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

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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 administration[3] **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

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[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.

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[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 communication[19] 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 study[24] 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

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[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

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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 take[29] 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]

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[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.

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[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

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[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%20%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 designed 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 Friend[84] – 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 (NSW[85] and Victoria[86]), 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,

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[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 Tribunals[96] 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.

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[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

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[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.

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[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

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[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.

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[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]

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[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] *MHN* [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 Educators[138] – 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 Series[140] – 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.

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[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.

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[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]

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[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	*Guardianship Act 1987* (NSW) Section 4(d)	"**4 General principles** It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles: … (d) the views of such persons in relation to the exercise of those functions should be taken into consideration, …"
	Guardianship Act 1987 (NSW) Section 14(2)(a)(i)	"**14 Tribunal may make guardianship orders** (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. (2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to: (a) the views (if any) of: (i) the person, and …"
	Guardianship Act 1987 (NSW) Section 44(2)(a)(i)	"**44 Tribunal may give consent** (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. (2) In considering such an application, the Tribunal shall have regard to: (a) the views (if any) of: (i) the patient, …"
VIC	*Guardianship and Administration Act 1986* (VIC) Section 4(2)(c)	"**4 Objects of Act** … (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— … (c) the wishes of a person with a disability are wherever possible given effect to."

	Guardianship and Administration Act 1986 (VIC) Section 22(2)(ab)	"**22 Guardianship order** … (2) In determining whether or not a person is in need of a guardian, the Tribunal must consider— (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 (ab) the wishes of the proposed represented person, so far as they can be ascertained; and …"
	Guardianship and Administration Act 1986 (VIC) Section 23(2)(a)	"**23 Persons eligible as guardians** … (2) In determining whether a person is suitable to act as the guardian of a represented person, the Tribunal must take into account— (a) the wishes of the proposed represented person, so far as they can be ascertained; and …"
	Guardianship and Administration Act 1986 (VIC) Section 38(a)	"**38 Best interests** (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— (a) the wishes of the patient, so far as they can be ascertained; and …"
	Guardianship and Administration Act 1986 (VIC) Section 46(2)(b)	"**46 Appointment of administrator** … (2) In determining whether or not a person is in need of an administrator of her or his estate, the Tribunal must consider— … (b) the wishes of the person in respect of whom the application is made, so far as they can be ascertained. …"
	Guardianship and Administration Act 1986 (VIC) Section 47(2)(a)	"**47 Persons eligible as administrators** … (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— (a) the wishes of the proposed represented person, so far as they can be ascertained; and …"
QLD	*Guardianship and Administration Act 2000* (QLD) Section 11A(1)	"**11A Primary focus—adults** (1) Adults with impaired capacity are the primary focus of this Act."
	Guardianship and Administration Act 2000 (QLD) Schedule 1 cl 7(1), (3)(b) and (4)	"**7 Maximum participation, minimal limitations and substituted judgment** (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. (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.

		(3) So, for example— … (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 … (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. … (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct."
	Guardianship and Administration Act 2000 (QLD) Schedule 1 cl 12(2)	"**12 Health care principle** … (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— (a) seek the adult's views and wishes and take them into account; and … (3) The adult's views and wishes may be expressed— (a) orally; or (b) in writing, for example, in an advance health directive; or (c) in another way, including, for example, by conduct. …"
SA	*Guardianship and Administration Act 1993* (SA) Section 5(b)	"**5—Principles to be observed** 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— … (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 …"
WA	*Guardianship and Administration Act 1990* (WA) Section 4(7)	"**4. Principles stated** … (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."
	Guardianship and Administration Act 1990 (WA) Section 44(2)(c)	"**44. Who may be appointed guardian** (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 —

		(a) will act in the best interests of the person in respect of whom the application is made; (b) is not in a position where his interests conflict or may conflict with the interests of that person; and (c) is otherwise suitable to act as the guardian of that person. (2) For the purposes of subsection (1)(c) the State Administrative Tribunal shall take into account as far as is possible — … (c) the wishes of the person in respect of whom the application is made; and …"
	Guardianship and Administration Act 1990 (WA) Section 68(3)(b)	"**68. Who may be appointed administrator** (1) An administrator (including a joint administrator) shall be — (a) an individual of or over the age of 18 years; or (b) a corporate trustee, who has consented to act and who, in the opinion of the State Administrative Tribunal — (c) will act in the best interests of the person in respect of whom the application is made; and (d) is otherwise suitable to act as the administrator of the estate of that person. … (3) For the purposes of subsection (1), the State Administrative Tribunal shall take into account as far as is possible — (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; (b) the wishes of that person; and …"
TAS	*Guardianship and Administration Act 1995* (TAS) Section 6(c)	"**6. Principles to be observed** A function or power conferred, or duty imposed, by this Act is to be performed so that – … (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."
	Guardianship and Administration Act 1995 (TAS) Section 21(2)(a)	"**21. Persons eligible as guardians** … (2) In determining whether a person is suitable to act as a guardian of a represented person, the Board must take into account – (a) the wishes of the proposed represented person so far as they can be ascertained; and …"
	Guardianship and Administration Act 1995 (TAS) Section 45(2)(a)	"**45. Consent of Board** (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 – (a) the medical or dental treatment is otherwise lawful; and (b) that person is incapable of giving consent; and (c) the medical or dental treatment would be in the best interests of that person. (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 – (a) the wishes of that person, so far as they can be ascertained; and …"

	Guardianship and Administration Act 1995 (TAS) Section 54(2)(a)	"**54. Persons eligible as administrators** … (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 – (a) the wishes of the proposed represented person, so far as they can be ascertained; and …"
NT	*Guardianship of Adults Act 2016* (NT) Section 4(3)(a) and (5)(a)	"**4 Guardianship principles** … (3) In determining what is in the adult's best interests, the decision maker must: (a) seek to obtain the adult's current views and wishes, as far as it is practicable to do so; and (b) take into account all relevant considerations; and (c) weigh up the relevant considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances. … (5) For subsection (3)(b), the ***relevant considerations*** include, but are not limited to, the following: (a) the adult's current views and wishes and previously stated views and wishes; …"
	Guardianship of Adults Act 2016 (NT) Section 15(2)(c)	"**15 Eligibility for appointment** … (2) In determining an individual's suitability to be a guardian for the adult, the Tribunal must take the following into account: … (c) the views and wishes of the adult; …"
ACT	*Guardianship and Management of Property Act 1991* (ACT) Section 4(2)(a)	"**4 Principles to be followed by decision-makers** … (2) The *decision-making principles* to be followed by the decision-maker are the following: (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; …"
	Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(a)	"**10 Considerations affecting appointment** … (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. (4) For subsection (3), the matters the ACAT must take into account include— (a) the views and wishes of the person (the ***protected person***) for whom a guardian or manager

		is to be appointed; and …"
	Guardianship and Management of Property Act 1991 (ACT) Section 70(3)(a)	"**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 …"

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.