



**Law Council**  
OF AUSTRALIA

*Office of the President*

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Dear Mr Schyvens

**Law Council submission on the Participation of the Proposed Represented Person – Draft Best Practice Guidelines**

Thank you for the opportunity to contribute to the Australian Guardianship and Administration Council's consultation on its Participation of the Proposed Represented Person Draft Best Practice Guidelines.

Please find attached the Law Council of Australia's submission.

Please contact Ms Sarah Sacher, Policy Lawyer, on (02) 6246 3724 or at [sarah.sacher@lawcouncil.asn.au](mailto:sarah.sacher@lawcouncil.asn.au) in the first instance, if you require further information or clarification.

Yours sincerely

**Arthur Moses SC**  
**President**



Law Council  
OF AUSTRALIA

# Participation of the Proposed Represented Person – Draft Best Practice Guidelines

Australian Guardianship and Administration Council

25 January 2019

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Elder Law and Succession Law Committee, the New South Wales Law Society, the Law Institute of Victoria, Law Society Northern Territory and the Law Society of South Australia in the preparation of this submission.

## Introduction

1. The Law Council strongly supports the Participation of the Proposed Represented Person Draft Best Practice Guidelines (**the Guidelines**).
2. As noted in the Australian Guardianship and Administrative Council's (**AGAC**) accompanying Issues Paper,<sup>1</sup> although the Guidelines arose in the context of elder abuse, they may assist tribunals in maximising the participation of all people for whom guardianship and related applications are made.
3. The Law Council makes suggestions for additional points to be incorporated into the Guidelines, some of which are addressed in the Issues Paper but not fully reflected in the Guidelines. The following is a summary of the key points made by the Law Council in this submission.
  - Regarding Guidelines 1-6 (Pre-Hearing), the Guidelines should reflect:
    - an obligation that all initial applications should be conducted in the presence of the proposed represented person (**PRP**);
    - that notice of a hearing should be given in a manner that allows the PRP to understand the nature of the application being sought;
    - draft Guidelines on pre-hearing processes should refer to accessing legal representation appropriate for the person; the provision of information about accessing legal representation and other support; the appointment of a support person and/or communication intermediary; ensuring the provision of information and documents to the PRP at the earliest opportunity; and ensuring that material to be relied upon is clearly communicated to the PRP;
    - accessibility considerations for people with low literacy skills; and
    - recognition that the provision of information alone will not necessarily result in genuine understanding for the PRP without access to additional support through legal and/or advocacy services.
  - Regarding Guidelines 7-17 (At Hearing), the Guidelines should reflect that:
    - technological alternatives to face-to-face hearings should be considered with reference to the needs and circumstances of the individual, and will not necessarily be appropriate;
    - expanded data collection and reporting to cover a range of additional data points, including measuring the number of self-represented persons;
    - regarding amenities, consideration should be had for cultural safety; and tribunal processes should reflect physical accessibility considerations by employing approaches that accommodate different communication styles; and
    - tribunals should remove barriers restricting access to legal representation.

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<sup>1</sup> Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings – Draft Guidelines for Australian Tribunals* (Issues Paper, 2018).

- Regarding Guidelines 18 – 20 (Oral Hearings) the Guidelines should reflect that:
    - a PRP should be provided with substantial information regarding how they may participate in a hearing;
    - all original applications should be determined *only* after an oral hearing; and
    - reviews of orders should be made on the basis of up-to-date medical evidence.
  - Regarding Guidelines 21-24 (Composition of Tribunals) the Law Council encourages a stronger position that provides for multi-disciplinary panels to be the standard.
  - Regarding Guideline 25 (Training) the Guidelines should reflect:
    - an *obligation* for tribunals to provide training;
    - that training programs should be developed in close consultation with people with disability and their advocates;
    - that training should be provided on an ongoing basis; and
    - training should be provided on elder abuse and family violence, noting their relevance to the guardianship context.
  - Regarding Guidelines 26-27 (Participation of Aboriginal and Torres Strait Islander People) the Guidelines should reflect that:
    - tribunal members and staff should be provided with cultural awareness training delivered by Aboriginal and Torres Strait Islander community organisations;
    - training should include a focus on the intersectional barriers faced by Aboriginal and Torres Strait Islander people with disability; and
    - tribunals should be encouraged to develop specialised Indigenous lists.
4. As an overall point, the Law Council welcomes AGAC's efforts to ensure accessibility of tribunals – including the provision of accessible information, encouraging diverse membership, the use of communication supports, interpreters and the many other considerations outlined in the Guidelines. However, even if all these supports were to become universally available, many vulnerable people would still require legal representation to help them navigate complex laws and a complex tribunal system. Therefore, wherever possible, the Guidelines should promote access to legal representation for vulnerable people who need it, and tribunals should remove existing practical barriers restricting legal representation for persons involved in guardianship proceedings.
  5. The Law Council adds that ideally the Guidelines should underpin the delivery of natural justice in guardianship matters through adoption in each jurisdiction by way of practice directions and procedural regulations.
  6. Finally, the Law Council includes a supplementary discussion of practical measures necessary to ensure the effective implementation of the Guidelines – namely adequate resourcing of tribunals and legal assistance services.
  7. Throughout, the Law Council draws on its Justice Project material. The Justice Project was a comprehensive national review into the state of access to justice in Australia

focusing on groups experiencing significant disadvantage. Relevant chapters include the [Courts and Tribunals Chapter](#), the [Older Persons Chapter](#) and the [People with Disability Chapter](#).



