Australian Responses to the United Nations Convention on the Rights of Person's with Disabilities (UNCRPD) in Guardianship Legislation and Legal Systems

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Introduction

Whilst Australia has signed up to the UN Convention of the Rights of Persons with Disabilities (UNCRPD),[2] implementation remains largely in the policy sphere, rather than legislation. This is not to say that legislation is not on the horizon. Many law reform proposals are currently under consideration and the formulation of policy in Australia is currently at the crossroads: whilst there is momentum for greater compliance with the UNCPRD in terms of greater empowerment for people with diminished decision making ability in terms of supported decision making,[3] there is also growing social momentum for greater protections to prevent elder abuse, to the extent that in recent weeks the Australian Prime Minister announced the establishment of a Royal Commission into elder abuse.[4]

In my view, tension is developing as to the way forward in Australia in terms of reform of our guardianship jurisdictions. On the one hand, well established reform processes in recent years have called for changes to legislation to bring greater alignment with the UNCRPD, calling for movements away from a protective jurisdiction based upon "bests interests", to one that is based more on enhancing autonomy and following a person's "will and preference". On the other, appalling examples of the abuse and exploitation of elderly Australians have now come to the attention of mainstream society, often leading news bulletins and current affairs programmes in the media.[5] There has been a sudden focus of our political leaders on this subject and calls for laws to be introduced to minimise the incidence of elder

[1] I acknowledge the assistance of Katherine Gardner, Legal Officer, NCAT Guardianship Division, in the preparation of this paper.

[2] UNCRPD, (3 May 2008)

[3] See *Equality, Capacity and Disability in Commonwealth Laws* (Report 124 December 2014)

[4] Prime Minister Scott Morrison announces Royal Commission into Elder Abuse

(see The Guardian, 16 September 2018); Aged Care (Single Quality Framework) reform Bill 2018 (Cth)

[5] For example, ABC TV, 17 September 2018, Four Corners programme, a two-part investigation into the treatment of elderly Australians in aged care homes.

abuse. It is unclear to me at this stage how these two seemingly divergent drivers for reform will impact on our guardianship laws into the future.

What I can be sure about however is, no matter what reforms are ultimately implemented, those who are the subject of guardianship and like applications must be the central focus for the legal system in which they are involved. Those of us who are called upon on a daily basis to make determinations on a person's capacity must always strive to ensure that the person's voice is heard. Accordingly, my main focus today will be on a project currently underway in Australia to develop best practice guidelines to enhance participation of the person the subject of applications in the hearing process, in compliance with the UNCRPD.

Before I turn to that project though I will, however, provide a brief overview of the Australian Guardianship landscape and summarise some current proposals for legislative reform based on the UNCRPD which would impact on Court and Tribunal processes.

The Australian Guardianship Landscape

In preparing for this presentation today, I have reviewed the Korean Civil Act to gain an understanding of the reformed guardianship jurisdiction which came into operation on 1 July 2013. If my understanding is correct, in Korea, applications can be made to the Family Court seeking orders for people who have impaired decision making ability. In Australia, specialist tribunals predominantly exercise the power in this domain, using the framework of substitute decision making. Such matters are only dealt with by the courts in very small numbers. However, the existing substitute decision making model in Australia, a "best interests" model, has been criticised for being too paternalistic and for taking away the right to self-determination too easily.[6]

In Australia, courts and tribunals share jurisdiction with respect to guardianship matters. Tribunals have evolved differently in the eight jurisdictions, but have common principles and features facilitating access to justice. Specialist tribunals have been preferred to Courts in Australia as the practice and procedure of tribunals is less formal than the courts as the rules of evidence do not apply, rather proceedings are guided by the principles of procedural fairness and are generally more inquisitorial in nature than courts. Access to justice through the tribunal system is facilitated by low costs and reduced formality. For example in New South Wales

[6] Key-note speech: Persons with Decision-Making Disabilities and Supported Decision-Making in New South Wales, Australia 2017 International Conference Seoul, 28 August 2017 Presentation delivered by Deputy President Malcolm Schyvens Division Head – Guardianship, New South Wales Civil and Administrative Tribunal (NCAT) – Sydney, Australia.

