

# Reflections on guardianship

The law and practice in Victoria

February 2023



Office of the  
Public Advocate





# Table of contents

<b>1</b>	<b>Message from the Victorian Public Advocate</b> .....	<b>4</b>
<b>2</b>	<b>Summary and recommendations</b> .....	<b>5</b>
2.1.1	The intention and key aspects of the Guardianship and Administration Act .....	5
2.1.2	Human rights and guardianship .....	6
2.1.3	Drivers of guardianship .....	7
2.1.4	Missing pieces — Inclusion, supported decision-making and advocacy.....	8
2.1.5	OPA recommendations .....	9
<b>3</b>	<b>Overview of the intention of the Act and key aspects of the Act</b> .....	<b>12</b>
3.1	The intention of the Act.....	12
3.1.1	Align concepts and terminology with the CRPD.....	12
3.1.2	Strike a balance between competing rights .....	13
3.1.3	Ensure will and preferences direct decisions as far as possible .....	13
3.1.4	Prevent unnecessary intrusions on the right to make decisions .....	14
3.1.5	Recognise supported decision-making .....	14
3.1.6	Ensure VCAT orders are proportional and tailored .....	14
3.1.7	Continue the role of the Public Advocate .....	14
3.2	Key aspects of the Act.....	15
3.2.1	The functions and powers of the Public Advocate .....	15
3.2.2	Definition of decision-making capacity .....	16
3.2.3	Role and responsibilities of guardians .....	17
3.2.4	Option to appoint someone to support decision-making .....	20
3.2.5	Steps for VCAT before appointing a guardian .....	20
<b>4</b>	<b>Human rights and guardianship</b> .....	<b>22</b>
4.1	The Victorian Government position .....	22
4.2	OPA’s human rights approach.....	23
4.3	Victoria’s Charter of Human Rights and Responsibilities .....	23
4.4	The Convention on the Rights of Persons with Disabilities .....	24
4.5	Autonomy .....	24
4.6	Protection from exploitation, violence and abuse .....	25
4.7	Living independently and being included in the community .....	26
4.8	Access to healthcare .....	26
4.9	Child-rearing rights and respect for family and home .....	27
4.10	First Peoples, self-determination and over-representation in guardianship matters .....	28
<b>5</b>	<b>Drivers of guardianship</b> .....	<b>30</b>
5.1	Drivers at odds with the intention of the Act .....	30
5.1.1	Broad-brush medical reports about decision-making capacity.....	30
5.1.2	Lack of less restrictive options due to lack of resourcing .....	32



5.1.3	Service systems, including the NDIS, failing to make adequate adjustments.....	33
5.1.4	Barriers to transition out of guardianship .....	36
5.2	Drivers that are not at odds with the intention of the Act .....	37
5.2.1	Conflict, or actions of others, impacting on individuals' rights .....	37
5.2.2	Complex circumstances and attitudinal barriers impacting on individuals' rights...	39
<b>6</b>	<b>Missing pieces — Inclusion, supported decision-making and advocacy .....</b>	<b>41</b>
6.1	Inclusion .....	41
6.2	Supported decision-making .....	43
6.3	Advocacy .....	44
6.4	OPA's 'Supported Discussions' pilot project.....	44
<b>7</b>	<b>Appendix: Trends in OPA guardianship over time .....</b>	<b>48</b>
7.1	Key findings .....	48
7.2	Introduction.....	48
7.3	The research .....	48
7.3.1	Goals.....	48
7.3.2	Method .....	49
7.3.3	Limitations .....	49
7.4	The data .....	50
7.4.1	Average time under OPA guardianship.....	50
7.4.2	Change in average length over time .....	51
7.4.3	The variation behind the averages.....	52
7.4.4	Age cohorts .....	53
7.4.5	Total numbers of people under OPA guardianship over time .....	55
7.4.6	Types of decision-making powers included in OPA guardianship orders over time	56
7.5	Discussion .....	59
7.5.1	Age, use of guardianship and the NDIS.....	59

# 1 Message from the Victorian Public Advocate



My office is committed to the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). As Public Advocate, my key function is to promote the human rights of persons with a disability. I may also be appointed as guardian of last resort under Victoria's *Guardianship and Administration Act 2019*, a role I can delegate to staff of the Office of the Public Advocate (OPA). This places OPA in the unusual position of being substitute decision-maker of last resort, while hoping to see that role played less, by

OPA and others, over time.

Victoria's *Guardianship and Administration Act*, which the Victorian Government has described as a 'milestone', has been in operation for almost 3 years. OPA welcomed the introduction of the legislation and its intention, however OPA has growing concerns about whether the intention of the Act is being fully realised. Of significant concern to OPA is the growing number of OPA clients under 65 who are under guardianship, and the increased time that people in this cohort are spending under guardianship. This statistic seems at odds with the intention of the legislation and does not align well with the aspiration of my office to see the role of substitute decision-maker being played less by OPA over time.

OPA reflects in this report on how guardianship can protect and promote the rights of people with disability, but also identifies concerning patterns of over-reliance on guardianship to fill service gaps, and service systems that operate in ways that do not adjust to the needs of people with disability.

The Act has recognised the important role of supported decision-making. However, this report highlights that this recognition has not been enough to ensure people's right to autonomy is promoted to the fullest extent possible. Resourcing of services and initiatives that will help realise the intention of the Act are needed, and the voice of people with lived experience of disability needs to be elevated.

Advocacy services, including legal advocacy, need to be adequately funded and available in a timely way, in order to offer a less restrictive option to guardianship in appropriate circumstances. Supported decision-making services also need to be appropriately resourced, with a range of options made available for people to access support for their decision-making. A funded supportive guardianship program is needed, so that people who do not have anyone in their lives to support their decision-making can have a supportive guardian appointed in appropriate circumstances.

Increased community understanding of supported decision-making and its value in promoting the dignity, equality and autonomy of people with disability is needed. Importantly, the voice of people with lived experience of disability should be at the centre of initiatives to promote increased community awareness of this, and of the Act and its intention.

My office will be undertaking a pilot project to trial some of the recommendations made in this report. However, more action than this is needed. The barriers to realising the intention of the Act need to be tackled from multiple directions — service systems that operate at odds with the legislation (and that hinder Australia aligning with the CRPD) need to change and alternatives to guardianship need to be resourced. Given that it is three years into the operation of the Act, my office considers that a review would be timely.

Colleen Pearce, Public Advocate.

## 2 Summary and recommendations

### 2.1.1 The intention and key aspects of the Guardianship and Administration Act

The Victorian Government has described the Guardianship and Administration Act as representing a ‘milestone’ in the way Victoria upholds the rights and meets the needs of people with disability.<sup>1</sup>

Its intention is to:

- Align concepts and terminology with the Convention on the Rights of People with Disabilities.
- Strike a balance between competing rights — recognising the right of people with disability to make their own decisions while ensuring there are mechanisms for protection when needed.
- Ensure will and preferences direct decisions as far as possible — with the person’s will and preferences only able to be overridden where it is necessary to do so to prevent serious harm to them.
- Prevent unnecessary intrusions on the right to make decisions — with the definition of decision-making capacity intended to promote each person’s right to recognition and equality before the law.
- Recognise supported decision-making — with the Victorian Civil and Administrative Tribunal (VCAT) able to make supportive guardianship appointments for people to have someone appointed to support them to make and give effect to their own decisions.
- Ensure VCAT orders are proportional and tailored to individuals’ circumstances.
- Continue the role of the Public Advocate as an independent statutory office that promotes the rights and interests of people with disability, and as guardian of last resort.<sup>2</sup>

The Act sets out the functions and powers of the Public Advocate<sup>3</sup> which include to promote the human rights of people with disability and to protect persons with a disability from abuse and neglect and exploitation. The Public Advocate may also be appointed by VCAT to be guardian for a person if VCAT is satisfied that there is no other person who fulfils the requirements.

The Act carefully defines ‘decision-making capacity’ and sets out a number of important principles that must be considered when determining if a person has decision-making capacity.<sup>4</sup> These include that person is presumed to have decision-making capacity unless there is evidence to the contrary, and a person has decision-making capacity in relation to a matter if they can make the decision with practicable and appropriate support.

Before VCAT can appoint a guardian for a person, it must be satisfied that, because of the person’s disability, they do not have decision-making capacity about particular personal matter(s); that the order will promote their personal and social wellbeing; and that the person is in need of a guardian, including because there is no less restrictive option.<sup>5</sup>

The Act expects guardians to support the person to express their will and preferences and to participate as much as possible in decision-making. If a person cannot be supported to make their own decision about a matter, the guardian makes the decision for them. When making a decision, they are required to give effect to the represented person’s will and preferences and

---

<sup>1</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 63 (Jill Hennessy, Attorney-General).

<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 60-63 (Jill Hennessy, Attorney-General).

<sup>3</sup> *Guardianship and Administration Act 2019* (Vic) ss 15-17.

<sup>4</sup> *Guardianship and Administration Act 2019* (Vic) ss 5-6.

<sup>5</sup> *Guardianship and Administration Act 2019* (Vic) s 30.



only override these if it is necessary to do so to prevent serious harm to them. If they cannot identify the represented person's likely will and preferences, the guardian must make a decision that promotes the represented person's personal and social wellbeing.<sup>6</sup> Guardians must also act as an advocate for the represented person, assist them to develop their decision-making capacity and act in such a way so to protect the represented person from neglect, abuse or exploitation.<sup>7</sup>

## 2.1.2 Human rights and guardianship

The Victorian Government has said of the Guardianship and Administration Act that it is compatible with human rights. It has acknowledged that the Act is 'directed towards people with disability' but has said that the extent to which the 'making of a guardianship or administration order limits the right to equality, any such limitation is demonstrably justifiable and constitutes the minimum interference necessary to enable persons with limited decision-making capacity to participate in society and enjoy personal and social wellbeing'.<sup>8</sup>

In this report, OPA brings a human rights lens to its reflections. This approach:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society
- recognises that the vast majority of challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual
- sees impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

A function of the Public Advocate is to promote the human rights of people with a disability and there is a requirement on the Public Advocate and all OPA staff to comply with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). Under Victoria's Charter, VCAT and OPA employees must act in a way that is compatible with human rights, and when making a decision must give proper consideration to relevant human rights. A human right may only be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.<sup>9</sup>

The Guardianship and Administration Act's primary object includes to 'protect and promote the human rights and dignity of persons with a disability by having regard to the Convention on the Rights of Persons with Disabilities, recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives'.<sup>10</sup>

In reflecting on human rights that may be promoted or limited by guardianship, OPA has identified some key rights, including:

- autonomy
- protection from exploitation, violence and abuse
- living independently and being included in the community
- access to healthcare
- child-rearing rights and respect for family and home.

---


6 *Guardianship and Administration Act 2019* (Vic) s 9.

7 *Guardianship and Administration Act 2019* (Vic) s 41.

8 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 49 (Jill Hennessy, Attorney-General).

9 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

10 *Guardianship and Administration Act 2019* (Vic) s 7.



OPA has also reflected that for Australia's First Peoples, the words 'protection' and 'intervention' historically have not been associated with positive outcomes for First Peoples. In light of this, and the importance of self-determination and cultural rights for Australia's First Peoples, it is concerning that across Australia there appears to be an overrepresentation of First Peoples in guardianship and administration matters.

### 2.1.3 Drivers of guardianship

OPA has reflected on drivers of guardianship that are at odds with the intention of the Act, and those that are not.

Drivers at odds with the intention of the Act include:

- **Broad-brush medical reports about decision-making capacity**  
VCAT appears to rely, either entirely or predominantly, on medical evidence of decision-making capacity. However, medical reports may describe in overly broad terms the personal matters for which a proposed represented person lacks decision-making capacity. This means, in turn, that orders may be made conferring overly broad decision-making powers on guardians. There is also a challenge for VCAT in making tailored and proportional orders and, at the same time, ensuring orders have the flexibility to adapt to circumstances that arise.
- **Lack of less restrictive options due to lack of resourcing**  
VCAT needs to be satisfied, when determining if a person is in need of a guardian, that there is no less restrictive option available. The lack of alternative less restrictive options to guardianship is one of the drivers of guardianship. There is a lack of resourcing of supported decision-making services, no funded supportive guardian program for people who do not have someone in their life who could act in this role, and limited availability of advocacy services that can be accessed in a timely way to divert appropriate matters from guardianship.
- **Service systems, including the NDIS, failing to make adequate adjustments**  
Complex service systems which fail to provide adequate supports and adjustments for people with cognitive disability are a key driver of guardianship orders, in particular, the NDIS. This is at odds with a key object of the *National Disability Insurance Scheme Act 2013* (NDIS Act) and with the intention of Victoria's Guardianship and Administration Act. OPA's data shows that the largest group of people who the Public Advocate is guardian for has changed from older people with dementia, to younger people with an intellectual disability, followed by people with a psychosocial disability. Concerningly, the younger a person is at the time they are made subject to OPA guardianship, the longer they will typically spend under guardianship.

The complexities of the system are compounded for NDIS participants who require specialised and intensive coordinated support in accessing NDIS services. Even though service agreements are not legally required for the provision or receipt of most types of NDIS supports, service providers often seek these for business reasons, and this can act as a driver of guardianship orders when there is no one else with authority to sign them. Also of concern, is that people are staying under guardianship for longer, often because of delays in securing housing, services or adequate NDIS plan funding.

There is an important role for the NDIA to play in ensuring that systems and processes associated with the NDIS do not act as a driver of guardianship, and there are a number of ways that the NDIA could act to better facilitate people with disability being able to navigate the NDIS.



While the aged care system is easier to navigate, OPA has similar concerns that the limited availability of appropriate advocacy and supported decision-making services, and lack of adjustments in the service system, are leading to guardianship being used to fill service gaps. In addition, people working in mainstream services may be able to assist a person to seek services and support yet not see this type of assistance as within their role, leading to guardianship applications being made.

- **Barriers to transition out of guardianship**

The indefinite nature of most guardianship orders, which requires VCAT to conduct a reassessment and receive fresh evidence before the order can be revoked, may act as a barrier to people exiting guardianship at the earliest appropriate time, especially if no-one is agitating for revocation of the order. The lack of housing, or the lack of options for service provision, can also lead to people staying on orders for longer.

Drivers that are not at odds with the intention of the Act include:

- **Conflict, or actions of others, impacting on individuals' rights**

Actions of others may adversely impact on the dignity, equality and autonomy of a person with disability. In these circumstances, having a guardian who complies with their duties and acts in accordance with the principles of the Act can promote the person's autonomy and other rights. For example, by ensuring the person's will and preferences direct decisions as far as possible, acting as an advocate for the person, and acting to protect the represented person from neglect, abuse or exploitation.

The protective function of guardianship might be needed even if advocacy or supported decision-making services were available. However, the need for guardianship for at-risk adults may become less over time if the recommendations OPA made in its report, *Line of Sight: Refocusing Victoria's adult safeguarding laws and practice*, are implemented. These recommendations are aimed at improving Victoria's safeguarding laws and practices for *all* at-risk adults.

- **Complex circumstances and attitudinal barriers impacting on individuals' rights**

There may be circumstances where less restrictive options may not be effective in promoting the dignity, equality and autonomy of a person with disability who doesn't have decision-making capacity for the matter. Complex circumstances, combined with discriminatory societal attitudes or assumptions, can act as barriers to a person exercising their rights. The need for a guardian in these circumstances may reflect that the human rights principles underlying the Guardianship and Administration Act have not yet been broadly embraced by society, and that paternalistic attitudes and ableist assumptions about people with cognitive disability remain.

## 2.1.4 Missing pieces — Inclusion, supported decision-making and advocacy

### Inclusion

The Guardianship and Administration Act is ahead of a broader change in societal views. It is also ahead of some areas of other legislation that retain a 'best interests' paradigm. Greater involvement of people with lived experience of disability is needed to promote awareness of the Act and its intention. Centring the voice of people with lived experience is the best way to shift broader societal views and to challenge deeply-rooted exclusionary attitudes and prejudices.



## Support for decision-making

A key learning from a 2016 pilot supported decision-making project of OPA and VALID (the OVAL project) was that many of the NDIS participants who were part of the project had few prior opportunities to make decisions, with or without support, in their day-to-day lives. This meant that they were overwhelmed when faced with the level of decision-making required in relation to their NDIS Plan. This project has highlighted that a range of options for people to access support for decision-making are needed.

Supported decision-making services need to be resourced, and a funded supportive guardianship program is needed, so that people who do not have anyone in their lives to support their decision-making can have a supportive guardian appointed in appropriate circumstances.

## Advocacy

To avoid an over-reliance on guardianship for navigating service systems, timely access to advocacy services is vital. To maximise the diversion of inappropriate matters from guardianship, advocacy services must be available at the time when guardianship is being contemplated, for example, when a person is considering making an application or VCAT is hearing a matter. This should include access to legal advocacy.

## Pilot project to trial OPA recommendations — ‘Supported Discussions’ project

In 2023 OPA will undertake a pilot project that will put into action some of the recommendations made in this report.

OPA will:

- undertake short term advocacy in appropriate matters using a supported decision-making approach and will provide education to service system organisations through direct engagement with workers
- deliver education to staff at organisations that are part of the service system – both to smaller and larger groups, and via a short video that will be developed as part of the project.

The project will highlight that an approach informed by supported decision-making principles is about:

- removing barriers
- making reasonable adjustments
- focusing on whether the person can make the decision/s with practicable and appropriate support.

The heart of the project will be the voice of people with disability, recognising that the expertise about what strategies service system organisations can use to best support and promote choice and control for people with disability, comes from people with lived experience.

## 2.1.5 OPA recommendations

OPA makes the following recommendations.

