

Guardianship Tribunal Response

“What is the Tribunal’s position on having a single registry service as opposed to a single consolidated tribunal?” (The Hon Sarah Mitchell)

“Registries outside Sydney may have a common registry service in more regional areas than you currently have.” (The Hon David Shoebridge)(Question on notice)

The Committee has heard evidence from Mr Nick O’Neill from the Nursing and Midwifery Tribunal that the Guardianship Tribunal in New South Wales has a ‘substantial hearing preparation arrangement’. Can you explain to the Committee what it is about the Guardianship Tribunal’s process of hearing preparation that makes it unique? (Supplementary Question No 1 (25 January 2012))

- ***Statutory function of the Guardianship Tribunal***

The Guardianship Tribunal exercises a protective jurisdiction, which is very different from many other tribunals which hear and determine disputes between individuals actively prosecuting their own cases. This necessitates approaches to both the pre-hearing and hearing processes that may be regarded as unique when compared with other tribunals.

The Guardianship Tribunal’s focus is on the paramount welfare and interests of the person the subject of the application. The *Guardianship Act* requires that the person’s freedom of decision and action be restricted as little as possible and, during the pre-hearing preparation process, where appropriate, alternatives to the need for Tribunal orders are explored and, if possible, the application finalised without progressing to hearing.

The *Guardianship Act* reflects the need to facilitate access to a protective jurisdiction. There are no fees to lodge an application, most people appear unrepresented and the test of standing to bring an application is “*a genuine concern for the welfare of the person*” subject of the application. This ensures that there are few barriers between concern for the welfare of a person with a decision-making disability and a forum to address those issues of risk through the appointment of a substitute decision maker.

Applications may be lodged with limited or no supporting material required for the Tribunal to determine the application against the tests set out in the *Guardianship Act*. An applicant may not identify all persons who are parties to the application and therefore entitled to appear and give evidence. An applicant may be able to identify

who holds key information about the person such as their treating doctor, accountant or lawyer but be unable to access this information to support their application.

A guardianship application for a person with a disability can be lodged by anyone concerned about the person. It is not uncommon for the Tribunal to receive an application form from a concerned neighbour or relative. This person, whilst having standing to make the application, does not have access to, or the resource to prepare the application fully and attach the necessary supporting documents. That investigative, case management and information gathering role is undertaken by Tribunal staff to ensure that when matters are listed for hearing the all the necessary information has been obtained.

The practices of the Guardianship Tribunal ensure that all applications requiring pre-hearing case management receive appropriate preparation and that there is effective communication with and support provided to the person with the disability, Tribunal users and Tribunal members. Some other Australian protective jurisdictions refer the investigation process to external agencies. The Tribunal manages this process itself enabling it to exercise control over the timing, quality and responsiveness of the hearing preparation process. This facilitates improved coordination between pre hearing preparation and the scheduling and listing of matters for hearing. Importantly it provides a single point of contact and a streamlined hearing pathway for Tribunal users.

Staff with tribunal registry skills and specialist knowledge and experience in the disability and health sectors are engaged in preparing applications for hearing.

This includes:

- Assessing and triaging applications into one of five categories focussing on risk to the person with the disability. Senior staff undertake this function informed by their knowledge of disability and the disability and health service sector.
- Facilitating access to justice and participation in Tribunal proceedings for the person subject of the application. This involves skills and experience in communicating with people with disability and in identifying circumstances requiring the appointment of a separate representative for the person.
- Assisting in identifying statutory parties to the application who have a right to appear and give evidence.
- Supporting the efficient and appropriate use of Tribunal resources. In 2010/11 approximately 11% of applications were finalised without progressing to hearing. Consistent with the principles of the Act this ensures that orders are made only where necessary.
- Providing information about possible alternatives to a Tribunal order to meet the needs of the person with the disability before applications are made and during the preparation of applications for hearing.

- Providing information to the parties about Tribunal practice and procedure and to the community about the Tribunal's jurisdiction.

Unlike other jurisdictions, Guardianship Tribunal staff actively seek reports and information relevant to the application. This supports effective and timely decision making and the most efficient use of Tribunal member resources.

