



Purple Orange



**Submission to the South Australian  
Civil and Administrative Tribunal  
regarding  
AGAC Draft Guidelines for Australian  
Tribunals: Maximising the  
Participation of the Person**

7 January 2019

## About the Submitters

JFA Purple Orange is an independent, social-profit organisation that undertakes systemic policy analysis and advocacy across a range of issues affecting people living with disability and their families.

Our work is characterised by co-design and co-production, and includes hosting a number of user-led initiatives.

Much of our work involves connecting people living with disability to good information and to each other. We also work extensively in multi-stakeholder consultation and collaboration, especially around policy and practice that helps ensure people living with disability are welcomed as valued members of the mainstream community.

Our work is informed by a model called *Citizenhood*.

The South Australian Council of Social Service (SACOSS) is the peak body for the not-for-profit (NFP) health and community services sector in South Australia. Our sector is a major provider of services to vulnerable and disadvantaged people including people who live with a disability. JFA Purple Orange is one of a number of key member organisations with an interest in issues impacting on people living with disability and their families.

SACOSS has collaborated with JFA Purple Orange to prepare this submission, to ensure that the best interests of some of our most vulnerable citizens are brought forward and enabled by maximising their participation in decision-making that is likely to significantly affect their lives.

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## Contents

1. Summary and recommendations .....	5
2. Introduction.....	9
3. Participation in hearings.....	9
3.1. Draft Guideline 18 .....	9
3.2. Draft Guideline 4 .....	10
4. Accessible information .....	12
5. Notice of hearing .....	12
6. Venue of the hearing.....	13
7. Representation .....	14
8. Composition of tribunal members and registry staff.....	16
9. Training.....	17
10. Tribunal to speak to the person before any appointment.....	19
11. Conclusion.....	20

## 1. Summary and recommendations

The participation of people living with disability in decision-making that affects their lives is of critical importance. Throughout this submission, we have identified ways in which the draft Guidelines could be strengthened to ensure that people's participation in guardianship and financial administration proceedings is encouraged, information is accessible, all necessary supports are available, and tribunal members and registry staff are well-trained and diverse in composition.

Above all, we believe that these Guidelines must recognise and emphasise the capacity of people living with disability to participate in proceedings, encourage tribunals to take all steps to support their participation, and not make any assumptions that it would be in their best interests not to participate.

We make the following recommendations:

### **Recommendation 1**

Draft Guideline 18 should be reformulated as follows and shifted to become Guideline 1:

'Given the centrality of the person who is the subject of guardianship and/or administration proceedings, the person should be given a genuine opportunity to participate and convey their views before any determination is made.'

### **Recommendation 2**

The qualification '(unless to do so would be detrimental to the person)' should be deleted from the third bullet point in draft Guideline 4.

### **Recommendation 3**

Guideline 6 should be elevated to become Guideline 2 and reformulated to expand its scope beyond information about the tribunal's practice and procedure as follows:

'All written information provided to a person about their application, the hearing, the tribunal's practice and procedure, and the tribunal's determination should be made available to the person who is the subject of proceedings in an accessible format. This requires the tribunal to develop such information in formats that are accessible to people from culturally and linguistically diverse backgrounds, with a vision or hearing impairment, and with cognitive disabilities.'

#### **Recommendation 4**

The second sentence of Draft Guideline 3 should be amended from '[r]egistry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details' to '[r]egistry staff should consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details'.

#### **Recommendation 5**

The first bullet point in Draft Guideline 8 should be incorporated into Draft Guideline 7 as follows:

'Optimally, hearings should be listed in a location that allows the person to participate in the hearing in person. The tribunal should consider whether measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a 'Visit to the Person' should be undertaken, taking into consideration the substantiveness of the decision and the circumstances of the individual.'

