social Service (ACOSS)

Australian Disability and Development Consortium (ADDC)

Australian Federation of Disability Organisations (AFDO)

Australian Group on Severe Communication Impairment (AGOSCI)

Australian Human Rights Commission

Australian Human Rights Commission

Australian Institute of Family Studies (AIFS) (Australian Government)

Australian Medical Association

Australian Network on Disability (AND)

Australian Research Network on Law and Ageing (ARNLA)

Autism Aspergers Advocacy Australia

Blind Citizens Australia (BCA)

Brain Injury Australia

Capacity Australia

Celebrate Ageing

Centre for Disability Studies (not-for-profit affiliated with University of Sydney)

Communication Rights Australia

Community Legal Centres NSW (CLCNSW)

Council for Intellectual Disability (NSW CID)

Council on the Ageing NSW (COTA NSW)

Deaf Australia

Deafblind Australia

Deafness Forum of Australia

Dementia Australia (formerly Alzheimer's Australia)

Disability Advocacy Network Australia (DANA)

Disability Council NSW - FACS

Disabled People's Organisations Australia

Down Syndrome Australia (DSA)

Dr Craig Sinclair

Dr Joanne Watson

Dr Maree Bernoth

Dr Piers Gooding

Eastern Elder Abuse Network (convened by Eastern Community Legal Centre (VIC))

Emeritus Professor Terry Carney AO

Ethnic Communities' Council of NSW

FACS Legal – Child Protection Law

Federation of Ethnic Communities' Councils of Australia (FECCA)

First Peoples Disability Network Australia

Inclusion Australia

Information on Disability Education and Awareness Services (IDEAS)

Intellectual Disability Network

Intellectual Disability Rights Service (IDRS)

Justice Connect

Law Council of Australia

Law Society of NSW

Leading Aged Services Australia (LASA)

Legal Aid NSW

Members of the Guardianship Division of NCAT

Mental Health Coordinating Council

Mental Health Review Tribunal (MHRT)

Ms Kathleen Cunningham (British Columbia Law Institute, Canadian Centre for Elder Law)

Ms Maria Berry

Multicultural Disability Advocacy Association of NSW (MDAA)/NSW Network of Women With Disability

Multicultural NSW

National Aboriginal and Torres Strait Islander Legal Service

National Ageing Research Institute (NARI)

National Association of Community Legal Centres (NACLC)

National Disability Insurance Agency (NDIA)

National Disability Services NSW (NDS)

National Ethnic Disability Alliance (NEDA)

National Rural Health Alliance

NDIS (Quality and Safeguards) Commission

NSW Bar Association

NSW Carers Advisory Council

NSW Council of Social Service (NCOSS)

NSW Elder Abuse Helpline and Resource Unit

NSW Mental Health Commission

NSW Ministerial Advisory Council on Ageing

NSW Ministry of Health

NSW Ombudsman

NSW Trustee and Guardian – Disability Advocacy Service

Office of the Public Guardian

Older Person Advocacy Network (OPAN)

Older Women's Network Australia (OWN Australia)

Older Women's Network NSW (OWN NSW)

Our Voice Australia

People with Disability Australia (PWDA)

Physical Disability Australia

Professor Ben White

Professor Bronwyn Hemsley

Professor Christine Bigby

Professor David Tait

Professor Julian Trollor

Professor Lindy Willmott

Professor Sue Field

Professor Susan Balandin

Professor Susan Kurrle

Professor Wendy Lacey

Scope

Senior Rights Service

Synapse (merged with Brain Injury Association NSW)

The Benevolent Society

The Physical Disability Council of NSW (PDCN)

Women with Disabilities Australia (WWDA)

List of Contributors – Annexure C

ACT Disability, Aged and Carer Advocacy Service

Aged and Disability Advocacy Australia

Aged Rights Advocacy Service (South Australia)

Australian Association of Developmental Disability Medicine

Australian Unity

Ms Maria Berry

Ms Michelle Butler (Latrobe Regional Hospital)

Emeritus Professor Terry Carney AO

Ms Julia Casey

Cognitive Decline Partnership Centre

Council for Intellectual Disability

Dr Helen Creasey

Darwin Community Legal Service

Department of Human Services – Government of South Australia

Developmental Disability WA

Eastern Health (Victoria)

Dr Piers Gooding

Intellectual Disability Rights Service

Law Council of Australia

Law Society of South Australia

Legal Aid ACT

Legal Aid Victoria

Ms Cheryl McDonnell

Macquarie Law School and the Australian Research Network on Law and Ageing

Mental Health Commission of NSW
Mental Health Coordinating Council
Mental Health Review Tribunal
National Disability Services
NDIS Quality and Safeguards Commission
Northern Territory Legal Aid Commission
NSW Ombudsman
Office of the Public Advocate (Queensland)
People With Disabilities Australia
Physical Disability Council of NSW
Purple Orange and South Australian Council of Social Service
Queensland Advocacy Incorporated
Resthaven (South Australia)
Seniors Rights Service
Tasmanian Council of Social Service



**Easy Read AGAC Draft Guidelines on participation for consultation –
Annexure D**

**Australian Guardianship and Administration Council
Draft Guidelines on how tribunals can support
people with disabilities to participate in hearings**

Easy Read November 2018



The draft guidelines



This is a document about how tribunals could help people participate in a guardianship or financial administration hearing.

These are things that we might like each tribunal to be like.

Tribunals want to know what you think about the guidelines.

Are there other things that tribunals should do?



If you have any feedback on the guidelines please email:

participation@justice.nsw.gov.au

The draft guidelines

If you need support to make decisions somebody who is worried about you might apply for a **guardian or financial administrator** to make decisions for you.



A guardian can make decisions about

- Your health care
- Where you live and services you need

A financial administrator can make decisions about how your money is spent.

To get a guardian or financial administrator somebody must make an application.

The **application** goes to the tribunal. The **tribunal** has a meeting to decide if you need a guardian or financial administrator.

This meeting is called a **hearing**.

You can have your say at the hearing.

Before the hearing



Guideline 1

Before the hearing each person that needs support should have it.

This will help the person to understand what the hearing is about.

It will help them to speak up in the hearing.

Guideline 2

Tribunals should tell the person if somebody has made an application.

Tribunals should tell other people like the person's partner or carer.



Before the hearing



Guideline 3

The person should get a letter that tells them when the hearing is.

This letter should also be sent to other people involved.

If the person cannot read the letter the tribunal should tell them the information in other ways.

Each person should have time to prepare for the hearing.



Before the hearing



Guideline 4

Before the hearing tribunals should try to make sure

- The person is told about the application for a guardian or financial administrator
- The person knows what the application means
- The person knows what happens at the hearing
- The person has their say in the hearing
- The tribunal knows how to support the person to speak with us
- The person can ask questions about the hearing.

Before the hearing



Guideline 5

Tribunals should plan hearings that work best for the person.

This means

- At a time of day that is best for them
 - Time for them to have their say
 - Breaks during the hearing
 - Extra time for an interpreter if one is needed
-



Guideline 6

Tribunals should give people information about how the hearing works.

The information should be easy to understand.

For example in easy read or a different language.

At the hearing



Guideline 7

Hearings should be in a place that is easy for people to get to.



Guideline 8

If somebody cannot come to the hearing tribunals should

- Have somebody they trust speak for them
 - Have a video call
 - Have the hearing over the phone
-



Guideline 9

Information of who attended the hearing will be collected.

Guideline 10

Information about how many people have a lawyer at the hearing should also be collected by the tribunal.

The hearing room



Guideline 11

Hearing rooms should

- Be wheelchair accessible
- Have a drop off point at the door
- Have accessible parking and toilets
- Be close to public transport



Guideline 12

There should be a good waiting area so people feel comfortable before the hearing.



Guideline 13

The hearing room should be relaxed and comfortable.

There should be table and chairs to sit around.

The room should have hearing loops and technology for video and phone hearings.

Support



Guideline 14

Tribunals should allow people to bring a support person to the hearing.

This could be

- A family member
- A friend
- An advocate



Guideline 15

People might want a lawyer to represent them at the hearing.

In some states people need to ask the tribunal if they can have a lawyer.

Tribunals should decide quickly whether people can have a lawyer so they can prepare for the hearing.

Support



Guideline 16

In some states the tribunal can select someone to attend the tribunal to help the person speak up.

When tribunals do this we should get someone quickly so they can talk to the person before the hearing.



Guideline 17

Everyone at the hearing should know how to support people with different ways to communicate.

This includes

- Using interpreters
- Hearing aids
- Pictures or images
- Other technology or aids used to communicate

The hearing



Guideline 18

Tribunals should give the person who the decision is about the best chance to take part in the hearing before making a decision.

You are the most important person.



Guideline 19

A hearing should take place before the tribunal decide if a person needs a guardian or financial administrator.

Some small decisions about guardianship or financial administration do not need a hearing.

Reviews



Guideline 20

If there is a guardian or financial administrator the tribunal sometimes needs to review to decide whether to make changes.

Tribunals should try to have hearings for reviews so the person is involved.

Sometimes reviews may only be small.

When they are small some tribunals do reviews by reading documents instead of having a hearing.

If there cannot be a hearing for a review tribunals would follow the law and should find out what the persons wants before making a decision.



Tribunal people



Guidelines 21, 22 and 23

Some tribunals only have 1 person making the decision about a guardian or financial administrator.

This might just be a lawyer.

We think it is best to have more than one tribunal person at hearings.



Having more than one tribunal person who knows about disability helps when making the decision about someone having a guardian or not.

Sometimes it is not possible to have more than one tribunal person at every hearing.

Tribunals should make sure more than one tribunal person who knows about disability is at the hearing if the situation is hard.

Communication



Guideline 24

Tribunals should make sure tribunal people have skills in communicating with people with disability.



Guideline 25

It is very important that tribunal people who make the decision get training on how to include people with disability.

Culture



Guideline 26

Tribunals should get more tribunal members and staff who are Aboriginal and Torres Strait Islander or know about the culture.



Guideline 27

Tribunal people should get training to understand Aboriginal and Torres Strait Islander culture.

Feedback

Tribunal people want to know what you think about the guidelines.

Are there any other things tribunals should do?

If you have any feedback on the guidelines, please email

participation@justice.nsw.gov.au

Australian Guardianship and Administration Council

Draft Guidelines

How tribunals can support people with disabilities to participate in hearings

Consultation with persons with disabilities who have been the subject of applications for guardianship and financial/administrative orders

Consultation undertaken and report prepared by:

Margaret Spencer & Francis Duffy
Members in the Guardianship Division of NSW Civil and Administrative Tribunal

INTRODUCTION

In 2017 the Federal Government funded the NSW Civil Administration Tribunal (NCAT) on behalf of AGAC to develop a set of best practice guidelines on the participation of the proposed represented person in guardianship and financial management/administration hearings. In November 2018, the Australian Guardianship and Administrative Council circulated draft guidelines for comment. The following is a report of the consultation undertaken with people who have been the subject of applications for guardianship and financial management orders.

CONSULTATION PROCESS

Focus groups were conducted to obtain the views of people who have been the subject of applications for guardianship and financial management orders. Focus groups have been proven to be an effective format for people with cognitive disabilities to participate in research and express their views (Gates & Waight, 2007; Kroll, Barbour, & Harris, 2007).

The managers of five agencies in metropolitan Sydney, known to have a high proportion of clients who have been the subject of applications for guardianship and financial management orders, were contacted and asked if they would invite clients to participate in a focus group to discuss the draft guidelines. Three of the five agencies agreed to this request. One agency was a residential aged care facility (also accommodating some younger residents), and the other two agencies provided support to adults with cognitive disabilities living in the community.

The manager of each agency took responsibility for inviting clients and supporting them to attend the focus groups. Participation in the project was voluntary. The focus groups were held in a meeting room at the facility or agency where participants resided or attended regularly. These venues were deemed most suitable as they were familiar and safe spaces for participants. Refreshment were provided; and at the request of one agency, participants were given a small gift voucher to compensate them for time and travel.

At the beginning of each focus group, participants were given a copy of the easy read version of the AGAC draft guidelines and a brief explanation about the AGAC project was

provided. Participants were told that the purpose of the focus groups was to hear from them about their experience of participating in a tribunal hearing and to explore with them how the experience might be improved. One of the challenges in each of the focus groups was keeping the participants 'on topic' and within the scope of the consultation. All participants were keen to speak about the negative impact of being subject to orders, in particular financial management orders, and the detrimental effect this had on their autonomy, self-esteem and mental and emotional wellbeing.

In total 16 people who have been the subject of applications for guardianship and financial management orders participated in the three focus groups. One group had four participants, another had seven participants and the other five participants. In one of the focus groups two participants were accompanied by support workers. Participants were informed about what would happen to the information they shared and the fact they were free to leave the group any time they wished. Some basic information was collected on each participant, including: their first name only, age, gender, the nature of their impairment; preferred language and cultural background.

The participants ranged in age from 20 to 71 years of age (20-30 years n= 3; 31-54 years n=7; 55 -71 n=6). Twelve participants were males and four were female. Two identified as being of CALD background and English being their preferred language. One participant was of Aboriginal background. Fourteen participants lived in greater Sydney and two participants in regional centres. All participants were under financial management and had their affairs managed by the NSW Trustee and Guardian. Eight participants were also subject to current guardianship orders with seven participants having the Public Guardian appointed as their guardian and one participant having a private guardian.

As the consultation process did not have formal ethics approval, the focus group discussions were not audio-recorded. Rather, detailed written notes were taken during and immediately after each focus group. Each discussion went for 60-90 minutes.

CONSULTATION FEEDBACK

In this section, the participants feedback is structured in such a way as to inform the further development of the AGAC best practice guidelines.

Issue related to prehearing (Draft guidelines 1-6)

“Not told” or if told, “Was not told the full story”

Approximately a third of participants said they were not told about the hearing. For some, because of the nature of their disability, they may not have been able to recall this detail. Two participants were ‘unable to be told’ because they were very unwell mentally and/or physically - for example one participant reported being in in a coma at the time the order was made.

Most participants reported being told about the application by their case manager (usually a social worker or another health professional). The common story was that they were only told about the application after it had been made.

‘Feeling ambushed’

A number of participants reported that they were not properly informed about the hearing. For instance, one participant described feeling, ‘ambushed’ when told they had to attend a hearing. Some participants expressed the view they should have been consulted ‘prior’ to the application being made.

“They just came and said this is happening. I had no say in it. I just had to go along with it.”
(participant)

Recommendation 1: The following be added to Draft Guideline 4

‘A person making an application, should make every effort to ensure all other means of enhancing decision making capacity (for example, through the implementation of supported decision-making strategies) have been exhausted prior to making an application. Further, they should if possible discuss their intentions of making an application for guardianship and/or financial management with the potential subject person prior to submitting the application.’

Feeling 'hoodwinked'

Though a number of participants remembered being told about the application, they felt they were not told the 'full story'. With the benefit of hindsight, some felt they had been 'hoodwinked'. As one participant recalled:

'I was just told we had to go a meeting about my money. She said it would be good for me... Looking back that was a bad thing. I didn't need a guardian and "the Trustee". Because of all this I am now on two tablets [for anxiety] and I tried to commit suicide.'

Another participant said;

'He [his case manager] kept me in the dark about the details and implications... it was not the first time, he has a history of keeping secrets.'

Given a sugar-coated explanation

Not being told the 'full story' about the applications and being provided with 'sugar coated information' clearly had a negative impact on these participant's ongoing ability to trust their formal and informal supports. One participant said;

'The tribunal need to do more to explain things beforehand. Family and workers can't be relied on to explain things because they explain it to suit them... they are often dishonest.'

Wanting to be appropriately informed

Participant thought the tribunal should be more diligent in ensuring persons who are subject to application have been fully informed.

Recommendation 2: Draft Guideline 3 be amended to include a statement to the effect:

Applicants should sign a statutory declaration stating they have given notice to the person to the best of their ability to accurately inform the person about the hearing and potential outcomes and the implications.

Participants agreed with the points listed in draft guidelines 4 as well as in draft guidelines 5 & 6. Participants said it was important that information be available in multiple formats

because as one participant noted; *'Every person with a disability has to be treated differently as they understand information differently and face different barriers.'* One participant said she liked the idea of an easy read guide. Another participant said that anything in writing was no good to him because *'I can't read'*. He liked the idea of being able to watch a video about the hearing and about what might happen. Some participants wanted to be able to have access to an independent person who could explain the application to them and tell them their rights before the hearing.

