



Tasmanian Council of Social Service Inc.

Draft Guidelines on the participation of the proposed represented person in guardianship proceedings

January 2019



INTEGRITY
COMPASSION
INFLUENCE

About TasCOSS

TasCOSS is the peak body for the community services sector in Tasmania. Our membership includes individuals and organisations active in the provision of community services to low-income Tasmanians living in vulnerable and disadvantaged circumstances. TasCOSS represents the interests of its members and their clients to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

Please direct any enquiries about this submission to:

Kym Goodes
CEO
Ph. 03 6169 9500
Email: Kym@tascoss.org.au

Introduction

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

TasCOSS advocates on behalf of low-income Tasmanians who often live in vulnerable and disadvantaged circumstances. We advocate for public policy that values and respects the diversity of Tasmanians and makes a real difference to the lives of people who are experiencing vulnerability. We work to ensure that the human rights of all Tasmanians are integrated into government consultation processes, policy approaches and budget allocations.

TasCOSS submissions and advocacy are strongly informed by the expertise of our members and the lived experiences of the Tasmanians we represent. In preparing this submission, we have drawn on previous TasCOSS work in relation to the Tasmanian Law Reform Institute's (TLRI) Review of the *Guardianship and Administration Act 1995* (Tas) as well as the Tasmanian Public Guardian's submission to the review and the Act itself; relevant international conventions; and work by the Australian Law Reform Commission. We have sought input from Equal Opportunity Tasmania, Advocacy Tasmania, the Tasmanian Guardianship and Administration Board, the Mental Health Council of Tasmania, and COTA Tasmania. Our comments in relation to these guidelines align with our position on the ongoing review of the *Guardianship and Administration Act 1995* (Tas).

Our vision

TasCOSS advocates for equality of opportunity and full and effective participation and inclusion in society of people with disability, based on the UN Convention on the Rights of Persons with Disability's principles of:

- Non-discrimination, including in relation to age and gender
- Respect for difference, dignity, independence and individual autonomy, including the freedom to make one's own choices.¹

Context

This review is timely and appropriate. The UN Convention on the Rights of Persons with Disability recognises that it is the quality of interaction between persons with impairment—whether physical, intellectual, sensory or psychosocial—and the attitudes and environments that surround them that creates 'disability' and hinders their full and effective participation in society on an equal basis with others.² In this regard, the impact of structures and systems on the ability of people with disability to engage in decision-making is increasingly under scrutiny,

¹ <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

² <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

with good-practice thinking turning from the currently dominant approach of substitute decision-making towards models of supported decision-making. This change in thinking is in line with recommendations made to Australia by the 2013 UN Committee on the Rights of Persons with Disabilities.³

Meanwhile, the proportion of older Australians is increasing. In Tasmania, the fastest-ageing state, the Tasmanian Guardianship and Administration Board reports that 55% of applications received in 2016-17 related to people over the age of 65, and that since 2012 the most commonly identified disability has consistently been dementia.⁴ Concurrently, awareness of elder abuse has increased, with the Australian Law Reform Commission (ALRC) delivering in 2017 a report that recommends “a practical program of reform for guardianship and financial administration schemes to enhance safeguards against elder abuse”.⁵

In the context of an examination of equality, capacity and disability in Commonwealth laws, the ALRC has laid out four National Decision Making Principles. These are:

- *Principle 1:* All adults have an equal right to make decisions that affect their lives and to have those decisions respected.
- *Principle 2:* Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.
- *Principle 3:* The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.
- *Principle 4:* Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.⁶

The Tasmanian Office of the Public Guardian has supported reforms to the *Guardianship and Administration Act 1995* (Tas) consistent with these Principles:⁷

“Whilst we do not consider that a substitute decision-making regime can be completely discarded, our view is that formal substitute decision-making

³ Convention Committee, Concluding Observations on the initial report of Australia, adopted by the Committee at its 10th session, UN Doc CRPD/C/AUS/CO/1 (2-13 September) 25.

⁴ Cited in http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report_p_421.