#### **Recommendation 6**

The option whereby a representative presents the views of the person should be removed from draft Guideline 8. The following Guideline could state that the person's views should only be provided by way of a representative as a last resort. Where this occurs, the tribunal should strive to ensure that the representative is accurately providing the views of the person or, where the person's views cannot be ascertained, that the representative is voicing what the person's views would likely be, based on all the information available, including consultations with family members, carers and other significant people in their

life. If it is not possible to determine what the person's views would likely be, the tribunal should only take the representative's own views into account if it determines that the representative has sufficient knowledge of the person, is acting in his or her best interests, and is acting to promote and uphold the person's human rights.

### **Recommendation 7**

Draft Guideline 26 should be amended to encourage tribunals to increase the diversity of their staffing and membership, including people living with disability, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds. Guideline 26 could be drafted as follows:

'Tribunals should seek to increase the diversity of their members and staff, in order to better represent the people they serve. This would include:

- People living with disability and as well as those who understand the experience of people living with disability;
- Aboriginal and Torres Strait Islander people as well as non-Indigenous people with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people; and
- People from culturally and linguistically diverse backgrounds.

### **Recommendation 8**

Guidelines 17, 25 and 27 should be combined into one Guideline on training, with suggested wording as follows:

'Tribunal members and registry staff need to be trained on how best to support all people living with disability to effectively access, understand and participate in hearings. Training should cover the following topics:

- the rights of people living with disability and the values which should underpin the work of the tribunal;
- issues that people living with disability may experience before, during and after a hearing;

- the role of representatives, support people and advocates in hearings;
  - the use of communication supports that a person may require in order to participate in a hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools;
  - specific cultural considerations relevant to Aboriginal and Torres Strait Islander people;
- and
- considerations to take into account when engaging with people from culturally and linguistically diverse backgrounds.'

### **Recommendation 9**

An additional Guideline should be added as follows: 'Tribunal members should, where possible, speak with the represented person before appointing a guardian or financial administrator, irrespective of attendance at the hearing.'



## 2. Introduction

In recent years, there has been a growing global shift away from substitute decision-making to supported decision-making, signalling widespread recognition that people living with disability have the right to participate in decisions that affect their lives.

It is against this background that we make this submission. Much of our work at both JFA Purple Orange and SACOSS has centred on giving people living with disability a voice. These Guidelines are an important vehicle for ensuring that tribunals across the country maximise the participation of people in proceedings, where they are subject to an application for guardianship or financial administration.

Both JFA Purple Orange and SACOSS take a rights-based approach to our policy, advocacy and research work. This submission, therefore, draws closely on the Convention on the Rights of Persons with Disabilities (the Convention).

## 3. Participation in hearings

### 3.1. Draft Guideline 18

Draft Guideline 18 states that '[g]iven 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.'

We recommend three amendments to this Guideline. Firstly, we suggest shifting this to become Guideline 1, given its overall relevance and importance. Secondly, we recommend expanding its focus beyond oral hearings, to emphasise that the overarching objective of these Guidelines is to give the person a genuine opportunity to participate before the tribunal makes a determination. This is consistent with Draft Guideline 20, which recognises that tribunals should also consider the views of the person before making a determination in the absence of an oral hearing. Thirdly, we recommend changing the phrase 'the person should have a genuine opportunity to participate' to 'the person should be given a genuine

opportunity to participate,’ to make it clear that responsibility to ensure that the person has the opportunity to participate lies with the tribunal.

### **Recommendation 1**

Draft Guideline 18 should be reformulated as follows and shifted to become Guideline 1:

‘Given the centrality of the person who is the subject of guardianship and/or administration proceedings, the person should be given a genuine opportunity to participate and convey their views before any determination is made.’

### **3.2. Draft Guideline 4**

The third bullet point of draft Guideline 4 states that ‘[p]re-hearing processes should seek to ensure that: ... the person’s participation is encouraged (unless to do so would be detrimental to the person)...’

It is our position that participation should always be encouraged. Whether the person requires support to participate is another matter; at the pre-hearing stage, it is important that all people who are subject to proceedings are made aware of their right to participate. It is not for the tribunal to decide whether the person’s participation would be detrimental or otherwise. There is also a risk that tribunals may interpret Guideline 4 as permitting them to *discourage* a person’s participation, which would contravene their rights.

