Advocacy for Disability Access and Inclusion Inc.

THE GUARDIANSHIP AND ADMINISTRATION ACT 1993: THE CASE FOR FREE LEGAL REPRESENTATION

Submission No.1 of Advocacy for Disability Access and Inclusion Inc. SA to the Royal Commission into violence, abuse, neglect, and exploitation of people with disability

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ABOUT ADAI

Advocacy for Disability Access and Inclusion (ADAI) are an advocacy organisation based in North Adelaide, South Australia.

ADAI was born as Parent Advocacy in 1986 after a group of parents acted as advisors to the then State Government in starting new and different disability services and to establish the Intellectually Disabled Persons' Services Act, 1986. At that time funds were provided by both the State and Federal Governments to establish Parent Advocacy. In 2006 Parent Advocacy changed its name to Family Advocacy Incorporated (FAI) and to Advocacy for Disability Access and Inclusion in 2015.

Today, ADAI is funded by the Department of Social Services (DSS) primarily through the National Disability Advocacy Program to provide independent advocacy to any person living with disability and or the family that supports them. ADAI has also been funded by DSS to provide advocacy and support to persons participating in the DRC. ADAI has assisted over 160 people to gather information about the Royal Commission, make a submission or assist someone to make a submission. ADAI is also funded to provided advocacy to people making an appeal to a NDIS decision through the NDIS AAT Appeals Program. The South Australian State Government does not currently provide funding for ADAI to provide advocacy.

ADAI welcomes the opportunity to make a submission to the Royal Commission into violence, abuse, neglect, and exploitation of people with disability.

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Introduction

This submission is partly based on ADAI's direct involvement in applications issued under the Guardianship and Administration Act 1993. To the year ending 30 April 2021 ADAI have taken up fourteen cases for people effected by the Act. See Addendum for examples of typical cases.

The term 'Aboriginal' is used respectfully in this submission to refer to all people of Aboriginal and Torres Strait Islander descent who are living in South Australia. ADAI acknowledges and respects Aboriginal peoples as the state's First Peoples and nations and recognises Aboriginal peoples as Traditional Owners and occupants of lands and waters in South Australia.

The report uses the terminology 'people with disabilities' to refer to the disability community. ADAI acknowledges and respects that there is a range of views about language and celebrates the right of all people to identify as they see fit.

Note: all persons referred to in this submission have been de-identified.

Terms of reference

> "What should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect, and exploitation."

This submission is partly based on ADAI's direct involvement in applications issued under the Guardianship and Administration Act 1993. To the year ending 30 April 2021 ADAI have taken up fourteen cases for people effected by the Act. See Addendum for examples of typical cases.

ADAI RECOMMENDATIONS

1. Free legal representation should be offered as of right to persons facing applications for a Guardianship Order and/or an Administration Order

2. Section 65 of the *Guardianship and Administration Act 1993* should be amended to read:

   (1) Where in any proceedings before the Tribunal commenced under this Act a person in respect of whom a guardianship or administration order is in force or a person in respect of whom an application is made chooses to be represented pursuant to this section, he or she is entitled to be represented by a legal practitioner provided pursuant to a scheme established by the Minister for the purposes of this section, being a legal practitioner— (a) chosen by the person himself or herself; or (b) in default of the person making a choice, chosen by such person or authority as the scheme contemplates.

The Guardianship and Administration Act 1993: The case for free legal representation

The Issue

There is a pressing need for people facing applications for a Guardianship Order and/or an Administration Order to be legally represented as of right. Disability advocates are indispensable, but their role stops short and needs to be augmented with legal representatives.

The South Australian Guardianship and Administration Act 1993 (GA Act) provides that a person with a mental incapacity[1] may be subject to a guardianship or administration order.[2]

An internal review of the decision to make an order can be made by the applicant, person subject to the order or interested persons.[3] A person subject to the order is provided legal representation through the Legal Representation Scheme provided through the Legal Services Commission[4]. Under the Scheme, the person can choose who their lawyer is, or a default lawyer will be provided from the panel of lawyers maintained by the Legal Services Commission. The existing of the Legal Representation Scheme does not derogate from the person's right to engage counsel at their own expense, or to appear personally[5].

This means that vulnerable people are drawn into a serious legal process, but they are unable to secure legal representation to protect their basic rights and freedoms. Most often, the person concerned will not appear at the hearing on account of being overawed or becoming distressed or having little or no understanding of the process. Private legal representation is prohibitively expensive, the person concerned might not have the capacity to find and instruct a lawyer. Orders are routinely made in a person's absence. Inevitably, this means that people have been made the subject of orders that were either unnecessary or over-restrictive.

[1] *Guardianship and Administration Act 1993* (SA), s 3 "mental incapacity".
[2] Ibid ss 29 and 35.
[3] Ibid s64.
[4] Ibid s65(2).
[5] Ibid s65(4).

Background

Cognitive disabilities are caused by several conditions e.g., neurological impairment, an intellectual impairment, a mental disorder, a brain injury, or dementia.

This is how the application process works. Generally, if a person does not have the ability to make financial decisions and/or life-decisions (accommodation, health, care services, employment, studying), then family/carers of the person will make these decisions (this is known as 'informal decision making').