Unlike other jurisdictions where parties file and serve their applications and documents upon which they seek to rely, the staff of the Tribunal are required to play an active role in distributing to parties documents lodged with the Tribunal or gathered in the course of preparing the matter for hearing to ensure procedural fairness.

An application to the Tribunal cannot be withdrawn except with the consent of the Tribunal. Consistent with the Tribunal's protective jurisdiction this frequently means that further investigation by Tribunal staff is required to determine whether consenting to withdrawal of the application is in the best interests of the person with the disability.

- ***Registry and case management services***

Tribunal registries provide a physical location to obtain forms, lodge documents, pay fees, and make general enquiries. Staff of the Guardianship Tribunal clearly undertake traditional registry functions such as mail and document management, registration of applications, and post hearing administration etc. However the Tribunal's registry and staff have a distinct role consistent with its protective jurisdiction and its investigative powers.

As already detailed above, the majority of the Tribunal's staff are engaged in providing these specialist services to Tribunal users, the community and Tribunal members before and after the lodgement of an application. Files are assigned to staff of varying seniority according to the issues raised in the application in order to facilitate timely preparation for hearing and to ensure efficient use of staff resources.

The skill and experience of the staff in assessing, investigating and preparing applications for hearing, the coordinated pre hearing case management being undertaken by Tribunal staff and members, and the focus of the jurisdiction on the person with the disability are unique to this tribunal.

It is difficult to envisage how the required level of skill, knowledge and experience could effectively be maintained in a multijurisdictional single registry environment or in regional registries while maintaining current standards of service. Even if basic administrative registry functions were undertaken at regional registries or the counter of a single registry service, referral to staff with specialist skills, knowledge and

experience would be necessary in relation to jurisdictional enquiries and assisting with information about possible alternatives to guardianship orders to meet the needs of the person, and to respond to urgent issues of risk to the person with the disability. Applications made under the *Guardianship Act* (such as applications for guardianship, financial management, applications to review enduring guardianship and enduring power of attorney appointments, applications for consent to medical or dental treatment, applications for consent to special medical treatment and applications for approval of a clinical trial) would need to be referred to consolidated specialist teams for assessment, triage and preparation for hearing. This would likely create unnecessary duplication and delay.

- ***Access to the Guardianship Tribunal registry***

The Tribunal provides an effective state-wide service. Currently Tribunal users, regardless of their location in NSW, have access to highly skilled and experienced staff and receive a consistent standard of service. It is doubtful that this level of service and support could be guaranteed in regional registries providing services across a broad range of jurisdiction, without significant resource implications.

Since it commenced operation in 1989, the Guardianship Tribunal has operated efficiently with a single registry located in Sydney.

The Tribunal has been subject to review by the Council on the Cost and Quality of Government in 2005, and has undertaken a number of reviews of its own practice, procedure and operations. It also monitors the feedback received from Tribunal users, the community and Tribunal members. None of these reviews have indicated that Tribunal service to the community would be improved by having a decentralised registry.

In 2010/11 the Tribunal registered in excess of 14,300 enquiries. Of these over 13,600 were made by telephone. Contact by telephone appears to be the preferred method as, given the population of the Sydney metropolitan catchment area, only 185 enquiries were made in person.

The vast majority of applications lodged are received by post or facsimile. This trend in Tribunal user contact being made by telephone and in writing has been consistent since the Tribunal was established.

The Tribunal sits at least monthly and more often as required in 17 regional centres and 4 outer metropolitan locations. In these locations the Tribunal uses NSW government facilities where possible and hearing venues, such as conference rooms, Local Government meeting rooms etc which provide suitable hearing services and a level of formality appropriate to a protective jurisdiction.

The Tribunal also sits in other hearing venues depending on the needs of the person subject of the application. A number of hearings are held at nursing homes and in hospitals to ensure the Tribunal is as accessible and flexible as needed.