### Recommendation 1

That the Victorian Government undertake or commission a review of the *Guardianship and Administration Act 2019* and its implementation to inquire into, among other things, whether the Act is realising its intention.



Among other things, such a review could inquire into:

- Whether additional time, resourcing and expertise is needed for decision-making capacity assessments to meet the Act's intention of 'preventing arbitrary and unnecessary intrusions on the right of people with disability to make decisions that affect their life.'<sup>11</sup>
- Barriers and challenges for VCAT in crafting orders that are 'proportional and tailored to the person's individual circumstances.'
- Whether the Act should include an automatic and rebuttable role for parents of adult children with significant cognitive disability as their legal 'supporter'.
- Whether the Act should clarify when and how a represented person who is able to make specific decisions within scope of the guardianship order may do so, and clarify for guardians their role in assessing the represented person's capacity to make specific decisions.

### **Recommendation 2**

That reference to 'disability' is removed from the Guardianship and Administration Act where this relates to the appointment of a guardian or administrator, so that the focus is on whether the person does not have decision-making capacity for a particular matter, rather than the person not having decision-making capacity *because* of their disability.

### **Recommendation 3**

That the Victorian Government make legislative reforms to grant VCAT the power to make a wider range of orders in relation to at-risk adults, as alternatives to guardianship orders, such as:

- entry and assessment orders
- removal and placement orders
- service provision orders
- banning orders.

### **Recommendation 4**

That the Victorian and Australian Governments give effect to the right of people with disability to support they may require to participate in decision-making by providing appropriate funding to establish a range of programs, recognising that effective support for decisions will be different for different people.

### **Recommendation 5**

That the Victorian Government fund a supportive guardianship program for people with no one available in their lives who could take on this role.

### **Recommendation 6**

That the Victorian and Australian Governments acknowledge the essential role independent advocacy plays for people with cognitive impairment in promoting positive outcomes in consumer choice-driven social care settings, and provide increased advocacy funding through the National Disability Advocacy Program and Victorian Government programs.

---

<sup>11</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).



### **Recommendation 7**

That the Victorian Government ensure the timely availability of funded advocacy services when guardianship is being contemplated as an option for a person, in order to enable diversion from guardianship in appropriate circumstances, and that this include both access to individual advocacy and legal advocacy.

### **Recommendation 8**

That the Victorian Government fund an initiative(s) that employs people with lived experience of disability to provide community education about the underlying principles and intention of the Act, and their importance for people with disability.

### **Recommendation 9**

That the NDIA provide funding for decision-making support for NDIS participants within their NDIS plans, where this is reasonable and necessary.

### **Recommendation 10**

That the NDIA proactively facilitate ways for people with disability to participate in the NDIS without the need for substitute decision-making. This may include ensuring appropriate access to advocacy and decision-making supports, setting clearer expectations regarding support coordinators' capacity building role, and providing better education and guidance to service providers about how to work with participants and their supporters to establish agreement about services to be provided in the absence of a formal contract for services.

### **Recommendation 11**

That the NDIA have a transparent and effective 'provider of last resort' system that ensures:

- provider of last resort mechanisms are established as an ongoing component of the NDIS market
- multiple designated providers of last resort are clearly identified
- providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure
- as soon as possible, participants are transitioned back to support outside provider of last resort arrangements.

### **Recommendation 12**

That the Victorian Government fund proven programs that embody a wraparound approach to housing and service provision for people with disability.

### **Recommendation 13**

That the Australian Government undertake, or commission, an inquiry into the apparent over-representation of First Peoples in guardianship.

## 3 Overview of the intention of the Act and key aspects of the Act

In this section OPA reflects on the intention of the Guardianship and Administration Act and some key provisions of the Act.

### 3.1 The intention of the Act

In 2018, in the Second Reading Speech, the then Attorney-General, The Hon Jill Hennessey, said of the Bill that:<sup>12</sup>

[It] represents a milestone in the way that Victoria upholds the rights and meets the needs of people with disability whose decision-making capacity is impaired. It moves away from the old ‘best interests’ principle that underpinned a paternalistic approach to disability, to a position of promoting the dignity, equality and autonomy of people living with disability, while retaining the safeguards necessary for them to most fully realise their potential.<sup>13</sup>

Below OPA reflects on the primary objective of the Act and the Second Reading Speech, to understand the intention of the Act as it relates to guardianship and the role of the Public Advocate.

Later in this report, OPA reflects on the drivers of guardianship. OPA is interested to understand whether the drivers of guardianship align with the intention of the Act, and whether there are barriers or factors impeding the full realisation of the intention of the Act.

Key aspects of the intention of the Act as it relates to guardianship are to:

- align concepts and terminology with the Convention on the Rights of Persons with Disabilities (CRPD)
- strike a balance between competing rights
- ensure will and preferences direct decisions as far as possible
- prevent unnecessary intrusions on the right to make decisions
- recognise supported decision-making
- ensure VCAT orders are proportional and tailored
- continue the role of the Public Advocate:
  - as an independent statutory office that promotes the rights and interests of people with disability, and
  - as guardian of last resort, where there is no-one else available or suitable for appointment.

#### 3.1.1 Align concepts and terminology with the CRPD

The Act explicitly refers to the CRPD.<sup>14</sup> The shift in thinking and changing circumstances that underly the Act are described by the Victorian Government:


[The Act] replace[s] the 1986 Act with a law that reflects a contemporary understanding of decision-making capacity and disability, and recognises the rights of people with a

---

<sup>12</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 60-63 (Jill Hennessey, Attorney-General).

<sup>13</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 63 (Jill Hennessey, Attorney-General).

<sup>14</sup> *Guardianship and Administration Act 2019* (Vic) s 7(1)(a).



decision-making impairment and the responsibilities of those who interact with such people – carers, health and accommodation providers, and the courts and tribunals. The challenges have shifted from de-institutionalising the many people whose disability was treated as a condition best managed behind secure walls, to managing the increasing numbers of people living in the community who lose their capacity through the onset of dementia or an acquired brain injury.

Australian legislation increasingly seeks to fully recognise the dignity, equality and autonomy of people with disability, whose fundamental rights have been enshrined in the United Nations Convention on the Rights of Persons with Disabilities. Australia was an original signatory to the Convention in 2008. This Bill draws on the Convention, and also on the 2012 Report of the Victorian Law Reform Commission on Guardianship, the 2015 Report of the Australian Law Reform Commission on Equality, Capacity and Disability in Commonwealth Laws, and recent Victorian legislation, such as the *Powers of Attorney Act 2014* (POA Act), the *Mental Health Act 2014* and the *Medical Treatment Planning and Decisions Act 2016* (MTPD Act). The Government has sought to align the concepts and terminology in this Bill as much as possible with these other Acts to promote consistent approaches and understanding of the rights, responsibilities and functions in relation to substitute decision-making that are articulated in these pieces of legislation.<sup>15</sup>

### 3.1.2 Strike a balance between competing rights

The Act is described as seeking to strike a balance between competing rights:

There is an ongoing discussion about how the balance should be struck between recognising the rights of people with disability to make their own decisions, and ensuring that there are effective mechanisms for protection when protection is needed. Some advocates and organisations emphasise that a person's will and preferences should be given priority in all but very limited circumstances. Others are concerned that the barriers to protective action by VCAT or a guardian or administrator should not be so high as to render such action unavailable when it is needed, despite a represented person's will and preferences.

The Bill strikes this balance by recognising the need to support people with disability to make, participate in and implement decisions that affect their lives, and otherwise providing that a person's will and preferences should direct decisions affecting the person as far as possible.

### 3.1.3 Ensure will and preferences direct decisions as far as possible

Under the Act, guardians must give effect to a represented person's known or likely will and preferences where possible, and can only override the will and preferences of the represented person where it is necessary to do so to prevent serious harm to the represented person.

The Victorian Government has stated that it 'believes that this is the best approach to promoting the rights of people with disability, while ensuring their safety and welfare. It is a significant

---

<sup>15</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 60 (Jill Hennessy, Attorney-General).



departure from the notion of decision-making in the 'best interests' of people with disability, which will enhance their autonomy, dignity and equality.<sup>16</sup>

### 3.1.4 Prevent unnecessary intrusions on the right to make decisions

The definition of decision-making capacity is a key provision of the Act and the Government has outlined the intention behind the provision:

The definition of decision-making capacity is intended to promote each person's right to recognition and equality before the law, and prevent arbitrary and unnecessary intrusions on the right to make decisions that affect their life. The definition is intended to prevent unnecessary appointments of guardians and administrators. VCAT will not be able to appoint a guardian or administrator simply because a person has a disability, or because someone else thinks that the person is making unwise decisions.<sup>17</sup>

### 3.1.5 Recognise supported decision-making

The importance of supported decision-making is recognised in the Act:

Supported decision-making signifies a shift from the traditionally held view that decision-making capacity is an absolute concept. It recognises the reality that a person can experience partial or fluctuating capacity and that capacity can depend on the nature of the particular decisions and the context in which they are made.<sup>18</sup>

Under the Act, VCAT can appoint a supportive guardian or administrator who 'will be empowered to support the person to make and give effect to their own decisions'.<sup>19</sup>

Two reasons why VCAT's ability to do this may be useful were described in the Second Reading Speech. This may be 'where VCAT decides in a proceeding that while a guardianship order is unnecessary, appointing a supportive guardian would assist the person in making and communicating their decisions'. Or a person may apply to VCAT for a supportive appointment if 'their capacity to make decisions with support is questioned'.<sup>20</sup>

### 3.1.6 Ensure VCAT orders are proportional and tailored

The nature of VCAT orders under the Act has been described by the Victorian Government:

The [Act] retains the important role of VCAT in making guardianship and administration orders in relation to adults but ensures that an order is proportional and tailored to the person's individual circumstances.<sup>21</sup>

### 3.1.7 Continue the role of the Public Advocate

The Government has described the role of the Public Advocate under the Act as continuing 'as an independent statutory office that promotes the rights and interests of people with disability.'

---

16 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 60-61 (Jill Hennessy, Attorney-General).


17 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

18 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

19 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

20 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

21 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).



VCAT will continue to have the power to appoint the Public Advocate as a person's guardian where there is no-one else available or suitable for appointment.<sup>22</sup>

## 3.2 Key aspects of the Act

In this sub-section of the report, OPA outlines key aspects of the Guardianship and Administration Act. OPA has particular interest in aspects of Act that seek to align guardianship law with the CRPD.

The CRPD is referred to in the Guardianship and Administration Act. One element of the primary object of the Act is to:

[P]rotect and promote the human rights and dignity of persons with a disability by having regard to the Convention on the Rights of Persons with Disabilities, recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives.<sup>23</sup>

This section of the Act also states that if a guardianship order is made, the Act seeks to protect and promote the human rights and dignity of persons with disability by providing guidance for guardians, enabling VCAT to set safeguards and appropriate limitations on the powers of guardians, and requiring VCAT to review the order regularly.<sup>24</sup>

In providing an overview of some key aspects of the Act below, OPA does not seek to provide a comprehensive overview of the Act.

### 3.2.1 The functions and powers of the Public Advocate

The functions of the Public Advocate are set out in the Guardianship and Administration Act.<sup>25</sup> They include to:

- promote the human rights of people with disability
- coordinate programs that do this
- promote the development of the ability of people with disability to act independently
- encourage services that do this and that promote accessibility
- protect persons with a disability from abuse, neglect and exploitation
- undertake advocacy for people with disability on a systemic and individual basis
- encourage programs and services that minimise restrictions on human rights
- promote community understanding of relevant laws in these areas
- make relevant recommendations for changes to the law or to the functions of OPA.

#### **Powers and duties of the Public Advocate**

Under the Act, the Public Advocate may be appointed by the Victorian Civil and Administrative Tribunal (VCAT) to be guardian for a person. VCAT can only appoint the Public Advocate if it is satisfied that there is no other person who fulfils the requirements under the Act for being a guardian.<sup>26</sup>

---

<sup>22</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 62 (Jill Hennessy, Attorney-General).

<sup>23</sup> *Guardianship and Administration Act 2019* (Vic) s 7(1)(a).

<sup>24</sup> *Guardianship and Administration Act 2019* (Vic) s 7(1)(b).

<sup>25</sup> *Guardianship and Administration Act 2019 Act* (Vic) s 15.

<sup>26</sup> *Guardianship and Administration Act 2019 Act* (Vic) s 33.



The Public Advocate can then delegate the powers and duties in the order to a staff member from her office.<sup>27</sup> (In this report, for simplicity, we will often refer to OPA being appointed guardian.)

Under the Act, the Public Advocate may also:

- advocate for the human rights and interests of a person with disability
- provide advice and information about guardianship, supported decision-making laws and medical decision-making laws
- investigate any complaint or allegation that a person is under inappropriate guardianship, is being exploited or abused or is in need of guardianship
- make an application to VCAT for the appointment of a guardian, supportive guardian, an administrator, or a supportive administrator
- intervene in any Guardianship and Administration Act proceeding
- investigate any matter in a Guardianship and Administration Act proceeding referred by VCAT
- enter particular premises where people with disability may reside or receive services and make enquiries relating to the admission, care, detention, treatment or control of any such person.<sup>28</sup>

### 3.2.2 Definition of decision-making capacity

As described above, the definition of decision-making capacity 'is intended to promote each person's right to recognition and equality before the law, and prevent arbitrary and unnecessary intrusions on the right to make decisions that affect their life'.<sup>29</sup> The Act includes significant detail about the meaning of decision-making capacity.<sup>30</sup>

It states that a person is presumed to have decision-making capacity unless there is evidence to the contrary.<sup>31</sup>

It states that a person has decision-making capacity for a matter if they are able to:

- understand the information relevant to the decision and the effect of the decision
- retain that information to the extent necessary to make the decision
- use or weigh that information as part of the process of making the decision
- communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.<sup>32</sup>

The Act also includes the following:

- A person is taken to understand the information relevant to a decision if they understand an explanation given to them in a way that is appropriate to their circumstances, for example modified language, or visual aids.<sup>33</sup>
- A person may have decision-making capacity in relation to some matters and not others.<sup>34</sup>
- If a person does not have decision-making capacity in relation to a matter, it may be temporary.<sup>35</sup>

---

27 *Guardianship and Administration Act 2019 Act (Vic)* s 19(1)(b).

28 *Guardianship and Administration Act 2019 Act (Vic)* ss 16(1), 17.

29 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

30 *Guardianship and Administration Act 2019 (Vic)* s 5.

31 *Guardianship and Administration Act 2019 (Vic)* s 5(2).

32 *Guardianship and Administration Act 2019 (Vic)* s 5(1).

33 *Guardianship and Administration Act 2019 (Vic)* s 5(3).

34 *Guardianship and Administration Act 2019 (Vic)* s 5(4)(a).

35 *Guardianship and Administration Act 2019 (Vic)* s 5(4)(b).



- It should not be assumed that a person does not have decision-making capacity in relation to a matter:
  - on the basis of their appearance
  - merely because they make a decision that, in the opinion of others, is unwise.<sup>36</sup>
- A person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.<sup>37</sup>

When assessing whether a person has decision-making capacity in relation to a matter, reasonable steps must be taken to conduct the assessment at a time at which, and in an environment in which, the person's decision-making capacity can be assessed most accurately.<sup>38</sup>

### 3.2.3 Role and responsibilities of guardians

A guardianship order specifies the personal matter(s) the guardian can make decisions about, such as:

- where the represented person lives
- with whom the represented person lives
- whether any services are needed and if so which ones
- medical treatment
- who has access to the represented person and under what circumstances.

Depending on the specific decision that needs to be made, the represented person may be able to make the decision. They may be able to do so without support, or may be able to do so with the support of the guardian or another person.

#### How guardians make decisions

If the represented person cannot be supported to make their own decision about the matter, the guardian makes the decision. The guardian should support the person to express their will and preferences and to participate as much as possible in the decision.

Under the Act, when a guardian makes a decision they should:

- give all practicable and appropriate effect to the represented person's will and preferences if these are known and, if not, to what they believe these are likely to be
- only override the represented person's will and preferences if it is necessary to do so to prevent serious harm to them
- consider the importance of any companion animal to the person
- exercise their power in a way that is the least restrictive of the ability of the represented person to decide and act as possible in the circumstances.<sup>39</sup>


---

<sup>36</sup> *Guardianship and Administration Act 2019* (Vic) s 5(4)(c)-(d).

<sup>37</sup> *Guardianship and Administration Act 2019* (Vic) s 5(4)(e). Examples of practicable and appropriate support are included in the Act. The examples are: using information or formats tailored to the particular needs of a person; communicating or assisting a person to communicate the person's decision; giving a person additional time and discussing the matter with the person; using technology that alleviates the effects of a person's disability.

<sup>38</sup> *Guardianship and Administration Act 2019 Act* (Vic) s 6.

<sup>39</sup> *Guardianship and Administration Act 2019 Act* (Vic) s 8(1)(c) and s 9.



---

In some circumstances the guardian may not be able to identify the represented person's likely will and preferences. If this is the case, they make a decision that promotes the represented person's personal and social wellbeing.<sup>40</sup>

### **Duties**

When exercising their powers under the Act, guardians must:

- act in accordance with the general principles and the decision-making principles in the Guardianship and Administration Act
- act as an advocate for the represented person
- encourage and assist the represented person to develop their decision-making capacity in relation to personal matters
- act in such a way so to protect the represented person from neglect, abuse or exploitation
- act honestly, diligently and in good faith
- exercise reasonable skill and care
- not use the position for profit
- avoid acting if there is or may be a conflict of interest
- not disclose confidential information gained as a guardian unless authorised to do so under the guardianship order or by law.<sup>41</sup>

OPA has developed a flowchart to assist guardians in understanding their role and duties. See Flowchart 1 below.