Where 'restrictive practices' are being applied or if there is nobody willing or appropriate to act in this informal role (e.g., family conflict - see case examples in the addendum), then a 'substituted decision maker' will be appointed by the South Australian Civil and Administrative Tribunal (SACAT). A Guardian is appointed to make the health/lifestyle decisions and an Administrator to make financial decisions. In the absence of a suitable person, the Office of the Public Advocate and the Public Trustee are appointed to these roles.

The purpose of such orders is to protect the person's health and welfare and/or enable their affairs to be managed. The practical effect of these orders is that the person concerned loses some or all their autonomy. Large areas of a person's life are put into the hands of the formal 'substituted decision maker'.

Guardianship orders will include some or all the following areas:

'Health' decisions- authorises the guardian to consent to all medical treatment and health care decisions including the administration of medications for the purpose of influencing a person's behaviour,

'Lifestyle' decisions authorise the guardian to make decisions about employment, type of care, education and giving or withholding consent to the use of restrictive practices including some behavioural modification or restrictive practices.

Access decisions – authorises the Guardian to make decisions about who the person concerned should have access to and when.

Section 32 of the Act goes further, the following 'Special Powers' can be included in Guardianship orders:

- A direction that the person must live in in a specified place with a specified person or body.
- The detention of the person.
- Use of force/restraint in medical or dental treatment.

An order will remain in force and be reviewed after three years and after one year if the order contains Section 32 provisions. Most often the orders will continue year on year with routine reviews by SACAT, so they remain in place for a person's lifetime or until amended or revoked. An example of the latter being where a person regains mental capacity. Free legal representation is not available for an application to revoke or amend an order.

Commonly, a person who is the subject of an application will strongly oppose the making of the order, particularly when they come to understand that they have lost the right to make self-determined decisions – the freedom to choose. It is important that those views are heard and considered[6].

Going deeper

As will be noted, 'Capacity law' is a complex, specialised and developing area of law; this is the situation facing **people** with cognitive disabilities when faced with these types of applications. Note, it is not the role of SACAT to give legal advice and whilst SACAT can request the Public Advocate to assist a person, the Public Advocate, like a Disability Advocate, does not give legal advice or make legal submissions to the Tribunal.

Before making a Guardianship or Administration Order, the Tribunal must be satisfied about all the person (1.) has **a mental incapacity** and (2.) that an order **should** be made.

Mental incapacity is defined as *"the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever*".

'Mental incapacity' is based on expert evidence in the form of a medical report. Deciding if the order 'should' be made is arrived at by the Tribunal considering information (factual evidence) gathered from third parties e.g. family members, care providers and anybody else providing services to the person concerned.

Before the Tribunal makes one of these orders, it must have regard to the principles set out in Section 5 of the Act i.e., the wishes of the person concerned, the adequacy of informal decision makers, the least restriction on the person's autonomy.

As if the above was not difficult enough, further complexity is added by the emergence of new law around the application of 'restrictive practices'. These are interventions used in

[6] *Guardianship and Administration Act 1993* (SA), s5(b).

the care of a person that may involve physical restraint or compulsion imposed on a person for their own safety or the safety of others. Here we come to the interface of the Guardianship and Administration Act 1993, the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018), Consent to Medical Treatment and Palliative Care Act 1995. In South Australia, guidance has been given in case law: Re KF, Re ZT, Re WD [2019] SACAT – a challenging read, even for lawyers.

There are many straightforward applications where the making of an order is the clear and obvious pathway. However, other applications are by no means straightforward. The decision whether to make an order, the scope of the powers contained in an order or the identity of who should be the Guardian or Administrator, can be finely balanced decisions; yet the person concerned is very unlikely to have a lawyer to question and challenge what is being proposed.

In summary, the applications take place in a highly legalistic landscape but one of SACAT's objectives is 'to act with as little formality and technicality as possible'. There is potentially a gap here, where the rights of disabled persons can fall through. Legal representation would go some way to ensuring that this does not happen.

Further arguments to support the provision of legal representation

1.) The United Nations Convention on the Rights of Persons with Disabilities (CRPD), Article 12 (3) states that:

"States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

'Legal-capacity' is defined as a person's ability to exercise legal rights. Applications under the Act are all about the curtailment of a person's legal capacity. It follows that 'appropriate measures' envisaged by Article 12 (3) ought to include the assistance of a lawyer to assist them in the proceedings.

The Disability Inclusion Act 2018 incorporates the CRPD. Section 7 states "to such an extent as may be reasonably practicable, the operation, administration and enforcement of this Act is to support and further the principles and purposes of the United Nations Convention on the Rights of Persons with Disabilities, as well as any other relevant international human rights instruments affecting people with disability as in force from time to time."

2.) The principles of natural justice and access to justice are the central pillars of the Rule of Law in Australia. The current position is that persons with disabilities are being deprived of liberty and deprived of autonomy for substantial periods of time without having a lawyer to safeguard their legal rights. Guardianship has been described as the 'invisible institution'.