Many persons with disability for whom guardianship applications are made, are considered "at risk". This risk can include the need for immediate medical treatment, situations where the person is a risk to themselves or others, where the person is a risk of abuse or neglect, or where the person is a risk of financial abuse.

The centralised coordination of Tribunal hearings enables the most appropriate response to the risk level that has been identified and assessed at triage. The centralised coordination of the Tribunal's case management functions ensures the most efficient use of Tribunal member expertise and Tribunal resources such as member expertise by listing, on the same day matters, requiring particular member expertise, for example members with medical expertise, psychologists with behaviour management expertise or members with experience in complex financial matters including trusts.

While the vast majority of parties appearing before the Guardianship Tribunal, like a number of other tribunals, are unrepresented, the key feature of the Tribunal's jurisdiction is that the person the subject of the application may have limited capacity to understand the process or participate in proceedings affecting their fundamental rights.

Orders made by the Tribunal affect a person's fundamental rights such as who will make personal decisions on the person's behalf, who will control and manage the person's financial affairs, and what medical or dental treatment a person will have.

All aspects of the Tribunal's practice and procedure, including its hearing preparation process, has as a primary focus the person with the disability and the need to maximise his/her understanding of the application and to maximise his/her participation in the proceedings.

The Submission from the Public Interest Advocacy Centre notes (p 8) that the Guardianship Tribunal often hears matters at short notice. Its Submission expresses concern that if the Guardianship Tribunal was amalgamated and presiding Tribunal Members are not experienced in the guardianship jurisdiction, then decisions may be flawed. Can you comment on this concern? Supplementary Question No 2 (25 January 2012)

In exercising its protective jurisdiction, the Guardianship Tribunal must ensure that applications suggesting a person with a decision making disability is at immediate risk of physical harm or financial exploitation are dealt with expeditiously. Tribunal staff with the relevant skills and experience assess and triage applications on the day they are received.

The issues raised in an application may indicate that the Tribunal needs to hear the application on the day it is received. This may be because the application is seeking consent to medical or dental treatment and the treatment needs to be provided immediately, the application indicates that there is an immediate risk of harm to the person or an immediate risk of financial abuse.

The Tribunal's scheduling procedures provide the necessary flexibility to enable the listing of urgent applications for hearing. The quality of Tribunal decision making in situations of urgency is underpinned by having members who sit regularly in the jurisdiction, who have knowledge of a range of decision making disabilities, and a detailed understanding of all aspects of the Tribunal's jurisdiction. Added to this jurisdictional experience is a member's particular qualifications and specialist expertise. This is drawn on, for example, to list members with qualifications and experience to hear urgent matters concerning people with anorexia nervosa, people at immediate risk resulting from homelessness, to hear applications concerning end of life decision making or make urgent orders where there is evidence that the person, should they leave the country, will be at serious risk of harm.

The Tribunal operates an afterhours service to respond to applications which must be heard urgently outside normal business hours. All Tribunal members participate in this roster to ensure that a panel with the requisite expertise is available to hear the application.

The urgent nature of these applications presents significant challenges to quasi-judicial decision-makers including determining the need for an immediate hearing, given the Tribunal inquisitorial function the experience in identifying sources of relevant information and obtaining evidence, and balancing urgency and the principles of procedural fairness.

It is essential that Tribunal Members determining matters at short notice, especially after hours and without recourse to Registry support, have comprehensive experience in the guardianship jurisdiction.

PIAC in its submission raises the concern that if the Guardianship Tribunal was amalgamated and presiding members were not experienced in the guardianship jurisdiction that it may result in flawed decisions.

It is likely that this concern may be realised should an amalgamated Tribunal exercising a protective jurisdiction not retain multi-disciplinary panels with both relevant expertise and the opportunity to sit regularly to gain experience in this challenging jurisdiction. Each of the major amalgamated Tribunals in other States, list the majority of applications before single members and these members in turn sit across jurisdictional lists other than the guardianship list. Criticism has been raised in other jurisdictions that this model does not provide the requisite expertise to attend to

guardianship jurisdictional matters. This expertise and experience is particularly important when hearing urgent applications at short notice.