("NSW") in my own Tribunal,[7] there are no filing fees for submitting an application in the Guardianship Division, there is no requirement for evidence to be in affidavit form, and most people appear unrepresented.[8]

The guardianship system in my home state of NSW operates much the same as all other Australian states and territories. The Guardianship Division of the NSW Civil and Administrative Tribunal (the Tribunal or "NCAT") is the primary body in NSW for making orders relating to people with cognitive disabilities. The Tribunal appoints substitute decision makers for adults with decision making incapacity. That is, it appoints guardians for personal, health and lifestyle decisions, and financial managers for financial and/or legal decisions.

The Tribunal must observe the principles in the *Guardianship Act 1987* (NSW). These principles state that everyone exercising functions under that Act with respect to people with a disability has a duty to:

- give the person's welfare and interests paramount consideration;
- restrict the person's freedom of decision and freedom of action as little as possible;
- encourage the person, as far as possible, to live a normal life in the community;
- take the person's views into consideration;
- recognise the importance of preserving family relationships and cultural and linguistic environments;
- encourage the person, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs;
- protect the person from neglect, abuse and exploitation; and
- encourage the community to apply and promote these principles.

In NSW, like most Australian jurisdictions, an order appointing a substitute decision maker is a last resort. An order will only be made if there is no other option, and if so made, will be limited to that aspect of the person's life where the order is required. For example, the Tribunal would frequently make orders appointing a guardian to decide a person's accommodation needs, but otherwise all other decision making authority would remain with the person, meaning they would make the decisions themselves or through informal support mechanisms. In most Australian jurisdictions, orders must be reviewed every one (1) to three (3) years.

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[7] The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) <www.ncat.nsw.gov.au>.

[8] *NCAT Annual Report 2016-2017,* Guardianship Division, one or more parties were legally represented in 4.6% of matters, p 44.

Where there is a suitable person, such as a family member or a friend, able and willing to be appointed as the substitute decision maker for the person, the Tribunal must consider that person for appointment. Where there is no such person available or it would not be in the best interests of the person to appoint a private person, then the Tribunal must appoint the Public Guardian for guardianship matters and the NSW Trustee and Guardian for financial matters, both statutory office holders. Australia does not currently have a system of appointing volunteers or professionals who are unknown to the person as substitute decision makers.

In NSW, for a guardianship or financial management order to be made, the Tribunal must be constituted by three (3) members, one being a barrister or solicitor who presides at the hearing, one being a healthcare professional (for example, a psychologist or a geriatrician), and one being a community member, usually a person who identifies as a person with a disability, or is a carer or advocate for a person with a disability. This structure brings a wealth of knowledge and expertise to the Tribunal process and is designed to assist in the involvement of the person in the hearing. In terms of involvement of the person the subject of an application ("the subject person"), current statistics applicable to my Tribunal indicate that in 82% of hearings the subject person is involved, whether this be by in person attendance, or via videolink or telephone.

Reform and the UNCRPD in Australia

The UN Committee on the Rights of Persons with Disabilities ("UN Committee") has been critical of Australia for its failure to establish a national "supported decision making framework", recommending that:

> …the State party effectively…take immediate steps to replace substitute decision-making with supported decision-making and that it provide a wide range of measures which respect a person's autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to a person's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry and to work.[9]

The vast majority of Australians with a cognitive disability do not have a court or tribunal appointed decision maker. By default, most are supported informally by family, friends or carers. Many would define this as supported decision making. However, this form of support is unregulated, lacks any of the safeguards contemplated by Article 12.4 of the UNCRPD, and leaves those who perform the support role without any guiding principles.

[9] UN Convention on the Rights of Persons with Disabilities, Committee Report, 21 October 2013, p 3.

The only Australian jurisdiction to have introduced legislation to recognise the role of a supporter so far is the state of Victoria. Their scheme permits a person who has the requisite capacity to enter into the instrument to appoint a "supportive attorney" who then has the power to access or provide information about them to organisations (such as hospitals, banks and utility providers), communicate with organisations, communicate their decisions, and give effect to their decisions. The goal is that the supportive attorney supports the person to make and act on their own decisions thereby increasing their independence and self-reliance. The scheme does not apply to "significant financial transactions" such as transactions relating to real property or investments of greater than $10,000 and the appointment does not have effect for any period during which the person does not have decision making capacity for the matters to which the supportive attorney appointment applies.[10]

As I mentioned in my introduction, there are currently many proposals for reform in various Australian jurisdictions, which, if implemented, would bring Australia into greater alignment with the principles of the UNCRPD.