# Commentary on Individual Guidelines

## Pre-Hearing: Guidelines 1-6

### Draft Guideline 1

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

8. The Law Council notes that, although it is clearly implied by the Guidelines, there is no starting Guideline that expresses an obligation upon tribunals that all initial applications should be conducted in the presence of the PRP, unless there is a compelling reason why the hearing should proceed in their absence – namely, strong medical evidence to show that it is not in the person’s interest.
9. There is no ‘should’ or ‘must’ element to Draft Guideline 1, unlike nearly all of the remaining Draft Guidelines. The Law Council considers that Draft Guideline 1 should be re-drafted to include an obligation element, ideally a ‘must’ element, ensuring the presence of the PRP.
10. The Law Council notes that the Victorian Law Reform Commission in its Final Report on Guardianship (**the VLRC Report**) observed that ‘there is widespread concern about the number of hearings that the Victorian Civil and Administrative Tribunal (**VCAT**) conducts without the PRP being present.’<sup>2</sup> The VLRC Report considered this concern serious enough to recommend a new statutory presumption that all initial applications in Guardianship List matters be conducted in the presence of the PRP.<sup>3</sup> This recommendation has since been incorporated into the Victorian Guardianship and Administration Bill 2018, which includes a provision that:

*29 The proposed represented person must attend in person a hearing conducted by VCAT in relation to an application made under this Division unless VCAT is satisfied that:*

*(a) The proposed represented person does not wish to attend the hearing in person; or*

*(b) The personal attendance of the proposed represented person at the hearing is impracticable or unreasonable, despite any arrangement that VCAT may make.<sup>4</sup>*

11. Once in force, this provision will provide the foundation for the Draft Guidelines in Victoria. While the Law Council generally approves of the obligation imposed, it notes that a PRP need not be present if the person ‘does not wish to attend’. This can be used against the PRP if a person who is not acting in the PRP’s interest encourages the PRP to say they do not want, or do not need to attend.

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<sup>2</sup> Victorian Law Reform Commission, *Guardianship* Final Report 24 (2012) 493.

<sup>3</sup> *Ibid* Recommendation 370.

<sup>4</sup> Guardianship and Administration Bill 2018 (Vic) cl 29.

### Draft Guidelines 2 and 3

*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.*

12. In relation to Draft Guidelines 2 and 3, the Law Council emphasises that notice of a hearing should be given in a manner that allows the particular person to understand the nature of the application being sought. In addition to written notice being provided, ideally this would include registry staff contacting the PRP to confirm and ensure that they understand the nature of the proceedings, and are aware of the hearing date. This may also encourage more engagement with the hearing process. Any documents lodged in support of the application should also be provided to the PRP at the time that notice is given.

### Draft Guideline 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 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*

13. The Law Council considers that this Draft Guideline on pre-hearing processes should specifically refer to accessing legal representation. As detailed below, legal representation is often critical to ensuring that persons who come before tribunals are provided with relevant information prior to the hearing, that their understanding is assessed, and opportunities provided for genuine engagement with the process. Such measures are essential in this jurisdiction considering the gravity of the orders available, and the implications for the person's rights and autonomy.

14. Additionally, within the Guidelines it should be noted that the provision of legal representation should be appropriate to the circumstances of the person. Specialist services should be preferred wherever practicable. For example, an Aboriginal woman

should be referred to an Aboriginal women's legal service, rather than a general service.<sup>5</sup>

15. As discussed below, the requirement that 'information is provided' does not necessarily improve the understanding or likelihood that the PRP will understand how and where to access independent legal advice and/or advocacy. This point should explicitly state that information about the appointment of legal representation should be provided. Similarly, this point should also include the provision of information about the appointment of a support person, to assist the PRP through the process.
16. Additionally, people with complex communication needs will benefit from the provision of additional or alternative methods of communication, and in some cases, the provision of professional support.<sup>6</sup> The Justice Project noted widespread support across various jurisdictions for the use of registered or communication intermediaries to assist people with complex communication needs to better navigate and participate in the justice system.<sup>7</sup> Intermediaries can help break down communication barriers in courts and tribunals and enhance the user's participation in proceedings, thus improving access to justice for people with communication needs.<sup>8</sup> A number of intermediary schemes have been implemented in a range of jurisdictions,<sup>9</sup> and could usefully be expanded in application to the guardianship context. If this occurs in the future, the Guidelines could incorporate attention to potentially utilising communication intermediaries, as a further consideration for the pre-hearing stage.
17. With respect to the use of interpreting services, the Law Council considers that reference to the Judicial Council on Cultural Diversity's *Recommended National Standards for Working with Interpreters in Courts and Tribunals* could be usefully included in the Guidelines, as it outlines best practice with respect to the tribunal's role in ensuring effective access to, and accommodation of, interpreters.<sup>10</sup>
18. The Law Council further submits that Draft Guideline 4 should require the tribunal to:
  - provide the PRP with a copy of the application and related information/documents in sufficient time prior to the hearing to enable them to prepare their case, including sufficient time to obtain legal advice;
  - ensure that the evidence and material relied on is clearly stated and communicated to the person; and
  - ensure all information provided to the PRP as part of the pre-hearing process is provided in an accessible, easily understood way that allows the particular person to understand the nature of the proceedings, and engage to the extent that they wish.
19. Ideally, briefs of evidence would also be exchanged between the parties at this stage (noting that this is of particular assistance to legal practitioners and medical teams)

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<sup>5</sup> See Law Council of Australia, *Justice Project: Legal Services Chapter* (2018) 51.

<sup>6</sup> Justice Project Submission: Speech Pathology Australia. See Law Council of Australia, *Justice Project: Courts and Tribunals Chapter* (2018) 33-36.

<sup>7</sup> See Law Council of Australia, *Justice Project: Courts and Tribunals Chapter* (2018) 39-40.

<sup>8</sup> See, eg, Ilana Hepner, Mary Woodward and Jeanette Stewart, 'Giving the Vulnerable a voice in the Criminal Justice System: The Use of Intermediaries with Individuals with Intellectual Disability' (2015) 22(3) *Psychiatry, Psychology and Law* 453; Jeanette Stewart, Mary Woodward and Ilana Hepner, 'Fitness to stand trial, human rights and possibilities from England and Wales' (2015) 22(4) *Journal of Law and Medicine* 886.

<sup>9</sup> See Law Council of Australia, *Justice Project: Courts and Tribunals Chapter* (2018) 39-40.

<sup>10</sup> Judicial Council on Cultural Diversity, *Recommended National Interpreter Standards* (2017) <<https://www.naati.com.au/media/1680/mca04694-national-standards-web-171025pdf.pdf>>.

although the Law Council recognises that this may require a degree of formality which may not be warranted in all circumstances.