What strategies does the Guardianship Tribunal have in place for the likely increased workload it will have as the NSW population ages? (Supplementary Question No 3 (25 January 2012))

The Tribunal's work concerns some of the most vulnerable members of our community. The Tribunal has demonstrated its capacity to effectively respond to changes in user demographic from one focussed on people with intellectual disability and mental illness to one where now 60% of applications concern people who are 65 years or older and approximately 50% of applications concern people with dementia.

The Tribunal recognises the need to plan for and respond to the increasing demands on its resources resulting from social and demographic change. The Tribunal has undertaken a number of significant initiatives to enable it to address its workload and position itself to manage projected future growth. The Tribunal's strategies have proved successful and over the five years from 2006/07-2010/11, it has managed a 13.6% increase in applications, conducted 21 % more hearings and finalised over 15% more matters with over the same period a staff increase of 4.5% and an average annual budget increase of 3.2%.

This demonstrates the Tribunal's efficacy in managing its increased workload and in adapting its practices and procedures to position itself to handle projected future increase in demand. The Tribunal is concerned that this proven capacity for timely and appropriate response, focus on quality decision making and the paramount interests of the person subject of the application, and the flexible and efficient use of resources would be at risk in a consolidated tribunal environment necessarily characterised by competing demands for resources and the need for some uniformity of practice and procedure.

Orders made by the Tribunal produce a cross-government benefit by facilitating the delivery of services provided by a range of Government departments and agencies including the NSW Ministry of Health, NSW Housing, agencies within the Department of Attorney General and Justice, and Family and Community Services.

Business process review: - The Tribunal has recently completed a comprehensive review of all case management practices and procedures. This has resulted in the risk-based triage of applications to address risk to the person with the disability and focus the application of Tribunal resources appropriately.

Management and staff restructure:- The Tribunal has recently implemented a staff restructure to create a flexible case management unit, and streamlined processes to prepare applications for hearing.

Communication and information technologies:- Exploitation of communication and electronic business solutions is a priority for most organisations. The Tribunal sees this as a key to positioning it to manage projected increase in demand.

Given the nature of the jurisdiction the Tribunal staff receive and distribute large numbers of documents in most matters. At present, little of this material is received or distributed electronically. A project currently within the Tribunal's business planning is the expanded use of electronic documents, including electronic application forms and improved capacity to make online applications, and electronic distribution of documents to members and parties. A successful realisation of this project would mean that staff would be available to undertake other duties associated with the increased application rate.

Ongoing review of Tribunal practice: - The Tribunal is engaged in ongoing review of its practice and procedure to ensure its responsiveness to meet changes in jurisdiction, demand and community and Government expectation. The publication of practice notes to better inform Tribunal users, the increased use of directions hearings to manage complex cases and ensure readiness for hearing, continuing review and improvement of listing and scheduling practices are undertaken to ensure the most efficient use of Tribunal resources.

Demand management and strategic community and professional education: - It is imperative that the Tribunal proactively manage the demand for its services. The key influence on the Tribunal's workload is the ageing of the population and increased prevalence of dementia.

Strategic education and information focussing on the community and key service professionals about mechanisms for planning ahead for future incapacity through making enduring guardianship and enduring power of attorney appointments would mean that these prior arrangements would avoid the need to seek orders from the Tribunal.

The Council on the Cost and Quality of Government (2005) identified strategic community education as an essential demand management strategy. The Tribunal's capacity to undertake this through community and professional education has been compromised over recent years by the need to divert staff and resources to deal with increasing workload.

The Tribunal reviewed its application forms to assist applicants to understand when and how to apply and clarify the responsibilities of an applicant. The Tribunal publishes de-identified decisions on the legal publication website Austlii to assist the community and Tribunal users to understand the Tribunal's process and how it makes decisions.

Operating within the Department of Attorney General and Justice:- The Tribunal is completing the final stages of its transition into the Department. The Department

provides the Tribunal's corporate services and support including finance, human resources, asset management, legal services and information technology. Finalising the transition will enable the Tribunal to utilise the resources including tribunal hearing rooms, videoconference facilities, and other relevant resources within a justice department.