ALRC

The Australian Law Reform Commission ("ALRC"), released a report in December 2014 titled Equality, Capacity and Disability in Commonwealth Laws. That report recommended that Commonwealth, state and territory laws and legal frameworks should be reformed where those laws concerned individual decision-making in accordance with the National Decision-Making Principles and Guidelines to ensure that:

- supported decision making is encouraged;
- representative decision makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.[11]

Generally, this Report recommended that persons who require decision-making support should be supported to participate in and contribute to all aspects of life, including making decisions about their lives. The role of persons providing decision-making support should also be acknowledged and respected. Further, persons who require decision-making support may choose not to be supported.[12]

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[10] See Part 7 of the *Powers of Attorney Act 2014* (Vic).

[11] *Equality, Capacity and Disability in Commonwealth Laws* (Australian Law Reform Report 124, December 2014, (ALR Report ECD Cth, Rec 3-1).

[12] ALR Report ECD Cth, Rec 3-2.

Victoria (Vic)

The Victorian State Parliament is currently considering a new Bill: The *Guardianship and Administration Bill 2018* (VIC) ("Victorian Bill"). The Victorian Bill seeks to repeal the existing *Guardianship and Administration Act 1986* (VIC) and replace it with a new statutory framework that provides for:

- the meaning of ***decision-making capacity*** and how it is to be assessed;
- the appointment by the Victorian Civil and Administrative Tribunal (VCAT) of a guardian or an administrator for a person with a disability who does not have decision making capacity, subject to appropriate limitations and safeguards;
- the establishment of new decision making principles, such as, if a person is making a decision for another person they must give all practicable and appropriate effect to the represented person's will and preferences, if known, and if the person is not able to determine the represented person's likely will and preferences, the person should act in a manner which promotes the represented person's personal and social well-being
- the appointment by VCAT of a supportive guardian or a supportive administrator to support a person with a disability to exercise decision-making capacity;
- and the retention of the Public Advocate as an independent statutory office to promote the rights and interests of persons with a disability.

It is unknown at this time if and when the Victorian Bill will be passed by the Victorian Parliament and become an Act (legislation) and in what form as it may be the subject of amendments prior to being enacted.

New South Wales (NSW)

The New South Wales Law Reform Commission Report (145) reviewing the Guardianship Act, was recently tabled in the New South Wales Parliament on 15 August 2018.[13] Key recommendations of that report include:

- The term "disability" should be removed as a precondition for a Court or Tribunal order and from the legislation altogether and be replaced with the concept of "decision making ability"

[13] NSW Law Reform Commission: *Report 145: Review of the Guardianship Act 1987 (2018)*.

- Supported decision making is to be favoured wherever possible to substitute decision making requiring the introduction of two types of formal supported decision making arrangements: personal support agreements and tribunal support orders

- The term guardianship should be removed from legislation and replaced with "assisted decision making" – the Guardianship Division of NCAT should be renamed the Assisted Decision Making Division

- Guardianship and Financial management orders would be retained but replaced with a single concept – representation orders.

- Appointed representatives would not make decision based on "best interests", but rather would be required to give effect to the person's "will and preference" where known (and does not create an unacceptable risk to the person), and if not known, make decision that promote their personal and social well-being.

- Enduring Power of Attorney ("EPOA") and Enduring Guardian ("EG") replaced by enduring representation agreements.

The NSW Government is currently reviewing the report and is expected to deliver its preliminary views on the implementation of the report's recommendations before the end of this year.

The AGAC Project – Maximising the participation of the subject person

I now wish to turn to an ongoing project underway in Australia which will result in the establishment of best practice guidelines to maximise the participation of the person the subject of an application before all Australian Tribunals exercising guardianship jurisdiction.

As mentioned previously, in 2017, the ALRC delivered its report titled Elder Abuse – A National Legal Response.[14] Chapter 10 of the report focuses on guardianship and financial administration, and the ALRC recommends "a practical program of reform for guardianship and financial administration schemes to enhance safeguards against elder abuse".[15] In particular, ALRC Recommendation 10-2 is directed to the Australian Guardianship and Administration Council ("AGAC"). The AGAC, of which I am the current Chair, is made up of each of Australia's Public Advocates and Public Guardians, Public Trustees, and Tribunals with guardianship and financial management/administration jurisdiction.