Attending a hearing (Draft guidelines 7, 8, 11, 12-16)

What hearing?

A number of participants said they never got to participate in a hearing. Whether this was the case or not was difficult to verify. This group of participants expressed the most frustration and confusion about being subject to orders which they believed they had no say in the process, and that this significantly impinged on their self-determination and autonomy. The distress expressed by these participants highlights the significant emotional and psychological ramifications of not optimally facilitating the participation of subject persons in hearings.

'It should be a person's choice to participate'

Participants agreed it should be a person's own choice whether they attend the hearing or not. As one participant said, *'It should be a person's choice ...it shouldn't be something you are forced to do.'* One participant said he did not participate in his first guardianship hearing because he was [mentally] unwell. At the next hearing, his case manager took him to the hearing. He recalled;

"I went to the hearing but it was very overwhelming for me. I just wasn't well enough to participate. By the third time, I was much better. I attended that hearing at [named place] and I was okay I could do it.'

Recommendation 3: Draft guideline 7 be amended to include a statement to the effect:

The participation of the persons in a hearing should be their choice and they should not be forced to attend.

Hearings are scary

Participants who attended the face-to-face hearings spoke about how the process was anxiety provoking and an intimidating process. One participant said; *'It's like they have Hawkeyes on you. It's very intimidating ...they look serious.'* Another participant who has been to numerous hearings said, *'It's kind of like going for an exam at school. Even though I have been a lot, it never gets any easier.'*

The role of support persons

Generally, participants said they valued having a support person to go with them to hearings. Support persons ranged from being a teacher, a relatives, paid support workers or case managers. Some participants said their support person helped them speak up. One participant said, *'people with disabilities are not always brave enough to speak up'*, particularly when they don't understand everything that is being said or they are in unfamiliar settings where *'everyone is watching them'*.

Whilst participants appreciated having support, some participants reported problems with support persons. For example, a few participants reported that were told what to say by their support person/case manager without understanding the consequences. One young participant said;

'At the first hearing I was scared to speak up. I didn't understand what they were saying. So, I just said what my teacher told me to say. I didn't like to go against her because she was my teacher and I was brought up to show respect. So, I agreed to stuff that now I see was a bad thing.'

Another participant said she felt obliged to *'go along with'* her support person/case manager's plan to have her finances managed because this support person was her only relative. As this participant said, *'She is the only family I've got so I didn't feel I could go against her.'*

Some participants thought it would be good if they could have an independent advocate to support them and to overcome the issue of other people's influence on them at hearings and suggested, *'The tribunal panel should ask us if we want to speak with them alone.'*

Recommendation 4:

Draft guideline 14 be expanded to include:

Consideration should be given to whether or not the support person is able to be impartial and is able to support the subject person to have their own voice heard, especially in cases where the subject person's views are contrary to theirs. Tribunal panel should be more give the subject person the option of speaking to the tribunal 'in camera'.

Being legally represented or have a separate representative or guardian ad litem appointed

In relation to draft guideline 15 and 16 participants did not have strong views about being legally represented or to have a separate representative or guardian ad litem appointed. Some thought it was good to be able to get legal advice, with some participants sharing how they had done so before going to subsequent hearings. Generally, however participants were concerned about others, including support persons, legal representatives or guardian ad litem, usurping their right to be heard.

Participating in hearing via other means

In relation to draft guideline 8, the majority of participants preferred to attend face to face hearings. Only two participants could recall participating in hearings via other means, e.g. videoconference and telephone participation. One participant who had been subject to a number of hearings said he had participated in one of his hearings via videolink from a correctional facility. When asked how he found the experience he said, it was '*okay cos I was used to it*'. When asked which was better, face-to-face or via videolink, he said face-to-face '*because it's easier to understand what's going on.*' Another participant said she attended her first hearing 'in person' and then 12 months later participated in the review hearing via a teleconference. When asked to compare the two hearing she said, '*when on the phone I felt they asked me more.*'

The tribunal panel & its processes

The experience that participants recalled most strongly from hearings was the way they were treated and talked to by different panel members. Even though it had been some time since participants attended their hearings, they were able to recall names of different panel

members and recall the style of communication that occurred and how it made them feel. Several participants reported feeling patronised by some panel members and reported feeling they were treated like children, not adults.

Participants were particularly frustrated by what they saw as the inordinate amount of time afforded to letting others speak at hearings, particularly privileging the voice of workers, health professional and family members. One participant interpreted this as the panel being 'rude', stating: *'They were rude to me. They talked for ages to my case manager and when they did talk to me, they talked to me like I was a two-year-old.'*

Several participants said they experienced the discussion about their disability to be deficit-focused, demeaning and disempowering. One participant living with mental health issues, said, *'When they spoke about my disability, I felt judged. I felt [holding his fingers close together] that small. I thought I went to college and shit and that counts for nothing.'* Another participant with intellectual disability said, *'I know I have a disability I've lived with it all my life. I didn't want them going on about it.'* A female participant said *'because they saw me as a person with disability, they didn't take what I was saying seriously.'*

A few participants spoke about how the hearing process was challenging for them to understand. Several participants spoke about how the panel had its way of running the hearing that failed to accommodate their needs. Also a few participants said they felt frustrated at not being allowed to express their views as soon as they needed to and with being asked to hold their comments/questions until later. They said that because of their disability, they had difficulty recalling later what they wanted to say in the moment. For example, one participant said, *'One thing I hate when I go there [the tribunal] they [the panel] tell me I have to wait to talk while they say all this stuff. They don't understand I am really anxious and just need to say what I gotta say.'*

Participants recalled how the panel used language and terms they didn't understand and as one participant said, *'therefore I could not go against them.'*

A young participant was upset because at the hearing she attended the panel kept asking her to leave the room. When she explained the context, it was apparent she and others were being asked to leave the room so the panel could confer privately. This must not have been explained clearly enough, resulting in this participant perceiving she was being excluded from the hearing.

Recommendation 5: Participants support draft guideline 24 & 25

It is also recommended that an additional guideline be included (as is the case in draft guideline 4) that outline the components of good communication with persons with cognitive disability in a hearing context. For example:

- Prior to a hearing the applicant or a person who knows the person well could prepare a communication tip sheet for the tribunal.
- Allow time at the beginning of the hearing to develop respectful rapport with the subject person
- Ask questions of or invite the subject person to share their views before seeking the views of others
- Allow the subject person ample time to express their views
- Check in regularly with the subject person to confirm if they understand what is going on at different intervals during the hearing.
- Check if the subject person understands by inviting them to explain in their own words what has been said.
- Use plain English language and avoid unfamiliar terminology, unnecessary legalese and acronyms
- Where appropriate use visual tools to augment oral communication and to assist the person to participate in the hearing process
- Ask the subject person if they wish to speak 'in camera'
- Regularly during the hearing ask the subject person if they need to have a break
- Be transparent in communication; for example, explain the rationale behind particular lines of questioning & protocols and processes

Post hearing

How did this happen to me?

All participants were primarily concerned to talk about hearing outcomes. In one focus group there were a group of participants who had been subject to an application while in hospital. These were among the group of participants who reported they were not told about the application and also reported not having participated in a hearing. Now in a secure aged care facility, they were at a loss to know how they were in their current position. When asked if they had received any mail, in the form of Orders and Reasons for Decision they claimed they had not. Having been transferred directly to the facility from hospital, it is possible they may not have received formal correspondence about the outcome of the hearing, unless someone redirected their mail.

Recommendation 6: that the following best practice guidelines be added:

- Applicants have a responsibility to ensure subject persons are informed about the outcome of the application and moreover about their rights to appeal and/or to request a review.
- In matters where an order has been made and the subject person does not return to their primary residence, the applicant should inform the Registry of the person's new address.
- In matters where a subject person is unable to be informed of an application and/or to participate in a hearing any orders made should be time limited and reviewable, at least in the first instance.

What are my rights?

Finally, the majority of participants expressed high levels of frustration and had a sense of being powerless in relation to knowing their rights post hearing. Many participants were eager to have their orders reviewed but did not know how to initiate or execute such a process. For example, one participant explained a nonreviewable financial management order was made for him when he was in a coma. He is now living independently in the

community and stated he was managing well. He said he wanted to have the order revoked but had no idea how to initiate this process.

Recommendation 7: that the following best practice guideline be included:
Subject person should have accessible information about their rights following the making of an order, including how they can appeal a decision or request a review of an order.

SUMMARY OF RECOMMENDATIONS

Recommendation 1:

The following be added to Draft Guideline 4

'A person making an application, should make every effort to ensure all other means of enhancing decision making capacity (for example, through the implementation of supported decision-making strategies) have been exhausted prior to making an application. Further, they should if possible discuss their intentions of making an application for guardianship and/or financial management with the potential subject person prior to submitting the application.'

Recommendation2:

Draft Guideline 3 be amended to include a statement to the effect: *Applicants should sign a statutory declaration stating they have given notice to the person to the best of their ability to accurately inform the person about the hearing, including the potential outcomes and the implications.*

Recommendation3:

Draft guideline 7 be amended to include a statement to the effect:

The participation of the persons in a hearing should be their choice and they should not be forced to attend.

Recommendation 4:

Draft guideline 14 be expanded to include:

Consideration should be given to whether or not the support person is able to be impartial and is able to support the subject person to have their own voice heard, especially in cases where the subject person's views are contrary to theirs. Tribunal panel should be more give the subject person the option of speaking to the tribunal 'in camera'.

Recommendation 5:

Participant support draft guideline 24 & 25

It is also recommended that an additional guideline be included (as is the case in draft guideline 4) that outline the components of good communication with persons with cognitive disability in a hearing context. For example:

- *Prior to a hearing the applicant (or a person who knows the person well) could prepare a communication tip sheet for the tribunal.*
- *Allow time at the beginning of the hearing to develop respectful rapport with the subject person*
- *Ask questions of or invite the subject person to share their views before seeking the views of others*
- *Allow the subject person ample time to express their views*
- *Check in regularly with the subject person to confirm if they understand what is going on at different intervals during the hearing.*
- *Check if the subject person understands by inviting them to explain in their own words what has been said.*
- *Use plain English language and avoid unfamiliar terminology, unnecessary legalese and acronyms*
- *Where appropriate use visual tools to augment oral communication and to assist the person to participate in the hearing process*
- *Ask the subject person if they wish to speak 'in camera'*
- *Regularly during the hearing ask the subject person if they need to have a break*
- *Be transparent in communication for example, explain the rationale behind particular lines of questioning & protocols and processes*

Recommendation 6:

That the following best practice guidelines be added:

- Applicants have a responsibility to ensure subject persons are informed about the outcome of the application and moreover their rights to appeal and/or to request a review.

- In matters where an order has been made and the subject person does not return to their primary residence, the applicant should inform the Registry of the person's new address.
- In matters where a subject person is unable to be informed of an application and/or to participate in a hearing any orders made should be time limited and reviewable at least in the first instance.

Recommendation 7:

that the following best practice guideline be included:

Subject person should have accessible information about their rights following the making of an order, including how they can appeal a decision or request a review of an order.

References

- Gates, B., & Waight, M. (2007). Reflections on conducting focus groups with people with learning disabilities: Theoretical and practical issues. *Journal of Research in Nursing, 12*(2), 111-126. doi:10.1177/1744987106075617
- Kroll, T., Barbour, R., & Harris, J. (2007). Using Focus Groups in Disability Research. *Qualitative Health Research, 17*(5), 690-698. doi:10.1177/1049732307301488

Glossary of terms

Application: Any process (usually the lodgement of a form/document with a Tribunal) used to initiate a determination by a Tribunal about whether a **Guardianship and/or Financial management / administration** order should be made in relation to the **Subject Person**.

Financial management / administration Substitute-decision making whereby an appointed financial manager(s)/administrator(s) makes decision on behalf of the Subject Person in relation to the Subject Person's estate (financial affairs and/or property).

Guardianship Substitute decision-making whereby an appointed Guardian(s) makes decisions on behalf of the Subject Person in relation to the Subject Person "person" (accommodation, services health care etc).

Guardianship order An order whereby the Tribunal appoints a Guardian(s) to make guardianship decisions on behalf of the Subject Person under relevant legislation.

Financial management / administration order: An order whereby the Tribunal appoints a Financial manager(s)/ administrator(s) to make decisions on behalf of the Subject Person in relation to the Subject Person's estate under relevant legislation.

Review of existing order Any process by which a Tribunal reviews an existing **Guardianship** or **Financial management / administration** order to determine whether it should end or be renewed, with or without being varied.

Tribunal Any state or territory body, other than a court, given power to determine **Guardianship** or **Financial management / administration Applications**.

Subject Person aka proposed represented person, "the person" The person the subject of an **Application**.

Annexure 2

Issues paper

Maximising the participation of the Person in guardianship proceedings – Draft guidelines for Australian Tribunals

February 2019

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

Table of contents

1. Introduction	2
2. Context	4
3. Draft Guidelines.....	7
4. Pre-hearing	11
Prompt notification of application and hearing details	12
Pre hearing support for the person	13
Time-tabling	16
Information in accessible formats	16
5. At the hearing	18
Hearing location.....	19
Physical accessibility of hearing venue	22
Waiting areas	22
Hearing rooms	23
Support and representation.....	24
Communication.....	26
6. Oral hearings	27
7. Composition of the tribunal.....	30
8. Training of members and registry staff.....	34
9. Participation of Aboriginal and Torres Islander People.....	36
Legislation concerning the views/wishes/opinions of subject person – Annexure A.....	38
Abbreviations – Annexure B.....	44
Methodology – Annexure C	45

1. Introduction

- 1.1 Each state and territory in Australia has enacted legislation dealing with guardianship and financial administration (for ease of reference, these laws are referred to collectively in this document as ‘guardianship legislation’).¹ The focus of this legislation, subject to limited exceptions, is on adults with impaired decision-making ability.
- 1.2 As noted in Carney and Tait:²
- [T]he issues tribunals and guardians deal with include life and death decisions, issues of bodily integrity and cultural identity. These are some of the most far reaching and fundamental decisions that any judicial body could be called to pass judgement on.
- 1.3 While each statute is different, they each have in common, albeit expressed differently, that, prior to making an order, the tribunal or board must consider the views of the person who is the subject of the application for guardianship or administration³ **Annexure A** provides an overview of these provisions.
- 1.4 The Western Australian Supreme Court described the obligation to ascertain the views and wishes of the person as follows:⁴
- No person should be deprived of his/her right and freedom to make decisions about their life without having had the opportunity to be heard...The right of [the person] to be heard and the obligation on the Tribunal to exercise its discretion so as to ensure that it has the best evidence before it so as to comply with its statutory duty to make a decision in [the person’s] best interests are matters going to the heart of the Tribunal’s discretion.
- 1.5 In 2017, the Australian Law Reform Commission (ALRC) delivered its report titled *Elder Abuse – A National Legal Response*.⁵ Chapter 10 of the report focuses on guardianship and financial administration, and the ALRC recommends ‘a practical program of reform for guardianship and financial administration schemes to enhance safeguards against elder abuse’.⁶
- 1.6 In particular, ALRC recommendation 10-2 is directed to the Australian Guardianship and Administration Council (AGAC). The AGAC is made up of each of Australia’s Public Advocates and Public Guardians, Public Trustees (State Trustees Ltd in Victoria) and Tribunals (including the Guardianship and Administration Board in Tasmania) with

¹ *Guardianship Act 1987* (NSW); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 2000* (Qld); *Powers of Attorney Act 1998* (Qld); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Guardianship of Adults Act 2016* (NT).

² T Carney and D Tait, *The Adult Guardianship Experiment – Tribunals and Popular Justice* (Federation Press, 1997) 5.

³ *Guardianship and Management of Property Act 1991* (ACT), s 4(2)(a); *Guardianship Act 1987* (NSW), ss 4(d), 14(2)(a)(i); *Guardianship of Adults Act 2016* (NT), s 4(3)(a); *Guardianship and Administration Act 2000* (Qld), s 11, Sch 1 cl 7(1); *Guardianship and Administration Act 1993* (SA), s 5(b); *Guardianship and Administration Act 1995* (Tas), s 6(c); *Guardianship and Administration Act 1986* (Vic), ss 4(2)(c), 22(2)(ab); *Guardianship and Administration Act 1990* (WA), s 4(7).

⁴ *G v K* [2007] WASC 319, [77].

⁵ Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) (‘ALRC, Report 131’).