Guardians are accountable to:

- the represented person
- VCAT.

VCAT must reassess a guardianship order within 12 months of it being made, unless stated otherwise in the order.<sup>42</sup> At that time, VCAT will consider whether the guardian has performed their duties.<sup>43</sup>

---

<sup>40</sup> *Guardianship and Administration Act 2019 Act (Vic) s 9 (1)(c).*

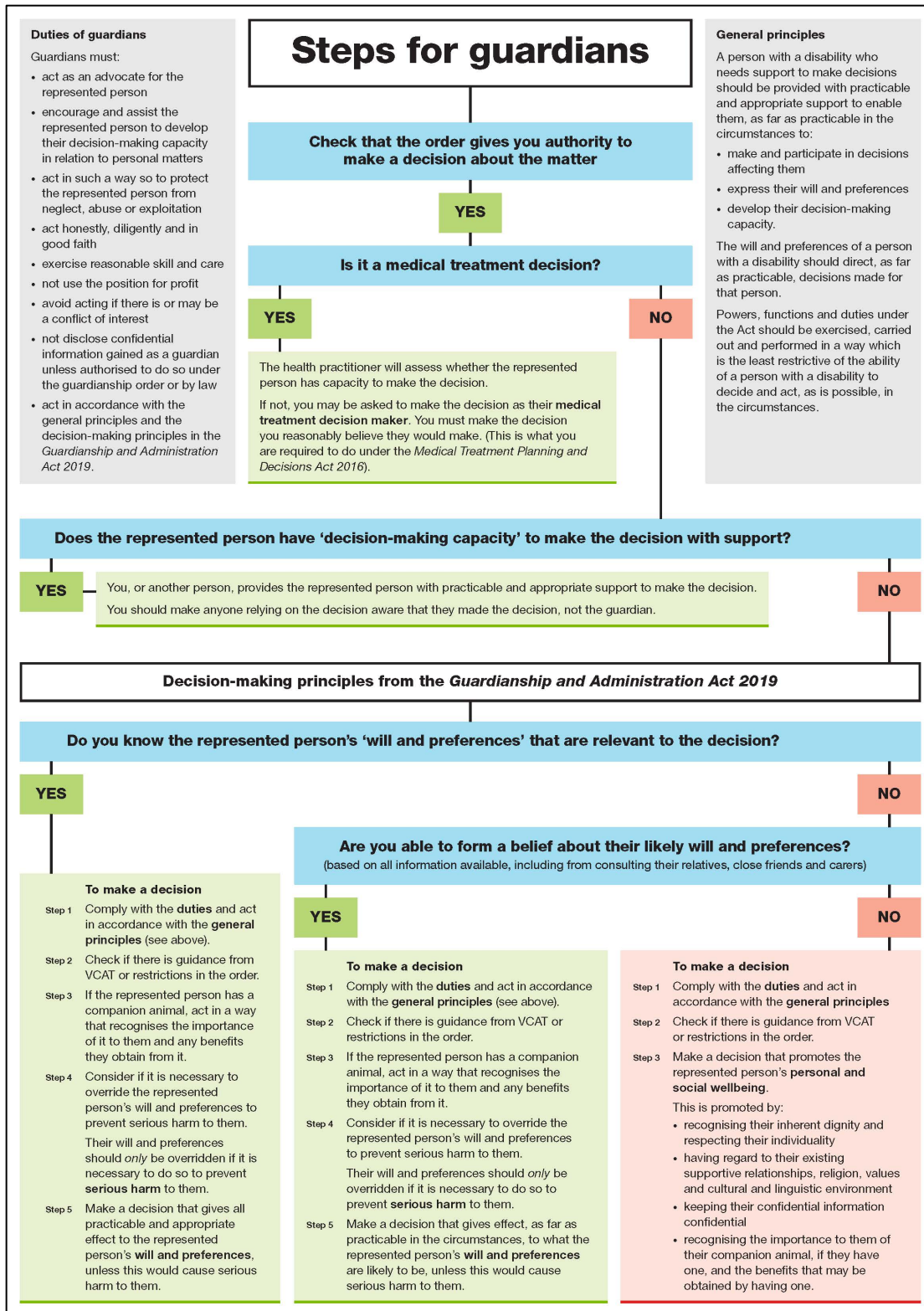
<sup>41</sup> *Guardianship and Administration Act 2019 (Vic) s 41.*

<sup>42</sup> *Guardianship and Administration Act 2019 (Vic) s 159(2)(a).*

<sup>43</sup> *Guardianship and Administration Act 2019 (Vic) s 166 (a).*



Flowchart 1. This tool to assist guardians understand their role is found in OPA’s ‘The role of a guardian’ fact sheet and in OPA’s *Guardianship Guide*.<sup>44</sup>



### 3.2.4 Option to appoint someone to support decision-making

Under the Guardianship and Administration Act 2019, VCAT can make a supportive guardianship order for a person with disability if:

- there is an application for the appointment of a guardian or supportive guardian
- the person will have decision-making capacity for the personal matter(s) in the order if given practicable and appropriate support
- the person agrees.<sup>45</sup>

The person who is to be appointed as supportive guardian needs to also agree.

A supportive guardian can support the person to make, communicate, and/or give effect to decisions about the personal matter(s) that are set out in the out in the VCAT order.

The powers that can be conferred on supportive guardians mirror those that can be conferred on supportive attorneys (for personal matters). The difference is that a supportive attorney is appointed by a person themselves under the *Powers of Attorney Act 2014*,<sup>46</sup> whereas VCAT makes the order appointing a supportive guardian for a person.

In addition to these two options, an adult can appoint a medical support person (known as a 'support person') to support them to make, communicate, and act on their medical treatment decisions and to represent their interests in relation to their medical treatment.<sup>47</sup> This appointment is made under the *Medical Treatment Planning and Decisions Act 2016*. A person can also choose a nominated person to represent their interests and support them they become a compulsory patient under the *Mental Health Act 2014*.<sup>48</sup> To make any of these appointments, the person being appointed needs to agree to take on the role.

Appointing a supporter may be helpful in making that person's role clear to everyone, and to enable them to access information on the person's behalf when they might otherwise be prevented from doing so by privacy laws. It may be helpful for VCAT to make a supportive guardian appointment if the person's capacity to make decisions with support is questioned.<sup>49</sup>

### 3.2.5 Steps for VCAT before appointing a guardian

VCAT may appoint a guardian to make decisions for another person about specified personal matter(s) if it is satisfied that:

- because of the person's disability, they do not have decision-making capacity in relation to the personal matters
- the order will promote the person's personal and social wellbeing
- the person is in need of a guardian having considered:
  - the will and preferences of the person (if VCAT can find out what these are)
  - whether the decisions for which the order is sought may be made informally or through negotiation or mediation

---

44 Office of the Public Advocate (Vic), *Guardianship Guide* (Guide, March 2020) 12 and *The role of a guardian* (Steps for guardians flowchart) (Factsheet, March 2020) <<https://www.publicadvocate.vic.gov.au/guardianship-and-administration/vcat-appointed-guardians-and-administrators/when-you-have-been-appointed-as-a-guardian>>.

45 *Guardianship and Administration Act 2019* (Vic) s 87.

46 *Powers of Attorney Act 2014* (Vic) s 85.

47 *Medical Treatment Planning and Decisions Act 2016* (Vic) s 31 and 32.

48 *Mental Health Act 2014* (Vic) s 24.

49 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

- the wishes of any primary carer, relative of the person, or someone with a direct interest in the application
- important relationships that the person has and the benefits in maintaining them.<sup>50</sup>

The Guardianship and Administration Act states that VCAT should exercise its power in a way that is the least restrictive of the ability of a person with disability to decide and act as is possible in the circumstances. The will and preference of the person should also direct, as far as practicable, decisions made for that person.<sup>51</sup>

If VCAT is satisfied that no other person fulfils the eligibility requirements set out in the Act for appointment as a guardian for the proposed represented person, VCAT may appoint the Public Advocate.<sup>52</sup>

### **Investigations**

VCAT may ask the Public Advocate to investigate and report on any matter in a guardianship proceeding. While OPA staff collect and provide information, it is VCAT that decides whether a guardian is needed and, if so, who should be appointed.

### **Hearings**

Under the Act, the person who is the subject of the application must be at the hearing so they have the chance to have their say, unless they do not want to or it is impracticable or unreasonable.<sup>53</sup>

### **Option for VCAT to appoint a supportive guardian**

If there is an application for a guardianship order, VCAT may also consider making a supportive guardianship order.<sup>54</sup>

---

50 *Guardianship and Administration Act 2019 Act (Vic)* s 30(2).

51 *Guardianship and Administration Act 2019 Act (Vic)* s 8(1)(a)-(c) and s 8(2).

52 *Guardianship and Administration Act 2019 Act (Vic)* s 33(1).

53 *Guardianship and Administration Act 2019 Act (Vic)* s 29.

54 *Guardianship and Administration Act 2019 Act (Vic)* s 87.

## 4 Human rights and guardianship

In this section OPA reflects on the interplay of human rights with guardianship.

In it OPA:

- briefly describes what the Victorian Government has said about the Guardianship and Administration Act and its compliance with human rights
- describes OPA's human rights approach
- reflects on the relevance of the Charter
- reflects on the relevance of the CRPD
- identifies human rights that may be promoted or limited in guardianship matters
- reflects on the impact of guardianship for First Nations' peoples.

### 4.1 The Victorian Government position

In relation to human rights, the Victorian Government has said of the Guardianship and Administration Act, that it is 'compatible with human rights as set out in the Charter',<sup>55</sup> and that:

- It 'aims to provide a solution to the challenges posed when a person with disability lacks decision-making capacity in relation to certain matters'.
- Its provisions 'are to be interpreted to adopt the way which is the least restrictive of a person's ability to decide and act'.
- It broadly reflects 'the paradigm shift signalled in the United Nations Convention on the Rights of Persons with Disabilities... view[ing] people with disability not as 'objects' of charity, medical treatment and social protection; but rather as 'subjects' with human rights to recognise people with disability as persons before the law and their right to make decisions for themselves'.<sup>56</sup>

#### **The Act is directed at people with disability**

The Government has also acknowledged that the Act is 'directed towards people with disability'<sup>57</sup> with VCAT only able to make a guardianship order if, among other things, 'because of the proposed represented person's disability'<sup>58</sup> they do not have decision-making capacity for the personal matter. The Government has recognised that:

To the extent that the [Act] treats persons with disability unfavourably because of their disability by potentially restricting their personal autonomy, [it] will be discriminatory in its effect, and its operation as a whole will limit the right to equality.<sup>59</sup>

In 2018, the then Attorney-General stated that:

In my view, to the extent that the making of a guardianship or administration order limits the right to equality, any such limitation is demonstrably justifiable and constitutes the minimum interference necessary to enable persons with limited decision-making capacity to participate in society and enjoy personal and social wellbeing.<sup>60</sup>

---

55 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 49 (Jill Hennessy, Attorney-General).

56 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 49 (Jill Hennessy, Attorney-General).

57 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 50 (Jill Hennessy, Attorney-General).

58 *Guardianship and Administration Act 2019* (Vic) s 30(2)(a).

59 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 50 (Jill Hennessy, Attorney-General).

60 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 51 (Jill Hennessy, Attorney-General).

## 4.2 OPA's human rights approach

In this report, as across all OPA's submissions and reports, OPA applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society
- recognises that the vast majority of challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual
- considers impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

OPA brings this lens to its reflection on the drivers of guardianship and the practical operation of the Act. This approach is the foundation for a pilot project described later in this report that will trial an approach to divert appropriate matters from guardianship.

### Reflections in this section

This section primarily reflects on circumstances where the Public Advocate is appointed guardian for a person. OPA does not have information about how private guardians are putting into practice their role under the new Guardianship and Administration Act, so does not focus upon this aspect of the implementation of the new Act.

The Public Advocate and her staff also adopt a human rights approach because:

- a function of the Public Advocate is to promote the human rights of persons with a disability<sup>61</sup>
- the Public Advocate and her staff must comply with the Charter.

## 4.3 Victoria's Charter of Human Rights and Responsibilities

In addition to its obligations under the Guardianship and Administration Act, the Public Advocate and OPA employees have obligations under Victoria's Charter of Human Rights and Responsibilities Act.<sup>62</sup> Private guardians do not have these obligations.

Under Victoria's Charter, VCAT and OPA employees must act in a way that is compatible with human rights, and when making a decision must give proper consideration to relevant human rights.<sup>63</sup>

Examples of Charter rights that may be relevant or limited, depending on the guardianship order and circumstances — and that OPA guardians must give proper consideration to — include the right to recognition and equality before the law,<sup>64</sup> the right to protection from torture and cruel, inhuman or degrading treatment,<sup>65</sup> the right to freedom of movement,<sup>66</sup> the right to privacy and reputation,<sup>67</sup> and the right to freedom of association.<sup>68</sup>

---

61 *Guardianship and Administration Act 2019* (Vic) s 15(a).

62 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6.

63 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

64 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

65 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

66 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12.

67 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

68 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16.



### When human rights may be limited

Under the Victorian Charter, a human right may only be subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>69</sup>

A public authority can only limit a human right to the extent provided for in the Charter.<sup>70</sup>

For example, OPA guardians may limit the right to freedom of movement of a represented person if making an accommodation decision contrary to the person's will and preferences. In such circumstances, an OPA guardian is obligated to ensure the limitation is lawful and justified under the Charter. The justification for limiting one right may be the need to promote and protect another right, and to prevent serious harm to the person.

## 4.4 The Convention on the Rights of Persons with Disabilities

A key aspect of the Act's primary object is to:

[P]rotect and promote the human rights and dignity of persons with a disability by having regard to the Convention on the Rights of Persons with Disabilities, recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives.<sup>71</sup>

In this section, OPA reflects on human rights that may be promoted or limited by guardianship. OPA seeks to identify key relevant rights in the CRPD and briefly outlines below some relevant articles of the CRPD. OPA also reflects on some related aspects of Victoria's Charter. OPA does not seek to create a comprehensive list of all rights that may be impacted by guardianship.

OPA's purpose here is to ensure that it brings a human rights lens to this reflection on guardianship.

## 4.5 Autonomy

When a guardian is appointed for a person that person's legal right to make some decisions is given over to a guardian who acts on their behalf. Article 12 of the CRPD is about people with disability enjoying legal capacity on an equal basis with others in all aspects of life and article 5 is about all people being equal before and under the law and being entitled without any discrimination to the equal protection and equal benefit of the law.<sup>72</sup>

The right of all people to personal autonomy, 'to determine who they are, how they will live their lives and what should be done to them', is a 'dimension' of the right to privacy in the Victorian

---

<sup>69</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>70</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(3).

<sup>71</sup> *Guardianship and Administration Act 2019* (Vic) s 7(1)(a).

<sup>72</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5 and 12.



Charter of Human Rights and Responsibilities Act.<sup>73</sup> '[T]he right is not absolute and may be limited where this is justified according to the strict human rights standard (s 7(2)).' A guardianship order confers power on the person appointed to make decisions for another person about the personal matters set out in the order<sup>74</sup>, and thereby engages this dimension of the right to privacy.

In Victoria, a guardianship order can only be made when VCAT determines that it is needed. In determining if the order is needed, among other things, VCAT must consider whether the decision may more suitably be made by informal means.<sup>75</sup> In the case of appointments of the Public Advocate as guardian, these appointments may only be made if there is no other person who fulfils the requirements to be appointed guardian.<sup>76</sup>

### **Duties of guardians<sup>77</sup> and promotion of autonomy**

Article 12 of the CRPD emphasises the will and preference of persons with disability. Article 12(4) of the CPRD provides that measures that relate to the exercise of legal capacity on behalf of a person with disability must respect the 'rights, will and preferences of the person'.<sup>78</sup>

When making a decision under the Guardianship and Administration Act, the guardian should give effect to the will and preferences of the represented person, and may only override their will and preference when it is necessary to do so to prevent serious harm to them. In addition, only when it is not possible for the guardian to establish the represented person's likely will and preferences, can they move to the next step of making a decision that promotes the personal and social wellbeing of the person. In any decision, guardians must act in a way that is least restrictive of the person's freedom of decision and action as is possible in the circumstances.<sup>79</sup>

Under the Act, guardians have duties to encourage and assist the represented person to develop their decision-making capacity in relation to personal matters, and to act as an advocate for the represented person.<sup>80</sup>

## **4.6 Protection from exploitation, violence and abuse**

Article 16 of the CRPD states that:

States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.<sup>81</sup>

One of the duties of a guardian under the Guardianship and Administration Act relates to this. Guardians have a duty to act in such a way as to protect the represented person from neglect, abuse or exploitation.<sup>82</sup> A guardian may also be acting to protect the represented person from

---

73 *PBU and NJE v Mental Health Tribunal* [2018] VSC 564 [127]

74 *Guardianship and Administration Act 2019* (Vic) s 38.

75 *Guardianship and Administration Act 2019* (Vic) s 30(2)(b) and s 31(b).

76 *Guardianship and Administration Act 2019* (Vic) s 33.

77 *Guardianship and Administration Act 2019* (Vic) s 41.

78 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

79 *Guardianship and Administration Act 2019* (Vic) s 8(1)(c).

80 *Guardianship and Administration Act 2019* (Vic) s 41(1)(b)-(c) and s 8(1)(a).

81 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 16.

82 *Guardianship and Administration Act 2019* (Vic) s 41(1)(d).



violence, abuse, neglect or exploitation when making a decision that overrides the person's will and preferences in order to prevent serious harm to the person.

## 4.7 Living independently and being included in the community

The appointment of a guardian may promote the represented person's right to live independently and be included in the community, for example through access to services that are needed.