Recommendation 10-2 provides that:

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[14] Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) ('ALRC, Report 131').
[15] ALRC, Report 131 [10-1].

> 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.

The ALRC report determined that the key elements of such a model could include:

- Case management and support during the pre-hearing stage
- Composition of the tribunal for the purposes of a particular proceeding
- Ensuring an oral hearing is held for all substantive applications
- Alternative methods for participation

The ALRC report noted that these approaches would both support and facilitate the exercise of a represented person's right under Article 13 of the UNCRPD. That article provides that such persons are entitled to access to justice, "including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants".

As part of the federal government's 2016 election commitment to fund a national plan to prevent elder abuse, titled *Protecting the Rights of Older Australians*, NCAT received funding to develop a set of best practice guidelines on behalf of AGAC.

Preparation of the guidelines is to involve:

- analysis of current participation rates of proposed represented persons in guardianship and financial management/administration hearings in Australia's state and territory jurisdictions,
- the 'best practice' initiatives already in place to encourage participation, and
- will also draw, where appropriate, on practices in place in comparable jurisdictions overseas, and in other relevant judicial and quasi-judicial hearing processes that take place in Australia.

To assist in the preparation of the draft guidelines, the NSW Department of Justice conducted research into the practices in place in overseas jurisdictions, which are comparable with Australian guardianship jurisdictions, and in other relevant judicial and quasi-judicial hearing processes that take place in Australia.

Whilst the focus of the ALRC report is on older Australians, it is envisaged that the proposed guidelines being developed will assist Tribunals in maximising the participation of all people for whom guardianship and related applications are made.

A draft of the guidelines has only recently been approved by AGAC members to proceed to be used in a phase of stakeholder and community consultation. The final guidelines are due to be completed by June 2019 and will then be available on the

AGAC website.[16] I have attached the draft guidelines to my formal paper prepared for this Congress (see Annexure A) and will briefly now summarise the key components of the draft guidelines.

Summary of the key components of the Guidelines

The key themes which are represented in the Guidelines are as follows:

1) Pre-hearing: consultation and early engagement with persons to determine their individual needs

2) Hearing: consideration is given to the particular needs of a person to ensure that they can participate in the hearing

3) Amenity: the individual needs of the person are anticipated and met wherever possible

4) Support for the person: being heard

5) Multi-disciplinary panels: constituted by Tribunal members with a broad range of qualifications and experience

Pre-hearing: Consultation and early engagement with persons to determine their individual needs

In Australia, the number of applications for guardianship is increasing.[17] This places greater time pressure on Tribunal members hearing such applications. Expanding the role of pre-hearing and case management support provides an opportunity to maximise the participation of the person in the hearing.[18] This goal can be furthered by measures such as:

1) Prompt notification of an application/s and hearing details to the person and other parties (Draft Guidelines 1, 2 and 3)

2) Case management support for the person (Draft Guideline 4)

3) Time-tabling (Draft Guideline 5)

4) Publicly available information (in writing and online) explaining tribunal processes in accessible formats and in different languages (Draft Guideline 6)

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[16] <www.agac.org.au>

[17] ALRC Report 131 [10-39].

[18] T Carney and others, *Australian Mental Health Tribunals — Space for Fairness, Freedom, Protection and Treatment* (Themis Press, 2011), 277.

The person and other parties should be promptly notified of an application. Hearings should be listed within appropriate timeframes dependent on assessments of risk to the person. Written notice of the hearing should be given to the person and other parties well in advance of the hearing so that the person, in particular, has time to prepare for the hearing and to seek support if they wish. For many people, cognitive and/or communication difficulties may inhibit their ability to understand written advice, received by post, that an application for guardianship or administration has been made.[19] Registry staff may therefore need to consider whether additional steps need to be taken to ensure that the person is informed about the hearing details.

At NCAT, the registry obtains the views of the person the application is about and assists in identifying how the person can best participate in the proceedings, wherever possible.[20] The benefits of the NCAT approach have been described as being that:[21]

- the Tribunal can have a high degree of confidence that the person who is the subject of the application has truly been made aware of the application, its implications and the process that it lends itself to;
- the views of the person are made known to the Registry and can inform decision-making about what less restrictive alternatives to guardianship and/or administration might be appropriate and subsequently how an application should proceed; and
- the pre-hearing process reflects the general principles in guardianship legislation and the principles of the Convention.