⁶ ALRC, Report 131 [10-1].

guardianship and financial management/administration jurisdiction. For ease of reference, these bodies are referred to collectively in this document as 'tribunals'.⁷

1.7 Recommendation 10-2 provides that:

The Australian Guardianship and Administration Council 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.

1.8 The ALRC report determined that the key elements of such a model could include:

- Case management and support during the pre-hearing stage
- Composition of the tribunal for the purposes of a particular proceeding
- Ensuring an oral hearing is held for all substantive applications
- Alternative methods for participation

1.9 It was also noted that stakeholders were strongly supportive of the ALRC's preliminary view, expressed in a Discussion Paper, that a best practice model, which reflects the principle of maximum participation, should require the tribunal, where possible, to speak with the represented person before the tribunal appoints a guardian or financial administrator, irrespective of attendance at the hearing.

1.10 The ALRC report noted that these approaches would both support and facilitate the exercise of a represented person's right under Article 13 of the United Nations' *Convention on the Rights of Persons with Disabilities*⁸ (UNCRPD). That article provides that such persons are entitled to access to justice, 'including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants'.

1.11 As part of the federal government's 2016 election commitment to fund a national plan to prevent elder abuse, titled 'Protecting the Rights of Older Australians', the NSW Civil and Administrative Tribunal (NCAT) received funding to develop a set of best practice guidelines on behalf of AGAC. The methodology for the project is at **Annexure C**.

1.12 Preparation of the guidelines is to involve:

- analysis of current participation rates of proposed represented persons in guardianship and financial management/administration hearings in Australia's state and territory jurisdictions,
- the 'best practice' initiatives already in place to encourage participation, and
- will also draw, where appropriate, on practices in place in comparable jurisdictions overseas, and in other relevant judicial and quasi-judicial hearing processes that take place in Australia.

1.13 These draft guidelines include the second and third aspects of the elements set out above.

1.14 It is proposed that the work required to address the first aspect, set out above, will be undertaken by tribunals in late 2018/early 2019.

⁷ A list of abbreviations for each of the tribunals is contained in **Annexure B**.

⁸ Entered into force 3 May 2008.

- 1.15 To assist in the preparation of these draft guidelines, the NSW Department of Justice conducted research into the practices in place in overseas jurisdictions, which are comparable with Australian guardianship jurisdictions, and in other relevant judicial and quasi-judicial hearing processes that take place in Australia.
- 1.16 Whilst the focus of the ALRC report is on older Australians, the proposed guidelines outlined in this document may assist tribunals in maximising the participation of all people for whom guardianship and related applications are made.
- 1.17 It is also noted that although ‘best practice’ is the language used in the ALRC report, the research conducted in the preparation of these draft guidelines indicates that there appears to be limited, if any, evaluation of the success or otherwise of efforts to maximise the participation of people about whom guardianship and/or administration applications are made. Therefore, at this point in time, ‘good practice’ guidelines may well be a more accurate description of the suggested guidelines contained in this document.
- 1.18 It should also be noted that the draft guidelines in this document have not necessarily been formally endorsed by each of the tribunals.

2. Context

- 2.1 Recommendation 10.2 builds on the reform initiatives outlined by the ALRC in its report on *Equality, Capacity and Disability in Commonwealth Laws*.⁹ In that report, the ALRC recommended that reform of Commonwealth, state, and territory laws (in particular, guardianship and administration laws),¹⁰ and legal frameworks concerning individual decision-making, should be guided by four National Decision Making Principles (and associated Guidelines). Such an approach would ensure:
- that supported decision-making is encouraged;
 - that representative decision-makers are appointed only as a last resort; and
 - the will, preferences and rights of persons to direct decisions that affect their lives.
- 2.2 The National Decision Making Principles are that:
- 1) All adults have an equal right to make decisions and to have their decisions respected.
 - 2) Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.
 - 3) The will, preferences, and rights of persons who may require decision-making support must direct decisions that affect their lives.
 - 4) Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) (ALRC, Report 124).

¹⁰ ALRC, Report 124 [1-3].

- 2.3 These principles reflect those set out in the UNCRPD which requires respect for the ‘inherent dignity’ and ‘full and effective participation and inclusion in society’¹¹ of people with disabilities, with emphasis on the autonomy and independence of people with disabilities who may require support in making decisions.¹²
- 2.4 Article 12 of the UNCRPD requires recognition of the following matters: that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;¹³ that appropriate measures should be taken to ensure that people with disabilities can access the support they may require in exercising their legal capacity;¹⁴ and that any measures relating to the exercise of legal capacity should incorporate appropriate and effective safeguards to prevent abuse, in accordance with international human rights law, and to respect the ‘rights, will and preferences of the person’.¹⁵
- 2.5 The Convention requires that people with disabilities have effective access to justice on an equal basis with others, including through the provision of procedural accommodations to facilitate their effective role as direct and indirect participants in legal proceedings.¹⁶ In order to help ensure effective access to justice for persons with disabilities, States Parties are obliged to promote appropriate training for those working in the field of administration of justice.¹⁷
- 2.6 Further, measures must be taken to ensure that people with disabilities can exercise the right to freedom of expression and opinion,¹⁸ including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication¹⁹ of their choice, including by:
- Providing information intended for the general public in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;²⁰
 - Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;²¹ and
 - Recognising and promoting the use of sign languages.²²
- 2.7 In an analysis of a sample of national laws in Europe involving legal capacity proceedings,²³ the following were identified as a (non-exhaustive) list of support

¹¹ UNCRPD, Articles 1-3.

¹² The UNCRPD includes within its description of “persons with disabilities” those who have “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

¹³ UNCRPD, Article 12(2).

¹⁴ UNCRPD, Article 12(3).

¹⁵ UNCRPD, Article 12(4).

¹⁶ UNCRPD, Article 13(1).

¹⁷ UNCRPD, Article 13(2).

¹⁸ UNCRPD, Article 21.

¹⁹ “Communication” is defined in article 2 of the UNCRPD as including “languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”.

²⁰ UNCRPD, Article 21(a).

²¹ UNCRPD, Article 21(b).

²² UNCRPD, Article 21(e).

²³ M Fallon-Kund and J Bickenbach, “Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings” (2016) 5(3) *Laws* 29 <<http://www.mdpi.com/2075-471X/5/3/29>>.

mechanisms, and procedural accommodations, required for the ‘implementation of an equal and effective right to be heard for persons with mental health problems, components that would facilitate the expression of the person’s will and preference’:

- Whether the right to be heard is statutorily provided and whether it contains exceptions;
- Support mechanisms at the individual level, namely, the support of other persons during the proceedings, which can take the form of assistance or representation by counsel or by a person of trust accompanying the person throughout the proceedings and beyond; and
- Procedural accommodations, made at the court level, in the sense of necessary and appropriate adjustments in the justice system; namely, adapting the setting of the hearing to accommodate the person’s needs, adapting the composition of the authority deciding about legal capacity by using multidisciplinary panels, and explicitly training those working in the administration of justice to involve the person concerned in the proceedings

2.8 Following a recent study of the participation of the person who is the subject of proceedings in the UK Court of Protection, the authors of the study²⁴ have proposed the following three essential principles for a human rights based approach to the participation of the persons in the determination process. These are modelled primarily around the case law of the European Court of Human Rights and also draw on the UNCRPD:

1. The overarching dignity principle: a person should be entitled to be present when decisions are taken which impose serious restrictions on her or his rights and freedoms.
2. The evidential principle: the relevant person her or himself is an important source of evidence for judicial decisions about their legal capacity and liberty.
3. The adversarial principle: Participation – including directly and through effective representation - may be necessary to help a person to present his case and to refute expert evidence or arguments recommending measures that a person opposes.

2.9 The UNCRPD has prompted law reform measures across the country in respect of guardianship and administration. This has involved a shift away from substitute decision-making, including a ‘best interests’ approach. Instead, jurisdictions are moving towards supporting people with disability to exercise their rights, so that a person’s will and preferences drive the decisions they make. A number of trials of supported decision-making are also underway.²⁵

2.10 Whilst there is much debate about the interpretation of Article 12,²⁶ these draft guidelines necessarily focus on existing legislative requirements and practices of

²⁴ L Series, P Fennell and J Doughty, *The Participation of P in Welfare Cases in the Court of Protection* (Cardiff University, 2017), 172. See also United Kingdom, Court of Protection, *Facilitating the Participation of “P” and Vulnerable Persons in Court of Protection Proceedings* (c2016) (‘Charles J’s guidelines’); *The Court of Protection Rules 2017* (UK); J. Lindsey (*forthcoming*), ‘Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection’ *Social and Legal Studies*, <https://doi.org/10.1177/0964663918793169>.

²⁵ A Arstein-Kerslake and others, “Future direction in supported decision making” (2017) 37(1) *Disability Studies Quarterly*.

²⁶ Noting the Declaration on the article issued by the Australian Government upon ratification (‘Australia declares its understanding that the Convention allows for fully supported or substituted decision making

tribunals around the country, each of which currently maintains a scheme of substitute decision-making.

- 2.11 Once finalised, the guidelines will continue to have relevance in the event that supported decision-making schemes are introduced by legislation in some or all states and territories. This is submitted on the basis that such schemes are likely to still include a requirement that a decision-making body determine, by hearing process, whether or not a supporter should be appointed for a person, or whether a substitute decision maker is required. The participation of the person will continue to be a critical aspect of any decision-making process.

3. Draft Guidelines

- 3.1 Given the different legislative schemes around the country, these draft guidelines are necessarily broad in nature. They set out principles to guide the work of the tribunals, including their registries, but also acknowledge that constraints exist (both legislative and in terms of resources, geography and population) as a result of the unique circumstances in which each tribunal operates.
- 3.2 It is also acknowledged that, in some circumstances, the extent of a person's cognitive impairment (for example, as a result of advanced Alzheimer's disease) will mean that the person will be unable to participate in the proceedings and it would be unlikely to be in their interests for a tribunal to require them to do so. A decision not to seek the views of the person should, however, be supported by evidence from an independent health professional. Evidence may be available from other sources (for example, family members, close friends, enduring documents previously made by the person) to provide an indication of what a person's will and preference may have been at a time when they were able to express those views.
- 3.3 Similarly, it is not uncommon for a tribunal to determine that it should proceed to hear a matter urgently, sometimes without notifying and/or in the absence of the person who is the subject of an application. This might occur where there is evidence that the person's health, welfare or estate are at imminent risk. The legislation in a number of jurisdictions enables a hearing to occur in such circumstances without notice being given to the person or other parties.²⁷
- 3.4 There may also be evidence that participation in the hearing may be detrimental to the physical or mental health or well-being of the person. This could, for example, be the result of the highly conflicted nature of the proceedings and in these circumstances other forms of participation may need to be considered.²⁸ Tribunals also need to be

arrangements which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards'); General Comment No.1 (2014) of the Committee on the Rights of Persons with Disabilities); and the Concluding Observations of Committee on Australia's Initial Report on its compliance with the Convention (Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia, 10th session, CRPD/C/AUS/CO/1 (2–13 September 2013)) and much academic and other commentary.

²⁷ See, for example, *Guardianship and Administration Act 2000* (Qld), ss129 and 155; *Guardianship and Administration Act 1995* (Tas), s 65(4)(a); *Guardianship and Administration Act 1993* (SA), s 66. Under s 67 of the *Guardianship and Management of Property Act 1991* (ACT), an emergency order may be made in certain circumstances without the holding of a hearing.

²⁸ Such as by way of representation (depending on the different forms of representation available in each jurisdiction) or by an advocate.

particularly aware of the different and often nuanced forms that elder abuse may take²⁹ as well as the dynamics of family violence, 'often characterised as a manifestation of power and control'.³⁰ In cases where such factors may be present, tribunals should seek to make arrangements for the person's participation in the hearing that does not risk reinforcing these dynamics and inhibiting the person's ability to provide their views about an application.

- 3.5 Prior to making an order, the decision-making body should take reasonable steps to satisfy itself that the person the subject of the application has been given a genuine opportunity to participate in the hearing. This approach acknowledges the obligation, howsoever expressed, for tribunals to consider the views of the subject person, as well as the impact that making an order has on a person's rights and freedom to make their own lifestyle and financial decisions. What constitutes reasonable steps depends on the circumstances of each matter, and needs to be considered on a case-by-case basis.

Summary of Draft Guidelines

- 3.6 The following draft guidelines could assist to maximise the participation of persons in the process of determining an application for guardianship or administration. Further discussion about each proposed draft guideline is contained in the section in which it appears in this document.

- **Draft Guideline 1:** Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person.
- **Draft Guideline 2:** The person and other parties should be promptly notified of an application being made.
- **Draft Guideline 3:** Written notice of hearing should be given to the person and other parties well in advance of the hearing. Registry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details.
- **Draft Guideline 4:** Pre-hearing processes should seek to ensure that:
 - the person is made aware of the application
 - information is provided to assist the person to understand what the application and hearing is about
 - the person's participation is encouraged (unless to do so would be detrimental to the person)
 - any further information that may assist the tribunal is obtained from the person
 - the person is provided with information as required about representation including advocacy
 - information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible

²⁹ World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002); J Lindenberg et al, 'Elder Abuse an International Perspective: Exploring the Context of Elder Abuse' (2013) 25(08) *International Psychogeriatrics* 1213, 1213.

³⁰ ALRC, Report 131, [241].

- the person has an opportunity to ask questions about any of these matters
- information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids
- **Draft Guideline 5:** Optimally, the listing of a hearing should take into account:
 - whether any particular needs of the person require a hearing at certain times of the day (for example, a morning hearing rather than the afternoon, or taking into account the effects of medication)
 - an estimate of the length of time the person may need to give their views to the tribunal, having regard to their communication needs
 - any need for breaks during the hearing
 - any additional time required for the use of an interpreter.
- **Draft Guideline 6:** Information about various aspects of the tribunal's practice and procedure (both in hard copy and online) should be made available to the person who is the subject of proceedings in formats that are accessible to people:
 - from culturally and linguistically diverse backgrounds
 - with a vision or hearing impairment
 - with cognitive disabilities
- **Draft Guideline 7:** Optimally, hearings should be listed in a location that allows the person to participate in the hearing in person.
- **Draft Guideline 8:** If a face-to-face hearing is not possible or practicable, then other means by which the person can participate in the hearing should be explored. This may include:
 - measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a "Visit to the Person" by a Tribunal member
 - the views of the person being provided by way of a representative
 - videoconferencing
 - telephone participation
- **Draft Guideline 9:** Tribunals should collect data and report publicly on the participation rates of persons in hearings, broken down into in-person participation, hearings by videoconference, and hearings by telephone.
- **Draft Guideline 10:** Tribunals should also collect data and report publicly on the rate of appointment of representatives.
- **Draft Guideline 11:** Hearing venues should:
 - be wheelchair accessible
 - have drop-off zones for people with mobility restrictions
 - have easily accessible parking
 - be accessible by public transport

- provide accessible toilets
- **Draft Guideline 12:** Tribunals should give consideration to the amenity of waiting room spaces, given the impact this can have on the person's anxiety levels, leading up to the hearing, and their ability to participate in the hearing.
- **Draft Guideline 13:** Tribunals should give consideration to the amenity and configuration of hearing rooms. Hearing rooms should:
 - provide the option of a more informal setting that is distinct from a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the person at ease;
 - provide hearing induction loop facilities; and
 - provide videoconference and teleconference facilities.
- **Draft Guideline 14:** Tribunals should, wherever beneficial for the subject person, allow the person to be accompanied by a support person during the hearing. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.
- **Draft Guideline 15:** In those jurisdictions that require the leave of the tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the person and their legal representative have adequate time to prepare.
- **Draft Guideline 16:** In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the person, consideration of whether such an appointment should be made should occur at the earliest opportunity.
- **Draft Guideline 17:** Tribunal members need to be trained in the use of communication supports that a person may require in order to participate in the hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.
- **Draft Guideline 18:** Given the centrality of the person who is the subject of guardianship and/or administration proceedings, the person should have a genuine opportunity to participate in an oral hearing before a determination is made.
- **Draft Guideline 19:** As a matter of good practice, original applications should be determined after an oral hearing.
- **Draft Guideline 20:** As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of orders are determined without an oral hearing, tribunals should consider their respective statutory obligations about considering the views of the person before making a determination.
- **Draft Guideline 21:** Acknowledging that some jurisdictions are constrained regarding composition of panels (such as WA), consideration should be given to the composition of tribunal panels that hear guardianship and administration matters.