### **Draft Guidelines 5 and 6**

*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*

20. The Law Council welcomes this Guideline, noting that accommodating individuals' needs through flexible measures such as additional time, breaks, and other reasonable adjustments were key success factors identified by the Justice Project with respect to a range of key groups, from people with disability to recent arrivals.<sup>11</sup> It adds that this Guideline should also consider people with low literacy skills, who are likely to be represented amongst older people and people experiencing economic disadvantage,<sup>12</sup> and do not necessarily fall into one or more of the listed categories.

21. The Law Council reiterates that unless the PRP has someone to explain the information to them, extra information, whether online or in print, is often unlikely to be read or understood by the PRP. 'Information overload' also has the potential to lead to greater confusion for the PRP. Again, the necessity of access to legal representation is apparent, as lawyers can help navigate the information available and ensure adequate understanding by the PRP. While a support person may also be useful for this purpose, a support person may not necessarily understand the relevant legal implications, including with respect to the orders made in guardianship and administration matters.

### **Overarching comments on Guidelines 1-6 regarding the provision of information**

22. The Law Council refers to the points made above regarding Guidelines 4 and 6, and the obligation for tribunals to provide information to PRPs.

23. As noted, the Law Council considers that the requirement that 'information is provided' does not necessarily improve the understanding or likelihood that the person will understand how and where to access independent legal advice and/or advocacy.

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<sup>11</sup> See generally, Law Council of Australia, *Justice Project: People with Disability* (2018); and Law Council of Australia, *Justice Project: Recent Arrivals* (2018).

<sup>12</sup> See Law Council of Australia, *Justice Project: People Experiencing Economic Disadvantage* (2018) 18; and Law Council of Australia, *Justice Project: Older Persons* (2018) 16.

Further, the provision of accessible information alone will not necessarily result in that information being genuinely understood in context of the relevant proceeding.

24. It is suggested that the Guidelines may be further strengthened by acknowledging that many PRPs may have a disability, though not necessarily sufficient to prevent the PRP from continuing to exercise his/her own decision making, but still require information to be provided in a meaningful and appropriate manner that accommodates their individual needs.
25. For example, the Law Institute of Victoria (**LIV**) submitted to the Law Council that currently, the VCAT website has links to the Office of the Public Advocate, Victoria Legal Aid, Elder Rights Advocacy, and the Victorian Advocacy League for Individuals with Disability. While this can be said to be satisfying the requirement that 'information is provided', it is not necessarily meaningful or accessible to a person who potentially has a disability.
26. The Law Council suggests that more can be included in the Guidelines as to how the information is to be provided. It further queries whether this could also be expanded to include hearing notices being provided in a readable and understandable format, with a clear indication about what the hearing will involve and where to get legal advice.
27. As identified by the Issues Paper, though it is critical that the person's participation is encouraged, how tribunals seek to achieve this varies significantly between jurisdictions. The LIV submitted, by way of example:
  - VCAT is currently piloting a case management model in enduring power of attorney or medical treatment matters that includes, among other measures, 'contacting the person who is the subject of the application, when possible.' The extent of VCAT's case management pilot program, and any other proactive measures it includes, is not known. In the absence of further information, if the pilot program is largely limited to contacting the PRP, the LIV submits that this falls short of the case management practices employed in other jurisdictions.
  - In NSW, early directions hearings allow a single tribunal member to explain the hearing process, and any evidence that might be needed, to the PRP, and answer any questions the person might have.<sup>13</sup> This is supplemented by the availability of fact sheets on process and legal and other services available.
28. The Law Council considers that contact with a legal service and/or advocacy service would be a practical way to ensure that 'information is provided' to PRPs in an appropriate and meaningful manner. In practice this would involve some form of arrangement where tribunals organise or contract for either a legal service or advocacy group to contact the PRP to provide the relevant information. Alternatively, tribunals could encourage a duty lawyer service to operate at all venues. This may not necessarily be confined to Legal Aid but could include other disability advocacy services. Such services could provide immediate advice to a person before their scheduled hearing, or could be used as an instant referral method, reducing delays and at the same time ensuring the person understands their legal rights.

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<sup>13</sup> Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings – Draft Guidelines for Australian Tribunals* (Issues Paper, 2018),15.

29. Considering the vulnerability of the cohort in question, and the serious impact tribunal decisions may have upon their rights, it appears reasonable that the onus would be on the tribunal to make sure that PRPs were provided with the appropriate supports.
30. Further, the Law Council notes that Health Justice Partnerships are relevant and useful services that are able to provide pro bono legal advice to PRPs. The Justice Project explored their many benefits in some detail and recommended their overall expansion as part of a multi-disciplinary, holistic service delivery approach.<sup>14</sup> Health Justice Partnerships could potentially also be included in the Guidelines as one of the resources available to PRPs.

## **At Hearing: Guidelines 7-17**

### **Draft Guidelines 7 and 8**

*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*

31. The Law Council welcomes the stated preference for face-to-face hearings. However, it considers that these Guidelines should note that a preferable approach is one that encourages visits to the person, and that in some cases the use of videoconferencing and other technologies may exacerbate existing barriers to communication. Technological alternatives should be considered with reference to the needs and circumstances of the individual, as they will not necessarily be appropriate. The Justice Project indicated that face-to-face approaches were often preferable for many groups experiencing disadvantage, for example, older people and regional, rural and remote residents, many of whom are digitally excluded, and therefore less able to engage with technology. The Project extensively analysed the pros and cons of various alternatives to face to face court and tribunal processes in its Courts and Tribunal’s Chapter, cautioning against the adoption of a ‘one size fits all’ approach.<sup>15</sup>

### **Draft Guidelines 9 and 10**

*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.*

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<sup>14</sup> See Law Council of Australia, *Justice Project: Legal Services* (2018) 81-91.

<sup>15</sup> Law Council of Australia, *Justice Project: Courts and Tribunals Chapter* (2018) 73-81.