The listing of the hearing should be designed to take into account whether any particular needs of the person require a hearing at certain times of the day (for example, a morning hearing as opposed to 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, including the likely need for breaks during the hearing; and any additional time required for the use of an interpreter.

Information about various aspects of the guardianship system should be produced in accessible formats and provided to the person who is the subject of the proceedings. Given the potential for fundamental decisions about a person to be made by a

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[19] Speech Pathology Australia, *Elder Abuse Discussion Paper*; Australian Law Reform Commission, *Submission 309* <www.alrc.gov.au/sites/default/files/subs/309._speech_pathology_australia.pdf>.

[20] *Guardianship Act 1987* (NSW) s 14(2)(a); New South Wales Civil and Administrative Tribunal, *Application Process: Guardianship Division* (21 June 2017) <www.ncat.nsw.gov.au/Pages/guardianship/application_process/application_process.aspx>.

[21] Office of the Public Advocate, *Decision-making support and Queensland's guardianship system*, Final Report (April 2016) 77 <www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf>.

tribunal, people who are the subject of proceedings should have available to them information about the legal process and their rights.

Hearing: Consideration is given to the particular needs of a person to ensure that they can participate in the hearing

Tribunal hearings can be stressful environments for most participants and levels of anxiety are undoubtedly heightened for the person who is the subject of the proceedings. A number of the factors identified below hold the potential to minimise stress. This can improve the quality of the experience for the person who is the subject of the proceedings, as well as other participants, and importantly provide an environment in which the person may feel more empowered and comfortable to express their views and take part in the hearing process. These factors include:

1) Hearing location (Guidelines 7 and 8)
2) Physical accessibility of hearing venue (Guideline 11)
3) Waiting areas (Guideline 12)
4) Hearing rooms (Guideline 13)
5) Support and representation (Guidelines 14, 15 and 16)
6) Communication (Guideline 17)

When a matter is listed for hearing, paramount consideration should be given to the interests of the subject person. Decisions about how matters are listed for hearing should start from the premise that the person is to be given the opportunity to participate in the hearing in person, and provide evidence and their views about the application(s) directly to the decision maker. 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, depending on the facilities available including video conferencing or telephone participation or the Tribunal visiting the person.

Hearing venues should:

- be wheelchair accessible
- provide drop off zones for people with mobility restrictions
- provide easily accessible parking
- be accessible by public transport
- provide accessible toilets

The amenity of waiting room spaces can affect those waiting to go into a hearing. Some important considerations are the extent to which waiting areas: reflect the formality or informality of the proceedings to come; provide privacy, if necessary, and appropriate seating arrangements to lessen the anxiety of the person who is the subject of proceedings (Draft Guidelines, pages 18 to 19).

When the Guardianship Division of NCAT moved to new premises in early 2016 (insert photo), steps were taken to address these issues, with a focus on people with disabilities. The primary focus in the development of the new premises was accessibility and designing an environment where clients would feel at ease. This was as important as ensuring that the premises were functional. Extensive consultation with stakeholders and retaining the expertise of specialist designers to work with the architect, resulted in a number of unique design features, including a reception area with easy to understand signage that contains pictures and patterns, with a colour scheme and soft furnishings selected with the aim of creating a peaceful atmosphere and to differentiate the area from a formal court environment. The configuration of the furniture allows people to sit in small zones. Chairs of varying heights were selected to assist people with mobility issues. The height of the reception desk is appropriate for people who use wheelchairs. Secure interview rooms are located adjacent to the reception area for staff to speak with clients privately and confidentially. There are accessible toilets for the public.

The configuration of hearing rooms can also be an important factor in how a person perceives the hearing process and their ability to engage with it (insert photo). Most tribunals have hearing rooms that aim to provide an informal atmosphere that is distinct from a traditional courtroom. For example, a meeting table around which members and parties sit together, no elevated bench, and flexibility in terms of seating arrangements that assist in putting the person at greater ease. The design considerations that were applied to the waiting area of the relatively new Guardianship Division NCAT premises (above) were also applied to the design of the hearing rooms. All hearing rooms have been fitted with a secure hearing loop to aid those with a hearing impairment, and the panelling and treatment in the rooms were designed to maximise the acoustics. Each hearing room contains video and teleconferencing facilities.