Building the capacity of Members and staff: - The Tribunal introduced an improved program of Tribunal Member induction, training and performance appraisal.

The Tribunal has developed an online collaboration portal which provides members access to resources such as the Tribunal Member's Manual, recent appeal decisions, training materials, and updates about current developments in the jurisdiction.

It has implemented improved strategies to build on the capacity of staff through improved induction, training, professional development and supervision. These programs support efficient management of workload and improved quality of decision making.

Your evidence to the Committee commented on the consolidation of the guardianship jurisdiction in Victoria, do you have any comments to make on the Queensland model? Supplementary Question No 4 (25 January 2012)

The evidence provided to the Committee at the proceedings on 23 January 2012 in relation to the Guardianship jurisdiction in Victoria was derived from the Consultation Paper on Guardianship issued by the Victorian Law Reform Commission ("VLRC") on 14 February 2011. In Chapter 21 of that Paper (attached), the VLRC summarises the views of the community it received as to the role and functions of VCAT, Victoria's amalgamated Tribunal, which has jurisdiction over Guardianship in that state. The paper reported that views were received indicating strong dissatisfaction with VCAT's processes and decisions in relation to its Guardianship division with a particular focus upon:

- Preparation and investigation conducted by VCAT leading up to the hearing;
- A perception of "creeping legalism" in proceedings;
- An insufficient emphasis on the attendance of the person subject to the application at the hearing;
- Hearings being conducted in court-like venues; and
- the most consistent concern expressed related to the qualifications and training of Guardianship list members, noting there was a perception that some members have insufficient knowledge of disabilities, the disability community and the service sector.

We do not have the benefit of a resource such as the VLRC Consultation Paper in providing comments in relation to the Queensland model. In Queensland, the previous Guardianship and Administration Tribunal ("GAT") became part of an amalgamated Tribunal, the Queensland Civil and Administrative Tribunal ("QCAT") upon its establishment in 2009. Prior to amalgamation, the GAT operated much the same as the current operations of the Guardianship Tribunal in NSW, with some variations.

The following comments as to our understanding of the impact of amalgamation in Queensland on the Guardianship jurisdiction are derived from participation in regular meetings and forums of the Australian Guardianship and Administration Council (which meets twice a year) and dealings generally with senior practitioners engaged in the Guardianship jurisdiction in Queensland:

a) Cost

The initial cost of amalgamation is understood to have been high and in excess of the combined cost of the previous independent Tribunals. The amalgamated Tribunal is reported to have experienced funding pressures since inception which, in terms of the Guardianship jurisdiction, has led to the majority of matters being dealt with by a single presiding member rather than multi-disciplinary panels. Similarly, the majority of review hearings, where the Tribunal reviews orders it has previously made to determine whether they should continue or otherwise, are dealt with "on the papers", that is on the documentary evidence available to a single presiding member without the taking of oral evidence. This could bring into question the quality of the decision-making, and diminish the extent to which the person with the disability participates in the process, criticisms previously reported by the VLRC in respect of VCAT;

b) Timeliness

Upon the establishment of QCAT it was necessary to direct resources towards divisions of the amalgamated Tribunal other than Guardianship to attend to a backlog of matters. This in turn resulted in a significant backlog in hearing and determining Guardianship matters;

c) Transparency

An amalgamated model is understood to have enhanced transparency of decision-making in the Guardianship jurisdiction. This is due to a greater level of provision of reasons for decision than was previously the case (note that NSW legislation requires the provision of written reasons for decision to be provided to parties in most matters);

d) Expertise

Some members preside on multiple lists of the amalgamated Tribunal, not just the Guardianship division. Further, it is understood that the level of specialised Guardianship jurisdiction training has diminished in comparison to that provided prior to amalgamation. Given that the majority of matters are determined by a single presiding member, these factors can lead to criticism that members have insufficient knowledge or expertise of disabilities, the disability community and the service sector, a criticism outlined in the VLRC consultation paper in relation to VCAT in Victoria.

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