Article 19 of the CRPD is about this right. It describes the 'equal right of all persons with disabilities to live in the community, with choices equal to others'. It recognises that people with disability should have 'the opportunity to choose their place of residence and where and with whom they live on an equal basis with others', and that people with disability should have 'access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community'.<sup>83</sup>

The right to freedom of movement under the Victoria's Charter of Human Rights and Responsibilities Act also includes the freedom to choose where to live.<sup>84</sup>

## 4.8 Access to healthcare

Article 25 of the CRPD is about health and states that people with disability 'have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability' and should be provided with 'the same range, quality and standard of free or affordable health care and programmes as provided to other persons'. Health professionals should provide 'care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent'.<sup>85</sup>

Under section 10(c) of Victoria's Charter of Human Rights and Responsibilities Act, a person must not be subjected to medical treatment without full, free and informed consent.<sup>86</sup>

In Victoria, if a health practitioner determines that a person does not have decision-making capacity for a medical treatment decision, they must follow the process set out in the Medical Treatment Planning and Decisions Act.<sup>87</sup> This may involve seeking a decision by the person's medical treatment decision maker. Sometimes a guardian appointed by VCAT will be the person's medical treatment decision maker.<sup>88</sup>

If a guardian is appointed with power to make medical treatment decisions — in addition to being required to follow the process in the Medical Treatment Planning and Decisions Act — they have duties as a guardian. These duties include acting as an advocate for the represented person. Depending on the circumstances, this may include advocating for the represented person to receive healthcare on an equal basis with others without discrimination.

---

<sup>83</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 19.

<sup>84</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12.

<sup>85</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 25.

<sup>86</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

<sup>87</sup> *Medical Treatment Planning and Decisions Act 2016* (Vic) s 58.

<sup>88</sup> The Medical Treatment Planning and Decisions Act sets out who is a person's medical treatment decisions maker: *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55.



## Coercive authority

The right to autonomy and the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability, can be competing rights in some circumstances.

VCAT can make orders authorising police, the ambulance service, or others provide assistance to enforce a decision of the guardian.<sup>89</sup> The main use of such orders is to facilitate the transport to hospital of a person who, because of a cognitive impairment, is unable to appreciate the need for treatment.<sup>90</sup>

## Restraint

A recent decision of VCAT has provided clarity about whether the scope of a guardian's power to make decisions about medical treatment extends to making decisions about restraint, if that restraint is required to provide medical treatment.<sup>91</sup>

OPA and the Victorian Equal Opportunity and Human Rights Commission (which intervened in the matter) held the view that:

[I]t would be incompatible with section 10(c) of the Charter to incorporate within the notion of “medical treatment” use of coercion, force or subterfuge.<sup>92</sup>

And, in relation to the Medical Treatment Planning and Decisions Act, OPA held the view that:

[I]t would be a strange interpretation... to incorporate the use of restrictive interventions within the meaning of “medical treatment”.<sup>93</sup>

VCAT found that the Guardianship and Administration Act ‘does not empower a guardian to authorise physical coercion or forcible physical restraint when authorising medical treatment’.<sup>94</sup>

It found that:

The use of restraint for the purposes of providing medical treatment may however, be authorised by way of an application brought pursuant of section 45 of the Guardianship and Administration Act. In our view, section 45 was intended by the legislature to allow for the enforcement or implementation of a decision of a guardian in a manner which provides for oversight by the Tribunal.<sup>95</sup>

## 4.9 Child-rearing rights and respect for family and home

Article 23 of the CRPD is about respect for home and is about the elimination of discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships. For example, it states that ‘[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents’.<sup>96</sup>

---

89 *Guardianship and Administration Act 2016* (Vic) s 45.

90 In 2021-2022, 26 clients of OPA were impacted by these orders, with less than half of the orders used: Office of the Public Advocate (Victoria), *Annual Report 2022* (Report, 2022) 15.

91 HYY (Guardianship) [2022] VCAT 97

92 HYY (Guardianship) [2022] VCAT 97 [Par 72(g)].

93 HYY (Guardianship) [2022] VCAT 97 [Par 72(f)].

94 HYY (Guardianship) [2022] VCAT 97 [Par 203].

95 HYY (Guardianship) [2022] VCAT 97 [Par 204].

96 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 23.



An example in relation to this area is that OPA guardians may play an advocacy role in relation to promoting the represented person's child-rearing right if child protection becomes involved in the life of the represented person, or if there is a family law matter that may impact on the represented person's right to raise their child. If the guardian has been appointed by VCAT with authority to make decisions about whether any services are needed and if so which ones, this aspect of the guardian's role will be important. OPA has observed that the parent/s with disability may have the onus placed on them to show that they have secured adequate services, despite the state's obligation under the CRPD to 'render appropriate assistance' to people with disability 'in the performance of their child-rearing responsibilities'.<sup>97</sup>

## 4.10 First Peoples, self-determination and over-representation in guardianship matters

Historically, under various laws, Australia's First Peoples have been denied the right to make decisions about the things that affect them.

[T]he powers under various Aborigines' Protection Acts had instituted legal regimes that provided for the total control of Indigenous activities, and which presumed that Indigenous people had impaired capacity in general. This may, in part, explain any reluctance of the part of Indigenous Australians to utilise the Guardianship and Administration system.<sup>98</sup>

OPA has recognised that:

Historically, the words 'protection' and 'intervention' have not been associated with positive outcomes for Aboriginal people, even where the actions of individuals offering such services may have been well-intended. There is an understandable mistrust of people who offer services based on these concepts.

Some reasons for this mistrust stem from European colonisation and the subsequent forced removal of Aboriginal children from their families and communities, resulting in the Stolen Generation.<sup>99</sup>

The Victorian Government has stated that:

Aboriginal Victorians hold the knowledge and expertise about what is best for themselves, their families and their communities.<sup>100</sup>

...[T]he United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) described self-determination as the ability for Indigenous people to freely determine their political status and pursue their economic, social and cultural development.<sup>101</sup>

---

97 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 23 [par 2].

98 Clements, Clapton and Chenoweth, "Indigenous Australians and impaired decision-making capacity" in *Australian Journal of Social Issues* Vol.45 No.3 SPRING 2010, p 388.

99 Office of the Public Advocate (Vic), *Walk with Me, Talk with Me: A practice guide for OPA staff* (Guide, May 2019) 9 <<https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/diversity-and-inclusion/171-walk-with-me-talk-with-me>>.

100 'Government's commitment to self-determination', *VIC.GOV.AU First Peoples – State Relations*, (Web page) <<https://www.firstpeoplesrelations.vic.gov.au/governments-commitment-self-determination>>.

101 'Government's commitment to self-determination', *VIC.GOV.AU First Peoples – State Relations*, (Web page) <<https://www.firstpeoplesrelations.vic.gov.au/governments-commitment-self-determination>>.

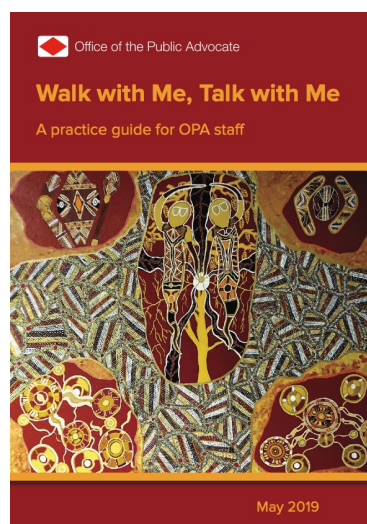
In light of this historical context, and the importance of self-determination and cultural rights for Australia's First Peoples, it is concerning that across Australia there appears to be an overrepresentation of First Peoples in guardianship matters.

OPA has recognised the importance of OPA guardians being culturally aware and guided by Aboriginal Community Controlled Organisations when acting as guardian for First Peoples. To assist OPA guardians, and other OPA staff, OPA engaged consultants to develop a practice guide called *Walk with Me, Talk with Me*.<sup>102</sup> The guide was developed as part of OPA's Koori Inclusion Action Plan.

Among other things, it recognises that:

- where possible, OPA staff should be guided by the Aboriginal workers that they will form partnerships with, as they are the best resource
- having a greater understanding of the history of Aboriginal people provides:
  - a foundation of understanding on how the past affects the Aboriginal community today and
  - better opportunities and outcomes for Aboriginal people using OPA's services.<sup>103</sup>

In 2023 OPA will have the following identified positions: a Guardianship Support / First People's Engagement Officer and an Advocate Guardian / First People's Engagement Lead.



<sup>102</sup> Office of the Public Advocate (Vic), *Walk with Me, Talk with Me: A practice guide for OPA staff* (Guide, May 2019).

<sup>103</sup> Office of the Public Advocate (Vic), *Walk with Me, Talk with Me: A practice guide for OPA staff* (Guide, May 2019) 6.

## 5 Drivers of guardianship

In this section, OPA reflects on drivers of guardianship that are at odds with the intention of the Act, and those that are not at odds with its intention. In doing so, OPA identifies barriers to the intention of the Act being fully realised and makes recommendations to address these.

The reflections are drawn from:

- OPA's observations of the operation of the Act
- OPA data
- reported VCAT decisions.<sup>104</sup>

### 5.1 Drivers at odds with the intention of the Act

#### 5.1.1 Broad-brush medical reports about decision-making capacity

VCAT may only make a guardianship order if it is satisfied that the person is in need of a guardian. To determine this,<sup>105</sup> one of the key things VCAT needs to be satisfied of, is that because of the person's disability, they do not have decision-making capacity in relation to the personal matter(s) for which the order is sought.<sup>106</sup>

##### Decision-making capacity assessments

Based on the reported decisions that OPA has reviewed, VCAT relies, either entirely or predominantly, on medical evidence to determine whether the person has decision-making capacity for specific personal matters. Medical reports may describe in broad terms the personal matters for which a proposed represented person lacks decision-making capacity. This, in turn, can mean that orders are made conferring broad decision-making powers on guardians.

The example extracts below from VCAT decisions illustrate this:

Based on the medical reports, I am satisfied that YXG now lacks the capacity to make decisions about her medical treatment, where she is able to live, what services she needs, and about her financial and property affairs.<sup>107</sup>

Based on the medical reports and the evidence at the hearing, I was satisfied that WLH has a disability and now lacks the capacity to make guardianship decisions about where she is able to live, what services she needs and her medical treatment.<sup>108</sup>

[U]pon the medical evidence, I was satisfied that NKT did not have decision-making capacity in relation to accommodation, access to services, or medical treatment and also did not have decision-making capacity in relation to financial matters.<sup>109</sup>

---

104 OPA reviewed 62 reported decisions relating to guardianship applications and the new Act. Not all VCAT decisions are reported. VCAT provides written reasons where these are requested: <<https://www.vcat.vic.gov.au/the-vcat-process/decisions/decisions-and-orders>>.

105 *Guardianship and Administration Act 2019 Act (Vic)* s 30(2) and s 31.

106 *Guardianship and Administration Act 2019 Act (Vic)* s 30(2)(a)(i).

107 YXG (Guardianship) [2022] VCAT 900 (9 August 2022) [Par 20].

108 WLH (Guardianship) [2022] VCAT 802 (29 July 2022) [Par 7].

109 NKT (Guardianship) [2022] VCAT 362 (4 April 2022) [Par 34].

Further examples include:

LWW (Guardianship) [2022] VCAT 221 (2 March 2022) [Par 35].



In the above-listed examples, VCAT conferred powers on the guardian to make decisions about where the represented person lives, whether any services are needed and if so which ones, and medical treatment.<sup>110</sup>

### **Tension between flexibility, and tailored and proportional orders**

The intention of the Act is to prevent unnecessary intrusions on the right to make decisions and for orders to be tailored and proportional. However, there is a tension for VCAT in seeking to make tailored orders, while ensuring that orders are appropriate for a range of circumstances that may arise.

Common decision-making powers VCAT includes in guardianship orders suggest the emphasis is currently on flexibility. Orders commonly include the power to make decisions about any or all of the following:

- where the represented person lives
- with whom the represented person lives
- whether any services are needed and if so which ones
- medical treatment
- who has access to the represented person and under what circumstances.

Recent OPA data indicates that in more than 70% of matters, OPA is appointed with power to make decisions about where the represented person lives. In over 35% of cases OPA is appointed with power to make decisions about access to services, including NDIS services. OPA is appointed with power to make medical treatment decisions in less than 10% of matters. (This relatively low figure is likely to be because the *Medical Treatment Planning and Decisions Act* empowers the Public Advocate to make decisions about significant medical treatment where there is no other medical treatment decision maker for a person without decision-making capacity, without the need for a guardianship order.)

In particular, the power to make decisions about ‘whether any services are needed and if so which ones’, is a broad decision-making power. While a represented person may not have decision-making capacity to navigate complex service systems, they are likely to have decision-making capacity to make decisions about some services (if provided with practicable and appropriate support, or sometimes without the need for any support).

---

Based on these medical reports, I am satisfied that LWW lacks the capacity to make decisions about her financial and legal affairs and personal matters including access to persons for the purposes of section 30(2a) of the GA Act.

FST (Guardianship) [2021] VCAT 1208 (18 October 2021) [Par 24]:

Taking all the available evidence into account, I was satisfied that FST had a disability as defined by the Act, being advanced Alzheimer’s dementia. I was satisfied that, because of this disability, she lacked decision making capacity with respect to her financial affairs or her personal circumstances.

TUY (Guardianship) [2021] VCAT 779 (4 October 2021) [Par 22]:

Based on the medical report and the evidence given by TUY’s treating team, I am satisfied that TUY now lacks the capacity to make decisions about her financial affairs and her general living circumstances.

VDX (Guardianship) [2020] VCAT 1186 (21 October 2020) [Par 24]:

Based on the medical reports, I am satisfied that VDX now lacks the capacity to make decisions about where she lives and what, if any, services she needs and that she would not have that capacity even if she had access to support in making decisions about those matters.

110 YXG (Guardianship) [2022] VCAT 900 (9 August 2022); WLH (Guardianship) [2022] VCAT 802 (29 July 2022); NKT (Guardianship) [2022] VCAT 362 (4 April 2022)



With the Act having been in operation for almost three years, the apparent challenges for VCAT in crafting orders that are ‘proportional and tailored to the person’s individual circumstances,’<sup>111</sup> is an example of why a review of the Act and its implementation would be valuable.

### 5.1.2 Lack of less restrictive options due to lack of resourcing

One of the key things that VCAT needs to be satisfied of when determining if a person is in need of a guardian<sup>112</sup> is that there is no less restrictive option available. Reported VCAT decisions highlight the steps that VCAT takes to explore this.

OPA is concerned that the lack of less restrictive alternatives to guardianship is one of the drivers of guardianship. This undermines one of the primary objectives of the Guardianship and Administration Act and which is:

[T]o protect and promote the human rights and dignity of persons with a disability by having regard to the Convention on the Rights of Persons with Disabilities, recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives.<sup>113</sup>

#### The option of a supportive guardianship order

When a guardianship application is made — in addition to the options of appointing a guardian or making no order — VCAT is able to appoint a supportive guardian if the requirements for this less restrictive option are met.

Below is an example of how VCAT explores whether this less restrictive option is available. In this example, VCAT found that there was no one available to be appointed as a supportive guardian.

On the basis of the medical evidence, I find that PVU has a degree of dementia. I accept the evidence that the presentation has stabilised, and possibly improved, and that this is a likely consequence of his abstinence from alcohol. I accept that “he does not present as someone with severe dementia” and that he “presents as appropriate”.

I accept [the] opinion that PVU does have the mental capacity to choose the location of his residence at the very least, and he has awareness of money adequate to understanding his preferences, choices and consequence.

Regardless of the above, I am not satisfied that PVU has the capacity to make the decisions confronting him. It is evident to me from the reports, evidence and my own observations that PVU could understand some of the information relevant to the decisions which he would be required to make. He has a medical diagnosis of short-term memory deficits which may prevent him from retaining necessary information. He has no appropriate supports available to support his decision-making.<sup>114</sup>

The intention of the Act is that ‘a person is given all the possible support to enable that person to exercise their decision-making capacity’. Examples of people with no-one available to be their supportive guardian highlight the importance of resourcing of supported decision-making services to ensure the effective implementation of the Act.

---

111 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General).

112 *Guardianship and Administration Act 2019* (Vic) s 30(2) and s 31.

113 *Guardianship and Administration Act 2019* (Vic) s 7(1)(a)

114 PVU (Guardianship) [2020] VCAT 1161 (15 October 2020)



### Decisions made informally

Apart from supportive guardian appointments, there may also be the option of decisions being made informally, as in the following example:

I was not satisfied that ZFN needs a guardian to make decisions about who has access to her. ZFN can express her own wishes about that. Decisions about who she sees can be made informally or through her chosen mediator...<sup>115</sup>

Appropriate and timely access to advocacy services is a vital component in ensuring alternatives to guardianship are fully explored. This can enable individuals to exercise their right to make decisions about the things that affect them without the need for a guardianship order.

In contrast, there is no need for the appointment of a guardian where there are no decisions about personal matters that need to be made, as was noted by VCAT in the following matter:

Acting Case Manager for UOZ said that the services had been accepted consistently for the last month, and that there are no current issues in relation to accommodation or services for a guardian to make decisions about.

Consequently, I find that there are no current decisions for a guardian and therefore a guardian is not needed. The application for guardianship is dismissed.<sup>116</sup>

This circumstance is straightforward for VCAT, and contrasts with circumstances where the need for the guardianship order arises only because of the lack of supported decision-making or advocacy support.

OPA reflects that it is disappointing to see the implementation of the Act hampered by the lack of appropriate services to realise its intention.

