



# The role of a guardian

## Appointed under the *Guardianship and Administration Act 2019*

### This fact sheet:

- introduces the role of a guardian
- explains some common terms
- explains the role of the Office of the Public Advocate (OPA)
- includes a flowchart of the steps for guardians.

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## Some common terms

### Who is a represented person?

The represented person is the term for the person with disability who has a guardian or administrator appointed for them by the Victorian Civil and Administrative Tribunal (VCAT).

### What is a guardian? What are their duties?

A 'guardian' can be appointed by VCAT to make decisions about personal matters for a represented person. For example, decisions about where and with whom the represented person lives, other people they associate with, or medical treatment decisions.

Guardians are appointed under the *Guardianship and Administration Act 2019*. This Act sets out the duties of a guardian. For example, VCAT may appoint a family member or a friend to be a guardian.

It is the guardian's responsibility to make sure they understand, and comply with, their duties. When the guardianship order is reassessed (the order will state when this will be) they will need to tell VCAT how they complied.

### What is the Office of the Public Advocate (OPA)?

OPA is a statutory body that promotes and safeguards the rights of people with disability. In some circumstances, the Public Advocate can be appointed by VCAT to be guardian for an adult with disability. One of OPA's other roles is to give advice to people about the Guardianship and Administration Act.

OPA is independent of VCAT.

OPA has expertise in making personal, lifestyle and medical decisions for represented persons, and also produces resources to assist guardians in their role.

OPA's Advice Service can provide advice to the represented person, to people appointed by VCAT, and to someone interested in ensuring the rights of a person with disability are promoted.

## Human rights principles

### What does the Act say about decision-making and human rights?

The Act aims to protect and promote the human rights and dignity of people with disability. This includes recognising the need to support people to make, be part of, and act on decisions that affect their lives.

All adults are presumed to be able to make decisions for themselves. However, based on available evidence, VCAT may find that a person needs a guardian to make a decision(s) for them.

If VCAT makes an order for the appointment of a guardian, this is very significant for the represented person.

The Act says that everyone with powers, functions and duties under the Act must follow its general principles. Those with decision-making authority must also follow the decision-making principles of the Act.



## Duties of guardians

- Guardians must:
- 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
  - act in accordance with the general principles and the decision-making principles in the *Guardianship and Administration Act 2019*.

# Steps for guardians

## Check that the order gives you authority to make a decision about the matter

YES

## Is it a medical treatment decision?

YES

The health practitioner will assess whether the represented person has capacity to make the decision.

If not, you may be asked to make the decision as their **medical treatment decision maker**. You must make the decision you reasonably believe they would make. (This is what you are required to do under the *Medical Treatment Planning and Decisions Act 2016*).

NO

## General principles

A person with a disability who needs support to make decisions should be provided with practicable and appropriate support to enable them, as far as practicable in the circumstances to:

- make and participate in decisions affecting them
- express their will and preferences
- develop their decision-making capacity.

The will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person.

Powers, functions and duties under the Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act, as is possible, in the circumstances.

## Does the represented person have 'decision-making capacity' (see overleaf) to make the decision with support?

YES

You, or another person, provides the represented person with practicable and appropriate support to make the decision.  
You should make anyone relying on the decision aware that they made the decision, not the guardian.

NO

## Decision-making principles from the *Guardianship and Administration Act 2019*

## Do you know the represented person's 'will and preferences' (see overleaf) that are relevant to the decision?

YES

- To make a decision**
- Comply with the **duties** and act in accordance with the **general principles** (see above).
- Step 1** Check if there is guidance from VCAT or restrictions in the order.
- Step 2** If the represented person has a companion animal, act in a way that recognises the importance of it to them and any benefits they obtain from it.
- Step 3** Consider if it is necessary to override the the represented person's will and preferences to prevent serious harm to them. Their will and preferences should *only* be overridden if it is necessary to do so to prevent **serious harm** to them.
- Step 4** Make a decision that gives all practicable and appropriate effect to the represented person's **will and preferences**, unless this would cause serious harm to them.