- **Draft Guideline 22:** Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.
- **Draft Guideline 23:** Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be utilised in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community based experience.
- **Draft Guideline 24:** Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.
- **Draft Guideline 25:** Training for members and registry staff about strategies to involve persons who are the subject of applications is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.
- **Draft Guideline 26:** Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members and staff with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.
- **Draft Guideline 27:** Members and registry staff should have access to training which promotes awareness of specific cultural considerations relevant to Aboriginal and Torres Strait Islander people.

4. Pre-hearing

- 4.1 **Draft Guideline 1:** Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person.
- 4.2 **Draft Guideline 2:** The person and other parties should be promptly notified of an application being made.
- 4.3 **Draft Guideline 3:** Written notice of hearing should be given to the person and other parties well in advance of the hearing. Registry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details.
- 4.4 **Draft Guideline 4:** Pre hearing processes should seek to ensure that:
- the person is made aware of the application
 - information is provided to assist the person to understand what the application and hearing is about
 - the person's participation is encouraged (unless to do so would be to the detriment of the person)
 - any further information that may assist the tribunal is obtained from the person
 - the person is provided with information as required about representation including advocacy and
 - information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible

- the person has an opportunity to ask questions about any of these matters
- information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids

4.5 **Draft Guideline 5:** Optimally, the listing of a hearing should take into account:

- whether any particular needs of the person require a hearing at certain times of the day (for example, a morning hearing rather than the afternoon, or taking into account the effects of medication)
- an estimate of the length of time the person may need to give their views to the tribunal, having regard to their communication needs
- any need for breaks during the hearing
- any additional time required for the use of an interpreter.

4.6 **Draft Guideline 6:** Information about various aspects of the tribunal's practice and procedure (both in hard copy and online) should be made available to the person who is the subject of proceedings in formats that are accessible to people:

- from culturally and linguistically diverse backgrounds
- with a vision or hearing impairment
- with cognitive disabilities

4.7 As noted in the ALRC Report on *Elder Abuse – A National Legal Response*, the number of applications for guardianship and administration is increasing.³¹ Among other things, this places greater time pressure on tribunal members hearing such applications. Expanding the role of pre-hearing support may therefore provide an opportunity to maximise the participation of the person in the hearing.³²

4.8 This goal can be furthered by measures such as:

- 1) Prompt notification of an application/s and hearing details to the person and other parties
- 2) Pre-hearing support for the person
- 3) Time-tabling
- 4) Publicly available information (in writing and online) explaining tribunal processes in accessible formats and in different languages

Prompt notification of application and hearing details

4.9 The person and other parties should be promptly notified of an application.

³¹ ALRC, Report 131 [10-39].

³² T Carney and others, *Australian Mental Health Tribunals — Space for Fairness, Freedom, Protection and Treatment* (Themis Press, 2011), 277.

- 4.10 Hearings should be listed within appropriate timeframes dependent on assessments of risk to the person. Written notice of the hearing should be given to the person and other parties well in advance of the hearing so that the person, in particular, has time to prepare for the hearing and to seek support if they wish. For many people, cognitive and/or communication difficulties may inhibit their ability to understand written advice, received by post, that an application for guardianship or administration has been made.³³ Registry staff may therefore need to consider whether additional steps need to be taken to ensure that the person is informed about the hearing details.
- 4.11 Some jurisdictions have a statutory obligation to personally serve a notice of hearing within a specified timeframe prior to hearing. For example, in the WA State Administrative Tribunal, this period is 14 days.³⁴ A dedicated service officer travels to the proposed represented person and personally serves the notice of hearing on them. The service officer also explains what the application and hearing is about, and provides information about the person's right to access documents.
- 4.12 In Queensland, QCAT must (subject to certain specified exceptions) give a copy of an application to the person within seven days.³⁵ The starting point for giving notice of the hearing to the person is at least seven days although this can also be reduced by direction of the Tribunal.³⁶ Notice is given to the person in the way that the Tribunal considers most appropriate having regard to the person's needs.³⁷ So, for example, if the person is a resident of an aged care facility, written notice of the hearing is sent to the person and also to the Manager of the facility requesting that they bring the notice to the attention of the person.³⁸
- 4.13 As a matter of good practice, tribunals should monitor and seek to minimise the time that lapses between the date that an application is lodged and the matter is heard.

Pre hearing support for the person

- 4.14 Pre hearing processes should seek to ensure that:
- the person is made aware of the application;
 - information is provided to assist the person to understand what the application and hearing is about;
 - any further information that may assist the tribunal is obtained from the person;
 - the person is provided with information as required about representation; and
 - information is given to the person about tribunal practice and procedure and to assist in addressing any confusion and anxiety, where possible
 - the person has an opportunity to ask questions about any of these matters

³³ Speech Pathology Australia, *Elder Abuse Discussion Paper*; Australian Law Reform Commission, *Submission 309* <www.alrc.gov.au/sites/default/files/subs/309._speech_pathology_australia.pdf>.

³⁴ *Guardianship and Administration Act 1990* (WA) s 41.

³⁵ Queensland Civil and Administrative Tribunal Rules 2009 (Qld), rr 19, 21.

³⁶ *Guardianship and Administration Act 2000* (Qld), s 118.

³⁷ *Guardianship and Administration Act 2000* (Qld), s 118.

³⁸ Consultation with QCAT, 6 September 2018.

- 4.15 The views of the person may also be ascertained as a consequence of these processes.
- 4.16 Of critical importance is that the person's participation is encouraged, unless to do so would be to the detriment of the person as previously discussed.
- 4.17 How these aims are achieved may vary depending on the legislative and resource constraints of each tribunal.
- 4.18 In some jurisdictions, registry processes have been developed to address these aims.
- 4.19 For example, when appropriate, registry staff of the Tasmanian Guardianship and Administration Board will contact the applicant, with the goal of encouraging them to help facilitate the person's attendance at the hearing. If the applicant is a family member or an employee of an aged care facility, the registry may prompt the applicant as to what transport arrangements are in place for the person to attend the hearing, and reinforce to the applicant the importance of having the person present at the hearing.³⁹
- 4.20 At NCAT, the registry obtains the views of the person in response to the application and assists in identifying how the person can best participate in the proceedings, wherever possible.⁴⁰ The benefits of the NSW approach have been described as being that:⁴¹
- the Tribunal can have a high degree of confidence that the person who is the subject of the application has truly been made aware of the application, its implications and the process that it lends itself to;
 - the views of the person are made known to the Registry and can inform decision-making about what less restrictive alternatives to guardianship and/or administration might be appropriate and subsequently how an application should proceed; and
 - the pre-hearing process reflects the general principles in guardianship legislation and the principles of the Convention.
- 4.21 The Victorian Civil and Administrative Tribunal (VCAT) is piloting a model of case management in certain applications, and will evaluate the pilot to test its effectiveness against several measures. This will include its effectiveness in encouraging the participation of the person in the proceedings. One aspect of the case management model is contacting the person who is the subject of the application, when possible.⁴² The Queensland Civil and Administrative Tribunal (QCAT) also undertakes active case management.⁴³

³⁹ Consultation with Tasmanian Guardianship and Administration Board, 21 August 2018.

⁴⁰ *Guardianship Act 1987* (NSW), s 14(2)(a); New South Wales Civil and Administrative Tribunal, *Application Process: Guardianship Division* (21 June 2017) <www.ncat.nsw.gov.au/Pages/guardianship/application_process/application_process.aspx>.

⁴¹ Office of the Public Advocate, *Decision-making support and Queensland's guardianship system*, Final Report (April 2016), 77 <www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf>.

⁴² Consultation with VCAT, 5 September 2018. Initially the case management pilot is in place for applications that include an issue about an enduring power of attorney or a medical treatment decision.

⁴³ *Guardianship and Administration Act 2000* (Qld), s 130; Queensland Civil and Administrative Tribunal Rules 2009 (Qld);

- 4.22 In other jurisdictions, these steps may be undertaken by other statutory bodies (such as Public Guardians, Public Advocates and Public Trustees) if required to do so by tribunal order or direction.⁴⁴
- 4.23 The Northern Territory Civil and Administrative Tribunal (NTCAT) seeks to address these matters by way of directions hearings before a Tribunal member for every proceeding.⁴⁵ As a matter of practice, prior to the directions hearing standard orders are given to the person and other interested persons. The applicant (for new matters) or the guardian (for other matters) must bring the orders to the attention of the person and the orders encourage the person to participate in the directions hearing. At the directions hearing the Tribunal member will first establish that the standard orders have been distributed as required and if it is not apparent that this has happened, the usual course is for the directions hearing to be adjourned and for additional standard orders to issue. If the person attends (or otherwise participates) then the Tribunal member will use the directions hearing as the opportunity to ascertain the person's views, as well as to gain their own impressions that may assist in the assessment of capacity. Depending on the level of attendance at the directions hearing and what is able to be elicited by the Tribunal member, orders will be made for the provision of necessary materials and for the further hearing of the matter.⁴⁶
- 4.24 An early directions hearing is also arranged at NCAT for a person who already has a guardianship and/or financial management order made about them and who wishes to have the order/s ended. This early listing of a directions hearing enables a single member of the Tribunal to explain to the person the kind of evidence they will need to give to the Tribunal to support their application and to answer questions that the applicant may have. Fact sheets have also been developed to explain the process to the self-applicant.⁴⁷ A fact sheet is also available that has a list of agencies that may be able to offer legal and other assistance to the applicant.⁴⁸
- 4.25 Pre-hearing case management may also provide an effective tool in identifying 'unmeritorious' applications, that is, those that have been lodged in circumstances where there are other measures available to support the person in their decision making. This can provide an early opportunity for the withdrawal of applications and the potential alleviation of stress and anxiety of the person who is the subject of the proceedings.
- 4.26 As noted in the Queensland Office of the Public Advocate's report on decision-making support and Queensland's guardianship system,⁴⁹ a person's health, wellbeing and/or circumstances can change between the time at which an application is made, and when the matter is heard. Accordingly, their ability to participate in a proceeding can change. The participation of the person in proceedings should therefore be confirmed immediately prior to a hearing, particularly when a notable period has passed between the making of the application and when the matter will be heard.

⁴⁴ See, for example, *Public Trustee and Guardian Act 1985* (ACT), s 24A and *Human Rights Commission Act 2005* (ACT), s 27BA; *Guardianship and Administration Act 1993* (SA), s 28; *Guardianship of Adults Act 2016* (NT), s 83; *Guardianship and Administration Act 1995* (Tas), s 17(2); *Guardianship and Administration Act 1986* (Vic), ss 16 and 18A; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Sch 1 cl 35.

⁴⁵ Consultation with NTCAT, 7 September 2018.

⁴⁶ Consultation with NTCAT, 7 September 2018.

⁴⁷ http://www.ncat.nsw.gov.au/Documents/gd_factsheet_ending_or_changing_your_guardianship_order.pdf;
http://www.ncat.nsw.gov.au/Documents/gd_factsheet_ending_or_changing_your_financial_management_order.pdf.

⁴⁸ <http://www.ncat.nsw.gov.au/Documents/gd_factsheet_who_can_help_you_with_your_application.pdf>

⁴⁹ *Ibid.*

- 4.27 Tribunals should also ascertain whether any communication supports are required, for example, interpreting services,⁵⁰ visual or auditory aids or other communication aids.

Time-tabling

- 4.28 Optimally, the listing of the hearing should take into account:
- 1) whether any particular needs of the person require a hearing at certain times of the day (for example, a morning hearing as opposed to the afternoon, or taking into account the effects of medication);
 - 2) an estimate of the length of time the person may need to give their views to the tribunal, having regard to their communication needs;
 - 3) any need for breaks during the hearing; and
 - 4) any additional time required for the use of an interpreter.

Information in accessible formats

- 4.29 Information about various aspects of the guardianship system should be produced in accessible formats and provided to the person who is the subject of the proceedings. Given the potential for fundamental decisions about a person to be made by a tribunal, people who are the subject of proceedings should have available to them information about the legal process and their rights. This information needs to be accessible to people:
- from culturally and linguistically diverse backgrounds
 - with a vision or hearing impairment
 - with cognitive disabilities
- 4.30 The accessibility of information online is also crucial. QCAT, for example, uses ‘Browse Aloud’ software on its website. The software has a number of functions, including the ability to allow users to increase font size on HTML and PDF, change language, and have text read back in selected languages. The software can also generate reports to identify commonly used languages and thereby provide for future consideration.⁵¹
- 4.31 Several jurisdictions have developed resources on this topic in accessible formats. See, for example:
- Victoria’s Office of the Public Advocate Fact Sheet on ‘What is an administrator’, in Easy English version.⁵²

⁵⁰ See Recommended National Standards for Working with Interpreters in Courts and Tribunals, Judicial Council on Cultural Diversity (2017) <<http://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf>>

⁵¹ Consultation with QCAT, 21 August 2018.

⁵² Available at <https://www.publicadvocate.vic.gov.au/our-services/publications-forms/239-what-is-an-administrator-easy-english-fact-sheet?path&_sm_au_=iVVtD17RS43D2nR7>.

- Tasmania’s Guardianship and Administration Board Fact Sheets on ‘What is the Guardianship and Administration Board?’, ‘Guardianship’ and ‘Administration’ in Easy Read version.⁵³
- Western Australia’s Office of the Public Advocate webpage on ‘Guardianship frequently asked questions’ (September 2016) in written and audio format.⁵⁴
- WA State Administrative Tribunal has information online ‘Practice Note 9: Proceedings under the *Guardianship and Administration Act 1990*’ in written and audio format.⁵⁵
- NTCAT Guardianship webpage ‘Adult guardianship and orders’ (August 2018).⁵⁶
- NCAT Guardianship Division Fact Sheet on ‘What to expect at a hearing’ (June 2016) made in Easy Read version by NSW Council for Intellectual Disability.⁵⁷
- South Australia’s Office of the Public Advocate Manual ‘Now you are a guardian’ in plain language and Easy Read version.⁵⁸
- AGAC Fact Sheet on “Things your guardian should do” (July 2017), in Easy English version and incorporating picture communication symbols, which has been adopted by Queensland’s Office of the Public Guardian, the Guardianship Division of the ACT Civil and Administrative Tribunal (ACAT) and Victoria’s Office of the Public Advocate.⁵⁹
- ACAT Guardianship webpage provides two documents in Word format, information for appointed guardians and information for appointed managers, which provide information about an appointee’s responsibilities.⁶⁰

4.32 Accessibility more generally is a particular focus for tribunals. For example, VCAT is implementing a comprehensive customer service improvement strategy that is focussed on ensuring that all VCAT processes are as accessible as possible, that all correspondence is easy to read and understand and that there is consistent and expert assistance available by telephone and in person.⁶¹ VCAT has also adopted its first

⁵³ Available at

<https://www.guardianship.tas.gov.au/publications/_factsheets?_sm_au_=iVVtD17RS43D2nR7>. The Guardianship and Administration Board sends to all proposed represented persons a letter, fact sheet on ‘What is the Guardianship and Administration Board?’ and the relevant application fact sheet in easy read and/or longer format (Consultation with Guardianship and Administration Board, 21 August 2018).

⁵⁴ Available at

<https://www.publicadvocate.wa.gov.au/G/guardianship_frequently_asked_questions.aspx?uid=6194-8506-7822-0632>.

⁵⁵ Available at <https://www.sat.justice.wa.gov.au/P/practice_notes.aspx>

⁵⁶ Available at <https://nt.gov.au/wellbeing/mental-health/adult-guardianship-and-orders?_sm_au_=iVVtD17RS43D2nR7>.

⁵⁷ Available at

<www.ncat.nsw.gov.au/Documents/gd_factsheet_what_to_expect_at_a_hearing_easyread.pdf>.

⁵⁸ Available at http://www.opa.sa.gov.au/resources/private_guardian_resources.

⁵⁹ Available at <https://www.publicguardian.qld.gov.au/_data/assets/pdf_file/0004/572917/easy-english-national-standards-of-public-guardianship.pdf>; <<https://www.ptg.act.gov.au/images/inf/easy-eng-nat-stds-public-grdship.pdf>>; <<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/guardianship-a-administration/guardianship-1>>.

⁶⁰ Available at www.acat.act.gov.au/application-type/guardianship.

⁶¹ Consultation with VCAT, 5 September 2018.

