



# Office of the Public Advocate

## Guardianship and administration from 1 March 2020

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It is a human right, enjoyed by all adults, that we make our own decisions. Some people with disability need support to do this.

From 1 March 2020, one way a person can be supported is by the appointment of a supportive guardian or supportive administrator. These are appointments the Victorian Civil and Administrative Tribunal (VCAT) will be able to make under the new *Guardianship and Administration Act 2019*.

Sometimes, even with support, a person is not able to make decision(s) about a financial or personal matter. If there is no alternative to protect and promote the human rights of an adult with disability, VCAT may appoint a guardian and/or an administrator.

The guardian or administrator is appointed with legal authority to make decisions for the person about specific personal or financial matter(s).

Guardians and administrators appointed on or after 1 March 2020 will make decisions that reflect the person's will (the way they live their life) and preferences, unless it would cause serious harm to the person.

### **Guardianship and administration applications on or after 1 March 2020**

Any adult can make an application to the VCAT Guardianship List for a guardianship or administration order.

From 1 March 2020, a person may choose to apply to VCAT if they are concerned that:

- a person with disability is not able to make a decision that needs to be made and
- an order is needed to protect and promote their human rights and dignity.

Someone may make an application because they are concerned about the decisions a person is making, or others are making for them.

If the application is for someone under 18 years of age the order will only take effect once the person turns 18.

VCAT will be able to appoint:

- an **administrator** with power to make decisions for the person about specified financial matter(s)
- a **guardian** with power to make decisions for the person about specified personal matter(s).

### **When will VCAT make an order?**

Under the new Act VCAT will only be able to make an order if it is satisfied that:

- because of the person's disability, they do not have decision-making capacity in relation to the personal or financial matter(s)
- the order will promote the person's personal and social wellbeing
- the person is in need of a guardian.

The Act says VCAT should exercise its power in a way that is least-restrictive of the ability of a person with disability to decide and act as is possible in the circumstances.

### **Decision-making capacity**

Adults are presumed to have decision-making capacity unless there is evidence to the contrary.

A person has decision-making capacity to make a decision if they are able to:

- understand the information relevant to the decision and its effect
- retain the information to the extent necessary
- use or weigh the information, and
- communicate their decision in some way, including by speech, gestures or other means.

## **Personal and financial matters**

A personal matter is a matter relating to the person's personal or lifestyle affairs, such as services they may need, or where they live.

A financial matter is a matter relating to a person's financial or property affairs. Examples include paying expenses, undertaking a real estate transaction, or carrying on a business.

## **How will VCAT decide if the order is needed?**

To decide whether the person is in need of a guardian or administrator, VCAT will consider:

- 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
  - may reasonably be made through negotiation or mediation
- 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 how to keep them.

## **Investigations**

VCAT may ask the Office of the Public Advocate (OPA) to investigate matters in the application. While OPA staff collect and provide information, it is VCAT that decides whether a guardian or administrator is needed and, if so, who.

## **At the hearing**

In most cases, the person who is the subject of the application must be at the hearing so they have the chance to have their say.

However, they do not have to attend if they do not want to, it is impracticable or unreasonable.

## **Urgent orders**

VCAT may not conduct a hearing if it is an application for an urgent order. An urgent order may be needed if there is an immediate risk of harm to the health, welfare or property of the person.

## Who can be appointed?

For a **guardianship** order, VCAT will usually appoint a relative or friend of the represented person. They must be an adult and agree to take on the role.

In some circumstances, VCAT may appoint the Public Advocate as guardian. The Public Advocate can then delegate the powers and duties in the order to an Advocate Guardian from her office or a volunteer Community Guardian trained and supported by OPA.

For an **administration** order VCAT may appoint a friend, relative, solicitor, accountant or organisation. If there is no suitable person or organisation, State Trustees Limited or a private trustee company may be appointed.

## What will VCAT consider?

VCAT must be satisfied that whoever they appoint will take on the duties of the role, will not have a conflict of interest, and is suitable. For an administrator, VCAT must also be satisfied that the person has enough expertise to make decisions about the financial matter(s) in the order.

## Role and responsibilities of guardians and administrators

A **guardianship** order will specify the personal matter(s) a guardian can make decisions about, such as:

- where and with whom the person lives
- access to services
- restricting visits to the person
- medical treatment decisions.

An **administration** order will specify the financial matter(s) that an administrator can make decisions about.

VCAT must reassess the order within 12 months unless it has stated otherwise in the order. At the time, VCAT will consider whether the guardian or administrator has performed their duties.

## Supporting the person

Depending on the specific decision that needs to be made, the represented person may be able to make the decision. Guardians and administrators should support the

represented person, as far as practicable and appropriate in the circumstances, to do this.

## **Making decisions**

If the represented person cannot be supported to make their own decision about the matter, the guardian or administrator will make the decision. They should support the person to express their will (the way they live their life) and preferences and to participate as much as possible in the decision.

Guardians and administrators who are appointed on or after 1 March 2020, when making decision(s), 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.

\* In some circumstances the guardian or administrator 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.

## **Duties**

Guardians and administrators appointed on or after 1 March 2020 will be required to:

- act as an advocate
- act honestly, in good faith, and with reasonable skill and care
- encourage and assist the represented person to develop their decision-making capacity
- act in a way to protect them from neglect, abuse or exploitation
- not use the position for profit or act if they have a conflict of interest (however administrators may be permitted by law or VCAT)
- not disclose confidential information gained in their role unless authorised to do so under the order or by law.

Administrators will have a range of other duties including in relation to:

- management of the property of the represented person
- keeping records and accounts
- providing annual accounts to VCAT.

Guardians and administrators who fail to comply with their duties may be ordered to compensate the represented person for any loss. If they act dishonestly, they may be guilty of a criminal offence.

### **Medical treatment decisions**

If a guardian makes a medical treatment decision, they must follow the process set out in the *Medical Treatment Planning and Decisions Act 2016* and make the decision they reasonably believe the represented person would have made if they had decision-making capacity to make the decision.

### **Supportive guardianship and supportive administration**

Supportive guardianship and supportive administration orders are new orders that VCAT will be able to make from 1 March 2020.

The role of a supportive guardian or supportive administrator is to support a person with disability to make their own decisions.

They will support the person to make, communicate and/or give effect to decisions about:

- the personal matter(s) set out in the order (supportive guardian)
- the financial matter(s) set out in the order (supportive administrator).

The order may give them authority to get information from others about the person to help the person make a decision. For example, from doctors, banks, utility providers, disability organisations or government agencies.

### **Who can apply?**

Any person will be able to apply to VCAT for a supportive guardianship or supportive administration order for an adult with disability. However, the application will need to propose someone for the role and they will need to agree to take it on.

Unlike guardianship and administration applications, VCAT will not appoint the Public Advocate, State Trustees Limited or similar body if there is no one suitable who agrees to take on the role.

### **Does the person who will be supported need to agree?**

For a supportive guardian or supportive administrator to be appointed, the proposed supported person will need to agree. If the application is for someone under 18 years of age, the order will only take effect once the person turns 18.

### **What if there is an application for a guardian or administrator?**

VCAT may decide a supportive guardianship or supportive administration order is a more appropriate option after considering an application for a guardianship or administration order.

The person to be supported and the proposed supportive guardian or supportive administrator would need to agree.

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