### 5.1.3 Service systems, including the NDIS, failing to make adequate adjustments

It is disappointing that complex service systems often fail to provide adequate supports and adjustments to enable people with cognitive disability to be able to navigate them. This a key driver of guardianship orders, and this over-reliance on guardianship to fill service gaps is of significant concern.

#### NDIS

OPA observes that the NDIS is a significant driver of guardianship orders. The introduction of the NDIS and greater individual choice and control about disability supports should not result in greater reliance on substitute decision-making. This is at odds with a key object of the *National Disability Insurance Scheme Act 2013* (NDIS Act) to:

[I]n conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities.<sup>117</sup>

It appears that the NDIS systems and processes, and the changed relationship between service providers and people with disability in a market-based system, have had the unintended consequence of increasing the use of guardianship.

It is concerning to see the NDIS impacting on the autonomy of people with disability.

---

115 ZFN (Guardianship) [2021] VCAT 138 (19 February 2021) [Par 36]

116 UOZ (Guardianship) [2020] VCAT 512 (27 April 2020) [Par 44-45].

117 *National Disability Insurance Scheme Act 2013* (Cth) s 3.



In the example below, VCAT recognises the complexity of navigating the NDIS service system:

Based on the medical report, and the evidence given by QWW in the course of the hearing I was satisfied that QWW continued to lack capacity to make decisions about her financial affairs and her lifestyle decisions in relation to accessing services particularly through the NDIS.<sup>118</sup>

It has become increasingly apparent that the advent of choice and control has not been accompanied by sufficient adjustments or support for decision-making, which has resulted in an over-reliance on the guardianship system.

OPA's data shows that the largest group of people who the Public Advocate is guardian for has changed from older people with dementia, to people with an intellectual disability, followed by people with a psychosocial disability. The fact that the greatest rise in demand came from people with an intellectual disability, closely followed by people with an identified psychosocial disability,<sup>119</sup> means the NDIS is likely a factor in this trend.

In addition, the younger a person is at the time they are made subject to OPA guardianship, the longer they will typically spend under guardianship. This increase in orders, and increase in length of orders, has had a significant impact on the demand for OPA guardianship in recent years. See section 7 of this report, 'Appendix: Trends in OPA guardianship over time', for analysis of relevant data.

### **Complexities of the NDIS system**

The complexities of the system include difficulties for NDIS participants who require specialised and intensive coordinated support in accessing NDIS services. Sometimes this results in people being stuck in restrictive environments or put at risk. This may occur because the participant's plan is not sufficiently funded for their needs, or an appropriate service provider is not available due to behaviours associated with the person's disability, or because there are simply no services available.

A stark indicator of the complexity of navigating the NDIS service system is the OPA data relating to service deeds. OPA established 3,500 NDIS service deeds during 2021-2022, reflecting the fact that people with an OPA guardian have an average of 5 service agreements each. The need for these deeds arises because OPA guardians do not have authority to enter into providers' own service agreements since they generally contain matters that go beyond the scope of the guardian's authority (such as financial matters or terms pertaining to the conduct of the participant). It is not a legislative or policy requirement that a service agreement be signed in order for an NDIS provider to commence providing services (except in respect of SDA). However, private service and accommodation providers are likely to prefer clear contractual arrangements with their clients. For people with significant cognitive disability who are unable to enter into a contract themselves and who do not have an appointed substitute decision-maker, there is often no one legally authorised to sign these service agreements. Even though service agreements are not legally required for the provision or receipt of most types of NDIS supports, service providers may seek these. This can act as a further driver of guardianship orders.

A guardian should not be required to be appointed for this type of administrative function. It is at odds with the intention of the Act. Also of concern is that people are staying under guardianship for longer, often because of delays in securing housing, services or adequate NDIS plan funding.

---

118 QWW (Guardianship) [2020] VCAT 717 (2 July 2020) [Par 16].

119 See on page 54 Graph 4. Number of people under 65 years old under OPA guardianship, by disability, by year.



There is an important role for the NDIA to play in ensuring that systems and processes associated with the NDIS do not act as a driver of guardianship.

The situation highlights the pressing need for the Victorian Government to look into the impact of the NDIS on the implementation of the Act. OPA notes that the Victorian Government recognised in 2018 that ‘full implementation of the National Disability Insurance Scheme might also affect the operation of Victoria’s guardianship and administration laws,’ and stated that [i]ts impacts will be closely monitored by the Government’.<sup>120</sup>

There are a number of ways that the NDIA could act to facilitate people with disability being able to navigate the NDIS. However, the impact of the NDIS service system failing to make adequate adjustments, is upon Victorian legislation that was meant to represent a ‘milestone in the way that Victoria upholds the rights and meets the needs of people with disability’, moving to a ‘position of promoting the dignity, equality and autonomy of people living with disability, while retaining the safeguards necessary for them to most fully realise their potential’.<sup>121</sup> It is important that Victoria leads the way in ensuring that the intention of the Act is realised through the availability of appropriate and timely advocacy services and a funded supportive guardian program for people who do not have anyone in their lives who could play this role.

Ways that the NDIA could act include by:

- Ensuring appropriate access to advocacy services and supported decision-making services that can informally support and build the capacity of people to engage
- funded decision-making supports within participants’ plans where this is reasonable and necessary
- Recognising and promoting greater uptake of unsigned service agreements which can be used to document the supports to be provided in a simple manner as an alternative to a formal service agreement<sup>122</sup>
- Educating support coordinators about performing their intended capacity-building function more effectively to support the person to be able to navigate the NDIS services market and choose and engage providers.

If these less restrictive approaches were more widely recognised, available and operating well, it would reduce the use or continuation of guardianship for NDIS-related purposes.<sup>123</sup>

### **Aged care**

The Public Advocate is commonly appointed guardian for a person over 65 in circumstances where they have been admitted to hospital and subsequently wish to be discharged home. Where the hospital has concerns that services are not in place to enable this or has concerns about whether adequate home services could be put in place, the hospital may make an application for the appointment of a guardian. OPA is likely to be appointed with power to make accommodation decisions and decisions about services. The aged care system has more straightforward access

---

<sup>120</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 63 (Jill Hennessy, Attorney-General).

<sup>121</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 63 (Jill Hennessy, Attorney-General).

<sup>122</sup> OPA’s ‘NDIS decision-making’ flowchart has information about this. See: ‘Your NDIS decisions’, *Office of the Public Advocate* (Web Page) <<https://www.publicadvocate.vic.gov.au/your-rights/your-ndis-decisions>>.

<sup>123</sup> OPA notes that plan nominees can also be appointed by the NDIA to act on behalf of a participant. Plan nominees act as substitute decision-makers for the participant where they do not have capacity to act/decide themselves. However, compared to guardians, plan nominees are not subject to clear requirements to act in accordance with the participant’s will and preference, and are not subject to the same level of oversight and other safeguards in the performance of their role. This means plan nominees may not be a less restrictive alternative in practice to an appropriately limited guardianship order.



requirements than disability services which makes it easier to navigate. OPA data shows that its clients over 65 years of age spend comparatively less time under guardianship than clients who are under 65 years of age. However, OPA has a similar concern as outlined above — that the lack of availability of appropriate advocacy and supported decision-making services are adversely impacting on the intention of the Guardianship and Administration Act being realised. Too often guardianship is being used to fill a service gap, impacting on people’s decision-making rights when a less restrictive option should be available.

### **Mainstream services and systems**

OPA has reflected that people working in mainstream services and systems may be able to assist a person to seek services and support, but may not see this type of assistance as within their role. This lack of assistance, may lead to the need for a guardian to be appointed. In some instances, mainstream services may also be concerned to transfer risk through the appointment of a guardian. In other instances, workers in mainstream systems may operate with a set of underlying assumptions that are not in line with the intention of the Guardianship and Administration Act. For example, a person with disability who has had the involvement of child protection in their lives and is soon to turn 18, may find that workers in that system who bring a ‘best interests’ mindset may assume that an adult guardianship order for the person will be required.

This reflects that the Act has come into operation ahead of a broader change in societal views. It is also ahead of some other areas of law that retain a ‘best interests’ paradigm.

If there was greater awareness of the important intention underlying the Guardianship and Administration Act and of disability rights more broadly, there may be a greater commitment on the part of people working in service systems to make adjustments and implement strategies to support people to make their own decisions. The most impactful way to raise awareness of the intention of the Act and of the importance of decision-making autonomy for people with disability, is by elevating the voice of people with lived experience of disability.

OPA’s Healthy Discussions project, described later in this report, provides an example of the impact of education being delivered by people with lived experience of disability. OPA will also shortly commence a pilot project that aims to divert matters from guardianship, and that has the voice of people with disability at its heart.

The implementation of the Act has, to date, lacked the strong voice of people with lived experience of disability.


## **5.1.4 Barriers to transition out of guardianship**

The Act requires that VCAT conducts a reassessment of an order within 12 months of the order, unless VCAT orders otherwise. The Act requires that, at a minimum, there must be a reassessment within three years.<sup>124</sup> At the reassessment VCAT considers whether the guardian has complied with their duties under the Act which can provide important oversight.<sup>125</sup> However, the indefinite duration of most orders, which require a further hearing in order to bring them to an end, can act as a barrier to people being able to transition easily out of the guardianship system and orders may continue for longer than is necessary, especially if no-one is agitating for a close review of the criteria or revocation of the order.

---

<sup>124</sup> *Guardianship and Administration Act 2019 Act (Vic)* s159

<sup>125</sup> *Guardianship and Administration Act 2019 Act (Vic)* s166



An additional factor is that OPA Advocate Guardians each hold delegation for multiple guardianship orders at any one time and experience competing demands for their time. This means actions which address an urgent need, or which will achieve the most impact for a client, may be prioritised over initiating applications for revocation of an order for a client who is settled.

A review of the Act would enable consideration of increased use self-executing orders/‘sunset clauses’ in guardianship orders that would mean the order would lapse after a period of time if no new order is made.<sup>126</sup> Such a measure may assist in addressing barriers for people to transition out of guardianship. If a guardianship order was needed after this date, a new application and order would be required. Alternative options would need to be considered for monitoring the role of guardians, other than at the time of reassessment of an order.

### **Lack of housing or options for service provision**

The lack of housing, or the lack of options for service provision, can also lead to people staying on orders for longer. For example, under the NDIS, where the market does not provide an appropriate service or an adequate accommodation option, there is no provider of last resort. OPA has seen providers discontinue supports at very short notice with no replacement provider in place. Health and safety concerns for staff are often cited as the reason. Under the NDIS, there is no one to guarantee the service which the person is entitled to and funded for, is actually provided. As a result, OPA Advocate Guardians spend longer piecing appropriate support packages together than before. Under the previous system, the person’s disability case manager would have performed this role.

## **5.2 Drivers that are not at odds with the intention of the Act**

### **5.2.1 Conflict, or actions of others, impacting on individuals’ rights**

One reason for guardianship orders is where the actions of others mean that the dignity, equality and autonomy of a person with disability have been adversely impacted.

A guardianship order may be needed because:

- actions by another person, or other people, are failing to promote the dignity equality or autonomy of a person who does not have decision-making capacity for some matters, or
- conflict within a family is adversely impacting on the person’s dignity, equality and autonomy.

On the face of it, a guardianship order limits the person’s autonomy, however in these types of circumstances, a guardian who acts in accordance with the principles of the Act and complies with their duties under the Act, can promote the person’s autonomy.

They can do this by:

- ensuring the person’s will and preferences direct decisions as far as possible
- encouraging and assisting the represented person to develop their decision-making capacity
- acting as an advocate for the person
- acting to protect the represented person from neglect, abuse or exploitation.

---

<sup>126</sup> This reform proposal appears in: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Roundtable Supported decision-making and guardianship: Proposals for reform* (Report, 16 May 2022) 45 [reform proposal 18].



For example, in one of its decisions VCAT noted that Victoria Legal Aid (acting for the proposed represented person) had submitted that:

[A]ny limitations affecting [the proposed represented person] as a result of the appointment of a guardian were reasonable limits on his rights that were demonstrably justified for the purpose of section 7(2) of the Charter. Further, the guardianship order did not restrict his autonomy rather it assisted him to exercise his decision-making capacity.<sup>127</sup>

There are other reported VCAT decisions that have noted the need for a guardianship order because of concerns about the person's vulnerability, the impact of family conflict, and/or a potential conflict of interest meaning that the person's will and preferences may not be given effect to without an order.<sup>128</sup> In these instances the making of a guardianship order aligned well with the intention of the Act.

In some circumstances the protective function of guardianship may be needed even if advocacy or supported decision-making services were available. However, this need may become less over time.

OPA has made recommendations in its 2022 report, *Line of Sight: Refocusing Victoria's adult safeguarding laws and practice*, to improve Victoria's safeguarding laws and practices for all at-risk adults. The recommendations aim to ensure that the Victorian community does not lose sight of any adult in our community who may be at risk of experiencing violence, abuse or neglect. The report identifies that 'some people are placed under guardianship when a less-restrictive option, if available, would be adequate to protect them,'<sup>129</sup> and that additional legislative reforms are needed 'to enable a more comprehensive range of responses to at-risk adults.'

While in some cases guardianship is an important protective mechanism... it is too often the only available option to protect the person. By its very nature it limits the human right of all adults to make their own decisions. It should only be used in limited cases, as a last resort, if there is no less restrictive alternative to protect and promote the human rights of an adult with disability.<sup>130</sup>

In the report, OPA recommends, among other things, that additional legislative reforms are made to enable a more comprehensive range of responses for at-risk adults, including granting VCAT the power to make a wider range of orders in relation to at-risk adults, as alternatives to guardianship orders, such as:

- entry and assessment orders
- removal and placement orders
- service provision orders
- banning orders.<sup>131</sup>

---

127 THD (Guardianship) [2020] VCAT 677 (25 June 2020)

128 WLH (Guardianship) [2022] VCAT 802 (29 July 2022), HVJ (Guardianship) [2022] VCAT 766 (8 July 2022),

PLQ (Guardianship) [2021] VCAT 824 (26 July 2021), SSX (Guardianship) [2021] VCAT 491 (18 May 2021),

UVJ (Guardianship) [2021] VCAT 404 (29 April 2021), OKW (Guardianship) [2021] VCAT 298 (13 April 2021), PXL (Guardianship) [2021] VCAT

124 (17 February 2021), TXA (Guardianship) [2020] VCAT 1357 (10 December 2020)

WZP (Guardianship) [2020] VCAT 1039 (18 September 2020), THD (Guardianship) [2020] VCAT 677 (25 June 2020)

TBV (Guardianship) [2020] VCAT 595 (5 June 2020)

129 Office of the Public Advocate (Victoria), *Line of Sight: Refocusing Victoria's adult safeguarding laws and practices* (report, August 2022) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/503-line-of-sight-refocussing-victoria-s-adult-safeguarding-laws-and-practices>>.

130 Office of the Public Advocate (Victoria), *Line of Sight: Refocusing Victoria's adult safeguarding laws and practices* (report, August 2022) 6.

131 Office of the Public Advocate (Victoria), *Line of Sight: Refocusing Victoria's adult safeguarding laws and practices* (report, August 2022) 16.



The report also recommends amendments to the Guardianship and Administration Act, including that the Public Advocate be able to receive complaints and undertake ‘own motion’ investigations.

The Victorian Law Reform Commission has noted that the Public Advocate’s powers are ‘limited in their application to circumstances where a guardianship or administration order might be appropriate,’ with OPA not having a comprehensive range of powers to carry out these functions. In practice, this has limited OPA’s investigation powers to situations where complaints are made about the well-being of people who have guardians or who may need an appointed guardian.<sup>132</sup>

The Public Advocate undertakes investigations on referral from VCAT, but she does not have a function of receiving and investigating complaints in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability where she believes that an investigation is warranted.<sup>133</sup>

## 5.2.2 Complex circumstances and attitudinal barriers impacting on individuals’ rights

Even if advocacy services and/or supported decision-making services are available, there can be circumstances where these less restrictive alternatives may not be enough to promote the dignity, equality and autonomy of a person with disability who lacks decision-making capacity for the matter.

For example, the Public Advocate was appointed guardian for a person who met NDIS eligibility criteria, but had been unable to access NDIS services and ‘opportunities for other more age appropriate and more suitably supported accommodation’. In appointing the Public Advocate as guardian, VCAT explored if there was a less restrictive option available than appointing a guardian. It found that conflicting family opinions meant that ‘even when supported’ the person would not be able ‘to express his opinion in any meaningful or persuasive way’.<sup>134</sup> In this example, the appointment of the Public Advocate for decisions about services and accommodation promoted the person’s right to live independently and be included in the community.

Complex circumstances, combined with discriminatory societal attitudes or assumptions, can act as barriers to a person exercising their rights. The involvement of a guardian may be needed in these circumstances. This need perhaps reflects that the human rights principles underlying the Guardianship and Administration Act have not yet been broadly embraced by society, so that paternalistic attitudes and ableist assumptions about people with cognitive disability remain.

An example of a complex matter is where child protection has become involved because of concerns about the ability of a person with disability to raise their child. The need for a guardian in these circumstances can arise from the complexity of navigating the legal and service systems, and because professionals may make assumptions about the person’s ability to parent that are based wholly, or partly, on the person’s disability. These types of circumstances can lead to the onus being placed on the individual to show that they have appropriate services in place to support them to raise their child. The decision-making authority of a guardian in relation to

---

132 J Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (Report, 2013) 72 citing the Victorian Law Reform Commission, *Guardianship Final Report* (Report, 2012) 447 <<https://www.churchilltrust.com.au/fellow/john-chesterman-vic-2012/>>.

133 Office of the Public Advocate (Victoria), *Line of Sight: Refocusing Victoria’s adult safeguarding laws and practices* (report, August 2022) 62.