Accessibility Action Plan (2018-2022)⁶² that sets out a program of work to ensure that the Tribunal is fully accessible for people with a disability.⁶³

5. At the hearing

- 5.1 **Draft Guideline 7:** Optimally, hearings should be listed in a location that allows the person to participate in the hearing in person.
- 5.2 **Draft Guideline 8:** If a face-to-face hearing is not possible or practicable, then other means by which the person can participate in the hearing should be explored. This may include:
- measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a “Visit to the Person” by a Tribunal member
 - the views of the person being provided by way of a representative
 - videoconferencing
 - telephone participation
- 5.3 **Draft Guideline 9:** Tribunals should collect data and report publicly on the participation rates of persons in hearings, broken down into in-person participation, hearings by videoconference, and hearings by telephone.
- 5.4 **Draft Guideline 10:** Tribunals should also collect data and report publicly on the rate of appointment of representatives.
- 5.5 **Draft Guideline 11:** Hearing venues should:
- be wheelchair accessible
 - have drop-off zones for people with mobility restrictions
 - have easily accessible parking
 - be accessible by public transport
 - provide accessible toilets
- 5.6 **Draft Guideline 12:** Tribunals should give consideration to the amenity of waiting room spaces, given the impact this can have on the person’s anxiety levels, leading up to the hearing, and their ability to participate in the hearing.
- 5.7 **Draft Guideline 13:** Tribunals should give consideration to the amenity and configuration of hearing rooms. Hearing rooms should:
- provide the option of a more informal setting that is distinct from a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the person at ease;

⁶² Available at <<https://www.vcat.vic.gov.au/AccessibleVCAT>>.

⁶³ Consultation with VCAT, 5 September 2018.

- provide hearing induction loop facilities
 - provide videoconference and teleconference facilities
- 5.8 **Draft Guideline 14:** Tribunals should, wherever beneficial for the subject person, allow the person to be accompanied by a support person during the hearing. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.
- 5.9 **Draft Guideline 15:** In those jurisdictions that require the leave of the tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the person and their legal representative have adequate time to prepare.
- 5.10 **Draft Guideline 16:** In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the person, consideration of whether such an appointment should be made should occur at the earliest opportunity.
- 5.11 **Draft Guideline 17:** Tribunal members need to be trained in the use of communication supports that a person may require in order to participate in the hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.
- 5.12 Tribunal hearings are stressful environments for most participants and levels of anxiety are undoubtedly heightened for the person who is the subject of the proceedings. Of critical importance is that the person's participation is encouraged, unless to do so would be to the detriment of the person as previously discussed.
- 5.13 The factors identified below hold the potential to minimise stress. This can improve the quality of the experience for the person who is the subject of the proceedings, as well as other participants, and importantly provide an environment in which the person may feel more empowered and comfortable to express their views and take part in the hearing process. These factors include:
- 1) Hearing location
 - 2) Physical accessibility of hearing venue
 - 3) Waiting areas
 - 4) Hearing rooms
 - 5) Support and legal representation
 - 6) Communication
- 5.14 Tribunals around the country seek to incorporate many of these strategies in their practices and procedures and specific examples are provided where relevant.

Hearing location

- 5.15 When a matter is listed for hearing, paramount consideration should be given to the interests of the person.

- 5.16 Decisions about how matters are listed for hearing should start from the premise that the person is to be given the opportunity to participate in the hearing in person, and provide evidence and their views about the application/s directly to the decision maker.
- 5.17 Face-to-face hearings may be particularly important for people with varying degrees of cognitive impairment and/or mental illness who may find communication by way of video conference or telephone confusing or disorienting.⁶⁴
- 5.18 A number of tribunals list hearings in locations apart from their principal registry. VCAT, for example, conducts many hearings in regional locations and is currently in the process, in partnership with government and community agencies, to develop hearing venues in metropolitan areas that are outside courts and more appropriate for guardianship hearings. VCAT also conducts regular hearings in six hospitals at least 80 days per year, and there are discussions in place with a seventh hospital. People who are in hospital attend these hearings at a far higher rate than hearings out of the hospital. Other jurisdictions also conduct hearings in locations away from their principal registries.
- 5.19 Geographic realities, population and their associated resource issues, have an impact on the ability of tribunal members to travel to regional locations for face-to-face hearings, particularly in the larger states and territories with widely dispersed populations. If a face-to-face hearing is not possible or practicable, then other means by which the person can participate in the hearing should be explored, depending on the facilities available including videoconferencing or telephone participation.
- 5.20 This possibility was specifically acknowledged in the ALRC report on *Elder Abuse – A National Legal Response*,⁶⁵ where '[s]takeholders highlighted that maximising participation of the represented person hinges upon providing people who are unable to attend a hearing in person with other means to participate. This could include, for example, access to video conferencing or telephone participation, or conducting hearings in alternative venues such as aged care facilities and hospitals.'⁶⁶
- 5.21 The majority of tribunals provide such facilities.
- 5.22 In South Australia, if the person is physically or medically unable to attend a hearing in person, but is able to communicate their wishes, and a video conference cannot be conducted (for valid reasons), then consideration will be given to a tribunal member visiting the person prior to the hearing to take evidence. This visit may take place in a hospital, an aged care facility or in the person's home and allows the Tribunal member to discuss the application, explain the medical evidence and ascertain the person's wishes. Each visit must be authorised by a Presidential Member.⁶⁷ As a matter of practice, the visit is only authorised if the person cannot participate in the hearing due to illness or infirmity (supported by medical evidence). The evidence taken during the visit to the person is audio recorded and a summary of the recording is documented in writing by the tribunal member. At the hearing the written summary is read out to all other parties and interested persons at the commencement of the hearing. The audio

⁶⁴ Speech Pathology Australia, *Elder Abuse Discussion Paper*; Australian Law Reform Commission, *Submission 309* <www.alrc.gov.au/sites/default/files/subs/309._speech_pathology_australia.pdf>.

⁶⁵ At [10-46].

⁶⁶ See footnote [87] in Ch 10 of ALRC, Report 131.

⁶⁷ *South Australian Civil and Administrative Tribunal Act 2013* (SA), s 86.

tape or a transcript of the audio tape is made available to other parties and interested persons on request.⁶⁸

- 5.23 In some circumstances, the views of the person could also be provided by way of a separate representative or guardian ad litem, where that option is available to the Tribunal. This option is available to a number of tribunals who make orders for this form of support or representation on a regular basis. Other jurisdictions do not have this option available to them and therefore rely on other strategies to involve the person in the hearing process.
- 5.24 In Tasmania, for example, the Guardianship and Administration Board may make an order that the Public Guardian investigate and report to the Board, which can include ascertaining the wishes of the person.⁶⁹ The Board may also appoint an Australian legal practitioner or medical practitioner or any other person with appropriate expertise to assist the Board in any proceedings before it.⁷⁰ In the ACT, the Public Trustee and Guardian, on request, speak with the person about their views and wishes in response to an application and provide a report to the Tribunal about the person's views and wishes.⁷¹
- 5.25 In Queensland, if the person is not represented in the proceeding or the person is represented by an agent that is regarded by the president or presiding member to be inappropriate to represent the person's interests, QCAT may appoint a representative to represent the person's 'views, wishes and interests'.⁷² A person with impaired capacity may be represented by someone else without leave.⁷³
- 5.26 In South Australia, the Public Advocate must investigate the affairs of a person if directed to do so by the SACAT.⁷⁴ The Public Advocate must give a copy of the report of the completed investigation to SACAT who may then receive the copy of the report in evidence and have regard to the matters contained in the report.⁷⁵ The Public Advocate will visit the person and the investigation report can incorporate their wishes.⁷⁶
- 5.27 The role of a traditional legal representative is discussed later in this document.
- 5.28 So that the success, or otherwise, of these various measures may be measured, tribunals should collect data and report publicly on the participation rates of the person in hearings, broken down into face-to-face participation, hearings by videoconference and hearings by telephone. Tribunals should also collect data and report publicly on the rate of appointment of legal representatives and separate representatives/guardians ad litem.
- 5.29 A number of jurisdictions already collect this data, and some collect additional information to make the data more meaningful. For example, in WA, the State Administrative Tribunal (SAT) seeks information about the reasons why the person did not attend the hearing, what the medical evidence discloses about whether the person

⁶⁸ See also, SACAT, "Hearings for guardianship, administration, consent to medical treatment, and advance care directives" <www.sacat.sa.gov.au/upload/General%20-%20Attendance%20what%20to%20expect%20at%20Hearings%20in%20the%20Community%20Stream%20May%202018.pdf>.

⁶⁹ *Guardianship and Administration Act 1995* (Tas), s 17(2).

⁷⁰ *Guardianship and Administration Act 1995* (Tas), s 10.

⁷¹ Consultation with ACAT, 7 September 2018.

⁷² *Guardianship and Administration Act 2000* (Qld), s 125.

⁷³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 43(2)(b)(i).

⁷⁴ *Guardianship and Administration Act 1993* (SA), s 28(1).

⁷⁵ *Guardianship and Administration Act 1993* (SA), ss 28(2) and (3).

⁷⁶ Consultation with SACAT, 7 September 2018.

could have attended the hearing, and whether the person's views or wishes were obtained in another way. This may include whether the Office of the Public Advocate met with the person and communicated the person's views to the hearing.⁷⁷

Physical accessibility of hearing venue

- 5.30 Hearing venues should:
- be wheelchair accessible
 - provide drop off zones for people with mobility restrictions
 - provide easily accessible parking
 - be accessible by public transport
 - provide accessible toilets

Waiting areas

- 5.31 The amenity of waiting room spaces can affect those waiting to go into a hearing. The following are important considerations: the extent to which waiting areas reflect the formality or informality of the proceedings to come; provide privacy, if necessary, and appropriate seating arrangements to lessen the anxiety of the person who is the subject of proceedings as well as account for the potential of conflict between participants in a hearing in contested matters.
- 5.32 In NSW, steps were taken to address these issues, with a focus on people with disabilities, when the Guardianship Division of NCAT moved to new premises in early 2016. The primary focus in the development of the new premises was accessibility, and designing an environment where clients would feel at ease was as important as ensuring the office was functional. A company experienced in designing facilities for people with disabilities was engaged to work with an architect to ensure the new Guardianship Division premises met not only the Building Code of Australia 2015, but also the requirements of the Disability (Access to Premises – Buildings) Standards 2010, and relevant Australian Standards as they relate to access to premises and the spirit and intent of the *Disability Discrimination Act 1992* (Cth). An independent accessibility report was also commissioned, and helped to inform the design. Consultation was also undertaken with major stakeholders, including peak bodies representing disability groups. This resulted in a number of unique design features, including a reception area with easy to understand signage that contains pictures and patterns, with a colour scheme and soft furnishings selected to with the aim of creating a peaceful atmosphere and to differentiate the area from a formal court environment. The configuration of the furniture allows people to sit in small zones. Chairs of varying heights were selected to assist people with mobility issues. The height of the reception desk is appropriate for people who use wheelchairs. Secure interview rooms are found adjacent to the reception area for staff to speak with clients privately and confidentially. There are accessible toilets for the public.
- 5.33 The configuration of waiting areas is not a matter that tribunals have a great deal of control over when they hold hearings outside their own premises including in court

⁷⁷ Information provided by SAT (20 August 2018).

premises in regional areas or in hospitals. A lack of appropriate physical space, seating and the like can heighten tension, particularly if time is spent waiting for a hearing to commence. This can be exacerbated if parties leave a hearing upset about the outcome, which could affect those waiting for their hearing to commence.

Hearing rooms

- 5.34 The configuration of hearing rooms can also be an important factor in how a person perceives the hearing process and their ability to engage with it. Most tribunals have hearing rooms that aim to provide an informal atmosphere that is distinct from a traditional courtroom, for example, a meeting table around which members and parties sit, no elevated bench, and flexibility in terms of seating arrangements that assist in putting the person at greater ease. There are occasions, however, where a more formal, court-like setting may be appropriate; for example, in heavily contested matters in which parties are legally represented, or where there is a need to manage safety concerns.⁷⁸
- 5.35 The design considerations that were applied to the waiting area of the new NCAT premises were also applied to the design of Guardianship Division hearing rooms: all hearing rooms have been fitted with a secure hearing loop, the panelling and treatment in the room was designed to maximise the acoustics, and each hearing room contains video and teleconferencing facilities.
- 5.36 When sitting in regional locations or hospitals, tribunals have limited control over the spaces in which hearings are conducted. The perception that a guardianship hearing is like a trial, particularly if a hearing is held in a court facility, can have a significant impact on a person's ability to participate in a hearing, sometimes with the result of preventing a person from entering the court precinct or courtroom.
- 5.37 Although hearings in a hospital may enable a person, such as an in-patient, to attend a hearing in person, this setting may contribute to a perception that there is a stronger relationship between the tribunal and the clinical team, with the person who is the subject of the application excluded from the process.⁷⁹
- 5.38 Giving attention to how these perceptions can be addressed is an important step in encouraging the confidence of the person in the hearing process.
- 5.39 Improving the accessibility to courts for older people, particularly in cases involving elder abuse, has received particular attention in certain parts of the United States.⁸⁰ In relation to the physical architecture of a hearing room, albeit in the setting of a court rather than a tribunal hearing room, the Eleazer Courtroom at Stetson University, Florida, is an example of a courtroom specifically designed to be "elder-friendly".⁸¹ The

⁷⁸ See also Professor David Tait, "Designing Tribunal Spaces, How can architecture contribute to effective communication?", Justice Research, University of Western Sydney, Presentation to COAT NSW Annual Conference (13 September 2013) <http://www.coat.gov.au/images/downloads/nsw/Prof_David_Tait-Designing_Tribunal_Spaces.pdf>.

⁷⁹ T Carney and others, *Australian Mental Health Tribunals — Space for Fairness, Freedom, Protection and Treatment* (Themis Press, 2011) 176.

⁸⁰ C Heisler, "Elder Abuse: An Overview for the CA Courts" Curriculum, Administrative Office of the Courts (CA) (2007) <<http://www.courts.ca.gov/documents/curriculum-aocelder.pdf>>; American Bar Association, 'Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse' <http://www.eldersandcourts.org/~media/Microsites/Files/cec/ABA%20Recommended%20Guidelines%20for%20State%20Courts%20Handling%20EA%20Cases.ashx>>.

⁸¹ Available at www.eldersandcourts.org/Aging/The-Role-of-the-Courts.aspx; see also "From the Elder-Friendly Law Office to the Elder-Friendly Courtroom—Providing the Same Access and Justice for All" (2006) 2 *National Academy of Elder Law Attorneys Journal* 325.

courtroom's design accommodates those with physical disabilities, and enhances audio and visual cues for the hearing and visually impaired. Its features include:

- Hearing amplification devices;
- Different colour borders to around carpet edges to indicate courtroom pathways;
- Flat touch screen panel outside the courtroom displaying the courtroom set up and key players;
- Non buzz, non-glare lighting; and
- A witness box located on the floor.

Support and representation

5.40 Support at a hearing for the person who is the subject of an application can take different forms, including informal measures of support by family members, close friends, disability advocates, or other person, who is able to provide assistance and support.

5.41 In their analysis of a sample of national laws in Europe involving legal capacity proceedings,⁸² the authors identify that an important component of the 'implementation of an equal and effective right to be heard' is the entitlement of a person who is the subject of an application to be accompanied by a trusted person throughout the legal capacity proceedings:⁸³

Assistance from a person of trust, freely chosen by the person with mental health problems, can enhance the person's understanding of the proceedings, and make it more likely that the will of the person will be expressed. A person of trust can come from the person's social network or from independent advocacy services. Care must be taken, however, to clearly distinguish the role of the person of trust from that of counsel. Indeed, no undue burden should be put on persons in close relationships with the person with mental health problems...and legal representation should remain the mandate of the counsel. Nevertheless, the involvement of a person of trust increases the consideration given to the family, friends and support people including the appreciation of the social network of persons standing before the legal authorities.

5.42 In relation to legal representation, most tribunals seek to design their procedures so that they are sufficiently accessible, such that the person can participate in the hearing without the assistance of a legal practitioner.

5.43 Legal practitioners are, however, regularly involved in tribunal proceedings. Their involvement can take a number of forms:

- General legal advisor – A legal practitioner may provide advice and assistance to the person without appearing at a hearing. They may, for example, assist the person in pre-hearing discussions with other parties, or assist a party in preparing documents and gathering evidence.

⁸² M Fallon-Kund and J Bickenbach, "Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings" (2016) 5(3) *Laws* 29 <<http://www.mdpi.com/2075-471X/5/3/29>>.