⁵ <https://www.alrc.gov.au/publications/10-guardianship-and-financial-administration>

⁶ The Australian Law Reform Commission (ALRC), Equality, Capacity and Disability in Commonwealth Laws, ALRC Summary Report 124, 2014. https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_summary_report_whole_pfd_.pdf

⁷ <https://www.publicguardian.tas.gov.au/guardianship-and-administration-act-review/Office-of-the-Public-Guardian-Submission>

should occur as a last resort. Our view is that, with appropriate reform to the law *and with adequate policy and program development* (emphasis added), there would be only a minority of people with a disability who would need formal guardianship appointments.”⁸

These principles, as noted by the ALRC, reflect the paradigm shift signaled in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) towards recognising the equal rights of all persons to make choices for themselves. The emphasis is on the autonomy and independence of all persons who may require support in making decisions: their will and preferences must drive decisions that they make, and that others make on their behalf.⁹

In the issue paper accompanying the draft guidelines, AGAC has expressed its support for the National Decision Making Principles.¹⁰ In association with the National Decision Making Principles, the ALRC has also proposed Guidelines around support; around will, preferences and rights; and around safeguards. These are found in Appendix A.

Key issues

The draft guidelines have the objective of making sure that people have the greatest possible say when a Guardianship and Administration Board or Tribunal is considering whether someone else should be appointed as a guardian or administrator to manage their living and financial arrangements, or whether someone should be able to make a decision about a specific issue on their behalf. As a best-practice document, TasCOSS wants to see the AGAC draft guidelines address the issue of participation in a rights-based, person-centric way. Such an approach is consistent with both the National Decision Making Principles and their associated guidelines. In the issue paper accompanying the draft guidelines, AGAC has expressed its support for the National Decision Making Principles.¹¹ In this section we discuss the ways in which the draft guidelines support the achievement of this goal as well as areas which need to be strengthened.

Before we go into detail we note that, as the Tasmanian Law Reform Institute has pointed out, the focus of guardianship and administration issues on people who have been determined to have disability singles out people with disability unfairly and unequally, and excludes from protections people who have not been determined to have disability. We therefore support the TLRI’s suggestion, in relation to a different review, that these draft Guidelines apply to “people

⁸ <https://www.publicguardian.tas.gov.au/guardianship-and-administration-act-review/Office-of-the-Public-Guardian-Submission>

⁹ https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_summary_report_whole_pfd_.pdf

¹⁰ <https://www.agac.org.au/announcements/101-agac-project-draft-guidelines-for-represented-persons>

¹¹ <https://www.agac.org.au/announcements/101-agac-project-draft-guidelines-for-represented-persons>

who are unable to understand, retain, use or weigh information relevant to a decision, or communicate a decision.”¹²

What the guidelines do well

A number of the draft guidelines cover issues related to the mechanics of hearings, in particular barriers to participation, and the human resources and practices of tribunals. These include:

- Pre-hearing:
 - Prompt notification for the proposed represented person of application
 - Prompt notification for the proposed represented person of hearing details
 - Time-tabling to meet the needs of the proposed represented person
 - Information in formats accessible to the proposed represented person
- At the hearing
 - Hearing location that allows the participation of the proposed represented person
 - Physical accessibility of hearing venue for the proposed represented person
 - Waiting areas to be taken into account
 - Hearing rooms to offer less formal setting and assistive technology
 - Communication supports such as interpreting services, visual or auditory aids or communication aids to be provided
- Composition of the tribunal
 - Multi-disciplinary panels
 - Diversity of backgrounds
 - Particular expertise in relation to communicating with people with disability
 - Increased staffing and membership of Aboriginal and Torres Strait Islander people
- Training
 - Training in communication and involvement strategies for people with disabilities
 - Training in awareness of cultural considerations relevant to Aboriginal and Torres Strait Islander people
- Data collection
 - Data to be collected and publicly reported on participation rates of persons in hearings, broken down by hearing venue, and on the rate of appointment of representatives.

These are all important issues, and most have been highlighted in other contexts: for instance, the Tasmanian Law Reform Institute’s review of the *Guardianship and Administration Act 1995* (Tas) recommends that “a person assessing a person’s decision-making ability...take reasonable

¹² <http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report>

steps to conduct the assessment at a time and in an environment in which the person's ability can be most accurately assessed.”¹³

The measures put forward in relation to these areas by the Draft Guidelines are positive ones that we believe will enhance meaningful participation in proceedings by people with disability. For example, Advocacy Tasmania (AT) reports that many of their clients have not seen the guardianship or administration application itself before AT or legal supports become involved and request access to a copy on their behalf; consequently, they do not understand the context and background to the orders being sought, and to what they need to respond if they oppose them. The proposed tightening of the guidelines around pre-hearing notification is therefore necessary and appropriate.