32. The Law Council welcomes an emphasis on data collection, as a lack of data across the justice system is a key concern. The Law Council adds that additional data should be collected on the experiences and justice outcomes of self-represented persons, as compared to those who are represented by a legal practitioner and those with other forms of support. As noted below, existing evidence indicates that self-represented litigants face worse outcomes in mental health tribunals and there are concerns that many vulnerable people find it difficult to navigate complex legislation in tribunal settings. The Justice Project found that there is a significant evidence gap in this respect, and an additional data point could help provide valuable insight and inform future policy.
33. Additionally, it would be useful for tribunals to collect data about the length of appointments made, and the rate and reasons why orders are revoked. Further relevant data that may be collected might usefully include:
- whether a private or public guardian was appointed;
  - what precise powers are guardians being appointed with;
  - whether the PRP agreed (consented) to the appointment;
  - whether it is a new matter (first time appointment or reappointment); and
  - the nature of the PRP's disability.
34. These details would provide meaningful insight into substituted/supported decision making and would assist service providers and the tribunals to better meet the needs of individuals most likely to be affected by guardianship.
35. Reporting this expanded view publicly would also assist and educate the general public to understand both the needs of people with disability, and the work of tribunals.

### **Draft Guidelines 11, 12 and 13**

*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.*

36. The Law Council welcomes an emphasis on accessibility, as the Justice Project indicated that this was critical for people with disability, and that people generally find legal proceedings to be very stressful.
37. The Law Council adds that cultural safety should be an additional consideration with respect to amenities, configuration of rooms and accessibility considerations.
38. Further, tribunal processes should reflect this informality and maintain a flexible approach to adducing information from persons with complex communication needs, in addition to consideration for the communication styles of Aboriginal and Torres Strait Islander peoples.<sup>16</sup>
39. As a general point, the Law Council cautions that in creating a less formal environment care should be taken to ensure that this does not lead to slackness with respect to the proceedings, as this can lead to injustice.

#### **Draft Guideline 14**

*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.*

40. The Law Council welcomes the emphasis on access to support persons, and in particular disability advocates, noting that this was a key Justice Project recommendation.<sup>17</sup> However, it notes that this should not result in legal representation being overlooked.

#### **Draft Guideline 15**

*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.*

41. Wherever possible, the Guidelines should promote access to legal representation for vulnerable people who need it, and tribunals should remove existing practical barriers restricting legal representation for persons involved in guardianship proceedings. The involvement of legal practitioners in tribunal proceedings can significantly enhance the efficiency and fairness of proceedings and improve the participant's experience.
42. As discussed further below, where legal representation is denied in tribunal proceedings, there can be a serious risk of unfairness or injustice for vulnerable parties. Self-representation in these jurisdictions is problematic as guardianship, mental health and administration proceedings have the potential to impact significantly upon an on the PRPs life and deprive him or her of his or her liberty in a way not dissimilar to the criminal justice system.
43. There are strong indications that self-represented people can face worse outcomes in proceedings.<sup>18</sup> For instance, the Victorian Mental Health tribunal approves

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<sup>16</sup> See Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander Peoples* (2018) 31.

<sup>17</sup> Law Council of Australia, *Justice Project: Critical Support Services* (2018) 54.

<sup>18</sup> Elizabeth Richardson, Tania Sourdin and Nerida Wallace, Australian Centre for Justice Innovation, *Self-Represented Litigants – Gathering Useful Information: Final Report* (2012) 11; Elizabeth Richardson, Tania



applications for electro-convulsive treatment in 85 per cent of cases but this approval rate drops to 50 per cent if the person is legally represented.<sup>19</sup>

44. To reduce the cost and the length of hearings, self-representation in tribunals is generally encouraged, and in certain instances, is mandatory unless the participant seeks and is granted permission from the other party and the tribunal member hearing the matter to be legally represented.<sup>20</sup> The Issues Paper states New South Wales and Victoria are the only states where leave must be granted by the tribunal.<sup>21</sup> Additionally, leave is required under legislation in Queensland,<sup>22</sup> although the Queensland Civil and Administrative Tribunal (**QCAT**) website states that 'in some cases, a party is automatically able to be represented. QCAT will always agree to representation for a person...with impaired capacity'.<sup>23</sup>
45. While there are procedures in place to enable a vulnerable party (including one who has mental capacity but is vulnerable for other reasons, such as failing health, poor education and literacy, or a history of trauma) to make an application to be legally represented, there are concerns that in some jurisdictions, applications may not be granted because the opposing side often objects to the application and tribunals are reluctant to rule in favour of the applicant if the other side opposes the application.<sup>24</sup> Additionally, a vulnerable applicant may not have the advocacy skills or knowledge to make an application for legal representation in the first instance.<sup>25</sup>
46. The Productivity Commission has recognised that such restrictions on representation prevent tribunals from becoming formal, expensive and adversarial legal bodies.<sup>26</sup> However, the Commission accepted that in certain circumstances, representation is 'desirable'. For example, to 'facilitate efficient identification and resolution of the issues, or ensure fairness and equity, such as in specialist tribunals dealing with adult guardianship and mental health issues'.<sup>27</sup>
47. During Justice Project consultations, Legal Aid commissions and community legal centres reiterated that the lack of legal representation perpetuates deep-seated power imbalances between parties and reinforces a lack of faith in the system.<sup>28</sup> Legal representation is especially important for people who are facing multiple complex barriers and/or whose legal knowledge, advocacy skills and readiness to act are relatively poor, noting also that the legal issues dealt with by tribunals can be significantly complex. Solicitor Jennifer Corkhill submitted to the Justice Project that for

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Sourdin and Nerida Wallace, *Literature Review*, 17-18; Tania Sourdin and Nerida Wallace, 'The dilemmas posed by self-represented litigants: The dark side' (2014) 24 *Journal of Judicial Administration* 61, 62.

<sup>19</sup> Mental Health Tribunal (Victoria), *Annual Report 2016-17*, 22; Stephanie Corsetti, 'Low mental health legal representation in regional Victoria affects patient outcomes, Legal Aid says', *ABC news* (online), 21 March 2018 <<http://www.abc.net.au/news/2018-03-21/mental-health-legal-representation-low-in-regional-victoria/9571696>>.

