

AAC ON BOTH SIDES OF THE FENCE

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- 1 Firstly, I would like to thank both Malcolm Schyvens, the Divisional Head of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) and Justice Robertson Wright, President of NCAT, for giving me permission to present the case of *MHN*.¹
- 2 At the outset, I feel it is important, to reiterate the obligations of state parties, under the United Nations Convention on the Rights of Persons with Disabilities. Article 13, states that persons with disabilities must have equal access to justice. Article 21, states that augmentative and alternative communication, must be recognised in all official interactions with state parties. The *Guardianship Act 1987* (NSW) instructs that the views of people with disabilities must be taken into account when the Tribunal determines an application made under that Act. The case of *MHN*, is a demonstration of these rights being upheld.
- 3 The purpose of this paper, is to demonstrate, how AAC – augmentative and alternative communication, is effective as a means of communication, by parties to applications to the Tribunal, and by members of the Tribunal.
- 4 AAC has given me a voice! Through education and experience that voice can now be heard. My limited speech options mean that when I speak, I want those words to mean something. I work towards educating others in understanding how I communicate. In doing so, I am giving knowledge to others and for others. AAC allows me to communicate electronically. It may not be my voice, but it is my thoughts: independent, educated, articulate and opinionated. As a Tribunal member, it is my job to hear the voice of every

¹ *MHN* [2017] NSWCATGD 14

party involved in an application. AAC enabled the voice of the subject person to be heard, in the case of *MHN*.

- 5 I have been a General Member of the Guardianship Division of NCAT for almost six years. I have found the Tribunal, as a whole, to be accommodating of my communication needs. My skills and abilities, as a Tribunal member, have been recognised by my recent appointment to the Appeals Panel. When I introduce myself at the commencement of a hearing, I explain I will be using a communication device to communicate throughout the hearing, and I will need time to compose my message. One of my colleagues recently observed, nobody sees this as a problem. My participation, as a member of the Tribunal, has not been impeded by my need to use a communication device. In fact, as is about to be shown, it can be a real asset.
- 6 By way of background, I have a law degree and since university have had a keen interest in access to justice for people with little, or no speech. In fact, I did my final Thesis on, Access to Justice for people with little or no speech. So, naturally, when *MHN* was listed before me, I felt that I was well qualified to hear it. I was also a little excited.
- 7 I sit on the Tribunal as a General Member. This means, I am there because of my experience in the disability community. But my legal training does not go astray. I find, when I am involved in a hearing, I need to think of a thousand things at once! These include, whether each party is being afforded procedural fairness, whether the power to make the order sought can, and if so, should be exercised, whether any security concerns arise. A party's ability to communicate and understand the procedure, is critical to a fair hearing being conducted.
- 8 Initiating applications to the Guardianship Division, are heard by a three member panel, which is comprised of a legal member, who is also the presider, a health professional member, and a general member, who has personal or professional experience of disability.

- 9 The case of Ms MHN involved a young woman who was the subject of a guardianship application. She used a speech generating communication device, and I, as the general member, of the three member panel, also used a speech generating communication device. This shared experience gave me empathy, and, a greater level of understanding of her circumstances.
- 10 Guardianship applications, involve various parties, including the person who made the initiating application, “the applicant”, and the person who is the subject of the application, in this case Ms MHN.
- 11 This case was significant, because AAC was essential to the effective communication, between the panel and Ms MHN. The information communicated by Ms MHN through AAC was central to the panel’s decision. AAC enabled the Tribunal to discharge its obligation to give Ms MHN a reasonable opportunity to be heard². It also appears, to have been the first case heard by an Australian court or tribunal where both the decision-maker and a party to proceedings was an AAC user.
- 12 The case was heard in regional NSW, which is significant, because from my experience, people are more likely to appear face to face. In the city, there seems to be a greater trend towards appearing via telephone, or video. Whether this is a transport issue, a time issue, or a lack of personal involvement, is unclear.
- 13 The crux of the case, was, whether Ms MHN had capacity to appoint an enduring guardian, herself, a far less restrictive option, than having a guardianship order imposed upon her. Under the *Guardianship Act*, the Tribunal is obliged to take the least restrictive, option.
- 14 Previously, in the justice system, and in the AAC community, there has been debate, about whether AAC is a valid means of giving evidence. Although, the rules of evidence do not apply in the Guardianship Division³, and the attitude

² s 38(5)(c) of the *Civil and Administrative Tribunal Act 2013* (NSW)

³ s 38(2) of the *Civil and Administrative Tribunal Act 2013* (NSW)

of the Tribunal is pro-AAC, there was never any question, about whether Ms MHN could give evidence, using her speech generating device.

- 15 Ms MHN's parents applied to be her guardians, to assist her with medical and accommodation issues. Ms MHN herself, stated, she wanted her parents to be appointed, so they could assist her with making decisions, and to be her voice at times when she was not well and was unable to use her communication device. During the course of the hearing, we informed Ms MHN, and her parents, that she could appoint her parents as Enduring Guardians, as opposed to having an order made by the Tribunal.
- 16 A person can appoint an Enduring Guardian to make lifestyle decisions on their behalf during times when their capacity to make decisions is impaired. That appointment can only be made, if the person has capacity to make the appointment. If a substitute decision maker is needed and the person lacks capacity to appoint an Enduring Guardian, an application to the Tribunal to have a Guardian appointed is required. Obviously, the decision to go down either of these guardianship paths, can be stressful. Indeed, it can be more stressful, having the panel appoint a guardian. Therefore, it is preferable, to make an enduring Guardianship document while you still have capacity.
- 17 Access to justice, for Ms MHN, was enhanced by having a fellow AAC user ask her questions, and be part of the decision making panel. Ms MHN had a peer, on the other side of the table. Prior to hearing the case, the presiding member, recognised, that given that I used AAC myself, it would be appropriate if I took the lead in asking questions of Ms MHN. I had to be mindful of asking questions that would require the least effort for Ms MHN to answer. I reassured her, that she could take her time. I was also able to assist, by rephrasing some of the presider's questions, to ensure that they were accessible to Ms MHN.
- 18 The Tribunal ultimately found, that although Ms MHN was unable to speak, her answers were appropriately articulated, using her communication device, and a Guardianship order, was not warranted. To quote directly from the

decision, the Tribunal found that, while “Ms MHN has a physical disability, and difficulties with verbal communication, her decision making capacity, is not impaired”.

- 19 Immediately after we had delivered our decision, my two colleagues realised how much this case meant to me. The presider emailed the Head of the Guardianship Division back in Sydney, saying, how great it was to watch the duelling communication devices!
- 20 For me, both professionally and personally, I felt that after years of studying and advocating, I had finally been a part of the change I am working towards. Very satisfying and humbling!
- 21 This case, is a demonstration of how far society has come. It confirms, AAC, is an accepted tool, in Tribunal proceedings for a decision maker and for a party.
- 22 This is as significant, as having circle sentencing in the aboriginal community. Circle sentencing, is ensuring aboriginal elders, are involved in the sentencing of aboriginals. Being heard by your peers, in a legal matter, is everybody’s right.
- 23 I would like to see people who use AAC, be more prevalent in judicial roles. I feel, that attitudes towards people, who use AAC in the wider community, are changing. People care about what I have to say, not how I say it.
- 24 You can find the link to the full decision on the AUSTLII website: *MHN* [2017] NSWCATGD 14.