⁸³ *Ibid.*

- McKenzie Friend⁸⁴ – A legal practitioner may attend the hearing as the person's McKenzie Friend by providing support but not representation.
- Legal Representative – A legal practitioner may attend the hearing as the person's legal representative and act on their instructions. In some jurisdictions (NSW⁸⁵ and Victoria⁸⁶), the tribunal needs to give permission (or 'leave') for a party to be represented by a legal practitioner. In others, leave is not required.⁸⁷
- Other representatives – In some jurisdictions, such as NSW,⁸⁸ a legal practitioner may also act as the separate representative of the person if appointed to do so by the tribunal. If a tribunal orders that the subject person is to be separately represented, then the role of the separate representative is, prior to the hearing, to seek to ascertain the views and wishes of the person and then appear at the hearing to communicate those views and wishes if the person is unable to do so. The separate representative is also able to make submissions about the application/s.

5.44 A separate representative for the person may be appointed in a range of circumstances, including the following:

- Where there is a serious doubt about the subject capacity to give legal instructions but there is a clear need for the person's interests to be independently represented at the hearing;
- Where is an intense level of conflict between the parties about what is in the interests of the person;
- The person is vulnerable to or has been subject to duress or intimidation by others involved in the proceedings;
- There are serious allegations about exploitation, neglect or abuse of the person;
- Other parties to the proceeding have been granted leave to be legally represented; and
- The proceedings involve serious and/or complex issues likely to have a profound impact on the interests of the person.

5.45 In some jurisdictions, free legal advice is available subject to certain criteria. For example, in QCAT, LawRight operates a Self-Representation Service that provides free legal advice and help for people involved in guardianship and administration matters.⁸⁹

5.46 In most jurisdictions, tribunals may also appoint another person to represent the person. In QCAT, for example, in certain circumstances the member may appoint a representative to represent the adult's views, wishes and interests.⁹⁰ In the Tasmanian Guardianship and Administration Board, the person may be presented by any person,

⁸⁴ The role of a McKenzie Friend was established in *McKenzie v McKenzie* [1970] WLR 472; [1970] 3 All ER 1034; [1971], 33.

⁸⁵ *Civil and Administrative Tribunal Act 2013* (NSW), s 45.

⁸⁶ *Victorian Civil and Administrative Act 1998* (Vic), s 62.

⁸⁷ *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 130; *South Australian Civil and Administrative Tribunal Act 2013* (SA), s 56; *State Administrative Tribunal Act 2004* (WA), s 39; *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 30; *Guardianship and Administration Act 1995* (Tas), s 73; *State Administrative Tribunal Act 2004* (WA), s 39; *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 43(2)(b)(i).

⁸⁸ *Civil and Administrative Tribunal Act 2013* (NSW), s 45(4)(c).

⁸⁹ Available at <<https://www.qcat.qld.gov.au/going-to-the-tribunal/legal-advice-and-representation>>.

⁹⁰ *Guardianship and Administration Act 2000* (Qld), s 125.

including a legal representative or advocate, authorised to that effect by the person in respect of whom the hearing is held.⁹¹

- 5.47 In WA, the SAT may direct the executive officer to apply on a person's behalf for legal aid (if the person is not represented or an order is in force).⁹² The SAT has also established a pro bono scheme to enable the Tribunal to refer people involved in matters before it for pro bono assistance from suitably experienced legal practitioners.

Communication

- 5.48 Other forms of support may be needed in order for the tribunal to communicate effectively with the person who is the subject of an application. Participation and the right to be heard is not just an issue of being present at a hearing, but being able to genuinely engage in order to 'influence the results through the articulation of [the person's] will and preferences'.⁹³ Communication ability is a central component of capacity and decision making ability and is a critical factor that may contribute to power imbalances.⁹⁴
- 5.49 As previously noted in these guidelines, in the pre-hearing period registries should, and do, seek information as to the supports that a person may require including interpreting services,⁹⁵ visual and auditory aids and other communication aids.
- 5.50 Tribunal members also need to be trained in the use of these supports. Indeed the Tribunal Competency Framework developed by the Council of Australasian Tribunals⁹⁶ suggest that tribunal members should aim to demonstrate not only that they have achieved high levels of knowledge and technical competence, but that they have also developed the behaviours, motivation and values that are essential to professional excellence. The Framework provides as examples of relevant performance indicators the ability of a tribunal member to:
- Make use of interpreters, signers and communication aids such as loop systems, to ensure effective communication between parties and Tribunal Members.
 - Make effective use of those who support, interpret, assist and represent parties in the Tribunal process, to enable all to participate fully in the proceedings, and ensures effective use of all types of communications aids.
- 5.51 As a practical issue, appropriate time should be provided for hearings so that the person can provide their views and depending on the person's particular communication needs, discussion should take place in the hearing as to how the person can indicate to the tribunal if they wish to interject or express a view.

⁹¹ *Guardianship and Administration Act 1995* (Tas), s 73.

⁹² *Guardianship and Administration Act 1990* (WA), Sch 1, cl 13(4).

⁹³ Marie Fallon-Kund and Jerome Bickenbach, Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings. *Laws*. 2016. 5(3), 29 <<http://www.mdpi.com/2075-471X/5/3/29>>.

⁹⁴ Speech Pathology Australia's Submission to the Australian Law Reform Commission, Elder Abuse Discussion Paper, 27 February 2017, Submission 309, 7. <https://www.alrc.gov.au/sites/default/files/subs/309._speech_pathology_australia.pdf>.

⁹⁵ See Recommended National Standards for Working with Interpreters in Courts and Tribunals, Judicial Council on Cultural Diversity (2017) <<http://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf>>.

⁹⁶ <<http://www.coat.gov.au/images/downloads/TribunalCompetencyFramework.pdf>>.

- 5.52 Training for members and registry staff is therefore essential in the range of supports that may need to be utilised in guardianship proceedings to ensure that the person is able to effectively communicate and participate in the hearing. This includes making effective use of interpreting services, including Auslan interpreters, communication techniques for people with hearing and vision impairments and the use of augmentative and alternative communication tools.⁹⁷

6. Oral hearings

- 6.1 **Draft Guideline 18:** Given the centrality of the person who is the subject of guardianship and/or financial administration proceedings, the person should have a genuine opportunity to participate in an oral hearing before a determination is made.
- 6.2 **Draft Guideline 19:** As a matter of good practice, original applications should be determined after an oral hearing.
- 6.3 **Draft Guideline 20:** As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of orders are determined without an oral hearing, tribunals should consider their respective statutory obligations about considering the views of the person before making a determination.
- 6.4 In the report on *Elder Abuse – A National Legal Response*,⁹⁸ AGAC is tasked with specifically addressing the need to hold an oral hearing for the exercise of all substantive functions relating to guardianship or financial administration. This arises from the ALRC’s analysis that in most states and territories, the tribunal retains a discretion to determine a matter, including a matter relating to the appointment of a guardian or financial administrator, without an oral hearing.
- 6.5 The actual degree of discretion available to tribunals in each of the states and territories, and how that discretion is exercised in practice, is nuanced.
- 6.6 In some Australian jurisdictions (NT, Qld and SA), the tribunal has the discretion to determine the matter on the basis of documents.⁹⁹
- 6.7 In Victoria, the parties must agree before a Tribunal proceeds to determine a matter without a hearing.¹⁰⁰ In the ACT, the parties must be given an opportunity to make

⁹⁷ See, for example, <https://www.isaac-online.org/english/what-is-aac/>; Speech Pathology Australia’s Submission to the Australian Law Reform Commission, Elder Abuse Discussion Paper, 27 February 2017, Submission 309 <https://www.alrc.gov.au/sites/default/files/subs/309._speech_pathology_australia.pdf>; Murphy, J., Tester, S., Hubbard, G., Downs, M., & MacDonald, C. (2005). Enabling frail older people with a communication difficulty to express their views: the use of Talking Mats as an interview tool. *Health & Social Care in the Community*, 13(2), 95-107; Murphy, J., Gray, C., Achterberg, T., Wyke, S., & Cox, S. (2010) The effectiveness of the Talking Mats framework in helping people with dementia to express their views on well-being. *Dementia*, 9(4), 454-472.

⁹⁸ At [10-45].

⁹⁹ *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 69(2); *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 31(1) and 32(2); *South Australian Civil and Administrative Tribunal Act 2013* (SA), s 67(2). In practice, however, this latter provision only applies to the review or reassessment of an order.

¹⁰⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 100(2).

submissions if the Tribunal proposes to determine an application without a hearing, and the Tribunal may only decide to proceed if it has taken into account the submissions of the parties and certain other criteria are satisfied.¹⁰¹

- 6.8 The legislation in Tasmania is silent about whether discretion exists to conduct proceedings on the documents.
- 6.9 In Western Australia, a hearing must be conducted for all original applications and reviews.¹⁰²
- 6.10 In NSW, when NCAT is exercising substantive functions of the Guardianship Division, the Tribunal must hold a hearing,¹⁰³ and may only dispense with a hearing for ancillary or interlocutory matters.¹⁰⁴ Hearings must therefore be conducted for all original applications and reviews of orders.
- 6.11 As a matter of practice, however, even in those jurisdictions where the tribunal has the discretion to determine the matter without an oral hearing, generally all non-urgent original applications for guardianship and administration are nevertheless determined after an oral hearing.¹⁰⁵
- 6.12 However, in a number of jurisdictions, review hearings may be conducted without an oral hearing.
- 6.13 The Tasmanian Guardianship and Administration Board conducts hearings on the papers for reviews of administration applications in the following circumstances:¹⁰⁶
- (1) the represented person's circumstances are considered settled, that is there is no change in the medical evidence concerning a represented person's disability and capacity; and where the financial estate of the represented person is settled
 - (2) the represented person's administrator is the Public Trustee
 - (3) when all parties are given the opportunity to attend an oral hearing but have declined or failed to respond. If a party wishes to attend a hearing the application is listed for an oral hearing.
 - (4) the Board determines it is appropriate to proceed without an oral hearing.
- 6.14 When hearing a matter on the papers, the Board can also adjourn the review application to an oral hearing.¹⁰⁷
- 6.15 In Queensland, QCAT Practice Direction No 8 of 2010, *Directions relating to guardianship matters*,¹⁰⁸ provides that unless the member allocated to hear the matter

¹⁰¹ ACT Civil and Administrative Tribunal Act 2008 (ACT), s 54. This does not apply to the Tribunal's review of existing appointments on the Tribunal's own initiative, but it does apply to applications for review of existing appointments. An application for review of an appointment may be brought by anyone at any time: *Guardianship and Management of Property Act 1991* (ACT), s 19(1).

¹⁰² *Guardianship and Administration Act 1990* (WA), ss 41(2)(a), 89(2)(a), 17B(2)(a).

¹⁰³ *Civil and Administrative Tribunal Act 2013* (NSW), Sch 6, s 6(1).

¹⁰⁴ *Civil and Administrative Tribunal Act 2013* (NSW), Sch 6, s 6(2).

¹⁰⁵ Information from consultation with Heads of Tribunals, AGAC meeting, Perth (19 October 2017).

¹⁰⁶ *Guardianship and Administration Act 1995* (Tas), s 11(2). See also Part 10 of Division 1 and Schedule 2 of the Act.

¹⁰⁷ Consultation with the Guardianship and Administration Board (21 August 2018).

¹⁰⁸ Available at <www.qcat.qld.gov.au/__data/assets/pdf_file/0017/101249/Practice-Direction-8-of-2010-Directions-relating-to-guardianship-matters.pdf>.

recommends that it is more appropriate that it is dealt with by an oral hearing the following matters, amongst others, will be heard on the papers:

- Review of the appointment of an administrator, guardian and guardians for restrictive practices.¹⁰⁹
- Application for the appointment of an administrator in which the proposed appointee is The Public Trustee of Queensland and none of the active parties (defined to include the adult who is the subject of the proceedings) oppose the appointment.¹¹⁰

6.16 In Victoria, the reassessments of administration orders may be conducted on the papers in certain circumstances, namely, where State Trustees is the appointed administrator, a reassessment has already been conducted once before, and there are no complex issues apparent on the file or in the report from the administrator. VCAT sends a letter to all parties and interested persons, including the person who is the subject of the application, asking if anyone seeks a hearing. If any person seeks a hearing then a hearing is listed. If no one seeks a hearing then the file is referred to a tribunal member for a reassessment on the papers. The Tribunal member assesses all material on the file. Depending on the available material, including medical evidence and financial records, the Tribunal member may refer the matter to the Public Advocate for an investigation as to disability and capacity, may contact the administrator for further information, direct that the proceeding be listed for hearing or determine the matter on the papers. If, after the reassessment is finalised the person then seeks a hearing, a hearing is listed.¹¹¹

6.17 In South Australia, all reviews are commenced on the papers. Updated medical evidence is sought in every matter and forms are sent to all parties (including the protected person) and interested persons seeking their views in relation to the orders. Where there is complexity, fresh medical evidence, evidence of a change of circumstances or where there is an application to revoke orders, the matter is referred to listing instructions and then to a full oral hearing of necessary.¹¹²

6.18 Given the focus in recommendation 10-2 of the ALRC's report on the support tribunals should give to a person to participate in the determination process as far as possible, the importance of an oral hearing is self-evident:

Hearing from...the person themselves, is...an important procedural safeguard against any arbitrariness that could result from over-reliance on expert evidence, and to consider the proportionality of any measures imposed.¹¹³

6.19 It has also been observed that potential difficulties raised by conducting reviews on the papers include that

[t]he evidence base from which a Tribunal member makes a decision on the papers is different to that obtained via a hearing. Presumably, many on the papers reviews would include only limited, if any, evidence from the person subject to the order. This is a concern, particularly considering the Tribunal must give full consideration to the same issues considered as part of a new appointment.

¹⁰⁹ Direction 3(b).

¹¹⁰ Direction 3(d).

¹¹¹ Consultation with VCAT, 5 September 2018.

¹¹² Consultation with SACAT, 7 September 2018.

¹¹³ L Series, *The Participation of the Relevant Person in Proceedings in the Court of Protection: A Briefing Paper on International Human Rights Requirements* (Cardiff University, 2014) 3.

Despite being a Tribunal with a different purpose and different evidential processes, evidence from the Mental Health Review Tribunal suggests that a person who attends a review hearing is ten times more likely to have their Involuntary Treatment Order revoked compared to those who do not attend a hearing. Arguably, the participation of the person in the review provides an opportunity for the Tribunal to conduct a more fulsome exploration of the circumstances and information relevant to their decision-making. It is feasible to suggest that this may also be the case in relation to the review of guardianship and/or administration appointments.¹¹⁴

- 6.20 From the analysis above, the practice in all jurisdictions is that original applications for guardianship and administration are generally determined after an oral hearing is conducted, even in those jurisdictions where discretion exists for these matters to be determined on the papers. This can be contrasted, however, with reviews of guardianship and administration orders where in certain categories of cases, matters may be determined without an oral hearing. The question is raised in these circumstances as to whether a person has been given a genuine opportunity to participate in the determination process.
- 6.21 Given the centrality of the person who is the subject of guardianship and/or financial administration proceedings, the person should have a genuine opportunity to participate in an oral hearing before a determination is made.
- 6.22 As a matter of good practice, original applications should be determined after an oral hearing.
- 6.23 As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of orders are determined without an oral hearing, tribunals should consider their respective statutory obligations about considering the views of the person before making a determination.

7. Composition of the tribunal

- 7.1 **Draft Guideline 21:** Acknowledging that some jurisdictions are constrained regarding composition of panels (such as WA), consideration should be given to the composition of tribunal panels that hear guardianship and administration matters.
- 7.2 **Draft Guideline 22:** Multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.
- 7.3 **Draft Guideline 23:** Given, however, the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be utilised in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community based experience.
- 7.4 **Draft Guideline 24:** Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.

¹¹⁴ Office of the Public Advocate, “Decision-making support and Queensland’s guardianship system” (April 2016) <www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf>.