<sup>20</sup> As is the case in Victoria – see *Victorian Civil and Administrative Act 1998* (Vic), s 62 (b)(iii) and s 62 (c).

<sup>21</sup> Issues Paper 25 citing *Civil and Administrative Tribunal Act 2013* (NSW), s 45; *Victorian Civil and Administrative Act 1998* (Vic), s 62 (c).

<sup>22</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)(b)(i)(iv). In other jurisdictions, leave is not required: *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.

<sup>23</sup> Queensland Civil and Administrative Tribunal, *Legal Advice and Representation* <<https://www.qcat.qld.gov.au/going-to-the-tribunal/legal-advice-and-representation>>.

<sup>24</sup> Justice Project Consultation: Townsville (Legal Aid Queensland).

<sup>25</sup> *Ibid.*

<sup>26</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2013) 14.

<sup>27</sup> *Ibid.*

<sup>28</sup> For example, Justice Project Consultations: Legal Aid Queensland, Caxton Legal Centre.

those with a mental health condition or mental incapacity, 'may not comprehend the powers of the [tribunal] and its potential impact on their lives'.<sup>29</sup> For those that are 'psychiatrically unwell at the time of the hearing, their ability to understand the case against them, call evidence or make representation on their own behalf can be compromised'.<sup>30</sup>

48. To illustrate, the Law Society of South Australia advises that it is rare for an unrepresented person to have access to the background materials that will be relied upon by the applicant in the hearing. As such, the represented person will often hear the evidence for the first time at the hearing. Jennifer Corkhill similarly submitted to the Justice Project that 'many are unaware in advance of the hearing of the nature of the evidence against them or that they can challenge the evidence, and few bring their own expert evidence for reasons of ignorance and/or cost'.<sup>31</sup> The Law Society of South Australia is concerned that this scenario risks breaching the hearing rule, one of the core components of natural justice. It is merely one illustration of the inequitable processes/outcomes associated with a lack of legal representation in these matters.
49. The following case study was provided to the Justice Project by Jennifer Corkhill. The case demonstrates the problems which arise because of a lack of free legal representation for first instance hearings in the mental health and guardianship jurisdictions. While 'Glenda' was fortunate to be assisted on a pro bono basis, many people are unable to access legal assistance.

*Glenda is an Aboriginal woman who was suffering from extremely severe depression and who was detained against her will under the Mental Health Act in a psychiatric institution. The treating team made an application to the Guardianship Board for Electro Convulsive Treatment (ECT).*

*Under [South Australian] law ECT can only be given without consent if the person lacks capacity. Glenda was taken to a Guardianship Board hearing where the Board and all of the treating team were male. No Aboriginal liaison person was appointed. Funding is not available for legal representation at these hearings.*

*The transcript of the hearing shows that the report of the treating team regarding Glenda's capacity was accepted without question and the order was made.*

*Fortunately for Glenda she had 2 daughters who, when they found out about the order, contacted Aboriginal Legal Rights who contacted me. I was able to get the matter on urgently before the District Court and seek a stay of the order.*

*Glenda was so depressed that she could barely speak but I was, after careful and gentle questioning over a considerable period of time with appropriate breaks, able to obtain clear instructions and make an assessment that Glenda did in fact have legal capacity. She was terrified about the prospect of ECT and had felt powerless to do anything about it.*

*Had Glenda had legal representation at the first instance, her legal capacity could have been established and her daughters could have accompanied her to the hearing. She would have been able to challenge the medical team and the order could not have been made.<sup>32</sup>*

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<sup>29</sup> Email from Jennifer Corkhill to the Law Council of Australia, 19 February 2018.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

50. Taking the above factors into account, the Justice Project recommended that in the context of tribunals, every tribunal should have the power to allow a party to be represented in proceedings, where it is deemed necessary to ensure a fair outcome in the proceedings. Such situations could include where there is a power imbalance between the parties; where a party lacks mental capability; where a party is particularly vulnerable; or where the consequences of decision-making are highly significant to individual lives.<sup>33</sup> The Justice Project further recommended that Guidelines be developed to assist tribunals to exercise this power consistently with the minimum standard.<sup>34</sup>
51. The Law Council notes that this recommendation was intended to apply broadly to all tribunals and is a starting point for legal representation in a tribunal setting generally, however, legal representation is particularly important in the guardianship context as the consequences of decisions are serious and the vulnerability of participants acute, and should be considered to be of high importance.

### **Draft Guidelines 16 and 17**

*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.*

52. The Law Council adds that tribunal members should not only be trained in the use of communication supports, but also trained in communication methods such as open questioning and prompting methods.

### **Oral Hearings – Guidelines 18-20**

#### **Draft Guideline 18**

*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.*

53. The Law Council welcomes this emphasis. However, the Law Council queries what is intended by the term ‘genuine’, and considers that including guidance about this point in Draft Guideline 18 would be beneficial. As discussed, the Law Council considers access to legal representation to be central to ensuring genuine participation and understanding by many persons subject to guardianship and administration proceedings.
54. The Law Council further considers that this Draft Guideline should include that the person should be provided with substantial information in a hearing in relation to how

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<sup>33</sup> Law Council of Australia, *Justice Project: Courts and Tribunals Chapter* (2018).

<sup>34</sup> *Ibid.*

that person may participate in the hearing, interject, indicate that they do not understand something, or require a break.

### **Draft Guidelines 19 and 20**

*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.*

55. As noted in the Issues Paper, the Australian Law Reform Commission's (**ALRC**) *Elder Abuse – A National Legal Response* reported that in most states or territories, the tribunal retains a discretion to determine a matter, including a matter related to the appointment of a guardian or financial administrator, without an oral hearing.<sup>35</sup> The Law Council is concerned that original applications would be determined on the papers in any circumstance. Having regard to findings of the ALRC that an oral hearing is an important procedural safeguard and the risks that a vulnerable person would not be able to participate in the process without such a hearing, the Law Council considers that all original applications should be determined *only* after an oral hearing, and that this should be strongly reflected in the Guidelines.
56. Further, the Law Council notes concerns expressed by the LIV that some of its members have reported that tribunals do not necessarily seek up-to-date medical reports and records, and may be making decisions based on historical information. As such, the Law Council considers that Guideline 20 should state that reviews of orders should be made on the basis of current, up-to-date, medical evidence.

