

Cognitive Decline Partnership Centre Activity 24 Project Team

**Submission to the Australian Guardianship Association re: Draft Guidelines on maximising the participation of the person in guardianship proceedings**

Dear Mr Schyvens,

Thank you for the opportunity to make a submission in respect of these draft guidelines. We write in our capacity as a team of academic researchers, practitioners and consumer representatives involved in a Cognitive Decline Partnership Centre funded research project. This research team includes members with consumer experience in dementia care, and professional expertise in law, medicine, psychology, aged care service provision, and policy development. The project has investigated community and professional views on supported decision-making, as a potential way of facilitating greater involvement in decision-making and advance care planning by people with dementia and their care-partners.

These Draft Guidelines have been developed by the Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT), who were funded externally for the project, (AGAC Draft Guidelines, 1.11). The Draft Guidelines are in response to the recommendation from the Australian Law Reform Commission (ALRC) Report 131 – ‘Elder Abuse – A National Legal Response’. (Letter from Malcolm Schyvens to Dr. Craig Sinclair dated 7<sup>th</sup> November, 2018).

Recommendation 10-2 of the ALRC Report states

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. (ALRC Report 131, @ <https://www.alrc.gov.au/publications/recommendations-5>)

We consider whether the draft guidelines reflect ‘best practice’, with particular emphasis on the inclusion and participation of people living with dementia. We note the increasing prevalence of age-related cognitive impairment in Australia, with dementia comprising a significant proportion of the caseload for guardianship tribunals around Australia.<sup>1</sup>

### **The Draft Guidelines**

There are 27 Draft Guidelines. These Draft Guidelines are based on the four National Decision-Making Principles underpinning the earlier ALRC Report 124 ‘Equality, Capacity and Disability in Commonwealth laws’ which reflect those set

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<sup>1</sup> John Chesterman, ‘The Future of Adult Guardianship in Federal Australia’ (2013) 66 *Australian Social Work* 26-38.

out in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). (Draft Guidelines pp 4-5).

The Draft Guidelines are comprehensive and clustered under the following headings:-

- Pre-hearing (Draft Guidelines 1-6)
- At the hearing (Draft Guidelines 7-20)
- Composition of the Tribunal (Draft Guidelines 21-24)
- Training of Members and Registry Staff (Draft Guideline 25)
- Participation of Aboriginal and Torres Strait Islander people (Draft Guidelines 26-27)

We note that the Draft Guidelines (at 1.17) acknowledges that:

“... 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 of 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 described in this document.”

We further note that the Draft Guidelines (at 1.18) “... have not necessarily been formally endorsed by each of the Tribunals.”

We take from these points that the Draft Guidelines are not yet informed by evidence on the current participation rates of proposed represented persons in proceedings, as well as the practices in place in other (including international jurisdictions).

**Recommendation 1: The AGAC Guidelines should be informed by up-to-date evidence on the participation rates of proposed represented persons in proceedings. Data from tribunals in each jurisdiction should be collated and used to monitor progress towards best practice.**

**Recommendation 2: The AGAC Guidelines should be informed by up-to-date evidence on practices across Australia, as well as international jurisdictions.**

The preamble to the Draft Guidelines acknowledges that there are constraints to implementing ‘best practice’ principles (legislative, resource, geography and population).

**Recommendation 3: A best practice approach will include action to ensure that legislation in each jurisdiction is in keeping with the guidelines principles (and a rights-based approach), and is sufficiently resourced to deliver services equitably across diverse geographic and cultural contexts.**

The preamble to the Draft Guidelines (at 3.2) makes note of the fact that there may be times, due to the person’s condition, that it would not be in the best interest for them to attend in person. It is suggested that evidence could be

obtained not only from an independent health practitioner but also family and friends. It is important to consider the screening of family members and friends who may be purporting to speak on behalf of the person. This recommendation applies in a range of situations across the different guidelines.

**Recommendation 4: That family members and friends who propose to speak on behalf of a person who is not attending or participating in proceedings should be screened, with a view to reducing the likelihood of these people representing their own interest, rather than those of the person who is the subject of the hearing.**

### **Specific Guidelines and Comments**

Our specific comments relating to the Draft Guidelines are below:

Draft Guideline 13: With respect to this guideline, we believe that there should be further consideration as to whether it is in fact appropriate to locate guardianship tribunals within courthouses or justice complexes. Many older people consider the courts are for criminal proceedings and are therefore daunted by the prospect of ‘appearing in court’. Even non-court facilities are often in large government buildings in the city, difficult to navigate, difficulties with parking and/or public transport access and requiring extensive security checks.

**Recommendation 5: Greater consideration should be given to the prospect of conducting guardianship proceedings outside of court buildings, when this is appropriate and where it facilitates the person’s participation.**

Draft Guideline 14: We agree with this point, though note above Recommendation 4. In jurisdictions with existing frameworks for supported decision-making arrangements these concerns could be addressed somewhat through the processes in place.

Draft Guideline 15: This is an important principle, and could be strengthened in the interest of promoting the person’s *right* to legal representation.

Draft Guideline 17: We agree with this point, noting also that given the increased prevalence of matters involving dementia, that tribunal members should receive training and be familiar with methods for engaging with people living with dementia. This includes a familiarity with the different sub-types of dementia, and opportunities to seek input from health professionals, family members and friends about effective ways to engage the person and support their participation. Basic training should also be given to key registry staff (e.g. receptionists and clerks).

**Recommendation 6: Staff working in guardianship tribunals should receive training in communicating and interacting with people living with dementia.**

Draft Guideline 20: Where resource limitations are the cause for a hearing being undertaken without an opportunity for the person to be present and make their

case, this is of significant concern with respect to a 'best practice' or rights-based approach.

As a final point, we suggest that those responsible for preparing the AGAC Guidelines may find the resources produced by our project team on supported decision-making among people with dementia to be relevant. These resources may be useful for registry staff as well as the broader community. The resources are available online

(<http://sydney.edu.au/medicine/cdpc/resources/supported-decision-making.php>) and include multi-media materials, some of which are translated into a selection of non-English languages.

**Project Team:**

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Thank you for the opportunity to provide this submission.

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