- 7.5 The ALRC recommended that one of the key elements of a best practice model could include (amongst others) consideration of the composition of a tribunal for the purposes of a particular proceeding.¹¹⁵ In the ALRC's view, the advantage of multi member panels, comprised of members with differing backgrounds and expertise, is that members with specific experience with people with disabilities or cognitive impairments may be able to engage better with the represented person.¹¹⁶
- 7.6 Currently, as is noted in the ALRC's report, other than in NSW the President of each of the state and territory tribunals has the power to determine the number of members that might constitute the tribunal. In NSW, multi-member panels, consisting of three members, must be convened for all initial applications. Tasmania and the ACT convene multi member panels on a regular basis to hear original applications (consisting of three members and two members respectively).¹¹⁷ Other jurisdictions (such as SA) will generally only list a multi member panel if a matter is assessed as being particularly complex.¹¹⁸
- 7.7 In Queensland, the Tribunal must be constituted by three members unless the President considers it appropriate for the proceeding to be heard by the tribunal constituted by two members or a single member. Most guardianship proceedings are constituted by a single member. However, in proceedings concerning special health matters, in particular, consent to sterilisation, the tribunal is constituted by a two member panel comprising a medical member and a legal member. If the adult is Indigenous, the tribunal will comprise at least one Indigenous member. In proceedings which are particularly complex a two member panel may be considered appropriate.
- 7.8 In Western Australia, internal review rights are only available for decisions made by a single member. If a matter is heard by more than one member, parties only have recourse to the Supreme Court of Western Australia if they wish to appeal a decision. So that parties are not denied the opportunity of an internal review, the SAT lists single members to hear most matters at first instance.¹¹⁹
- 7.9 In Victoria, VCAT frequently lists urgent hearings at short notice and takes the hearing to the most appropriate place, such as a hospital ward. Organising urgent hearings in this way often avoids temporary orders being made in the absence of the person and

¹¹⁵ ALRC Report at [10-37].

¹¹⁶ ALRC Report at [10-43].

¹¹⁷ Information from consultation with Heads of Tribunals, AGAC meeting, Perth (19 October 2017).

¹¹⁸ Ibid.

¹¹⁹ Section 17A of the *Guardianship and Administration Act 1990 (WA)* provides a right of review by a three member tribunal of a decision of the Tribunal consisting of one member. Division 3 of Pt 4 provides for appeals to the Supreme Court or the Court of Appeal in relation to decisions of the Tribunal constituted by three members. The Act is silent as to any right of review or appeal in respect of decisions of the Tribunal constituted by two members. It follows that the only right of appeal from a decision of the Tribunal under the *Guardianship and Administration Act 1990 (WA)* by a Tribunal consisting of two members would be under s 105 of the *State Administrative Tribunal Act 2004 (WA)*. An appeal under s 105 of the SAT Act is only available with leave and on a question of law. That is a much more restrictive right of review or appeal than is available under s 17A in respect of single member decisions, or an appeal under Div 3 of Pt 4 of the GA Act from a decision of a three member Tribunal, which, although it requires leave, is available on questions of both fact and law. Because the effect of constituting the Tribunal in a GA Act matter with two members would be to significantly limit the right of appeal or review when compared with the rights in relation to one or three member tribunals, the Tribunal has avoided constituting the Tribunal in GA Act matters with only two members <https://www.sat.justice.wa.gov.au/_files/Annual_Report_2009.pdf at p 25>.

maximises participation. In VCAT's view, this flexibility and responsiveness would not be possible if a three member panel had to be convened.¹²⁰

- 7.10 The ALRC's report acknowledges that convening a multi-member panel for all initial applications requires a significant investment of resources and that an alternative approach may be to limit the use of such panels to complex matters.¹²¹
- 7.11 The Victorian Law Reform Commission's Final Report on Guardianship also considered the use of multi member panels.¹²² The VLRC recommended that the President of VCAT should retain a discretionary power in relation to the composition of the tribunal for guardianship matters but that VCAT should also consider making greater use of multi-member panels for more complex matters where a range of expertise would be beneficial.¹²³
- 7.12 In a submission to the NSW Law Reform Commission's review of the *Guardianship Act 1987* (NSW),¹²⁴ NCAT noted that subject to certain specified exceptions,¹²⁵ when hearing initial applications, the Tribunal must be constituted by three Division members as follows: a member who is an Australian lawyer, a member with a 'professional qualification', and a member with a 'community based qualification'.¹²⁶ NCAT highlighted the advantages of the three-member panel model as follows:
- 1) Members holding a professional qualification have expertise in a range of areas relevant to the guardianship jurisdiction, including medicine, psychiatry, psychology, social work and pharmacology. Those holding a community-based qualification generally have direct personal or professional experience with people with disability.
 - 2) The three-member model enables NCAT to draw on the collective skill and experience of its members.
 - 3) Given that, in most proceedings, the parties are not legally represented and the quality of expert evidence is often uneven, the collective expertise of the Tribunal assists it in understanding the available evidence and discharging its fact-finding role.
 - 4) This collective expertise also assists the Tribunal to discharge its obligation to ensure that all relevant material is disclosed by, for example, enabling it to identify any gaps in the evidence.
 - 5) NCAT's ability to draw on its own expertise contributes significantly to the quality of its decisions. It also reduces the time and expense involved in conducting hearings.
 - 6) In circumstances where the parties or other participants are in conflict and the subject matter is contentious, the use of a multi-disciplinary panel contributes to a more effective and fairer hearing.

¹²⁰ Consultation with VCAT, 5 September 2018.

¹²¹ ALRC Report at [10-44].

¹²² Victorian Law Reform Commission, Final Report on Guardianship 2012, [21.147]-[21.151].

¹²³ Victorian Law Reform Commission, Final Report on Guardianship 2012, Recommendation 380.

¹²⁴ Available at <www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Submissions/GA101A.pdf>.

¹²⁵ *Civil and Administrative Tribunal Act 2013* (NSW), cl 4(2) of Sch 6.

¹²⁶ *Civil and Administrative Tribunal Act 2013* (NSW), cl 4(1) of Sch 6.

- 7) The use of a multi-disciplinary panel reduces the likelihood that an aggrieved party will perceive that the Tribunal has been biased or has determined the application other than on its merits.
- 8) The use of multi-disciplinary panels also appears to result in a reduced rate of appeals.
- 7.13 As a matter of practice, NCAT generally lists the hearing of reviews before a single member. However, in review hearings that involve the following issues, the panel will usually be heard by a two member panel, constituted by a legal member and a professional or community member with relevant expertise. These issues include:
- restrictive practices;
 - end of life decision-making;
 - where the person who is the subject of the review is an Indigenous person or Torres Strait Islander;
 - anorexia and other eating disorders; and
 - where there is conflicting evidence or a dispute about the capacity or regained capacity of the person.
- 7.14 In the final report of the New South Wales Law Reform Commission’s Review of the Guardianship Act,¹²⁷ the Commission noted that it considered whether the size of panels should be reduced to reduce the length and cost of hearings and concluded that
- the current provisions are an important safeguard for protecting a person’s rights. In particular, the composition of a three-person panel for substantive decisions reflects the potential gravity of a Tribunal order, which may curtail the rights and freedoms of the subject person.¹²⁸
- 7.15 In the mental health context, which has relevant parallels with the guardianship context, Carney et al (2011) note that in the context of a study of three mental health jurisdictions (NSW, Vic and ACT):¹²⁹
- In short, the argument for inclusion of medical and community members in addition to legal members is that it arguably necessary to allow tribunals to more fully engage with both the health and the social context in which legal decisions to discharge or continue involuntary detention are necessarily embedded ...the omission of either of these membership categories surely impoverishes the tribunal – the substantive content of reviews suffers from a lack of medical and broader clinical expertise, knowledge of different treatment and support options in hospitals and the community, and experience of the daily reality of mental health service delivery.
- 7.16 In the European context, procedural accommodations, in terms of ‘necessary and appropriate adjustments’, are noted as being able to take various forms.¹³⁰

¹²⁷ New South Wales Law Reform Commission, Review of the Guardianship Act 1987, Report 145, May 2018 (tabled in Parliament on 15 August 2018).

¹²⁸ At [16.8].

¹²⁹ T Carney and others, *Australian Mental Health Tribunals — Space for Fairness, Freedom, Protection and Treatment* (Themis Press, 2011), 101-102.

¹³⁰ M Fallon-Kund and J Bickenbach, “Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings” (2016) 5(3) *Laws* 29 <<http://www.mdpi.com/2075-471X/5/3/29>>.

One possibility is to adapt the setting of the hearing to accommodate the person's needs. Another way is to adapt the composition of the competent authorities deciding about legal capacity, by using multidisciplinary panels. This adaptation facilitates a collaborative exchange between members from different disciplines or walks of life. This may also defuse some of the implicit power relations, where, for example too much weight was given to the medical doctor's opinion and not enough to the input from social workers who deal with the persons on a day-to-day basis.

- 7.17 In those jurisdictions in which applications are heard by legal members, usually sitting as single members, and who may or may not have a relevant background in guardianship issues or disability more generally, it becomes even more imperative that training and professional development is ongoing, with a focus on the person who is the subject of the application and different communication needs.
- 7.18 Directly related to the issue of the composition of tribunal panels is that of ensuring that tribunals have available to them members with relevant expertise and from a diversity of backgrounds. In particular, recruiting members who have lived experience of disability and/or and other expertise in communicating with people with disabilities can be a crucial factor in ensuring that persons with communication difficulties are able to participate meaningfully in proceedings that are about them. The hearing of a matter in regional NSW in which both the person who was the subject of the application for guardianship and a tribunal member used speech generating communication devices provides a practical example of this.¹³¹

8. Training of members and registry staff

- 8.1 **Draft Guideline 25:** Training for members and registry staff about strategies to involve persons who are the subject of applications is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.
- 8.2 In their analysis of a sample of national laws in Europe involving legal capacity proceedings,¹³² the authors identify that one of a number a procedural accommodations, forming an important component of the 'implementation of an equal and effective right to be heard' involves training those working in the administration of justice to involve the person concerned in the proceedings. Such training would allow panels of deciding authorities 'to be better informed about the communication needs of clients with mental disabilities and the characteristics associated with different mental disabilities'.¹³³ Such training might also 'contribute to avoid the temptation to substitute the judgement of those working in the field of administration of justice for the person's judgement'.¹³⁴

¹³¹ *MHV* [2017] NSWCATGD 14; F Given, "AAC on Both Sides of the Fence" (Speech delivered at the 18th Biennial Conference of the International Society for Augmentative and Alternative Communication, Gold Coast Convention and Exhibition Centre, 24 July 2018) <http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20180724_paper_given_fiona_aac_both_sides_fence_isaac.pdf>

¹³² M Fallon-Kund and J Bickenbach, "Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings" (2016) 5(3) *Laws* 29 <<http://www.mdpi.com/2075-471X/5/3/29>>.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

- 8.3 In terms of improving the accessibility to courts for older people particularly in cases involving elder abuse, training has also been identified as a critical issue. For example, the American Bar Association has developed 'Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse'¹³⁵. Whilst these guidelines are not restricted to guardianship matters, and encompass both criminal and civil proceedings, recommendations are made as to the ways in which State Courts can improve their handling of cases involving elder abuse, including the training of judges and other court personnel about elder abuse with suggested topics including dynamics of elder abuse and family violence, types of cases involving elder abuse, capacity issues, case management issues and procedural innovations and data collection about elder abuse cases.¹³⁶
- 8.4 The Center for Elders and the Courts (CEC), a project of the US National Center for State Courts, has also created a list of examples of the kinds of accommodations for older persons with physical or mental impairments that have been implemented or recommended by judges, court managers and other professionals working to improve their courts' responses to elder abuse with similar themes to those of the American Bar Association.¹³⁷ The CEC also identifies training for judicial officers as critical in the response to elder abuse cases. See, for example:
- Elder Abuse Curriculum for State Judicial Educators¹³⁸ – a joint project of the National Center for State Courts and the Center of Excellence on Elder Abuse and Neglect at the University of California, Irvine School of Medicine, the three-part curriculum can be adapted to meet state laws and practices.
 - Online Elder Abuse Course – *Justice Responses to Elder Abuse*¹³⁹ is an extensive online program divided into four parts: Aging in America; Enhancing Elder Abuse Awareness; Special Issues and Tools for Courts; and Case Scenarios.
 - 10 Tips Series¹⁴⁰ – a video series featuring elder abuse experts discussing topics such as: strategies to use in cases involving elderly witnesses, how to establish an elder protection court or Elder Justice Center, how to develop a working relationship with Adult Protection Services, best practices in guardianship appointments.
- 8.5 Whether Australian tribunals are constituted by multi-disciplinary panels or not, the training of members about different disabilities and communication techniques is vital. This is even more critical in those jurisdictions in which panels are largely constituted by a single member, who, as a result, does not have the benefit of sitting with colleagues with expertise and knowledge in these areas.
- 8.6 Such training is equally important for registry staff assisting the person concerned in the initial stages of the application process.

¹³⁵ Available at <<http://www.eldersandcourts.org/~media/Microsites/Files/cec/ABA%20Recommended%20Guidelines%20for%20State%20Courts%20Handling%20EA%20Cases.ashx>>.

¹³⁶ Recommendations 1 and 2. The guidelines also include recommendations on a range of matters consistent with approaches discussed elsewhere in this document including holding hearings in cases involving elder abuse in the setting that best accommodates the needs of the abused older person (Recommendation 4), recognition that the capacity of older persons may fluctuate with time of day, medications etc and should be flexible in scheduling hearings to accommodate those individual variations (Recommendation 5), expediting cases involving elder abuse on the calendar (Recommendation 6) and acknowledgement that incapacity could increase the likelihood of abuse (Recommendation 9).

¹³⁷ Available at <<http://www.eldersandcourts.org/Aging/The-Role-of-the-Courts.aspx>>.

¹³⁸ Available at <<http://www.eldersandcourts.org/Training/Elder-Abuse-Curriculum.aspx>>.

¹³⁹ Available at <<https://courses.ncsc.org/course/Elders>>.

¹⁴⁰ Available at <<http://www.eldersandcourts.org/Training/10-Tips-Series.aspx>>.

- 8.7 For example, in the Tasmanian Guardianship and Administration Board, for example, registry staff regularly undergo training from a range of organisations including legal services, advocacy services and COTA (formerly the Council on the Ageing). This ensures that frontline staff are aware of legal and advocacy services and their funding or other requirements in taking clients, so that referral information can be provided to persons who are the subject of applications.¹⁴¹
- 8.8 In NSW, NCAT registry staff receive regular training concerning different types of disability and on a range of topics, including strategies to increase the participation of the person in guardianship proceedings.
- 8.9 In Victoria, as previously noted, VCAT has also adopted its first Accessibility Action Plan (2018-2022)¹⁴² that sets out a program of work to ensure that the Tribunal is fully accessible for people with a disability. As part of the Plan, a core component of VCAT's induction program and annual training for all registry staff and members will include disability awareness and confidence training.
- 8.10 The provision of training for members and registry staff that enables registry services and hearings to be conducted in a trauma informed manner also has the potential to improve the experience of people who are the subject of tribunal proceedings and who may have been the subject of trauma or abuse.¹⁴³ This may arise in a wide range of range of circumstances including abuse and/or family violence experienced by an older person or someone who has been the subject of child protection services and/or institutional care as a younger person.
- 8.11 Recognition of, and training in relation to, these issues has the potential to improve the ability of tribunals to better enable the participation of the person and for their views to be provided as well as reducing the potential for the hearing process to reinforce traumatic events. Strategies to assist people who have experienced torture and other traumatic experiences, albeit in the context of migration and refugee matters, have been specifically addressed by the Administrative Appeals Tribunal (AAT) in its *Guidelines on Vulnerable Persons* (July 2015)¹⁴⁴ and recognises the vulnerability of people in these circumstances.

9. Participation of Aboriginal and Torres Islander People

- 9.1 **Draft Guideline 26:** Tribunals should seek to increase their staffing and membership of Aboriginal and Torres Strait Islander people as well as non-Indigenous members with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people.
- 9.2 **Draft Guideline 27:** Members and registry staff should have access to training which promotes awareness of specific cultural considerations relevant to Aboriginal and Torres Strait Islander people.

¹⁴¹ Information from consultation with Guardianship and Administration Board (21 August 2018).

¹⁴² Available at <<https://www.vcat.vic.gov.au/AccessibleVCAT>>.

¹⁴³ See, for example, <<https://aifs.gov.au/cfca/publications/trauma-informed-care-child-family-welfare-services/what-trauma-informed-care>; <https://mhaustralia.org/general/trauma-informed-practice>>.

¹⁴⁴

<http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Vulnerable-Persons.pdf>, [86]-[94].

