

Australian Guardianship and Administration Council (AGAC)

Participation of the proposed represented person – Draft Best Practice

Guidelines

Draft Guideline 1: Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person.

Draft Guideline 2: The person and other parties should be promptly notified of an application being made.

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

Draft Guideline 4: Pre-hearing processes should seek to ensure that:

- the person is made aware of the application
- information is provided to assist the person to understand what the application and hearing is about
- the person's participation is encouraged (unless to do so would be detrimental to the person)

- any further information that may assist the tribunal is obtained from the person
- the person is provided with information as required about representation including advocacy

information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible

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

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

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

Comment [CM1]: NDIS has killed the role of case management. Coordinators of Support have, in part taken over this role and there is no funding in NDIS to cover the cost of a CoS carrying out this service for this purpose. Who will be the case manager and how will that be funded? Support for the person should include sufficient time for persons with cognitive disability to receive and process information. This can be a long process as information is given in short lots and discussed between ... [1]

Comment [CM2]: Define 'notified'. In some circumstances there are gatekeeping actions by carers, service providers, etc that may block delivery of the notification to the individ... [2]

Comment [CM3]: See above comment.

Comment [CM4]: If the information is provided needs to be read, interpreted, or otherwise pass through a 'gatekeeper' what steps will be taken to ensure the meaning ... [3]

Comment [CM5]: Who determines the 'detrimental' nature of the proceedings to the person? Again third parties with an interest in the outcome of the proceedings cou... [4]

Comment [CM6]: Who gains this information? Whose role is it and how will this be funded are fundamental questions that need to be answered to ens... [5]

Comment [CM7]: Providing this information is left up to carers, service providers, or others involved or invested in the outcome of the proceedings this is inherently un... [6]

Comment [CM8]: Having 'an opportunity' is only useful to those who are supported to be able to ask questions. And if a question is asked, who is going to provide the ans... [7]

Comment [CM9]: Will the hearing also take into account that there is a group of people for whom expressive communication is so difficult that something as simple as a new lo... [8]

Comment [CM10]: This should not be 'Optimally' because the response to that will always be, 'we can't always have optimal conditions' ... [9]

☑ 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

Draft Guidelines approved for consultation 26 September 2018

☑ 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.

Comment [CM11]: Which aspects? Various does not tell us much. Who decides which aspects should or should not be included? Being 'made available' is not the same thing as ensuring the person at the centre of the procedures receives the information.

Comment [CM12]: Again, remove the word optimally. And change 'should' for 'will'.

Comment [CM13]: Exploring and implementing are two different things. Please add 'and implemented'

Comment [CM14]: Who chooses the representative and how is this done? Remembering that medically trained people will view proceedings from a medical model and not a social model.

Comment [CM15]: Break down further the 'in-person' participation to collect data from person at hearing, person visited by tribunal member, or person represented.

Comment [CM16]: Data needs to be collected regarding where the representative is sourced from, their relationship to the person, and the outcome of proceedings.

Comment [CM17]: Be in various locations throughout metropolitan areas, rural and remote locations reducing the stress of travel for all concerned. Be within close proximity of places where food and drinks can be bought or provide such as needed. Long days at tribunals are made more painful by having to traipse long distances to find food or drinks during breaks.

Comment [CM18]: And change rooms with suitable equipment for changing adults with disability.

Comment [CM19]: The 'amenity' of the waiting room should be determined by the people using the waiting room. Consultation with people with disability is the only way to do this.

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 Guidelines approved for consultation 26 September 2018

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

Comment [CM20]: The definition of what is a good amenity or configuration should be determined by consultation with people with disability.

Comment [CM21]: The size of the room to accommodate the number of people should always be taken into account. Personal space for each individual should be taken into account.

Comment [CM22]: Replace 'should' with 'will'

Comment [CM23]: Of their own choosing or in the case of where an advocate is appointed, one that is randomly chosen for them.

Comment [CM24]: It is abominable to think in this day and age that a tribunal can 'give leave', or not, for a person to be legally represented during procedures that have life long legal ramifications. Without the right to legal representation in these proceedings the tribunal is indeed a kangaroo court.

