Feedback to Australian Guardianship and Administration Council (AGAC)
Participation of the proposed represented person –
Draft Best Practice Guidelines

About Aged and Disability Advocacy Australia

Aged and Disability Advocacy (ADA) Australia is a not-for-profit, independent, community-based advocacy and education service with more than 25 years' experience in supporting and improving the wellbeing of older people and people with disability.

ADA Australia provides advocacy support to recipients of Queensland Community Care Services and Commonwealth funded aged care services. ADA Australia is a member of the Older Persons Advocacy Network (OPAN) and receives funding under the National Aged Care Advocacy Program (NACAP) to deliver advocacy, information and education services.

ADA Australia also has an established Human Rights Service which supports people with a decision-making disability and people aged over 65 years, to express their views, wishes and preferences at the Queensland Civil and Administrative Tribunal (QCAT) and in relation to guardianship, administration and Enduring Power of Attorney matters.

Headquartered in Brisbane, ADA Australia has regional offices in Cairns, Townsville, Rockhampton, Bundaberg, Toowoomba, Sunshine Coast and the Gold Coast and is active in providing advocacy services in metropolitan, regional, rural and remote communities across Queensland.

Feedback on the Guidelines

ADA Australia's comments are limited to areas in which we are able to offer valuable commentary, otherwise we generally agree with the Guidelines as proposed. We commend the work done on the draft guidelines to date.

ADA Australia has extensive experience in the role of separate representative. We value the Tribunal identifying suitable matters early, so that agencies like ADA Australia can become familiar with the person and their situation. This then enables us to also craft tailored recommendations to the Tribunal for their consideration, usually via written submissions filed three days prior to the hearing.

Draft Guidelines

DF 2 - We endorse the West Australian approach of having the application "served" on the adult concerned. There is too much reliance placed on the applicant to notify the person about the application, its purpose and proposed impact. This occurs in situations where there is a clear conflict of interest between the applicant and the proposed represented person (person).

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DF 3 - Agreed. If people are seeking to engage support, then they need 14 days' notice of the hearing, due to the reduced postal service, to give them enough time to approach agencies and enable advocates and lawyers the opportunity to meet.

DF 4 - We agree with the Section F "Assistance at the Hearing" section, which is worded to "presume" the person will attend their hearing and sets to identify their support needs. This approach should be adopted (eg NCAT Form Section F). The current forms, in other jurisdictions, which provide an 'opt-out of attendance if detrimental to the person' option, set up a usual (default) practice where the person rarely participates, whether they are capable, or not. This is a conflict of interest between the applicant and the person.

Agree that easy English sheets on the hearings and possible orders that the Tribunal may order, need to be developed.

Information on advocacy and legal services should be ordinarily sent out.

DF 5 - If a person requires a hearing at a certain time of the day, this could be first canvassed in a section similar to NSW form Section F.

DF 8 - In gathering views of the person, this needs to occur via an independent representative, rather than risk an interested party claiming to also be the representative.

Linking people to independent advocates/lawyers gives rise to the opportunity of informing the Tribunal of unmeritorious applications, or possibility of diverting to mediation/conferencing.

It is our experience that there is not sufficient scrutiny to the pre-hearing process to reduce applications where less restrictive approaches have yet to be fully explored or trialed. This lack of scrutiny, in turn leads to more applications in situations which an application is premature. There is little encouragement of the health/disability/aged care sector to consider arrangements that may promote a person's autonomy if a hearing is granted in the first instance.

For example, if a hearing occurs too early in a person's time in hospital, there is too little time for recovery or even the possibility of recovery to be demonstrated. This can result in an order and a premature discharge into aged care with the accompanying financial obligations. Leaving aged care is an enormously difficult and complex process and premature entry via order based on dubious or premature evidence should be guarded against.

There are options to promote other conflict resolution options and give an opportunity for an agreement to be activated.

DF 9 & 10 - Standardised collection of data and public reporting on it is necessary. Also, outcomes such as private people appointed vs statutory appointments, details of the person such as age, culture, language and the condition/disability that is impacting on the person's decision making.

DF 14 - Tribunals also need to consider their practice in hospitals and other locations where they have less control over the environment.

Considering that if the person opposes the appointment, it is very likely that the applicant, the treating team, may no longer be viewed by the person as supportive, and the hearing is often far more stressful on the person than acknowledged by the hospital.

ADA Australia has concerns about the perception of hearings in the hospital, and the potential for conflict of interest where it is in the interest of the hospital to discharge quickly to aged care, reducing the likelihood of a readmission, and this may not always be in the interest of the person. **(Strongly agree with the point raised in 5.37). This practice also works to the timetable of the hospital and may not suit the person. There is a reluctance to discharge a person (even on a trial leave basis) prior to their hearing, regardless of medical needs. This often results in weeks to months of hospital time and a resultant financial charge to the person. A preferred model is where the adult is discharged with transition services until their hearing date, at which point they can demonstrate their functional abilities and needs or otherwise of decision makers. This provides the tribunal with tangible evidence. This also frees up hospital resources.**

Tribunal members need to always be sensitive to the impact that other parties may have on the adult, offering breaks and ways for the adult to contribute their views and wishes without necessarily being present at the hearing (such as AV).

We strongly support 5.50 training in accordance with Tribunal Competency Framework.

DF 17 - We agree with all the options that assist the person to participate in the hearing, and we would also include whiteboards, so that the topics being discussed can be placed in large letters on the board. (or screen that could be used as a simple display). This could help people with memory and other sensory issues be simply reminded of the current topic, as well as assisting the tribunal to keep all participants on point.

DF 20 - The right of a person subject to an order to have that order reviewed is not widely known. This factor places more emphasis on only running hearings that are meritorious on their face.

The lack of automatic reviews in this jurisdiction places Tribunals at risk of breaching Article 12 UNCRPD, in that an order is not in place for the shortest possible time.

The approach of ordinarily reviewing on the papers tends to presume the person still lacks capacity, and is not capable of recovery, learning new skills, and receiving new supports.

DF 25 - We strongly agree with sentiments and specific training to involve the person in their own matter, as raised in 8.2

Thank you for the opportunity to provide feedback on these guidelines.

Yours faithfully,

Geoff Rowe

Chief Executive Officer

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