## Are you able to form a belief about their likely will and preferences?

(based on all information available, including from consulting their relatives, close friends and carers)

YES

- To make a decision**
- Comply with the **duties** and act in accordance with the **general principles** (see above).
- Step 1** Check if there is guidance from VCAT or restrictions in the order.
- Step 2** If the represented person has a companion animal, act in a way that recognises the importance of it to them and any benefits they obtain from it.
- Step 3** Consider if it is necessary to override the represented person's will and preferences to prevent serious harm to them. Their will and preferences should *only* be overridden if it is necessary to do so to prevent **serious harm** to them.
- Step 4** Make a decision that gives effect, as far as practicable in the circumstances, to what the represented person's **will and preferences** are likely to be, unless this would cause serious harm to them.

## To make a decision

- Step 1** Comply with the **duties** and act in accordance with the **general principles**
- Step 2** Check if there is guidance from VCAT or restrictions in the order.
- Step 3** Make a decision that promotes the represented person's **personal and social wellbeing**.
- This is promoted by:
- recognising their inherent dignity and respecting their individuality
  - having regard to their existing supportive relationships, religion, values and cultural and linguistic environment
  - keeping their confidential information confidential
  - recognising the importance to them of their companion animal, if they have one, and the benefits that may be obtained by having one.

## Making decisions

Before a guardian can make a decision for the represented person they need to consider if the represented person could make the decision themselves.

It is possible that if the represented person is provided with practicable and appropriate support they could make the decision. If they can, they should make the decision. If not, the guardian does.

It is important to know who is making the decision. If it is the guardian who makes the decision for the represented person, they must make sure they make it according to the Act.

### When does the represented person have decision-making capacity to make the decision?

The Act says a person has capacity to make a decision if they are able to:

- understand the information relevant to the decision and its effect
- 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 their decision, and their views, and needs as to the decision, in some way, including by speech, gesture or other means.

The represented person may have capacity to make the decision if they have practicable and appropriate support. For example, this may be by having information explained in a way they can understand (which could include using visual aids), or by having someone who supports them by helping break up the decision into smaller steps.

### The represented person's will and preferences

Generally, a guardian must make decisions that give effect to the represented person's will\* and preferences, unless to do so would cause serious harm to them.

\* For example, a person may express, through their words and actions, their will to live independently rather than in care.

## The Public Advocate

### What happens if the Public Advocate is appointed guardian?

If the Public Advocate is appointed guardian they can delegate the powers and duties in the order to an Advocate Guardian from OPA or a volunteer Community Guardian trained and supported by OPA.

OPA will make contact after it receives a copy of the VCAT order.

### How do OPA Advocate Guardians make decisions?

OPA Advocate Guardians, like all guardians, must follow the process and comply with the duties set out in the Act. This includes exercising reasonable skill and care.

These processes, and making sure they comply with their duties under the Act, take time. How long it will take to make a decision will depend on all the circumstances.

### Supportive guardians and supportive administrators

If VCAT has appointed a supportive guardian or supportive administrator, it means it is satisfied that the person will have capacity to make their decisions if they have practicable and appropriate support.

A supportive guardian or supportive administrator cannot make decisions for the person: they *support* the person to make their own decisions. They have powers, duties and obligations as set out in the Act. Find more information on the OPA website.

### Legal responsibilities

When VCAT appoints people to be guardians, administrators, supportive guardians and supportive administrators it means those people are given powers that otherwise they would not have.

Guardians' duties are set out in section 41 of the Act (see the flowchart inside for these duties).

There are possible legal consequences for people appointed to these roles if they act dishonestly or negligently. It is therefore important to comply with these duties.

### More information

For more information about the role and duties of a guardian visit [publicadvocate.vic.gov.au](http://publicadvocate.vic.gov.au) for OPA's *Guardianship* guide. Or contact OPA's Advice Service on 1300 309 337.