### **Composition of Tribunals- Guidelines 21-24**

#### **Draft Guidelines 21-23**

*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.*

57. The Law Council generally supports these Guidelines and adds that having non-lawyer panel members is important as it can foster a better engagement with, and questioning of, the subject person. Further, the knowledge of such non-lawyer

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<sup>35</sup> Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings – Draft Guidelines for Australian Tribunals* (Issues Paper, 2018) 26.

members in relation to disability and relevant services is very important, particularly in circumstances where some members sit in a number of divisions and may lack the depth of experience and understanding in these areas.

58. Guidelines 21-24 note that multi-disciplinary panels are 'optimal in appropriate circumstances,' and state that tribunals 'should' give consideration to the composition of panels, and have a diversity of members available. However, these encouragements are somewhat undercut by Draft Guideline 23, which acknowledges that practical constraints may cause multi-disciplinary tribunals to be used (at least) in matters assessed as being complex, or that would otherwise benefit from a multi-disciplinary tribunal.
59. Currently, in all Australian jurisdictions except NSW, the composition of panels is at the discretion of the President of the tribunal. However, as noted in the Issues Paper, the ALRC's 2017 report noted that multi-disciplinary panels were only regularly convened by NSW and Tasmania,<sup>36</sup> and that other jurisdictions 'will only list a multi-disciplinary panel if the matter is assessed as being particularly complex.'<sup>37</sup>
60. The Law Council questions the extent to which the Draft Guidelines will improve this position. It is submitted that the guidelines should take a stronger position to encourage multi-disciplinary panels to become the standard rule, rather than the exception they appear to be in practice.
61. Further, determining the need for a multi-disciplinary panel based on the 'complexity' of the matter is not particularly helpful from the point of view of the PRP. A matter that may be considered relatively 'simple' or straightforward by the tribunal or the applicant, for example, still has the potential to cause considerable difficulty, confusion or distress for the PRP.
62. The LIV submitted to the Law Council that ideally, all PRPs should have the benefit of a multi-disciplinary tribunal, unless there are compelling reasons why the matter should be heard by only a single member. It proposes an approach similar, in part, to a mental health tribunal considering involuntary treatment pursuant to the *Mental Health Act 2014* (Vic).
63. However, the LIV notes VCAT's view that the flexibility and responsiveness facilitated by its ability to list hearings at short notice and take hearings to the most appropriate place, such as a hospital, 'would not be possible' if it was required to convene a three member panel.<sup>38</sup>
64. The LIV added that some Victorian practitioners have questioned the value of guardianship matter being heard by a multi-disciplinary panel, and have noted that provisions exist in legislation to allow for rehearing and reassessments, should there be any concern with a particular decision by a particular member, and that this may somewhat mitigate the need for multi-disciplinary panels.
65. Further, considering the far reaching and serious nature of tribunal decisions, the LIV considers that these matters should be approached by 'legal' members applying

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<sup>36</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response* Report No 131, (2017) 329.

<sup>37</sup> Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings – Draft Guidelines for Australian Tribunals* (Issues Paper, 2018), 31, citing information from consultation with Heads of Tribunals, AGAC meeting, Perth (19 October 2017).

<sup>38</sup> Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings – Draft Guidelines for Australian Tribunals* (Issues Paper, 2018),32, citing consultation with VCAT, 5 September 2018.

appropriate legal principles and standards. Victorian practitioners have relayed their view that VCAT members generally have experience in the jurisdiction, which includes communication with represented persons and PRP.

#### **Draft Guideline 24**

*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.*

66. The Law Council strongly supports diversity measures and adds that this can be facilitated through leadership measures undertaken by committees and overarching bodies, such as the Council of Australasian Tribunals. The Justice Project recommended that the National Judicial College of Australia should consider establishing a dedicated disability committee with experts on disability, including people with lived experience of disability, to facilitate training and encourage diversity.<sup>39</sup> A similar initiative could be undertaken in the tribunal context.

#### **Training: Guideline 25**

*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.*

67. The Law Council strongly supports the provision of training for tribunal members and staff. The Justice Project observed that current levels of training are not adequate across the breadth of the justice system, and outlined the negative consequences of insufficient training.<sup>40</sup> However, the Law Council notes that Draft Guideline 25, unlike nearly all of the other Draft Guidelines, is not drafted to include a 'should' element, and therefore does not place any obligation on tribunals to provide training to members and registry staff, nor any guidance about the content or extent of best practice training. The Law Council submits that Draft Guideline 25 should be redrafted to require tribunals to provide training, and to provide tribunals with guidance on what is intended by 'strategies to involve persons'.

68. The Justice Project recommended that training should be developed in consultation with people with disability and their advocates.<sup>41</sup> Training programs could incorporate presentations by people with disabilities that highlight relevant issues. Improved understanding of the lived experiences of people who appear before tribunals is necessary to facilitate the development of strategies to increase their participation.

69. As a starting point with respect to the specifics of training on engagement strategies, the VLRC Report provides a useful list of components:

- *the various disabilities that affect decision-making capacity;*
- *the experiences of people who appear before VCAT, and in particular people who are the subject of applications;*

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<sup>39</sup> Law Council of Australia, *Justice Project: Courts and Tribunals* (2018) 58.

<sup>40</sup> Law Council of Australia, *Justice Project: People with Disability* (2018) 34 – 37.

<sup>41</sup> Law Council of Australia, *Justice Project: People with Disability* (2018) 34 – 37.