3.) Before the first hearing of an application, SACAT will write to the person concerned and invite them to:

- *represent yourself or be represented*
- *call, give or present evidence*
- *make oral or written submissions*
- *ask questions of people participating in the hearing.*

However, encouraging a person with severe cognitive disabilities, to take part in the proceedings is illogical unless legal representation is provided. Legal representation is a safeguarding measure which would ensure that a.) all practical steps are put in place to enable a person to express their wishes and feelings b.) the most vulnerable in society are enabled to be as practically involved as possible in a process that leads to a curtailment of their rights and freedoms.

Legal representation would not take away the valuable role played by advocates in this space, they are excellently placed to put forward the wishes of people, explain process and work in partnership with the lawyer. However, advocates are prevented from giving legal advice, weighing up the probity of evidence and are not trained to examine witnesses or present clear and articulate oral submissions.

4.) Supporting a person with cognitive disabilities to be involved in decision-making is recognised as the best practice from a Human Rights perspective. This is given legal effect by the CRPD and in Australia it has been taken up by the state of Victoria in their new Guardianship and Administration Act 2019. The key thinking behind supportive decision making is that the person with a disability is equal under the law thereby taking a more active role in their own life and hence gaining or retaining self-confidence and personal autonomy, these are key components of 'well-being'. This increases a person's capacity to protect themselves against abuse and neglect, it assists in empowering them to seek the support of others.

However, this approach does not align with the SACAT procedure, which is conducted in an objective way, so that the 'the person concerned' is spoken 'about'. Compare for legal representation 'as of right' which would put a person's legal rights front and centre in the process. The representative will stand in the legal shoes of the person, thus ensuring that the person's wishes and feelings are heard, ensuring the person is given every opportunity to be involved (including the appointment of a communication partner) and ensuring that the law is applied appropriately and proportionally.

The Next Step

Save for South Australia, all States and Territories have legal aid schemes with some discretion to 'grant' legal representation to people who are the subject of Guardianship and Administration applications. In South Australia free legal representation is only available to a person who wishes to 'review' or appeal an order that has already been made. This is illogical, an unrepresented person is unlikely to have anybody to advise them on the merits of seeking a review or appealing. Also, if the review warrants the appointment of a lawyer on a review then why not have one appointed to deal with the application when at the first phase ?

Our Community Legal Centres also support people in this space; however, a person may not be able to find this type of support, there may be a lack of expertise and there may not be any resources.

Free legal representation should be offered as of right. So, Section 65 of the Act should be amended to read:

> (1) Where in any proceedings before the Tribunal commenced under this Act a person in respect of whom a guardianship or administration order is in force or a person in respect of whom an application is made chooses to be represented pursuant to this section, he or she is entitled to be represented by a legal practitioner provided pursuant to a scheme established by the Minister for the purposes of this section, being a legal practitioner— (a) chosen by the person himself or herself; or (b) in default of the person making a choice, chosen by such person or authority as the scheme contemplates.

Addendum.

Case examples

1. A young man aged seventeen had a mild cognitive disability. He was under the guardianship of the Chief Executive of the Department for Child Protection (DCP). As he was about to turn eighteen the Department applied to SACAT for an Administration Order and Guardianship Order that would come into effect when he turned eighteen. This was on the basis that he lacked capacity to make decisions about his finances and make 'life-decisions.' The DCP asserted that the orders should be made to protect his wellbeing. Seeing that these orders would have huge consequences for this young person, the DCP had the foresight to pay for him to have a legal representative. The final hearing was contested, the lawyer ensured that the person had the support of a professional communication partner. The lawyer made legal submissions and the applications where dismissed.

2. A person with an advanced degenerative illness was removed from his partner and family due to concerns about abuse and neglect. The person was very unhappy about being separated and placed in residential care. The person frequently expressed the desire to return to live with the family. Due to the illness, the person had communication difficulties, but these were not unsurmountable. On the evidence of a cognitive functioning assessment the Tribunal found that the person lacked capacity and the orders were made. However, the issue was not clear cut, other evidence pointed to the person having capacity. One would have expected a lawyer representing the person to have challenged the assessment process e.g., if there had been a communication partner present during the test would the outcome have been different? Was the scope of the assessment appropriate i.e., did the assessment look at the questions in hand, did the person have the capacity to understand, weigh up and remember the information about returning home or was the test more abstract and less relevant?

3. A 22-year-old female was autistic and had a severe intellectual disability. She lived with her father but had frequent access visits with her mother. The parents had a very acrimonious relationship, over the years there had been protracted proceedings in the Family Court. The father felt that mother was neglectful and unstable, so she decided to stop all contact. He then filed an application to be appointed the Guardian and it was granted. Amongst other matters, this enabled him to have unilateral control about how much contact his daughter had with her mother. At no time in the process was the daughter ever consulted about her wishes and feelings in relation to seeing her mother. A legal representative acting on the daughter's behalf could have taken steps to ensure that her wishes and feelings were explored; this might have added weight to an argument that her well-being would be best served by placing

decisions about access in the hands of a neutral third party. It is common in cases of family conflict for the Office of the Public Advocate to be appointed to the role of Guardian.