Support at a hearing for the person who is the subject of an application can take different forms, including informal measures of support by family members, close friends, disability advocates, or other persons who are able to provide assistance and support (Guideline 14).

Tribunal members also need to be skilled in the use of these supports in order to make use of interpreters, signers and communication aids such as loop systems and other technology.

Multi-disciplinary panels: constituted by Tribunal members with a broad range of qualifications and experience

Careful consideration should be given to the composition of tribunal panels, and multi-disciplinary panels, constituted by members with relevant and different areas of expertise are optimal (Guidelines 21 and 22). The ALRC recommended that one of the key elements of a best practice model could include (amongst others) consideration of the composition of a tribunal for the purposes of a particular proceeding.[22] In the ALRC's view, the advantage of multi-member panels, comprised of members with differing backgrounds and expertise, is that members with specific experience with people with disabilities or cognitive impairments may be able to engage better with the represented person (Guideline 24, Draft Guidelines, pages 26 to 29).[23]

Recruiting members who have lived experience of disability and/or other expertise in communicating with people with disabilities can be a crucial factor in ensuring that persons with communication difficulties are able to participate meaningfully in proceedings that are about them.

I would like to conclude today by highlighting a relatively recent hearing in my Tribunal in which the importance of member expertise and understanding can be illustrated. In the hearing in question, both the person the subject of the hearing and one of my Tribunal members both used speech generating communication devices. Ms Fiona Given is a General Member of the Tribunal and sits as part of a three-member panel. Ms Given only has limited speech ability and uses a communication device in hearings. The hearing concerned a young woman who was the subject of a guardianship application and the facilitation of the hearing using augmentative and alternative communication through the expertise of Ms Given enabled the young woman a reasonable opportunity to be heard in an inclusive environment. The Tribunal ultimately found that there was no need to make a guardianship order for the young woman concluding that while

> …Ms MHN has a physical disability, and difficulties with verbal communication, her decision making capacity, is not impaired (*MHN* [2017] NSWCATGD 14).

Ms Given has since presented a paper on this particular case in the Tribunal and her experiences as a Tribunal member generally (available on NCAT's website), in which she states:

> I have been a General Member of the Guardianship Division of NCAT for almost six years. I have found the Tribunal, as a whole, to be accommodating of my communication needs. My skills and abilities, as a Tribunal member, have been recognised....When I introduce myself at the commencement of a hearing, I explain I will be using a communication device to communicate throughout the hearing, and I will need time to compose my message. One of my colleagues recently observed,

[22] ALRC Report at [10-37].
[23] ALRC Report at [10-43].

> nobody sees this as a problem. My participation, as a member of the Tribunal, has not been impeded by my need to use a communication device. In fact, as is about to be shown, it can be a real asset.[24]
> …

Conclusion

In conclusion, I would like to express my gratitude to the conference organisers for inviting me to speak today and for making this Congress happen. I am well aware of the work that goes into organising events such as these.

It is events such as these that allow us to exchange understandings of the various legal systems around the world that are in place relating to those in our community who need a system to promote and protect their rights. They enable us to go away and question our own jurisdiction's systems, reflect on their strengths and weaknesses, and use this to promote reform.

As I have spoken of today, one area that the Australian Guardianship and Administration Council is looking to foster improvement is emphasising the centrality and the importance of participation in hearings of the very person's whose rights will be impacted by that hearing. This topic, elder abuse, law reform promoting supported decision making and much more will be lead topics of the next Australian Guardianship Conference to be held in Canberra in March next year. On behalf of the Council, I welcome you and our colleagues to join us in Australia next year to continue these important conversations (www.agac2019.org.au).

[24] *AAC on Both Sides of the Fence*, Fiona Given, General Member, NSWCAT, GD.

Annexure A

Maximising the participation of the person in guardianship proceedings – Draft guidelines for Australian tribunals

Summary of Draft Guidelines

The following draft guidelines could assist to maximise the participation of persons in the process of determining an application for guardianship or administration. Further discussion about each proposed draft guideline is contained in the section in which it appears in this document.

