

20 December 2018

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Chair, Australian Guardianship and Administration Council
Guardianship Division
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By email to: participation@justice.nsw.gov.au

Dear Mr Schyvens

Draft guidelines on the participation of the proposed represented person

Thank you for the opportunity to comment on the Australian Guardianship and Administration Council (AGAC) draft guidelines on the participation of the proposed represented person in guardianship and financial management/administration hearings.

Our comments have been informed by our extensive work with people with disability in carrying out a broad range of functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, including our standing inquiry into the abuse and neglect of adults with disability in community settings (such as their family home).¹

We support the development of the guidelines; our comments are primarily aimed at strengthening the guidance to both maximise the participation of, and minimise adverse impacts on, a person who is the subject of an application – particularly in relation to matters involving alleged abuse, neglect or exploitation.

Strengthening safeguards to enable maximum participation in the context of potential abuse

In our view, there would be benefit in building in additional mechanisms and supports to reflect the National Decision Making Principles to provide ‘appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.’

In relation to AGAC’s draft position that the proposed represented person’s participation is encouraged ‘unless to do so would be detrimental to the person’,² there would be merit in amending this position to focus on ensuring that appropriate supports are provided to enable the person’s participation. In our view, the person’s participation should *always* be encouraged – this does not necessarily mean that the person has to directly participate in the hearing, or that they cannot opt out. However, the default position should be that the person is provided with the support they require to enable them to participate to the

¹ We are conducting the standing inquiry under s11(1)(e) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. Our November 2018 special report to Parliament, [Abuse and neglect of vulnerable adults in NSW: the need for action](#), details our standing inquiry and its significant cases of alleged abuse and neglect of vulnerable adults, including those with impaired decision-making ability.

² Draft Guideline 4, and sections 3.4, 4.16, 5.12.

maximum extent in the process. In the event that there is a view that 'participation in the hearing may be detrimental to the physical or mental health or well-being of the person', timely action should be taken to:

- clarify the basis of this view, the source of the expected detriment, and the supporting evidence
- understand the factors involved (such as whether the view has been promoted by a party that is the subject of allegations)
- explore options for facilitating the person's participation and minimising any adverse impact and risks.

We note that AGAC has identified that tribunals may consider other forms of participation (such as representation or an advocate). In the draft paper, AGAC has also recognised the need for tribunals to make arrangements for the person's participation in the hearing that do not reinforce dynamics that can be inherent in family violence and inhibit the person's ability to provide their views about an application (3.4). In our view, there would be merit in ensuring that the guidelines more clearly reflect these considerations.

At 3.5, the draft paper appropriately notes that before 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.' We note that the paper identifies that what constitutes 'reasonable steps' depends on the circumstances of each matter, and needs to be considered on a case-by-case basis. We agree that there needs to be scope to respond flexibly to the particular circumstances of an individual matter. However, there would be merit in AGAC more clearly outlining the agreed minimum expectations of 'reasonable steps', and identifying options that could be explored in particular scenarios. For example, in matters where there is alleged abuse, neglect or exploitation, tribunals should ensure that the person who is the subject of the application receives support to separately and safely provide their view, and that sufficient protections are provided to minimise adverse consequences for the individual.

In this regard, and inter alia, there would be benefit in providing guidance on the minimum steps that tribunals should take to:

- prior to the hearing, identify whether the person's views may be subject to coercion, intimidation or coaching (or otherwise affected by their circumstances and relationship to parties to the hearing), and use effective strategies to enable the person to express their genuine view
- ensure that the tribunal obtains the views of the person in the absence of other parties to the hearing.

Risk assessment

We note that at 4.10, the draft paper refers to hearings being listed within appropriate timeframes 'dependent on assessments of risk to the person'. We support these decisions being informed by a risk assessment; however, we consider that there is a need to ensure that broader decisions relating to hearings (and pre-hearings) are informed by an assessment of risk to the person.

There would be merit in more explicitly incorporating risk assessment as part of tribunal processes to enable informed decisions to be made about:

- the supports the person will require to participate to the maximum extent
- risks to the person and how they can best be minimised.

In our view, there would be benefit in AGAC reaching an agreed position on the key factors that tribunals should consider as part of a risk assessment, and providing guidance on

potential options and useful strategies to mitigate risks to the individual.

Communication intermediaries

We support AGAC's position that it is essential that members and registry staff receive training in the supports that may need to be used in proceedings to ensure that the person is able to effectively communicate and participate in the hearing (5.52). However, it is not evident that Draft Guideline 25 will deliver the change that is required to maximise the meaningful participation of the person. In our view, there would be merit in AGAC considering the work of communication (or witness) intermediaries, and their potential application to tribunal proceedings.

As you would be aware, the NSW Government is piloting the use of witness intermediaries for children and young people in relation to sexual abuse cases.³ In our contact with senior members of the NSW Police Force, we are aware that the trial is producing highly positive outcomes, and has also been successfully employed with a small number of vulnerable adults. The main role of registered intermediaries is to assist two-way communication between the person and the professionals involved in the investigation and trial stages of a case (including police officers, lawyers, judges and magistrates).

We have engaged Professor Penny Cooper to develop – in collaboration with our office – a guide and related training package for disability providers on obtaining 'best evidence' from people with cognitive impairment, particularly those who are the subject of, or witnesses to, alleged abuse. Professor Cooper devised and delivers the national training and procedural guidance for registered witness intermediaries in the UK and also trained the first cohort of intermediaries employed by the child witness intermediary pilot scheme in NSW. We would be happy to provide further information to AGAC about our work in this area, and our discussions with relevant parties about a communication intermediary scheme for adults who require communication support.

Thank you for the opportunity to provide feedback on the draft guidelines. Please contact Kathryn McKenzie, Director Disability, on kmckenzie@ombo.nsw.gov.au or 9286 0984 if you have any questions or require further information.

Yours sincerely



Michael Barnes
NSW Ombudsman

³ Section 88 of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*