134 MBG (Guardianship) [2021] VCAT 206



services will be important, alongside their advocacy role. OPA hopes that over time there will be reduced need for a guardian in these types of circumstances as societal attitudes shift.

Including people with lived experience of disability at the heart of initiatives to change societal attitudes is a vital component for seeing the intention of the Guardianship and Administration Act fully realised.

## 6 Missing pieces — Inclusion, supported decision-making and advocacy

### 6.1 Inclusion

The introduction and implementation of the milestone Guardianship and Administration Act has lacked a vital component for raising awareness of the Act — the voice of people with lived experience of disability.

By the time a matter is before VCAT to determine whether a guardianship order is needed, the voice of people with disability is limited to a focus on the specific hearing — the person with disability who is the subject of the application must be at the hearing so they have the chance to have their say (unless they do not want to or it is impracticable or unreasonable) and VCAT must consider the will and preferences of the person (where these can be ascertained).

#### **Elevating the voice of people with disability**

The Guardianship and Administration Act is ahead of a broader change in societal views. It is also ahead of some other areas of legislation that retain a 'best interests' paradigm.

Greater involvement of people with lived experience of disability is needed in promoting awareness of the Act and its intention. OPA considers that hearing directly from people with lived experience of disability is the best way to challenge deeply-rooted exclusionary attitudes and prejudices.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in its Rights and Attitudes Issues Paper noted:

Research suggests limited contact between people with disability and the wider community can contribute to a lack of understanding of disability. Negative attitudes can cause a social distance between people with disability and the wider community driven by stigma.<sup>135</sup>

OPA has previously submitted that one of the best ways to challenge negative attitudes is through increased interaction, especially in the highly valued domain of paid employment.<sup>136</sup> To ensure that the Guardianship and Administration Act genuinely marks a *milestone* in the way Victoria upholds the rights and meets the needs of people with disability, greater involvement of people with lived experience of disability is needed.

#### **The example of OPA's Healthy Discussions project**

OPA has been piloting such an approach through its project *Healthy discussions: Supporting people with disability to make and communicate health decisions*. It is a four-year project, funded by the Australian Government Department of Social Services, that aims to assist health professionals throughout Victoria to improve their communication with, and understanding of, people with disability. The project highlights that in Victoria everyone with capacity to do so has the right to make their own decisions about their health and, to the extent possible, people should be provided with the support they need to make these decisions.

---

<sup>135</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation, *Issues Paper: Rights and Attitudes* (Issues Paper, April 2020) 3.

<sup>136</sup> Office of the Public Advocate (Victoria), *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Response to Employment Issues Paper* (Submission, October 2020) 7 <<https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/royal-commission-into-violence-abuse-neglect-and-exploitation-in-disability-care/136-opa-response-to-drc-employment-issues-paper>>.



At the heart of the *Healthy Discussions* project is the voice of people with disability. The project is informed by principles of supported decision-making and uses a best-practice model of people with disability leading the design and delivery of the project in a paid capacity. The project has developed a short video that includes tips from people with disability, has delivered information sessions for health professionals in which the voice of people with lived experience is central, and has developed a series of audio interviews exploring issues of human rights that have been led by a person with lived experience of disability.

It has become clear through this project that the assumptions that others make about people with disability, discriminatory attitudes, and failures to make reasonable adjustments are barriers to people exercising their decision-making autonomy.

The project produced a video called 'HealthCARE Conversations'<sup>137</sup> in which people with intellectual disability, acquired brain injury, neurological impairment and autism share reflections and tips for health professionals.

The following are some of the powerful quotes from the video:

I often worry if I am going to get the standard quality of care that other patients get because I have a physical disability.

I can't stand when the doctor directs questions to my carer.

'Has this been going on for a very long time with... for Colin?' 'I don't know, why don't you talk to him and ask him?'

I see people treat disability as if you're a little child.

I'll tell them that I go to work and they'll be like: 'Really!? You're amazing. Well done!' I'm like: 'Come on guys. Seriously?' Just because I have a physical disability does not mean to say I'm going to spend the rest of my life doing absolutely nothing at all.

They don't speak my lingo. Like when they speak too high.

So, they either treat you like a pharmacist and you know exactly what they're talking about, or they treat you like a dummy.

Always assume competence. Speaking directly to me, not the person I'm with.

Understand that it's true we are disabled but we have a bit of intelligence, enough to understand.

Treating you like an adult and not breaking down *words like this so that they think you understand them*.

Not using big medical terminology. Giving me as much information as possible to be able to make decisions about my own health.

It's about teaching health professionals about the importance of developing rapport with patients with disability.

Why? Why can't I be given the chance and the opportunity the same as anyone else in this community, whether they're disability or not.

Just look at us in the eyes and put yourselves in our experiences.

---

<sup>137</sup> Video: 'HealthCARE Conversations', *Office of the Public Advocate*, (Web page) < <https://www.publicadvocate.vic.gov.au/opa-s-work/healthy-discussions-project/watch-online-healthcare-conversations>>.

We're all different. We've all got different issues. So, just treat us all with a bit of respect. Can't go wrong.

## 6.2 Supported decision-making

When a high value is placed on autonomy, it can shift the focus to questioning whether guardianship is required to achieve the outcome. Are alternative options such as supported decision-making and advocacy possible pathways to the same outcome?

### Lessons from the OVAL project

In 2016 VALID (the Victorian Advocacy League for Individuals with Disability) and OPA undertook a pilot supported decision-making project (the OVAL project). Volunteers were trained and supported to work with NDIS participants. Participants were selected on the basis of both their interest in the project and their need for an independent decision-supporter (in circumstances where there was no other person in their life to undertake the role).

In the report about the project<sup>138</sup>, OPA and VALID made the following observation about the important role for support for decision making.

Frequently people with cognitive impairments, such as intellectual disability, brain injury and psychosocial disability, have their ability to make decisions questioned. In part, this is because decision making has been viewed as an autonomous, cognitive process. However, more recently there is growing recognition that decision making is often a shared process, not done in isolation. All of us choose to receive support with decision making at various times and if the support is helpful, it enables us to make difficult decisions and remain in control of our lives.


The CRPD has clarified that people with cognitive impairments have a right to be reasonably accommodated with their decision making. The support provided by OVAL project volunteers enabled participants to build their capacity to make decisions and control their own lives.

A key learning from this project was that many of the participants had few prior opportunities to make decisions, with or without support, in their day-to-day lives. This meant that they were overwhelmed when faced with the level of decision-making required in relation to their NDIS Plan. Opportunities for the development of decision-making skills, over time and as part of day-to-day life, were observed to be a necessary element of decision-making capacity building. Developing skills to make daily decisions is, for people who have not had many opportunities to make decisions throughout their lives, essential to increase their capacity to make the more complex decisions required as part of their NDIS planning. The project identified that this can be achieved by ensuring that NDIS participants are able to purchase such supports through their NDIS plan.

A range of options for people to access support for decision-making are needed. Supported decision-making services need to be resourced and a funded supportive guardianship program is needed, so that people who do not have anyone in their lives to support their decision-making can access a supportive guardian in appropriate circumstances.

---

<sup>138</sup> Office of the Public Advocate (Victoria), *Oval Project, Volunteer Programs of Support for Decision-Making: Lessons and recommendations from the OVAL Project* (Report, 2017) 7 < <https://www.publicadvocate.vic.gov.au/opa-s-work/research/144-research-item-on-frontpage> >.



OPA's pilot project, 'Supported Discussions' will provide the opportunity for OPA to trial the impact that supported decision-making strategies can have in diverting matters from guardianship.

## 6.3 Advocacy

High quality advocacy can have an enormous impact, as illustrated in the example below. In this example, it was the advocacy work of the OPA guardian that was crucial. The example raises the question about whether the same outcome could have been achieved if the individual had been able to access appropriate advocacy services.

The individual whom OPA was guardian for, was assessed as requiring Specialist Disability Accommodation (SDA). Obtaining an SDA vacancy in the local area took some six months and significant advocacy to finally convince the supported independent living provider that the person would suit their care model. Without this advocacy, the only options would have meant relocation far from her the local area.<sup>139</sup>

To avoid an over-reliance on guardianship for navigating service systems, timely access to advocacy services is vital.

OPA's pilot project, 'Supported Discussions' will provide the opportunity for OPA to trial the impact that advocacy can have in diverting matters from guardianship.

## 6.4 OPA's 'Supported Discussions' pilot project

In 2023 OPA will undertake a pilot project that will trial putting into action some of the recommendations made in this report.

The project, *Supported discussions: Promoting ways Victorian service system organisations can remove barriers to access to services by using supported decision-making strategies*, will seek to divert appropriate matters from guardianship.

It will do this by:

- trialing the provision of the less restrictive option of advocacy in appropriate matters
- promoting supported decision-making principles to workers from sectors commonly making guardianship applications. This will include sharing information about:
  - the less restrictive options that can be explored before considering guardianship and
  - the importance of promoting autonomy through exploring less restrictive options.

The heart of the project will be the voice of people with disability, recognising that the expertise about what strategies service system organisations can use to best support and promote choice and control for people with disability, comes from people with lived experience. A small project team will include an Advocacy Officer and Supported Discussions Project Officer who will be a person with lived experience of disability.

This pilot project is informed by OPA's current Healthy Discussions<sup>140</sup> project that promotes supported decision-making and people's right to make decisions in relation to their medical treatment. The projects, which share a common approach, will be supported by a new Inclusion

---

139 Office of the Public Advocate, *Annual Report 2021* (Report, 2021) 16

140 The full title of the project is 'Healthy Discussions: Supporting people with disability to make and communicate health decisions'. See more about the project at: <https://www.publicadvocate.vic.gov.au/opa-s-work/healthy-discussions-project>



Projects Manager role at OPA. The projects, and OPA's focus on inclusion, marks a concerted effort on the part of OPA to elevate the voice of people with lived experience of disability.

The 'Supported Discussions' project focuses on a cross-service gap identified by OPA. The gap stems from some service system organisations seeking substitute decision-making arrangements for a person with disability when a different less restrictive option may be available.

In particular, the project focuses on this cross-service gap as it relates to service system organisations providing or coordinating:

- health services and
- NDIS-funded services.

When these organisations seek a substituted decision-making arrangement for a person with disability through a guardianship application, this action can impact upon that person having choice and control in aspects of their life. While, a guardianship order can be one pathway to prevent people with disability experiencing harm, it is vital that guardianship is used appropriately. Even if a guardianship order is ultimately not made by VCAT, the process may be disempowering and distressing for an individual.

Inappropriate guardianship applications regularly happen when the focus has shifted away from supporting people with disability to exercise choice and control, and has also shifted away from removing barriers to access to the service/s.

This is commonly because of any, or all, of:

- poor understanding of guardianship and related legislation
- lack of understanding of options for removing administrative barriers related to NDIS service agreements
- lack of skills and knowledge about supported decision-making
- lack of recognition of the requirement to make reasonable adjustments.

As outlined in this report, currently the Public Advocate is being appointed guardian in some matters where, if the service system was appropriately skilled, a guardian would not be needed. In these cases, a less restrictive option could achieve an outcome that promotes the rights of people with disability.

Inappropriate guardianship applications can:

- undermine the exercise of choice and control by people with disability
- cause organisations to lose sight of their obligation to remove barriers to access to services for people with disability, and
- contribute to backlogs in the guardianship system because of the volume of applications. This, in turn, means the system becomes less able to respond in a timely way to situations of genuine need and risk.

Through this project, a small team will be able to focus, over the course of one year, on achieving change and improved cross-system supports for people with disability.

The project will:

- undertake short term advocacy in appropriate matters using a supported decision-making approach and will provide education to service system organisations through direct engagement with workers
- deliver education to staff at organisations that are part of the service system – both to smaller and larger groups – and via a short video that will be developed as part of the project.



The project will highlight that an approach informed by supported decision-making principles is about:

- removing barriers
- making reasonable adjustments, and
- focusing on whether the person can make the decision/s with practicable and appropriate support.

This approach aligns both with the intention of Victoria’s Guardianship and Administration Act and the Safety Targeted Action Plan<sup>141</sup> (part of Australia’s Disability Strategy 2021-2031) which recognises that preventing harm involves both:

- supporting people with disability to exercise choice and control in all aspects of their lives, as well as removing barriers and providing access to services and supports and
- appropriate pathways for action if things go wrong.

The voice of people with lived experience of disability will be at the centre of the project. Only people with disability will be eligible to apply for one of the two project worker positions, and there will be an advisory committee that involves people with lived experience of disability who will be paid casually for their time and involvement in the project.

#### **Putting into practice a supported decision-making approach**

The project will also involve OPA applying for rehearings or reassessments seeking revocation of guardianship orders where OPA has identified that there is a less restrictive option now available and/or where guardianship is no longer needed. In appropriate circumstances, OPA will offer short-term advocacy based on supported decision-making principles which will include engaging with and educating relevant service system staff about supported decision-making and strategies they can use to remove barriers to access to services for people with disability.

#### **Development of a video resource**

The project will include the development of a short video resource that will highlight key messages from the education component of the project, and that will have at its centre the voice of people with lived experience of disability.

#### **Summary of the aims of the project**

The project aims to contribute to preventing harm for people with disability by:

- promoting strategies that service system organisations can use that support the exercise of choice and control by people with disability in all aspects of their lives and that remove barriers to access to services
- reducing the inappropriate use of guardianship applications that can have detrimental impacts on people with disability exercising choice and control
- promoting the use of guardianship applications for appropriate circumstances where this course of action will protect and promote the human rights and dignity of a person with disability.

---

141 'Safety Targeted Action Plan', *Australian Government Disability Gateway*, (Web page) <<https://www.disabilitygateway.gov.au/document/3176>>.



The strategies that the project will utilise and the supported decision-making principles that underly the project, are applicable to all jurisdictions in Australia so, the learnings from this pilot project will have broad relevance.

## 7 Appendix: Trends in OPA guardianship over time

This paper presents trends identified in the analysis of OPA data for the 14-year period from 1 July 2008 to 30 June 2022 where the Victorian Public Advocate was appointed guardian.

### 7.1 Key findings

- Across the 14 years from July 2008 to June 2022, the average time a represented person spent under OPA guardianship was 18 months.
- Age is a reliable predictor of the length of time a person spends under OPA guardianship – the younger a person is at the time they are made subject to OPA guardianship, the longer they will typically spend under guardianship.
- There has been a sustained upward trend in the numbers of people under 65 years old who are under OPA guardianship since 2008.
- There has been a notable increase in the average length of order for people under 65 in the latter part of this 14-year period.
- The sustained increase in the number of people under 65 under OPA guardianship is compounded by the greater lengths of time this group spends subject to orders. This has had a significant impact on the demand for OPA guardianship services since 2015/16.

### 7.2 Introduction

Data in relation to matters where the Public Advocate has been appointed guardian for a person ('OPA guardianship') has always been made publicly available as part of OPA's annual reports. These year-on-year snapshots necessarily have used data that was correct and meaningful in relation to that period. For a given year, the number of guardianship orders received from VCAT (or 'matters') is the most useful and easily reported indicator of OPA's guardianship work.

This research sought to identify trends over time: offering a broader context for the Royal Commission's look at current guardianship laws and practices than annual reports can provide.

### 7.3 The research

#### 7.3.1 Goals

This research sought to discover how long a represented person spends under OPA guardianship and what factors might influence length of time under OPA guardianship.

Looking at a significant period of historical data enabled OPA to analyse the same data usually reported in annual reports by person (individual people who had been subject to guardianship) as opposed to by guardianship order (or 'matter'). In this way, OPA hoped to better understand the total length of time individuals spend under guardianship and whether length of time is correlated with age or disability type.

OPA also sought to document other notable trends in relation to who becomes subject to OPA guardianship and prevalence of different types of powers specified in guardianship orders.

### 7.3.2 Method

Information on each guardianship order (including temporary or urgent orders) received by OPA between 1 July 2007 and 30 June 2022 was extracted from OPA's data management system (Resolve). The data analysis subsequently focused on the 14 years from 1 July 2008 to 30 June 2022 following advice that Resolve was in a period of transition throughout 2007 and so may not provide a complete record.

The range of information chosen for analysis was limited to basic demographics and information about the order (including received and closed dates).

Data analysis using Power BI and Excel was undertaken.

### 7.3.3 Limitations

The impact of Victoria's new Guardianship and Administration Act on length of orders could not be explored due to the insufficient time that has passed since its commencement in March 2020, and confounding factors such as the COVID-19 pandemic. While 941 people in the data set of 7447 people had a least one order made under the Guardianship and Administration Act 2019, the majority of orders were made under the *Guardianship and Administration Act 1986*.

Whether the people under OPA guardianship are NDIS participants or not, and what influence this has had on trends over time, could not be explored using this data set. NDIS participant status has only been consistently recorded by OPA guardians in recent times. As such, age and (to some extent) disability type has been used as a proxy for NDIS involvement when considering the potential impact of the NDIS using this data set. In 2021/22, the proportion of people under 65 years old who were also NDIS participants was 72 per cent.

Average length of time calculations are influenced by the period of data being considered – hence, a calculation that uses all 14 years of data will produce higher averages than a calculation that seeks to compare different 5-year periods within that data set. This is because some people have been under guardianship for more than 5 years and these larger totals only impact the calculations when working with an extended time-period.

The method used to calculate average time on order relied on 'first date an order was received' and 'last order closed'. In the vast majority of cases this would be an accurate estimate of the time a person spent under OPA guardianship. For a small number of people, there were gaps between their multiple guardianship orders and this method was not able to recognise these breaks. This could have led to slight overestimates of length of guardianship – however, this is likely more than offset by the underestimates of length that occur when you limit the period of time under analysis.