- **Draft Guideline 1**: Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person.
- **Draft Guideline 2**: The person and other parties should be promptly notified of an application being made.
- **Draft Guideline 3**: Written notice of hearing should be given to the person and other parties well in advance of the hearing. Registry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details.
- **Draft Guideline 4**: Pre-hearing processes should seek to ensure that:
    - the person is made aware of the application
    - information is provided to assist the person to understand what the application and hearing is about
    - the person's participation is encouraged (unless to do so would be detrimental to the person)
    - any further information that may assist the tribunal is obtained from the person
    - the person is provided with information as required about representation including advocacy
    - information is given to the person about tribunal practice and procedure and to assist in addressing any confusion or anxiety where possible
    - the person has an opportunity to ask questions about any of these matters
    - information is sought as to whether any communication supports are required, for example, interpreting services, visual or auditory aids or communication aids

- **Draft Guideline 5**: Optimally, the listing of a hearing should take into account:
    - whether any particular needs of the person require a hearing at certain times of the day (for example, a morning hearing rather than the afternoon, or taking into account the effects of medication)
    - an estimate of the length of time the person may need to give their views to the tribunal, having regard to their communication needs
    - any need for breaks during the hearing
    - 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
- **Draft Guideline 7**: Optimally, hearings should be listed in a location that allows the person to participate in the hearing in person.
- **Draft Guideline 8**: If a face-to-face hearing is not possible or practicable, then other means by which the person can participate in the hearing should be explored. This may include:
    - measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a "Visit to the Person" by a Tribunal member
    - the views of the person being provided by way of a representative
    - videoconferencing
    - telephone participation
- **Draft Guideline 9**: Tribunals should collect data and report publicly on the participation rates of persons in hearings, broken down into in-person participation, hearings by videoconference, and hearings by telephone.
- **Draft Guideline 10**: Tribunals should also collect data and report publicly on the rate of appointment of representatives.
- **Draft Guideline 11**: Hearing venues should:

- be wheelchair accessible
- have drop-off zones for people with mobility restrictions
- have easily accessible parking
- be accessible by public transport
- provide accessible toilets

- **Draft Guideline 12**: Tribunals should give consideration to the amenity of waiting room spaces, given the impact this can have on the person's anxiety levels, leading up to the hearing, and their ability to participate in the hearing.

- **Draft Guideline 13**: Tribunals should give consideration to the amenity and configuration of hearing rooms. Hearing rooms should:
  - provide the option of a more informal setting that is distinct from a traditional courtroom; for example, a meeting table, no elevated bench for Tribunal members, and flexible seating arrangements to assist in putting the person at ease;
  - provide hearing induction loop facilities; and
  - provide videoconference and teleconference facilities.

- **Draft Guideline 14**: Tribunals should, wherever beneficial for the subject person, allow the person to be accompanied by a support person during the hearing. A support person could be a family member, close friend, disability advocate, or other person who is able to provide assistance and support.

- **Draft Guideline 15**: In those jurisdictions that require the leave of the tribunal for a party to be legally represented at the hearing, any application made by or on behalf of the person who is the subject of the application should be determined at the earliest possible opportunity. This ensures that the person and their legal representative have adequate time to prepare.

- **Draft Guideline 16**: In those jurisdictions that provide for the appointment of a separate representative or guardian ad litem for the person, consideration of whether such an appointment should be made should occur at the earliest opportunity.

- **Draft Guideline 17**: Tribunal members need to be trained in the use of communication supports that a person may require in order to participate in the hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools.

- **Draft Guideline 18**: Given the centrality of the person who is the subject of guardianship and/or administration proceedings, the person should have a genuine opportunity to participate in an oral hearing before a determination is made.

- **Draft Guideline 19**: As a matter of good practice, original applications should be determined after an oral hearing.

- **Draft Guideline 20**: As a matter of good practice, reviews of existing orders should ordinarily be determined after an oral hearing. Given, however, the practical constraints (both in terms of legislation and resources) that exist for each of the jurisdictions, in the event that reviews of 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.

- **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.

- **Draft Guideline 24**: Tribunals should have available to them members from a diversity of backgrounds with particular expertise in relation to communicating with people with disabilities.

- **Draft Guideline 25**: Training for members and registry staff about strategies to involve persons who are the subject of applications is critical. Such training would allow members and registry staff to be better informed about the communication needs of persons with particular disabilities and the characteristics associated with different disabilities.

- **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.

- **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.