- *'capacity', 'capacity assessment' and the options that exist to support people in the exercise of capacity*
- *The service and support networks that assist people with impaired decision-making ability;*
- *The experience of family and carers of people with impaired decision-making ability; and*
- *Cultural diversity, and the different ways in which Aboriginal, Torres Strait Islander and culturally and linguistically diverse communities support people with impaired decision-making ability.<sup>42</sup>*

70. Further to the above, the Law Council considers that training should be provided on an ongoing basis.

71. Finally, the Law Council adds that this Guideline should include the provision of training on the nature of elder abuse and family violence, noting the relevance of these dynamics in the context of guardianship, including potential impacts upon tribunal processes and outcomes.

## **Participation of Aboriginal and Torres Strait Islander People: Guidelines 26-27**

### **Draft Guideline 26**

*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.*

72. The Law Council strongly supports this Guideline. The Justice Project explored the importance of diverse personnel in courts and tribunals, and the role of specialist staff such as cultural liaison officers.<sup>43</sup> The case study of 'Glenda' extracted above illustrates the difficulties confronted by Aboriginal and Torres Strait Islander people where there is insufficient staff diversity and a lack of liaison support. The Law Council adds that in order to effectively recruit and retain Aboriginal and Torres Strait Islander staffing and membership, tribunals must also ensure that they are culturally safe workplaces.

### **Draft Guideline 27**

*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.*

73. The Law Council strongly supports this Guideline and considers that it should be strengthened to require that members and registry staff attend this cultural awareness training.

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<sup>42</sup> Victorian Law Reform Commission, Guardianship (Final Report 24, January 2012) 496.

<sup>43</sup> Law Council of Australia, *Justice Project: Courts and Tribunals* (2018) 52, 63-4.

74. Crucially, cultural training should be delivered by Aboriginal and Torres Strait Islander community organisations.

75. Training should be provided to panel members that includes appropriate factors that relate to the interaction of Aboriginal and Torres Strait Islander people with child protection, welfare and government institutions. Further, training should consider the specific intersectional issues facing Aboriginal and Torres Strait Islander people with disability, and conceptions of disability within Aboriginal communities.<sup>44</sup> For context:

- The 2014-2015 National Aboriginal and Torres Strait Islander Social Survey found that 45 per cent of Aboriginal and Torres Strait Islander people lived with some disability, of which 7.7 per cent had a severe and profound disability (compared to 4.6 per cent of the general population).<sup>45</sup> The First Peoples Disability Network has reported that Aboriginal and Torres Strait Islander people are 2.1 times more likely to be living with disability than other Australians and five times more likely to experience a mental health condition than other Australians.<sup>46</sup>
- Some Aboriginal and Torres Strait Islander people find the concept of disability 'hard to understand or irrelevant' which may affect the accuracy of surveys that record disability rates.<sup>47</sup> The First Peoples Disability Network has commented that 'in traditional language there was no comparable word for disability which suggests that disability may have been accepted as part of the human experience'.<sup>48</sup>
- As noted by the Law Society Northern Territory (**LSNT**), the Northern Territory has the highest per capita guardianship orders with majority under public guardianship. Aboriginal and Torres Strait Islander people under guardianship in the Northern Territory are disproportionately represented (over 50 per cent of new applications compared with 26 per cent of the general population), most often under state guardianship (78 per cent).<sup>49</sup> This reality highlights the necessity for adequate training and culturally competent responses in the guardianship context.

76. The Law Council further considers that members and registry staff should have access to more advanced cultural competency training, and tribunals should be encouraged to develop specialised Indigenous lists, and to develop and train a pool of members with specialist Indigenous cultural competencies to hear matters involving Indigenous people.

77. In this regard, the LIV noted that VCAT has been funded to establish a Koori Engagement Project Officer, one of the functions of which is to establish 'a pool of culturally competent members who can be directed to hear Koori specific matters,

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<sup>44</sup> See Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander Peoples* (2018) 10-12.

<sup>45</sup> Australian Bureau of Statistics, *Social and Economic Wellbeing of Aboriginal and Torres Strait Islander People with Disability* (March 2017)  
<[http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20people%20with%20disability%20\(Feature%20Article\)~10000](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20people%20with%20disability%20(Feature%20Article)~10000)>.

<sup>46</sup> First Peoples Disability Network Australia, *First Peoples Disability Network Australia* (2017)  
<<http://fpdn.org.au/>>.

<sup>47</sup> Productivity Commission, *Disability and Care Support*, Inquiry Report No 54, (31 July 2011) vol 2, 534.

<sup>48</sup> First People's Disability Network, Submission No 542 to the Productivity Commission, *Inquiry into Disability and Care Support*, August 2010, 8.

<sup>49</sup> Alistair McLaren, 'The Northern Territory's adult guardianship scheme: Depriving the vulnerable of a voice', *Alternative Law Journal Article* 2018 43(2), 113-119.



particularly in the Residential Tenancy and Guardianship lists.<sup>50</sup> VCAT continues to provide Koori Cultural Awareness training to all VCAT staff.<sup>51</sup>

## Practice Directions and Procedural Regulations

78. The Law Council considers that, as a means of addressing the gap between the theory of best practice and implementation, the Guidelines should underpin the delivery of natural justice in guardianship matters through adoption by each jurisdiction by way of practice directions and procedural regulations.

79. The Law Council draws attention to the input of the LSNT, which stated that the Northern Territory (NT) tribunal system is moving away from best practice, outlining the following points:

- Provision for representation of the represented person has been removed in current NT legislation and so the movement in the NT has been toward substituted decision making despite best practice and the trend in other jurisdictions. There is no supported decision making in the NT.
- NT legislation places more emphasis on best interests over the represented person's freedom of decision and action, also moving away from best practice.
- Participation of the represented person is not supported by an evidence-based approach in NT or the adversarial principle. Reliance on the Office of the Public Guardian's function of investigation, monitoring and reporting lacks independence and conflicts with their role as guardian of last resort and is not balanced by voice of the represented person.
- Lack of resources is used to justify summary justice and a lack of accommodation to support those with impaired decision making.
- Provision for access is extremely poor. NTCAT does not move outside main cities of Darwin and Alice Springs. Little information in accessible formats and limited use of assistive technology.