What could be improved

These practical guidelines, however, need to be underpinned by principled and detailed overarching direction to ensure that people coming before a Board or Tribunal receive the best possible support in exercising their own will, preferences and rights and in achieving meaningful engagement and involvement. Given the significant impact guardianship and administration orders have on individual's fundamental rights and freedoms, including to liberty and autonomy, tribunals and boards should be applying standards of natural justice to ensure that the person has a realisable opportunity to prepare for and respond to matters raised.¹⁴

As the issues paper accompanying the draft guidelines points out, current state-level practice in relation to the inclusion of proposed represented persons and in relation to decision-making supports varies widely.¹⁵ As a consequence, the draft guidelines will require a clear spelling out of principles, objectives and practices to achieve a consistent rights-based, person-centered approach across the country's tribunals.

In particular, TasCOSS recommends that the draft lays out clear guidelines in relation to supported decision-making on the part of persons who are the subject of guardianship and administration proceedings. This is because the *right* to participate in proceedings and the *lack of barriers* to participation in proceedings do not necessarily translate to the *ability* to participate in the absence of supports.

The draft guidelines, in particular Draft Guidelines 1, 14 and 15, establish support as a valuable part of the pre-hearing proceedings and allow for the participation of support persons at hearings. But they do not enshrine support for decision-making, and its role in strengthening a person's capacity to exercise choice in the pursuit of their goals, as a fundamental component

¹³ <http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report>

¹⁴ For a related discussion on the impact of communication on the ability to obtain due process, see http://www.utas.edu.au/_data/assets/pdf_file/0011/1061858/Intermediaries-Final-Report.pdf

¹⁵ <https://www.agac.org.au/announcements/101-agac-project-draft-guidelines-for-represented-persons>

of operations of the guardianship and administrative tribunal system. This is a particularly noticeable absence given that results of a South Australia trial of supported decision-making suggest that it not only can contribute to guardianship proceedings, but in fact can operate alongside and be a viable alternative to guardianship. In this context, the South Australian Office of the Public Advocate has suggested that supported decision-making should be considered as an option each time that guardianship is proposed for a person as well as when a person is applying for a guardianship order to be revoked.¹⁶

The Tasmanian Law Reform Institute, in its review of the *Guardianship and Administration Act 1995* (Tas), has recommended that adequately funded decision-making support programs be developed, ensuring equity of access, and that a legislated supported decision-making scheme be available for personal matters, including consent to healthcare and treatment.¹⁷

Recommendations

Based on the discussion above, TasCOSS makes the following recommendations:

Recommendation 1: That the Draft Guidelines be preceded by a preamble that spells out:

- **The need for boards and tribunals to assume legal decision-making capacity on the part of the proposed represented person, and to assess and meet support and communication needs to that end**
- **The National Decision-making Principles**
- **The principles of the Disability Convention.**

Recommendation 2: That, per the recommendations of the Tasmanian Law Reform Institute's review of the *Guardianship and Administration Act 1995* (Tas), the guiding principles of the Draft Guidelines apply to any person assisting someone/making a decision for someone in relation to a tribunal as well as to tribunals, and include:¹⁸

- **People who require support in decision-making must be provided with access to the most effective support necessary for them to make, communicate and participate in decisions that affect their lives**
- **The views, wishes, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives**
- **A function or power conferred, or duty imposed, by guardianship or administration orders is to be performed in ways that are the least restrictive as possible of the person's freedom of decision and action, in the circumstances.**

¹⁶ https://www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf

¹⁷ <http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report>

¹⁸ <http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report>

Recommendation 3: That, per the recommendations of the Tasmanian Law Reform Institute’s review of the *Guardianship and Administration Act 1995* (Tas), the Draft Guidelines include the following factors that must not, by themselves, result in an assumption that a person does not have decision-making ability:

- Where a person makes a decision that is, in the opinion of others, unwise
- Where a decision results, or may result, in an adverse outcome for the person
- Where a person does not have a particular level of literacy or education
- Where a person engages in particular cultural, political or religious practices
- Assumptions because of a person’s age.

Recommendation 4: That the ALRC’s Guidelines related to support, will/preferences/rights, and safeguards (see Appendix A) be incorporated into the Draft Guidelines.

Recommendation 5: That, per the recommendations of the Tasmanian Law Reform Institute’s review of the *Guardianship and Administration Act 1995* (Tas), tribunal or board application forms ask specifically about the informal decision-making supports that have been offered to a proposed represented person and/or attempted prior to the making of the application.

