



Guardianship

Making personal and lifestyle decisions for an adult with a decision-making disability

What is guardianship and how does it operate?

Guardianship is the appointment of a person (a 'guardian') to make decisions for an adult with a disability (the 'represented person') when they are unable to do so.

All adults over the age of 18 years, regardless of disability, are entitled to make their own decisions. This is the case unless, when they were competent, they appointed a person to be their guardian under the enduring power of guardianship and have now lost capacity to make the types of decisions they appointed the enduring guardian to make for them.

Alternatively, a guardianship order can be obtained by making an application for guardianship to the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT).

VCAT hears the matter and, if necessary, appoints a guardian to make specific types of decisions.

The guardian makes decisions about the represented person's lifestyle, such as where they live and who can have access to them, according to the terms of the order.

The guardian's decisions have the same legal force as if the person had made them themselves.

When is guardianship needed?

It is often mistakenly assumed that the parents or carers of people with

disabilities are their guardians. People with disabilities should be encouraged and supported to make decisions for themselves.

Guardianship is needed, however, when:

- a person who has a disability is at risk because they cannot make decisions about their own personal and lifestyle affairs, such as where they will live
- a decision needs to be made on their behalf.

A guardian may be appointed when there is unresolved conflict between a person with a disability and a service provider, family and friends, or in cases of self-neglect.

Who appoints a guardian?

VCAT appoints a guardian. It must be satisfied that the represented person:

- has a disability
- cannot make reasonable personal and lifestyle decisions because of that disability
- needs to make decisions, and there is no less restrictive way of making the decisions other than to appoint a guardian
- needs someone to act in their best interests.

Who can be a guardian?

VCAT can appoint an individual(s), usually a relative or friend, as guardian. VCAT seeks to appoint a guardian who is familiar with the represented person's values and

beliefs, likes and dislikes. VCAT must be assured that the guardian will act in the represented person's best interests.

When deciding who to appoint, VCAT must take into account the wishes of the represented person, so far as they can be ascertained, as well as family members and interested parties.

If there is no one available or there is a need for an independent person because of disagreement between family or friends about what is best for the represented person, the Public Advocate can be appointed.

What decisions can a guardian make?

The types of decisions an appointed guardian can make depend on the order (or decision) made by VCAT.

A limited order specifies the type of personal and lifestyle decisions the guardian can make. These may include decisions about accommodation, medical and dental treatment and other health care, or access to services.

A plenary order allows the guardian to make all lifestyle decisions, subject to the following exception:

Medical and dental treatment

The 'person responsible' can consent to medical and dental treatment (a guardian may be the person responsible). Refer to OPA's fact sheet *Medical/Dental Treatment for Patients Who Cannot Consent* for further information.

Office of the Public Advocate

Level 5, 436 Lonsdale Street, Melbourne, Victoria 3000
PO Box 13175 Law Courts, Victoria 8010. DX 210293
Local Call: 1300 309 337 TTY: 9603 9529 Fax: 1300 787 510

www.publicadvocate.vic.gov.au

Victorian Civil and Administrative Tribunal,
Guardianship List

55 King Street, Melbourne, Victoria 3000

Tel: (03) 9628 9911 Fax: (03) 9628 9932

Toll Free: 1800 133 055

www.vcat.vic.gov.au



It is not necessary to apply for a guardian to make such decisions if there is already an appropriate person responsible (for example, a close family member or unpaid carer).

If a person has appointed an agent under an enduring power of attorney (medical treatment), or if VCAT has appointed another person to make decisions in relation to proposed treatment, they would then take precedence over a guardian as ‘person responsible’.

What decisions can't a guardian make?

A guardian cannot make decisions about the represented person's finances. For further information, see OPA's *Administration* fact sheet.

A guardian cannot make a decision about a ‘special procedure’, such as termination of a pregnancy or a procedure leading to permanent infertility. An application must be made to VCAT for these decisions, and only VCAT can consent to special procedures.

What are the responsibilities of a guardian?

A guardian must make decisions that are in the best interests of the represented person. This means they:

- protect the represented person from abuse, exploitation and neglect
- consider the represented person's wishes
- advocate for the represented person
- encourage the represented person to make their own decisions where possible.

What is the application process?

To apply for a guardian, an application form is available from VCAT. This can be requested via telephone, mail, or downloaded from the VCAT website at www.vcat.vic.gov.au. A link to the form is also available from OPA's website at www.publicadvocate.vic.gov.au

It is suggested that you call OPA's Advice Service on 1300 309 337 to discuss whether guardianship is necessary, and what supporting material is required for the application.

After receiving the form, VCAT will set a hearing date. Urgent applications will be heard as soon as possible. Most other applications will be heard within 30 days.

VCAT hearings

VCAT is less formal than a court. If a person cannot travel to a hearing, VCAT may agree to accept evidence over the phone.

VCAT is not bound by legal rules of evidence and does not have to use formal legal processes. However, hearings must comply with the principles of natural justice (i.e. be fair and unbiased).

Legal representation at VCAT is not necessary, although people attending hearings may ask VCAT to allow them to use a lawyer.

Emergency orders

OPA and VCAT have a 24-hour emergency service. If VCAT considers that a matter is urgent (where there is significant risk to the person's life), a temporary order can be made for up to 21 days. The order can be extended a further 21 days. Before the end of the order,

VCAT must hold a hearing to determine whether guardianship is needed.

Duration of an order

An order may last for a maximum of three years. All orders are reassessed by VCAT within three years and can be cancelled if no longer needed.

If the represented person dies, the order ends.

Rehearings

If someone believes VCAT has made a wrong decision, they may apply for a rehearing within 28 days of the original decision.

Interstate orders

It is possible to register Victorian guardianship orders in other states, and for interstate orders to be registered in Victoria. For further information, contact OPA.

Safeguards

Guardians are accountable to VCAT for the decisions they make. The following safeguards help to ensure that guardians act in the best interests of the represented person:

- guardians can ask VCAT for advice at any time
- on appointment, private guardians can contact OPA for information and support on private guardianship
- any person who believes that a guardian is not acting in the best interests of a represented person can apply to VCAT for a reassessment
- if the Public Advocate has been appointed the guardian, complaints can be made to OPA. Contact OPA for further information.