A further limitation is that the data includes some people who are still currently under OPA guardianship (so the duration of their time under OPA guardianship to date does not reflect the total period they will spend under OPA guardianship).

## 7.4 The data

### 7.4.1 Average time under OPA guardianship

Across the 14 years from July 2008 to June 2022, the average time a represented person spent subject to OPA guardianship was 18 months.<sup>142</sup> When orders were closed due to the death of the person were removed from these calculations, the average time spent under OPA guardianship rose to 19 months.<sup>143</sup> Deaths impacted average time under OPA guardianship more strongly in the older age groups (Table 1).

Note that grouping all represented persons together to calculate the average obscures the strong influence a person's age has on the length of time they spend under OPA guardianship. The average length of time represented persons under 65 years spent under OPA guardianship was 23 months during this period, compared to just 14 months for represented persons over 65.<sup>144</sup>

The following table helps explain the findings above. It shows a clear negative correlation between age and length of time spent under OPA guardianship: the younger you were when placed on an order the longer you spent subject to an order. It also shows a divide between the average length of time under OPA guardianship for people over 65 when compared with people under 65.<sup>145</sup>

**Table 1. Average time under OPA guardianship for represented person whose (closed) matters were received between July 2008 to June 2022, by age when first order received.**

Age	Average number of months	Average number of months (excluding orders where people had died)
<20	29.3	29.4
20-34	28.4	28.5
35-40	24.7	25.4
50-64	22.6	23.1
65-79	15.2	15.8
80+	13.1	14.2
Grand total	18.2	19.3

142 This calculation involved analysis of closed matters for 7,447 people who had been subject to OPA guardianship during this period.

143 This calculation involved analysis of closed matters (for reasons other than death) for 6,396 people who had been subject to OPA guardianship during this period.

144 These calculations include all closed matters for all represented persons with matters received between July 2008 and June 2022 (and does not exclude people whose matters were closed because they died).

145 There is a bigger difference in the average time spent under OPA guardianship between the 50-64 cohort and the 65-79 cohort than any others. The recorded averages for the under 65 age groups cluster together, as do the over 65 age groups.

OPA also explored the impact that the person’s disability profile had on average time under OPA guardianship. The correlation between age and length held, irrespective of a person’s disability (except where the numbers of people in each age group were insufficient to be representative). In addition, people with multiple recorded disability types were more likely to spend longer periods of time on OPA guardianship orders.

## 7.4.2 Change in average length over time

To explore whether average time under OPA guardianship has varied over time, the data was divided into 5-year blocks of time. Then averages were calculated using data from all the people for whom OPA received an order during the middle year of the relevant period. These averages will be underestimates, as they do not consider orders for the year-cohort that were received prior to or following the nominated 5-year period. However, this approach is necessary to enable comparison over time.

This approach is not directly comparable with the average across the 14-year period, as the people who remain under OPA guardianship for longer periods of time are disproportionately represented in these more limited timeframes.

The years chosen for the comparison were the earliest and latest possible 5-year periods (looking at the guardianship cohorts of 2010/11 and 2019/20) and two crossover periods in the middle of the 14 years (looking at the guardianship cohorts of 2014/15 and 2015/16).

Table 2 demonstrates an upward trend in the average length of time under OPA guardianship across the 14 years.

At 30 months, the average time under OPA guardianship for people under 65 from the 2019/20 cohort was notably higher than for previous cohorts.

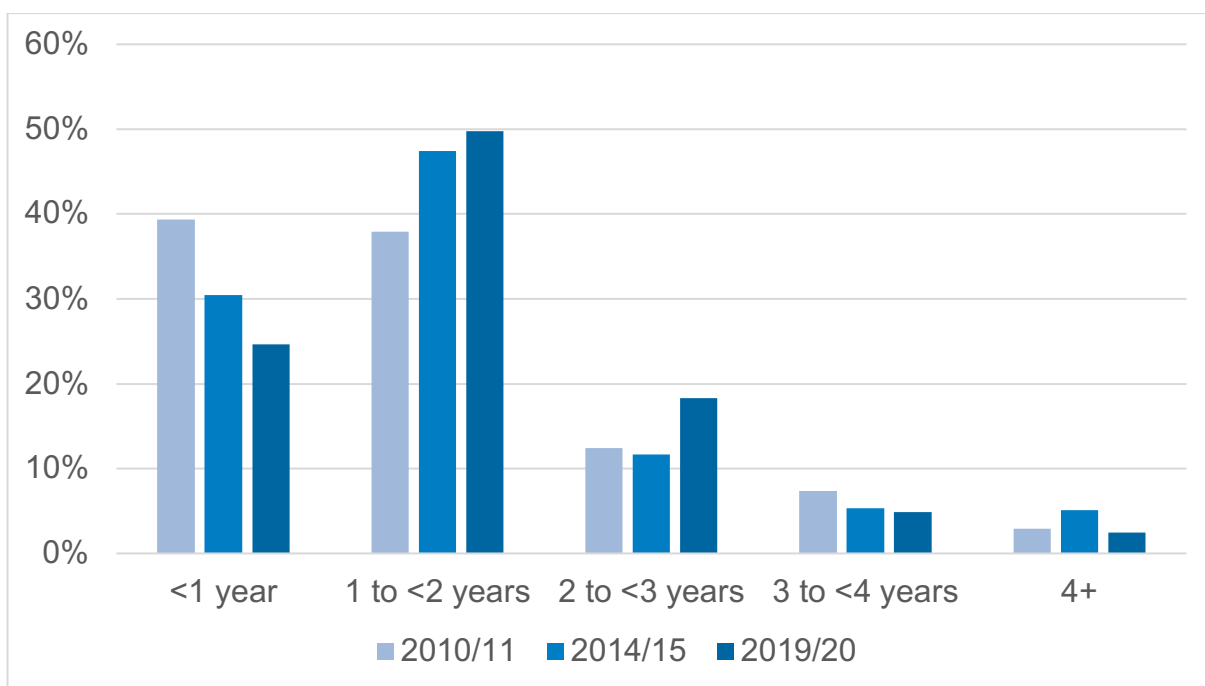
**Table 2. Average length of time (in months) under OPA guardianship for represented persons with matters received in the nominated year, by age cohort.**

	People over 65 years old	People under 65 years old	All represented persons
2010/11	16.0	24.0	19.2
2014/15	17.4	26.9	21.3
2015/16	18.4	24.8	21.4
2019/20	17.8	30.3	24.5

### 7.4.3 The variation behind the averages

While age and the year in which you were under an order make a demonstrable difference to the average amount of time a person spends under OPA guardianship, it is also useful to get a sense on the variability behind these averages.

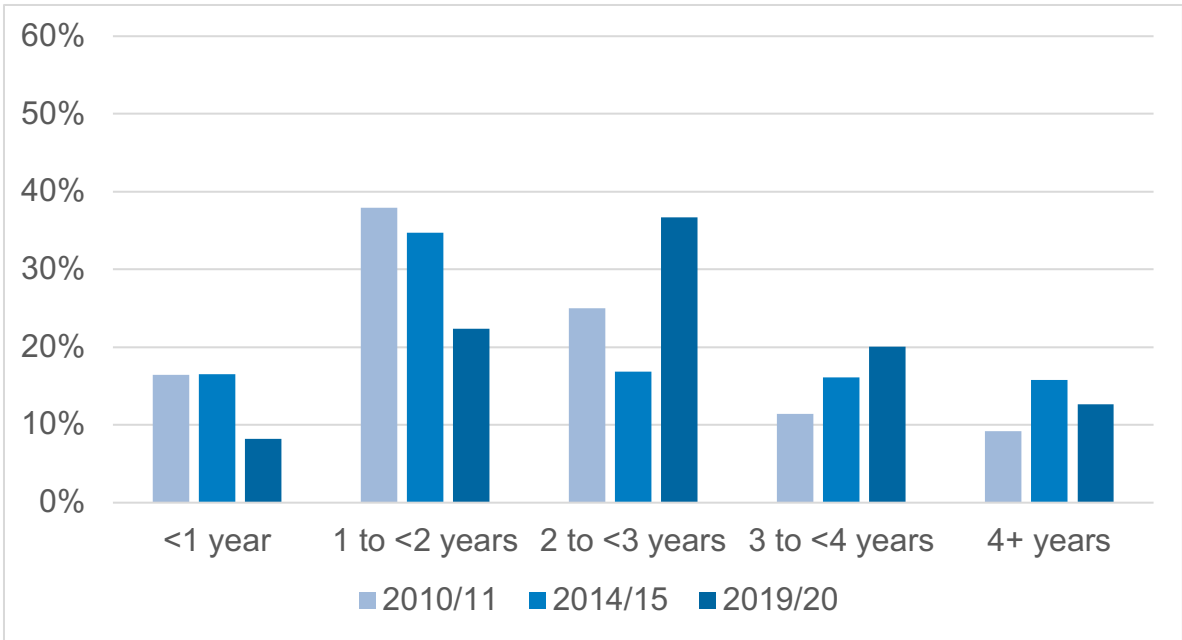
**Graph 1. Proportion of represented persons over 65 years old with an order received in the nominated year, by length of time under OPA guardianship<sup>146</sup>**



<sup>146</sup> Note that orders that ended when the represented person died were also included in this set of data.



Graph 2. Proportion of represented persons under 65 years old with an order received in the nominated year, by length of time under OPA guardianship



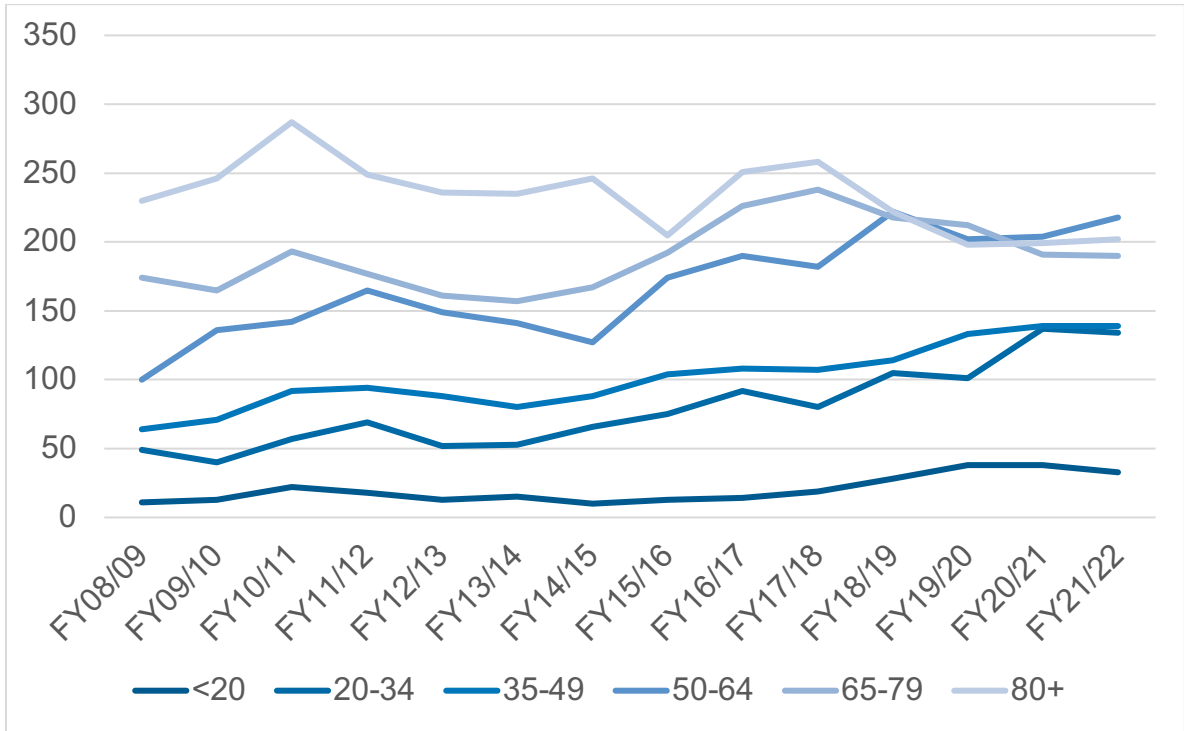
Graphs 1 and 2 above show that in both age cohorts there have been shifts towards greater proportions of people spending more time under OPA guardianship. However, the proportion of people under 65 years old who spend more than three years under guardianship has been at more than 30 per cent since 2014/15, compared to less than 10 per cent of people over 65 years. In the periods prior to 2019/20, more than half of people under 65 had their orders revoked in under two years. This fell to less than one in three people in 2019/20.

#### 7.4.4 Age cohorts

Across the 14 years, OPA has seen a large increase in the demand for guardianship services for people under 65 years (see Graph 3). The upward trends for the cohorts who were under 65 became more pronounced after 2015/16. There has been a notable decline in total demand for OPA guardianship for people over 65 years since 2017/18.

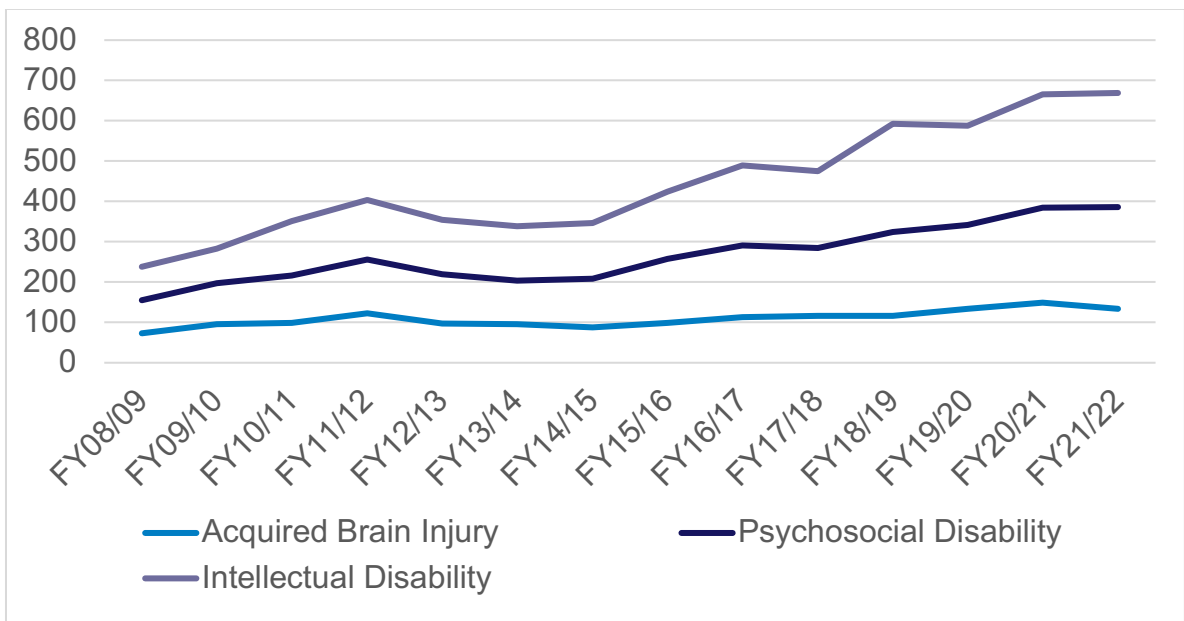


Graph 3. Number of people under OPA guardianship, by age group, by year.



The graph below shows the increasing use of OPA guardianship for people under 65 years with intellectual or psychosocial disabilities. The clear growth in numbers in these cohorts is also evident beginning in 2015/16.

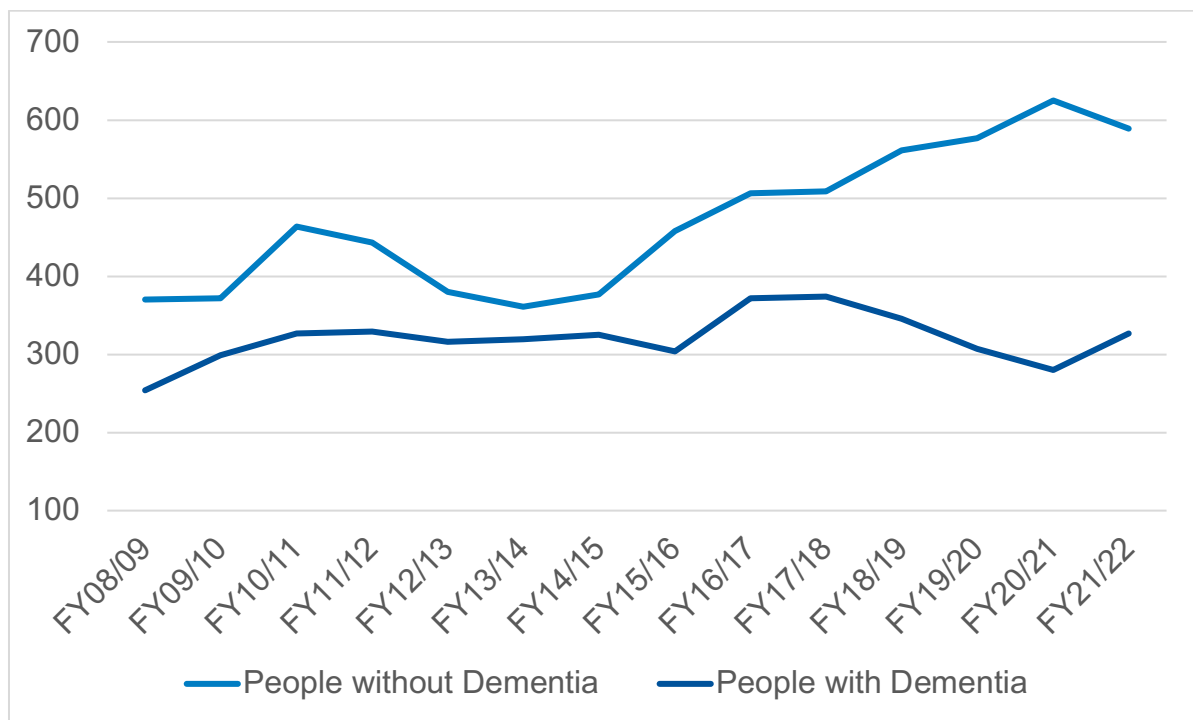
Graph 4. Number of people under 65 years old under OPA guardianship, by disability, by year.