Article 13 of the Convention requires States Parties to ‘ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.’ This Article calls for necessary accommodations to be made to facilitate people with disabilities’ participation in all legal proceedings. As presently drafted, Draft Guideline 4 sends the wrong message to tribunals and registry staff; that in some circumstances, people should not be encouraged to

participate. To the contrary, their default position should be to consider which steps may be necessary to ensure that a person’s participation can best be facilitated.

Article 12 of the Convention addresses equal recognition before the law, affirming that all persons living with disability have full legal capacity and requiring States Parties to provide any necessary support for them to exercise this. The United Nations Committee on the Rights of Persons with Disabilities makes clear that ‘a person’s status as a person with disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12.’<sup>1</sup> Arguably, if registry staff were to decide that it would be detrimental for a person to participate in a hearing, they would essentially be treating the person as though they lack legal capacity.

As an aside, we similarly do not support part 3 of the discussion paper, which suggests that the tribunal should not seek the views of a person if there is evidence that this may be detrimental to the person’s physical or mental health, or that the extent of a person’s cognitive impairment renders them unable to participate in the proceedings. All people living with disability should be recognised and empowered by the tribunal as holding legal capacity. While a person may decide not to participate, it should not be the tribunal that makes this decision.

## **Recommendation 2**

The qualification ‘(unless to do so would be detrimental to the person)’ should be deleted from the third bullet point in draft Guideline 4.

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<sup>1</sup> United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12: Equal Recognition before the law, para 9.

## 4. Accessible information

Draft Guideline 6 currently states that '[i]nformation 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, and with cognitive disabilities.'

The accessibility of information is of critical importance. We suggest elevating this to become Guideline 2 and expanding its scope beyond information about the tribunal's practice and procedure to include all written information that is provided to a person about their application and hearing, as well as the tribunal's determination. Where a person is still unable to understand this information, registry staff should take further steps to explain its content and, where applicable, inform the tribunal that the person may need support to participate during proceedings.

### **Recommendation 3**

Guideline 6 should be elevated to become Guideline 2 and reformulated to expand its scope beyond information about the tribunal's practice and procedure as follows:

'All written information provided to a person about their application, the hearing, the tribunal's practice and procedure, and the tribunal's determination should be made available to the person who is the subject of proceedings in an accessible format. This requires the tribunal to develop such information in formats that are accessible to people from culturally and linguistically diverse backgrounds, with a vision or hearing impairment, and with cognitive disabilities.'

## 5. Notice of hearing

Draft Guideline 3 states that written notice of a hearing should be given to the person and other parties well in advance of the hearing. It notes that '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’.

We recommend strengthening this second point, by replacing ‘may need to’ with ‘should.’ Registry staff might decide that additional steps are not necessary, but in all instances they need to make this judgement based on an assessment of the particular circumstances of the individual.

There are many reasons why written notice may not suffice to alert a person to an upcoming hearing. For example, some people – particularly those living with intellectual and/or cognitive disability – experience barriers to understanding, retaining and responding to written information. Others may feel intimidated by official written correspondence and decide not to read or engage with it, without realising the potential consequences. Others might not have sufficient organisational skills to plan ahead for the hearing.

In situations such as these, registry staff may need to take additional steps such as calling the individual, delivering the written notice in person and explaining its meaning, and/or speaking with a trusted and reliable family member or supporter who could relay the information to the person concerned.

#### **Recommendation 4**

The second sentence of Draft Guideline 3 should be amended from ‘[r]egistry staff may need to consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details’ to ‘[r]egistry staff should consider whether any additional steps need to be taken to ensure that the person is informed of the hearing details’.

## **6. Venue of the hearing**

Draft Guideline 7 states that optimally, hearings should be listed in a location that allows the person to participate in the hearing in person.