Comment [CM25]: Giving a person opportunity to participate is not the same as giving their testimony full and due consideration in the context of their own life.

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.

Comment [CM26]: Tribunals should consider the views of the person. Always. Views of the person should be central.

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.

Comment [CM27]: Consideration should be given to the age, gender identity and cultural background of the person when selecting panels. Three 60 year olds determining the future for an 18 year old would produce a biased outcome. Likewise three white women of euro background would produce a biased outcome for an aboriginal man.

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.

Comment [CM28]: People who hold guardianship or financial management over a friend or family member should be excluded from the panel.

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.

Comment [CM29]: Tribunals should wherever possible include persons who have disability.

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.

Comment [CM30]: This training needs to come from an organisation that is run by people with disability for people with disability.

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.

Comment [CM31]: Training in this area should be given by Aboriginal and Torres Strait Islander orgs

Comment [CM32]: See above comment.

Comment [CM33]: Overall comments
Where is the guideline regarding what weight will be given to the testimony of the person?

Page 1: [1] Comment [CM1] Cheryl McDonnell 12/12/2018 10:35:00 AM

NDIS has killed the role of case management. Coordinators of Support have, in part taken over this role and there is no funding in NDIS to cover the cost of a CoS carrying out this service for this purpose. Who will be the case manager and how will that be funded?

Support for the person should include sufficient time for persons with cognitive disability to receive and process information. This can be a long process as information is given in short lots and discussed between the person and the case manager/advocate

Page 1: [2] Comment [CM2] Cheryl McDonnell 12/12/2018 10:49:00 AM

Define 'notified'. In some circumstances there are gatekeeping actions by carers, service providers, etc that may block delivery of the notification to the individual person. Some people with disability may be able to be notified by mail and or a phone call, however others will require a visit by an official person to personally notify them.

Page 1: [3] Comment [CM4] Cheryl McDonnell 12/12/2018 10:53:00 AM

If the information is provided needs to be read, interpreted, or otherwise pass through a 'gatekeeper' what steps will be taken to ensure the meaning of the information is not skewed, misrepresented, or otherwise changed by the gatekeeper.

This would be a good role for individual advocates who could be trained in passing on the information to ensure that the message sent is the same as the message received.

Page 1: [4] Comment [CM5] Cheryl McDonnell 12/12/2018 10:57:00 AM

Who determines the 'detrimental' nature of the proceedings to the person? Again third parties with an interest in the outcome of the proceedings could gatekeep this situation. Again this is a role of an advocate to assert whether the person feels the process will be detrimental to them.

Page 1: [5] Comment [CM6] Cheryl McDonnell 12/12/2018 10:59:00 AM

Who gains this information?

Whose role is it and how will this be funded are fundamental questions that need to be answered to ensure the person at the centre of the proceedings is involved in the proceedings.

Page 1: [6] Comment [CM7] Cheryl McDonnell 12/12/2018 11:01:00 AM

Providing this information is left up to carers, service providers, or others involved or invested in the outcome of the proceedings this is inherently unfair to the person because they may not know this is information they should have received.

Again an advocate, and I suggest one should be allocated at random from an advocacy service and this needs to be funded should be given the role.

It is of course possible to allocate two advocates where necessary, one who provides the information and another to serve as an advocate throughout the proceedings.

Page 1: [7] Comment [CM8] Cheryl McDonnell 12/12/2018 11:05:00 AM

Having 'an opportunity' is only useful to those who are supported to be able to ask questions. And if a question is asked, who is going to provide the answer? Tribunals themselves are all too often a hurried affair with several matters being heard in a day and time is of the essence so who will hear the question and who will answer it?

Page 1: [8] Comment [CM9] Cheryl McDonnell 12/12/2018 11:07:00 AM

Will the hearing also take into account that there is a group of people for whom expressive communication is so difficult that something as simple as a new location can affect their ability to communicate their views.

This should not be 'Optimally' because the response to that will always be, 'we can't always have optimal conditions' Optimally is all too often used as a substitute for 'optionally'

Should read.

The listing for a hearing will take into account.