Recommendation 6: That, per the recommendations of the Tasmanian Law Reform Institute’s review of the *Guardianship and Administration Act 1995* (Tas), when considering whether there is a need for a representative, the Board consider:

- The values, wishes and preference of the proposed represented person
- Whether the needs of the proposed represented person could be met by any other means less restrictive of that person’s freedom of decision and action, including whether the need could be met by informal means, through negotiation, mediation or similar means, or, in the case of a guardianship order, through the appointment of a supporter in jurisdictions where this role exists.¹⁹

Recommendation 7: That in particular the current Draft Guidelines 1 and 4 be changed:

- The current Draft Guideline 1 be changed from “Pre-hearing case management and support for the person provides an opportunity to maximise participation by the person” to read:
“Pre-hearing case management and support for the person identifies the person’s needs for information and support, and how best to meet these needs, with the objective of maximising participation by the person.”
- The current Draft Guideline 4 be changed to read (deletions in strikethrough, additions in red):
“Prehearing processes should ~~seek to~~ ensure that: ...

¹⁹ See pp 131-133, <http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report>; also <https://www.publicguardian.tas.gov.au/guardianship-and-administration-act-review/Office-of-the-Public-Guardian-Submission>

- The person is made aware of the application
 - **Accessible** information is provided to assist the person to understand what the application and hearing is about **and to give them an opportunity to prepare for and respond to matters raised**
 - The person's participation is encouraged **and supported** (unless to do so would be detrimental to the person)
 - Any further information that may assist the tribunal is obtained from the person **and the person can provide the tribunal with any further information that they believe the tribunal should be aware of**
 - The person is provided with information ~~as required~~ about representation, including advocacy
 - **Options for supported decision-making are made available to the person**
 - The person has the opportunity to ask **and receive answers to** questions about any of these matters
 - Information is sought as to whether communication supports are required..."
- **'Optimally' be removed from Draft Guidelines 5 and 7 (timing and location of hearings).**
 - **The current Draft Guideline 7 be redrafted to read:**

"Persons should have the right to participate in a hearing in the manner most convenient to them and should be encouraged and supported to participate in person. If the person chooses to participate in person, hearings should be listed in a location that allows this participation. If they prefer not to participate in person, other means of participation should be explored. This may include..."

APPENDIX A: AUSTRALIAN LAW REFORM COMMISSION SUPPORT, WILL/PREFERENCES/RIGHTS, AND SAFEGUARDS GUIDELINES²⁰

Support Guidelines

(1) General

- a. Persons who require decision-making support should be supported to participate in and contribute to all aspects of life.
- b. Persons who require decision-making support should be supported in making decisions.
- c. The role of persons who provide decision-making support should be acknowledged and respected—including family members, carers or other significant people chosen to provide support.
- d. Persons who require decision-making support may choose not to be supported.

(2) Assessing support needs

In assessing what support is required in decision-making, the following must be considered:

- a. All adults must be presumed to have ability to make decisions that affect their lives.
- b. A person must not be assumed to lack decision-making ability on the basis of having a disability.
- c. A person's decision-making ability must be considered in the context of available supports.
- d. A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.
- e. A person's decision-making ability will depend on the kind of decisions to be made.
- f. A person's decision-making ability may evolve or fluctuate over time.

Will, Preferences and Rights Guidelines

(1) Supported decision-making

(a) In assisting a person who requires decision-making support to make decisions, a person chosen by them as supporter must:

- i. support the person to express their will and preferences; and
- ii. assist the person to develop their own decision-making ability.

(b) In communicating will and preferences, a person is entitled to:

- i. communicate by any means that enable them to be understood; and
- ii. have their cultural and linguistic circumstances recognised and respected.

(2) Representative decision-making

Where a representative is appointed to make decisions for a person who requires decision-making support:

- a. The person's will and preferences must be given effect.
- b. Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the

²⁰ <https://www.alrc.gov.au/publications/recommendations-2>, Recommendations 3-2, 3-3, 3-4.

information available, including by consulting with family members, carers and other significant people in their life.

- c. If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights. Recommendations 21
- d. A representative may override the person's will and preferences only where necessary to prevent harm.

Safeguards Guidelines

(1) General Safeguards should ensure that interventions for persons who require decision-making support are:

- a. the least restrictive of the person's human rights;
- b. subject to appeal; and
- c. subject to regular, independent and impartial monitoring and review.

(2) Support in decision-making

- a. Support in decision-making must be free of conflict of interest and undue influence.
- b. Any appointment of a representative decision-maker should be:
 - i. a last resort and not an alternative to appropriate support;
 - ii. limited in scope, proportionate, and apply for the shortest time possible; and
 - iii. subject to review.