80. The following case study illustrates how these concerns manifest in practice:

*An applicant (sister of the represented person) and represented person (RP) were participants in a guardianship review hearing.*

*The applicant and RP both live on a remote community. The RP has severe disabilities. His condition of cerebral palsy includes global development delay and severe language delay, which mean he has hearing impairment and is non-verbal, highlighting the importance of face to face meeting.*

*The RP did not 'participate' in the hearing because:*

- *There had been numerous requests for funding to bring the RP and his sister to Darwin to participate in the directions hearing in person, to account for the RP's sensory deprivation, which had been, for one reason or another, rejected;*

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<sup>50</sup> Victorian Civil and Administrative Tribunal. *Koori Inclusion Action Plan 2017-18*, 2 <<https://www.vcat.vic.gov.au/resources/koori-inclusion-action-plan-2017-18>>

<sup>51</sup> Ibid 1.

- *A video conference was organised through the local council. The link failed on the day preventing the RP and his sister from seeing the other participants.*
- *An audio-link by phone was used as a backup. The sister reported background noise prevented her hearing any of the discussion about the reassessment of the guardianship. She did not participate.*
- *The tribunal provided an audio tape of the hearing to be made available to the RP and his sister. The technical discussion in the tape could not enlighten the RP or his sister on the issues raised and discussed about them, in this manner.*

*The matter has had to be adjourned for various reasons. This means the bid for guardianship being made by the sister is delayed further.*

*The facilities make this a failure in the access to equity and justice for the represented person.*

81. The Law Council considers that the adoption of Guidelines in each jurisdiction by way of practice directions and procedural regulations will help progress the practical implementation of the Guidelines, particularly for outlying jurisdictions.
82. The LSNT has further suggested that the Guidelines and trends in other jurisdictions should be used as a framework to guide review of outlying jurisdictions (and, to guide the review of NT legislation).

## Broader Remarks: Commentary on Resourcing and Implementation

### **Resourcing of tribunals is required to ensure the effective implementation of the Guidelines**

83. The Guidelines are an important and necessary articulation of best practice standards; however the Law Council is conscious of the fact that there are currently deficits in the funding available for tribunals to implement them. Efficiency and cost-saving at the expense of fairness and effective participation in the justice system can diminish the quality of justice, especially for people requiring additional support, adjustments or aids.
84. The Law Council is concerned that the capacity of tribunals to resolve matters both swiftly and fairly in accordance with the Guidelines may be hampered by insufficient resources in the face of increasing demand for services. Sufficient resources and sustainable funding are necessary for tribunals to efficiently process disputes and provide a fair outcome to participants. As the Law Council has previously argued:

*The failure by governments to properly resource the courts and tribunals is a false economy, which results in a slower, less efficient and (in some cases)*

*unsatisfactory dispute resolution processes and leads to expensive societal problems over the longer term’.*<sup>52</sup>

85. As such the Law Council has advocated extensively for increased funding for tribunals and the justice system overall. Noting that there has not been a full scale review and assessment of the resourcing needs of courts and tribunals in recent years, the Justice Project highlighted the need for a full and publicly available review of the resourcing needs of the judicial system to ensure funding is allocated appropriately, including to support the needs of vulnerable members of the community navigating the system.<sup>53</sup>

## **Guidelines must be underpinned by access to free legal representation**

86. Similarly, inadequate access to free legal assistance for guardianship matters undermines the potential for meaningful participation. The Law Council therefore regularly advocates for increased funding of the legal assistance sector, including to meet demand for civil assistance and representation in tribunals.

87. In some jurisdictions, notably Western Australia and South Australia, people with disability who are subject to proceedings under Guardianship and Administration, and Mental Health legislation are denied access to free legal assistance and representation for first instance hearings – although free legal representation may be available for appeals to the District Court against initial orders.<sup>54</sup> In other jurisdictions, such as Victoria and Queensland, limited legal representation for first instance hearings may be available either through Legal Aid or community legal centres.

88. However, as the Justice Project found, due to resource constraints, legal assistance for these types of civil matters is severely limited and frequently unable to meet demand.<sup>55</sup> For example:

- Between 2012 and 2013, only three per cent of Legal Aid grants were for civil matters, compared to 63 per cent for criminal matters and 34 per cent for family matters.<sup>56</sup> While people may receive other more limited Legal Aid services, these grants enable direct legal representation.
- Despite being reliant on a pension or other government benefit as their main form of income, a significant number of older people fail to meet the Legal Aid means test for ongoing advice and representation due to owning assets such as a house.<sup>57</sup> Older persons who fall into a low income and/or low assets category and cannot afford private legal fees are ‘often referred to community legal centres or pro bono services, despite chronic underfunding and under-resourcing in the community legal sector’.<sup>58</sup>

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<sup>52</sup> Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements* September 2013, 50.

<sup>53</sup> Law Council of Australia, *Justice Project: Courts and Tribunals* (2018) 4.

<sup>54</sup> Law Council of Australia, *Justice Project: People with Disability Chapter* (2018), 57.

<sup>55</sup> Justice Project Consultation: Townsville Community Legal Service.

<sup>56</sup> Productivity Commission, *Access to Justice Arrangements* (2014) 678.

<sup>57</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law* (2007) 171.

<sup>58</sup> *Ibid.*

- As an illustration of the extreme pressure placed on community legal centres, and their inability to meet demand for civil legal assistance: in 2015-2016, community legal centres had to turn away nearly 170 000 people.<sup>59</sup>
- The Justice Project revealed the vast inadequacies of available assistance for persons subject to guardianship, mental health and administration jurisdictions. For example, data from the 2016-17 Victorian and New South Wales Mental Health Tribunal Annual Reports indicate that legal representation was provided in 15 per cent of hearings in the Victorian Mental Health Tribunal and in 70 per cent of hearings in the NSW Mental Health Tribunal.<sup>60</sup>

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<sup>59</sup> National Association of Community Legal Centres, *Submission to the Australian Government: Federal Budget 2018-2019* (21 December 2017).

<sup>60</sup> Mental Health Tribunal (Victoria), *Annual Report 2016-17* (2017) 29; Mental Health Tribunal (New South Wales), *Annual Report 2016-17* (2017) 29.