- 9.3 Each of the Australian jurisdictions contain provisions in their guardianship laws that, albeit worded differently, require consideration of the person's cultural, linguistic or social environment when determining whether guardianship or administration orders should be made and whether another person is appropriate for appointment as a guardian or administrator. A number of studies have considered the challenges faced by Aboriginal and Torres Strait Islander people and their interaction with the guardianship and administration schemes in Australia in view of the multiple disadvantages that may be experienced by Indigenous Australians with disability and particular difficulties faced by those people living in remote and rural areas with limited access to services and support.¹⁴⁵
- 9.4 Tribunal members and registry staff should be aware of these issues and the impact that they may have on the person's participation in the hearing process. Training for tribunal members and registry staff is therefore critical as well as increasing Indigenous staffing and membership on tribunals and members who otherwise have relevant expertise in relation to the culture, values and beliefs held by Indigenous Australians. Some jurisdictions have already undertaken proactive measures in this regard. VCAT, for example, has a Koori Inclusion Action Plan (2017-2018)¹⁴⁶ that seeks to encourage Koori participation at VCAT, both in terms of accessing VCAT's services or as part of its workforce.
- 9.5 These matters take on even greater importance in jurisdictions in which Aboriginal and Torres Strait Islander people are disproportionately represented in the appointment process. For example, the Office of the Public Guardian (NT) reports that while Aboriginal and Torres Strait Islander people represent just under 26% of the population of the Northern Territory, they comprise an estimated 78% of adults under guardianship where the Public Guardian is appointed.¹⁴⁷ The Public Guardian suggests that the high prevalence of adults under guardianship may be a reflection of systemic issues in areas of social disadvantage, cultural dislocation and poor health, education, housing and employment outcomes.¹⁴⁸

¹⁴⁵ See, for example, J Clapton and others, Impaired Decision-Making Capacity and Indigenous Queenslanders, Final Report (Office of the Public Advocate Queensland, 2011); Other-Gee, B., Penter, C., Ryder, L., & Thompson, J. (2001). Needs of Indigenous people in the Guardianship and Administration system in Western *Australia*. Perth: Office of the Public Advocate Western Australia; Law Reform Commission of Western Australia - Aboriginal Customary Law – The interaction of Western Australian law with Aboriginal law and Culture, Final Report, Project 94 (September 2006) <www.lrc.justice.wa.gov.au/_files/P94_FR.pdf>.

¹⁴⁶ Available at <<https://www.vcat.vic.gov.au/resources/koori-inclusion-action-plan-2017-18>>.

¹⁴⁷ Annual Report 2016-17 (Annual Report, Office of the Public Guardian (NT), 31 October 2017), p 2 < https://health.nt.gov.au/__data/assets/pdf_file/0003/463017/OPG-Annual-Report-2016-17.pdf>

¹⁴⁸ Annual Report 2016-17 (Annual Report, Office of the Public Guardian (NT), 31 October 2017), p 17 < https://health.nt.gov.au/__data/assets/pdf_file/0003/463017/OPG-Annual-Report-2016-17.pdf>

Legislation concerning the views/wishes/opinions of subject person – Annexure A

Jurisdiction	Legislation	Provisions
NSW	<p><i>Guardianship Act 1987</i> (NSW) Section 4(d)</p>	<p>“4 General principles</p> <p>It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:</p> <p>...</p> <p>(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,</p> <p>...”</p>
	<p><i>Guardianship Act 1987</i> (NSW) Section 14(2)(a)(i)</p>	<p>“14 Tribunal may make guardianship orders</p> <p>(1) If, after conducting a hearing into any application made to it for a guardianship order in respect of a person, the Tribunal is satisfied that the person is a person in need of a guardian, it may make a guardianship order in respect of the person.</p> <p>(2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to:</p> <p style="padding-left: 40px;">(a) the views (if any) of:</p> <p style="padding-left: 80px;">(i) the person, and</p> <p style="padding-left: 80px;">...”</p>
	<p><i>Guardianship Act 1987</i> (NSW) Section 44(2)(a)(i)</p>	<p>“44 Tribunal may give consent</p> <p>(1) If, after conducting a hearing into an application for consent to the carrying out of medical or dental treatment on a patient to whom this Part applies, the Tribunal is satisfied that it is appropriate for the treatment to be carried out, it may consent to the carrying out of the treatment.</p> <p>(2) In considering such an application, the Tribunal shall have regard to:</p> <p style="padding-left: 40px;">(a) the views (if any) of:</p> <p style="padding-left: 80px;">(i) the patient,</p> <p style="padding-left: 80px;">...”</p>
VIC	<p><i>Guardianship and Administration Act 1986</i> (VIC) Section 4(2)(c)</p>	<p>“4 Objects of Act</p> <p>...</p> <p>(2) It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—</p> <p>...</p> <p>(c) the wishes of a person with a disability are wherever possible given effect to.”</p>

	<i>Guardianship and Administration Act 1986</i> (VIC) Section 22(2)(ab)	<p>"22 Guardianship order</p> <p>...</p> <p>(2) In determining whether or not a person is in need of a guardian, the Tribunal must consider—</p> <p>(a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and</p> <p>(ab) the wishes of the proposed represented person, so far as they can be ascertained; and</p> <p>..."</p>
	<i>Guardianship and Administration Act 1986</i> (VIC) Section 23(2)(a)	<p>"23 Persons eligible as guardians</p> <p>...</p> <p>(2) In determining whether a person is suitable to act as the guardian of a represented person, the Tribunal must take into account—</p> <p>(a) the wishes of the proposed represented person, so far as they can be ascertained; and</p> <p>..."</p>
	<i>Guardianship and Administration Act 1986</i> (VIC) Section 38(a)	<p>"38 Best interests</p> <p>(1) In this Part, for the purposes of determining whether any special procedure or any medical or dental treatment would be in the best interests of the patient, the following matters must be taken into account—</p> <p>(a) the wishes of the patient, so far as they can be ascertained; and</p> <p>..."</p>
	<i>Guardianship and Administration Act 1986</i> (VIC) Section 46(2)(b)	<p>"46 Appointment of administrator</p> <p>...</p> <p>(2) In determining whether or not a person is in need of an administrator of her or his estate, the Tribunal must consider—</p> <p>(b) the wishes of the person in respect of whom the application is made, so far as they can be ascertained.</p> <p>..."</p>
	<i>Guardianship and Administration Act 1986</i> (VIC) Section 47(2)(a)	<p>"47 Persons eligible as administrators</p> <p>...</p> <p>(2) In determining whether a person is suitable to act as the administrator of the estate of a proposed represented person, the Tribunal must take into account—</p> <p>(a) the wishes of the proposed represented person, so far as they can be ascertained; and</p> <p>..."</p>
QLD	<i>Guardianship and Administration Act 2000</i> (QLD) Section 11A(1)	<p>"11A Primary focus—adults</p> <p>(1) Adults with impaired capacity are the primary focus of this Act."</p>
	<i>Guardianship and Administration Act 2000</i> (QLD) Schedule 1 cl 7(1), (3)(b) and (4)	<p>"7 Maximum participation, minimal limitations and substituted judgment</p> <p>(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.</p> <p>(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.</p>

		<p>(3) So, for example—</p> <p>...</p> <p>(b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and</p> <p>...</p> <p>(4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.</p> <p>...</p> <p>(6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct."</p>
	<p><i>Guardianship and Administration Act 2000</i> (QLD) Schedule 1 cl 12(2)</p>	<p>"12 Health care principle</p> <p>...</p> <p>(2) In deciding whether the exercise of a power is appropriate, the guardian, the public guardian, tribunal or other entity must, to the greatest extent practicable—</p> <p>(a) seek the adult's views and wishes and take them into account; and</p> <p>...</p> <p>(3) The adult's views and wishes may be expressed—</p> <p>(a) orally; or</p> <p>(b) in writing, for example, in an advance health directive; or</p> <p>(c) in another way, including, for example, by conduct.</p> <p>..."</p>
SA	<p><i>Guardianship and Administration Act 1993</i> (SA) Section 5(b)</p>	<p>"5—Principles to be observed</p> <p>Where a guardian, an administrator, the Public Advocate, the Tribunal or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to this Act or pursuant to powers conferred by or under this Act—</p> <p>...</p> <p>(b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and</p> <p>..."</p>
WA	<p><i>Guardianship and Administration Act 1990</i> (WA) Section 4(7)</p>	<p>"4. Principles stated</p> <p>...</p> <p>(7) In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions."</p>
	<p><i>Guardianship and Administration Act 1990</i> (WA) Section 44(2)(c)</p>	<p>"44. Who may be appointed guardian</p> <p>(1) A guardian (including a joint guardian) shall be an individual of or over the age of 18 years who has consented to act and who in the opinion of the State Administrative Tribunal —</p>

		<p>(a) will act in the best interests of the person in respect of whom the application is made;</p> <p>(b) is not in a position where his interests conflict or may conflict with the interests of that person; and</p> <p>(c) is otherwise suitable to act as the guardian of that person.</p> <p>(2) For the purposes of subsection (1)(c) the State Administrative Tribunal shall take into account as far as is possible —</p> <p>...</p> <p>(c) the wishes of the person in respect of whom the application is made; and</p> <p>...</p>
	<p><i>Guardianship and Administration Act 1990</i> (WA) Section 68(3)(b)</p>	<p>“68. Who may be appointed administrator</p> <p>(1) An administrator (including a joint administrator) shall be —</p> <p>(a) an individual of or over the age of 18 years; or</p> <p>(b) a corporate trustee, who has consented to act and who, in the opinion of the State Administrative Tribunal —</p> <p>(c) will act in the best interests of the person in respect of whom the application is made; and</p> <p>(d) is otherwise suitable to act as the administrator of the estate of that person.</p> <p>...</p> <p>(3) For the purposes of subsection (1), the State Administrative Tribunal shall take into account as far as is possible —</p> <p>(a) the compatibility of the proposed appointee with the person in respect of whom the application is made and with the guardian (if any) of that person;</p> <p>(b) the wishes of that person; and</p> <p>...”</p>
TAS	<p><i>Guardianship and Administration Act 1995</i> (TAS) Section 6(c)</p>	<p>“6. Principles to be observed</p> <p>A function or power conferred, or duty imposed, by this Act is to be performed so that –</p> <p>...</p> <p>(c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.”</p>
	<p><i>Guardianship and Administration Act 1995</i> (TAS) Section 21(2)(a)</p>	<p>“21. Persons eligible as guardians</p> <p>...</p> <p>(2) In determining whether a person is suitable to act as a guardian of a represented person, the Board must take into account –</p> <p>(a) the wishes of the proposed represented person so far as they can be ascertained; and</p> <p>...”</p>
	<p><i>Guardianship and Administration Act 1995</i> (TAS) Section 45(2)(a)</p>	<p>“45. Consent of Board</p> <p>(1) On hearing an application for its consent to the carrying out of medical or dental treatment the Board may consent to the carrying out of the medical or dental treatment if it is satisfied that –</p> <p>(a) the medical or dental treatment is otherwise lawful; and</p> <p>(b) that person is incapable of giving consent; and</p> <p>(c) the medical or dental treatment would be in the best interests of that person.</p> <p>(2) For the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the Board include –</p> <p>(a) the wishes of that person, so far as they can be ascertained; and</p> <p>...”</p>

	<i>Guardianship and Administration Act 1995</i> (TAS) Section 54(2)(a)	<p>“54. Persons eligible as administrators</p> <p>...</p> <p>(2) In determining whether a person is suitable to act as the administrator of the estate of a proposed represented person, the Board must take into account –</p> <p style="padding-left: 40px;">(a) the wishes of the proposed represented person, so far as they can be ascertained; and</p> <p>...”</p>
NT	<i>Guardianship of Adults Act 2016</i> (NT) Section 4(3)(a) and (5)(a)	<p>“4 Guardianship principles</p> <p>...</p> <p>(3) In determining what is in the adult's best interests, the decision maker must:</p> <p style="padding-left: 40px;">(a) seek to obtain the adult's current views and wishes, as far as it is practicable to do so; and</p> <p style="padding-left: 40px;">(b) take into account all relevant considerations; and</p> <p style="padding-left: 40px;">(c) weigh up the relevant considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances.</p> <p>...</p> <p>(5) For subsection (3)(b), the relevant considerations include, but are not limited to, the following:</p> <p style="padding-left: 40px;">(a) the adult's current views and wishes and previously stated views and wishes;</p> <p>...”</p>
	<i>Guardianship of Adults Act 2016</i> (NT) Section 15(2)(c)	<p>“15 Eligibility for appointment</p> <p>...</p> <p>(2) In determining an individual's suitability to be a guardian for the adult, the Tribunal must take the following into account:</p> <p style="padding-left: 40px;">...</p> <p style="padding-left: 40px;">(c) the views and wishes of the adult;</p> <p>...”</p>
ACT	<i>Guardianship and Management of Property Act 1991</i> (ACT) Section 4(2)(a)	<p>“4 Principles to be followed by decision-makers</p> <p>...</p> <p>(2) The <i>decision-making principles</i> to be followed by the decision-maker are the following:</p> <p style="padding-left: 40px;">(a) the protected person's wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person's interests;</p> <p>...”</p>
	<i>Guardianship and Management of Property Act 1991</i> (ACT) Section 10(4)(a)	<p>“10 Considerations affecting appointment</p> <p>...</p> <p>(3) Someone (other than the public trustee and guardian) may be appointed as a guardian or manager only if the ACAT is satisfied that the person will follow the decision-making principles and is otherwise suitable for appointment.</p> <p>(4) For subsection (3), the matters the ACAT must take into account include—</p> <p style="padding-left: 40px;">(a) the views and wishes of the person (the protected person) for whom a guardian or manager</p>

		<p>is to be appointed; and ...”</p>
	<p><i>Guardianship and Management of Property Act 1991 (ACT)</i> Section 70(3)(a)</p>	<p>“70 ACAT may consent to prescribed medical procedures ... (3) In deciding whether a particular procedure would be in the person’s best interests, the matters that the ACAT must take into account include— (a)the wishes of the person, so far as they can be ascertained; and ...”</p>

Abbreviations – Annexure B

ACAT – Australian Capital Territory Civil and Administrative Tribunal

AGAC – Australian Guardianship and Administration Council

ALRC – Australian Law Reform Commission

GAB – Tasmanian Guardianship and Administration Board

NCAT – New South Wales Civil and Administrative Tribunal

NTCAT – Northern Territory Civil and Administrative Tribunal

QCAT – Queensland Civil and Administrative Tribunal

SACAT – South Australian Civil and Administrative Tribunal

SAT – Western Australian State Administrative Tribunal

UNCRPD – United Nations' Convention on the Rights of People with Disabilities

VCAT – Victorian Civil and Administrative Tribunal

Methodology – Annexure C

On 11 April 2018, governance arrangements for this project were finalised. In summary, each state and territory has representation on the governance group, with the sector split showing three Public Advocate/Public Guardian representatives, three Tribunal representatives and three Public Trustee representatives. Victoria has two representatives; initially State Trustees were the sole representative, but the Victorian Civil and Administrative Tribunal representative was approached also to be on the group in order to have sufficient tribunal representation. The Commonwealth Attorney General's Department is also represented on the governance group.

It was proposed that by the date of a meeting of the AGAC in Darwin in late August 2018, a working draft of the guidelines for the purpose of consultation would be ready for distribution to, and consultation with, AGAC and Governance Group members.

Following input into the working draft of the guidelines from AGAC and Governance Group members, consultation would then occur, with the working draft as the basis for consultations, with a range of peak bodies. NCAT anticipates that communication with these peak bodies will be primarily via written communication with discussion and meetings as appropriate. Peak bodies to be consulted with include those representing seniors groups (such as Alzheimer's Australia, COTA, and seniors rights organisations); peak bodies representing disability groups (such as the Council for Intellectual Disability, People with Disability Australia); peak bodies representing culturally and linguistically diverse groups and Aboriginal and Torres Strait Islander peoples; academics working in the field of inclusive practices; key statutory agencies and representatives (in addition to AGAC members), such as the federal Age Discrimination Commissioner and Disability Discrimination Commissioner.

It is anticipated that, where possible, consultations with peak bodies representing disability groups can include people with disability who those peak bodies represent.

NCAT also hopes to consult with people who have been the subject of applications before state and territory tribunals and their views concerning participation in the hearing process. It is anticipated that these consultations take place with the assistance of peak bodies representing disability groups and advocacy organisations as well as offices of public guardians, advocates and trustees who are able to assist.

Data collection by participating state and territory tribunals of participation rates in guardianship and administration hearings will take place over a two month period in late 2018.

A revised version of the working draft of the guidelines based on the consultations as outlined will be forwarded to AGAC and governance group members in February 2019 and further feedback sought.

The project is due for completion by 30 June 2019.