We believe that the tribunal should take all necessary steps to ensure that the person can participate in person. One such step could involve the tribunal member visiting the person directly to obtain their views. In addition to experiencing anxiety in a formal tribunal setting, some people living with disability may also face barriers to communication, which limits their ability to describe the context in which they live. If a tribunal member were to visit the person, they would gain a sense of his or her surroundings and context, which could lead to better, more informed decision making.

### **Recommendation 5**

The first bullet point in Draft Guideline 8 should be incorporated into Draft Guideline 7 as follows:

‘Optimally, hearings should be listed in a location that allows the person to participate in the hearing in person. The tribunal should consider whether measures similar to that undertaken by the South Australian Civil and Administrative Tribunal involving a ‘Visit to the Person’ should be undertaken, taking into consideration the substantiveness of the decision and the circumstances of the individual.’

## **7. Representation**

Draft Guideline 8 lists alternative means for a person to participate in a hearing where a face-to-face hearing is not possible or practicable. As mentioned above, we believe that the first bullet point should be shifted to Draft Guideline 7. We also believe that the second bullet point, which allows the views of the person to be provided by a representative, should become a standalone provision.

It is our view that the involvement of a representative should be guided by the principles of representative decision-making, which would justify making this a separate Guideline. Although the representative would not directly make decisions in this context, they would play an important role in conveying the person’s views and could influence the making of decisions by the tribunal.

The ALRC has made the following recommendation with respect to 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 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.
- (d) A representative may override the person's will and preferences only where necessary to prevent harm.<sup>2</sup>

The ALRC has also recommended that any appointment of a representative decision-maker should be a last resort and not an alternative to appropriate support.<sup>3</sup> Again, although the Guidelines do not relate to the appointment of a representative decision-maker as such, there are similar risks involved when a person's views are presented by a representative. The Guidelines should therefore state that the provision of a person's views by a representative should be a last resort that is only used if there is no alternative way for the person to represent him or herself.

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<sup>2</sup> ALRC, Report 124, Equality, Capacity and Disability in Commonwealth Laws (August 2014), Recommendation 3-3 (2).

<sup>3</sup> Ibid, Recommendation 3-4(b).

## **Recommendation 6**

The option whereby a representative presents the views of the person should be removed from draft Guideline 8. The following Guideline could state that the person's views should only be provided by way of a representative as a last resort. Where this occurs, the tribunal should strive to ensure that the representative is accurately providing the views of the person or, where the person's views cannot be ascertained, that the representative is voicing what the person's views would likely be, based on all the information available, including consultations with family members, carers and other significant people in their life. If it is not possible to determine what the person's views would likely be, the tribunal should only take the representative's own views into account if it determines that the representative has sufficient knowledge of the person, is acting in his or her best interests, and is acting to promote and uphold the person's human rights.

## **8. Composition of tribunal members and registry staff**

Draft Guideline 26 states that 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.

It is extremely important for tribunals to represent and understand the diversity of the people they serve. This would necessarily include Aboriginal and Torres Strait Islander people, but may also include people from culturally and linguistically diverse backgrounds.

Importantly, tribunals should also seek to increase their staffing and membership of people living with disability, as well as those who understand the experiences of people living with disability. This could contribute to tribunal members and registry staff becoming more inclusive and tribunal practice and procedures becoming more accessible. This would also provide valuable employment opportunities to individuals living with disability.



## **Recommendation 7**

Draft Guideline 26 should be amended to encourage tribunals to increase the diversity of their staffing and membership more broadly, including people living with disability, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds. Guideline 26 could be drafted as follows:

‘Tribunals should seek to increase the diversity of their members and staff, in order to better represent the people they serve. This would include:

- People living with disability as well as those who understand the experience of people living with disability;
- Aboriginal and Torres Strait Islander people as well as non-Indigenous people with an understanding of the culture, values and beliefs held by Aboriginal and Torres Strait Islander people; and
- People from culturally and linguistically diverse backgrounds.

## **9. Training**

The training needs of tribunal members and/or registry staff are currently addressed in three separate Guidelines: 17, 25 and 27. We suggest grouping these together into one training Guideline.