Graph 5 shows that the number of people under OPA guardianship with dementia has remained relatively consistent over time, hovering just above 300 persons per year. There was a recent dip in demand for OPA guardianship in this cohort in 2019/20 and 2020/21 which may be attributable to reduced health care and in-home service contacts for older age groups during the pandemic.

**Graph 5. Total number of people under OPA guardianship, with and without dementia, by year.**



### 7.4.5 Total numbers of people under OPA guardianship over time

As discussed at the beginning of this section, the number of people who receive OPA guardianship services in a given year is not precisely equivalent to the number of guardianship orders OPA receives (as one person can be subject to multiple orders in the one year). Nevertheless, the graph below shows matters are a good proxy for people when looking at data for a single year.

Graph 6 also shows that there was a notable and sustained increase in demand for OPA guardianship from 2016/17 onward. There was also a bump in demand in 2010/11 and 2011/12.



Graph 6. Total number of people under OPA guardianship versus total number of orders (matters) received, by year.

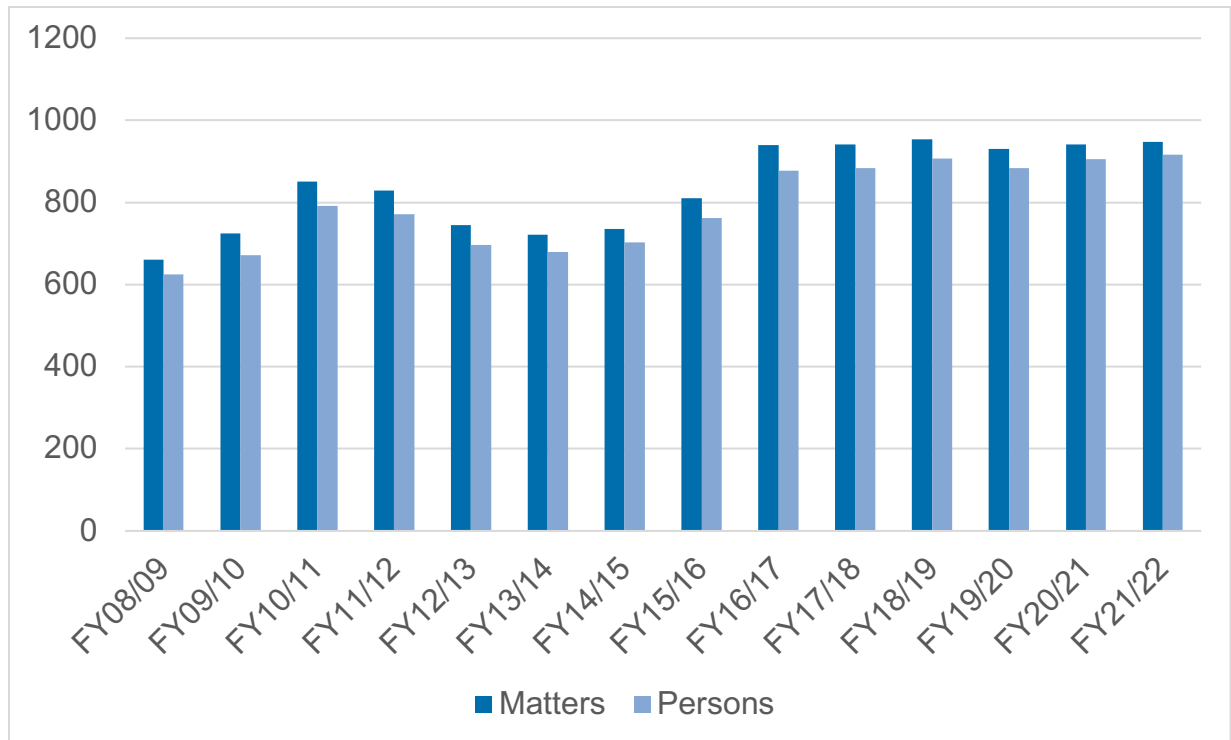


Table 3 shows the number of people under OPA guardianship across each 5-year period in relation to the number of orders made for them. The total number of people subject to OPA guardianship in the most recent period was more than 10 per cent higher than in each of the earlier 5-year periods (for example, 3325 compared to 2932 persons or a 13 per cent increase). The average number of orders made increased by 19 per cent in the last period. The average number of orders made per person under OPA guardianship had also increased (see Table 3).

Table 3. Persons subject to OPA guardianship and matters, by time period.

	Persons	Matters	Ratio of matters to persons
July 2008 to June 2013	2959	3809	1.29
July 2012 to June 2017	2932	3951	1.35
July 2017 to June 2022	3325	4714	1.42

### 7.4.6 Types of decision-making powers included in OPA guardianship orders over time

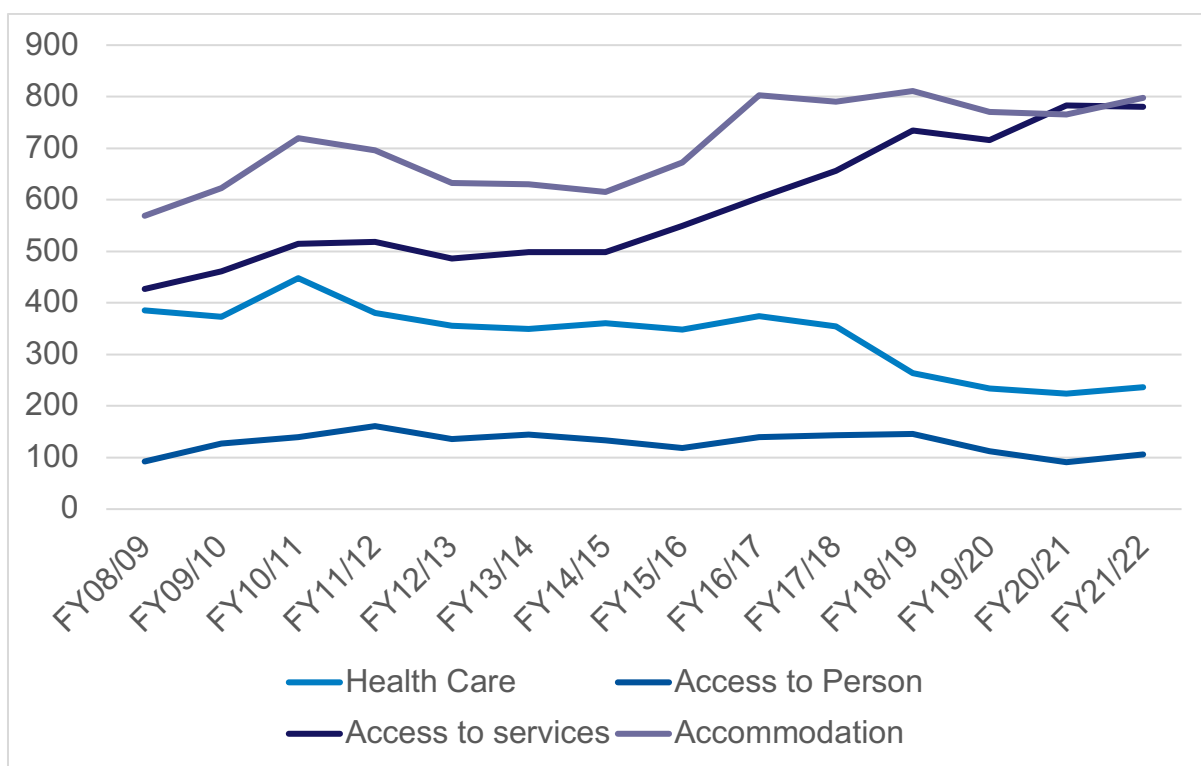
This section examines the types of decision-making powers given to OPA guardians in relation to individual orders (noting that each order can involve multiple powers). The most common



types of powers given to the guardian by the Victorian Civil and Administrative Tribunal are in relation to accommodation, access to services, healthcare and access to persons. OPA’s data management system also records matters where ‘other’ powers are given but these were not analysed.

Graph 7 shows the steady increase since 2015/16 in the number of OPA guardianship orders that included access to services as a decision-making power. The number of orders involving healthcare powers fell notably in 2018/19, likely influenced by the commencement of the *Medical Treatment Planning and Decisions Act 2016* (Vic).

**Graph 7. Types of decision-making powers included in OPA guardianship orders for all matters, by year.**

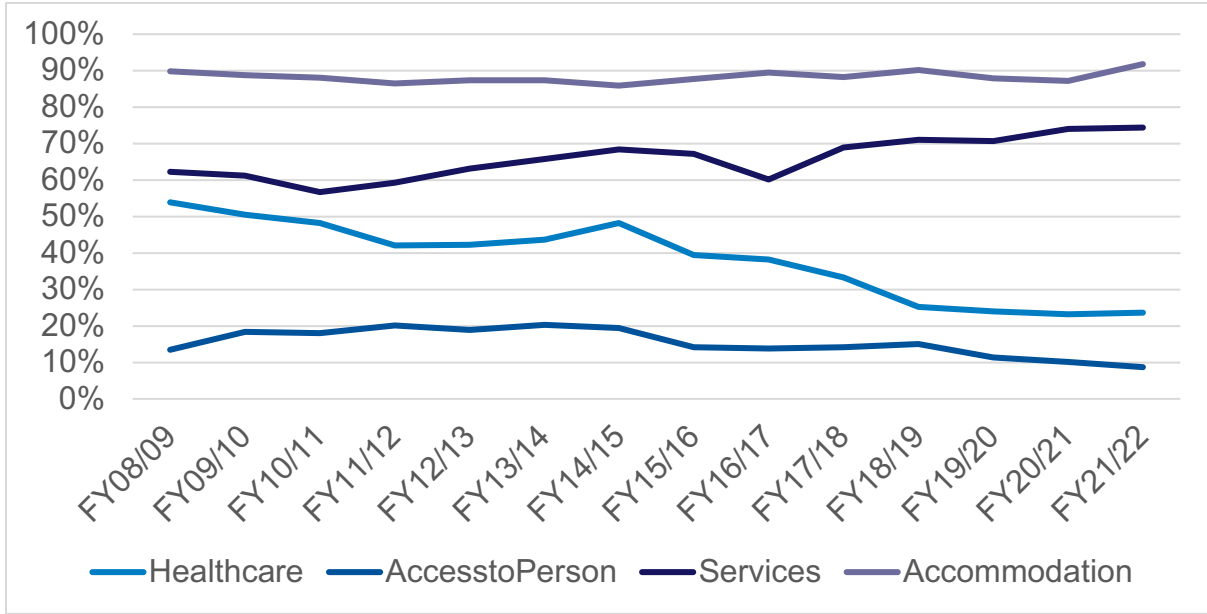


The following two graphs look at the likelihood of each type of power being given in a specific guardianship order, according to year and whether the person was under 65 or over 65 years old when they first came under OPA guardianship.

Graph 8 below shows that the likelihood of certain types of powers being given in relation to people subject to OPA guardianship who are over 65 years has been relatively stable over time (for example, accommodation and access to persons) or subject to a gradual decline (healthcare) or gradual increase (access to services).

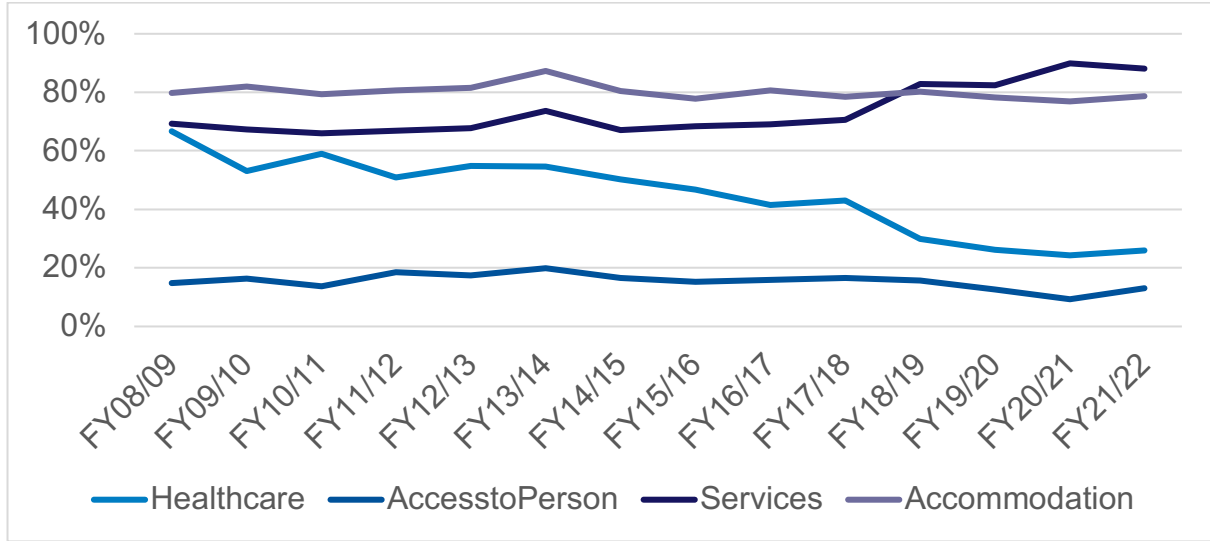


**Graph 8. Types of decision-making powers included in guardianship orders for OPA clients over 65 years as proportion of all matters, by year.**



There was a decline in the likelihood of healthcare powers being included in guardianship orders for people under 65 years across the period (see Graph 9). From 2018/19 onwards, there was also a notable and sustained jump in the likelihood of orders involving access to services powers, with access to services powers becoming the most likely power to be granted in relation to any individual OPA guardianship order for persons under 65 years in 2018/19 (see Graph 9). This continued to be true for the remainder of the period.

**Graph 9. Types of decision-making powers included in guardianship orders for OPA clients under 65 years as proportion of all matters, by year.**





## 7.5 Discussion

The data presented above provides a unique perspective on the demand for OPA guardianship services in Victoria. An examination of this data shows trends that match our experience and perception that there has been an increase in the number of represented persons on guardianship orders associated with the NDIS. Taken together the analyses have generated a compelling picture with the following key findings:

- Age is a reliable predictor of the length of time a person spends under OPA guardianship.
- There has been a sustained upward trend in the numbers of people under 65 years old who are subject to OPA guardianship since 2008.
- There has been a notable increase in the average length of order for people under 65 in the latter part of this 14-year period.
- The sustained increase in the number of people under 65 under OPA guardianship is compounded by the greater lengths of time this group spends subject to orders. This has had a significant impact on the demand for OPA guardianship services since 2015/16.<sup>147</sup>

### 7.5.1 Age, use of guardianship and the NDIS

The younger the represented person is when their order is received by OPA, the longer they are likely to spend under OPA guardianship. There was also notable clustering of average duration under OPA guardianship depending on whether the person was under or over 65 years old.

While data alone cannot provide an explanation for this clear finding, which applied consistently across the 14-year period of analysis, OPA posits that it is linked to differences between the aged care and disability service systems. The need for individual decision-making when accessing disability services has increased over the 14-year period. Even prior to the introduction of the NDIS, disability services in Victoria have been positively influenced by human rights agendas, including deinstitutionalisation and movement towards person-centred planning and service delivery. It is likely that this positive shift towards more individualised service provision, requiring more decision-making and responsibility for service coordination and management by individuals, has increased the demand for substitute decision-making services for people with significant cognitive impairment who lack informal networks of support. OPA believes that the use of substitute decision-making could be reduced with improved access to and availability of advocacy and supported decision-making services for this group of people.

The other clear service system difference that likely influences the length of time spent under OPA guardianship is access to and availability of appropriate support options. The aged care system has much more straightforward access requirements than disability services, and that makes it easier to navigate. OPA notes that the NDIS has increased the variety of support options available to people with disability and many have benefitted greatly from its introduction. OPA's report *Decision Time* discusses the ways in which OPA suspects that the NDIS has increased the demand for guardianship services – including as a result of thin-market failures, the lack of service and accommodation 'providers of last resort', and the gap left by the closure of state-provided disability case management services. OPA's experience

---

<sup>147</sup> See, for example, Graph 7. Types of decision-making powers included in OPA guardianship orders for all matters, by year.



suggests that these things, along with NDIA’s complex administrative systems, have contributed to the increases in the length of time that younger people spend subject to OPA guardianship.

Further, OPA’s anecdotal experiences of the time it takes to find, organise, trial and manage appropriate accommodation and support packages for NDIS participants finds support in this data analysis. OPA’s experiences are corroborated by the large increase in average length of time spent subject to OPA guardianship for people under 65 years old in the final period of this longitudinal data set (2017/18 to 2021/22) – when the NDIS was almost wholly responsible for disability services in Victoria.

Overall, increasing numbers of people under 65 being subject to OPA guardianship over this period, along with fewer people having their orders revoked in under 2 years, has significantly contributed to the demand for OPA guardianship services since 2015/16. The fact that the greatest rise in demand came from people with an intellectual disability, closely followed by people with an identified psychosocial disability,<sup>148</sup> means the NDIS is likely a factor in this trend.

---

<sup>148</sup> See Graph 4. Number of people under 65 years old under OPA guardianship, by disability, by year.