We also suggest expanding the scope of the training that is called for. At present, the Guidelines emphasise the need for training on the use of communication supports (17), strategies to involve persons who are the subject of applications (25), and specific cultural considerations relevant to Aboriginal and Torres Strait Islander people (27). Though Guideline 25 notes that training on strategies to involve people in proceedings would allow members and registry staff to be better informed about the characteristics associated with different disabilities, we believe this should be elaborated on further. The focus should not

just be on involving persons who are the subject of applications, but also treating them with dignity and respect, recognising their capacity to participate, and identifying and responding to their support needs.

This training would need to be rights-based and values-based. One of its key objectives should be to ensure that registry staff and tribunal members do not underestimate the potential and capacity of people living with disability. In particular, the training should emphasise the legal capacity of people living with disability. Indeed, the UN Committee on the Rights of Persons with Disabilities has stated that the judiciary (in this case, tribunal members) must be trained and made aware of their obligation to respect the legal capacity of all people living with disability, including legal agency and standing.<sup>4</sup> Article 13 of the Convention also requires States Parties to promote appropriate training for those working in the field of administration of justice, in order to help ensure effective access to justice for people living with disability.

Guideline 27 should also be expanded to include considerations relevant to people from culturally and linguistically diverse backgrounds.

### **Recommendation 8**

Guidelines 17, 25 and 27 should be combined into one Guideline on training, with suggested wording as follows:

‘Tribunal members and registry staff need to be trained on how best to support all people living with disability to effectively access, understand and participate in hearings. Training should include the following topics:

- the rights of people living with disability, including their legal capacity, and the values which should underpin the work of the tribunal;

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<sup>4</sup> United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12: Equal Recognition before the law, para 39.

- issues that people living with disability may experience before, during and after a hearing;
  - the role of representatives, support people and advocates in hearings;
  - the use of communication supports that a person may require in order to participate in a hearing including interpreting services, visual and auditory aids and other communication aids including different forms of augmentative and alternative communication tools;
  - specific cultural considerations relevant to Aboriginal and Torres Strait Islander people;
- and
- specific considerations relevant to people from culturally and linguistically diverse backgrounds.'

## 10. Tribunal to speak to the person before any appointment

In the Australian Law Reform Commission (ALRC) report on elder abuse, the ALRC expressed a preliminary view that a best practice model should require the tribunal, where possible, to speak with the represented person before the tribunal appoints a guardian or financial administrator, irrespective of attendance at the hearing.<sup>5</sup> The ALRC notes that stakeholders were strongly supportive of this approach.

We agree that this would be desirable.

### Recommendation 9

An additional Guideline should be added as follows: 'Tribunal members should, where possible, speak with the represented person before appointing a guardian or financial administrator, irrespective of his or her attendance at the hearing.'

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<sup>5</sup> Australian Law Reform Commission, 'Elder Abuse – A National Legal Response', ALRC report 131 (2017), pp327-8.

## 11. Conclusion

Thank you for the opportunity to comment on these Draft Guidelines. The participation of people living with disability in decisions that affect their lives is of critical importance, and we see great value in providing guidance to Australian tribunals on how best to support the participation of people who are subject to applications for guardianship or financial administration.

More broadly, we also support a shift from substitute decision making by guardians and financial administrators to supported decision making, which would require legislative amendments at the state and territory level. It is essential that this takes place as a matter of urgency. Indeed, the UN Committee on the Rights of Persons with Disabilities has repeatedly stated that States parties must ‘review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences.’<sup>6</sup>

By encouraging maximum participation by people living with disability in tribunal proceedings, these Guidelines are a step in the right direction. They will continue to serve a useful purpose if states and territories do adopt supported decision-making frameworks.

JFA Purple Orange and SACOSS are grateful for the opportunity to provide this feedback and would welcome the opportunity to discuss it in person if considered helpful.

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<sup>6</sup> United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12: Equal Recognition before the law, para 26.