



Office of the Public Advocate

Enduring powers of attorney and guardianship

‘Empowering people for future decision-making’

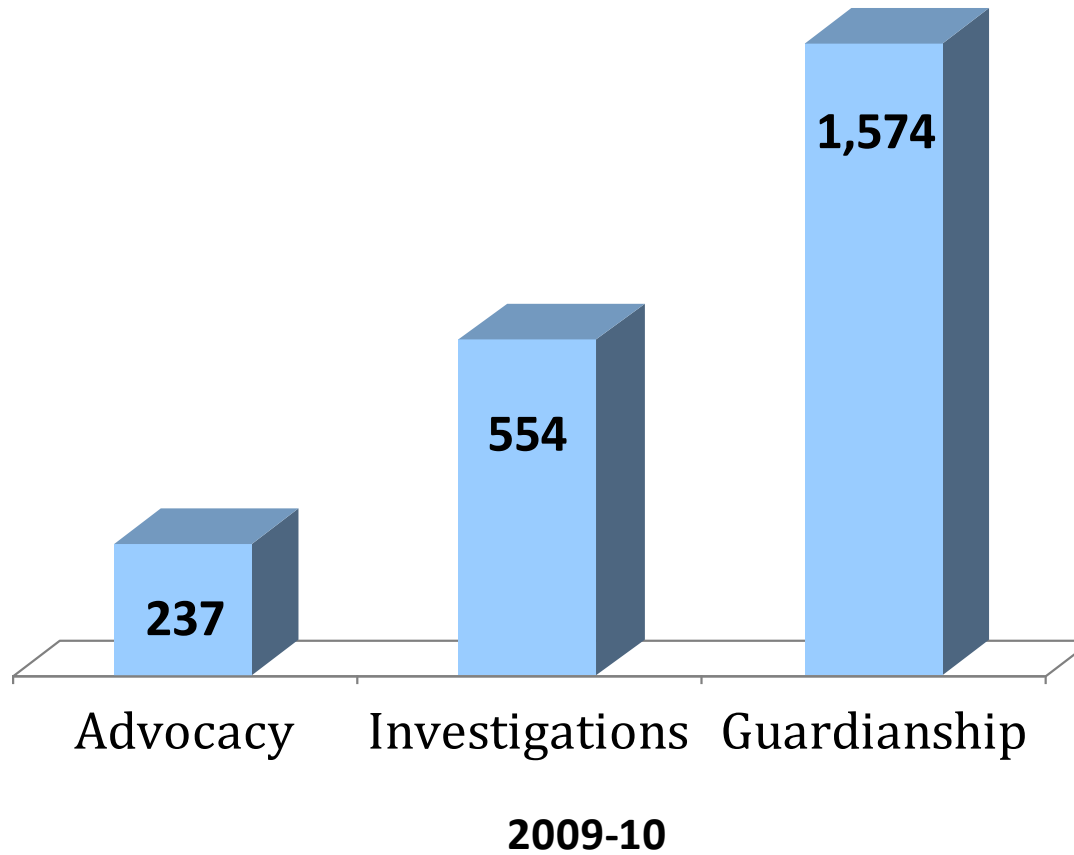


Our services

Functions

- guardian of last resort
- investigation of applications to VCAT
- advocacy: individual and systemic
- support for private guardians
- advice service
- community education
- awareness & information: website, publications, media

Service statistics





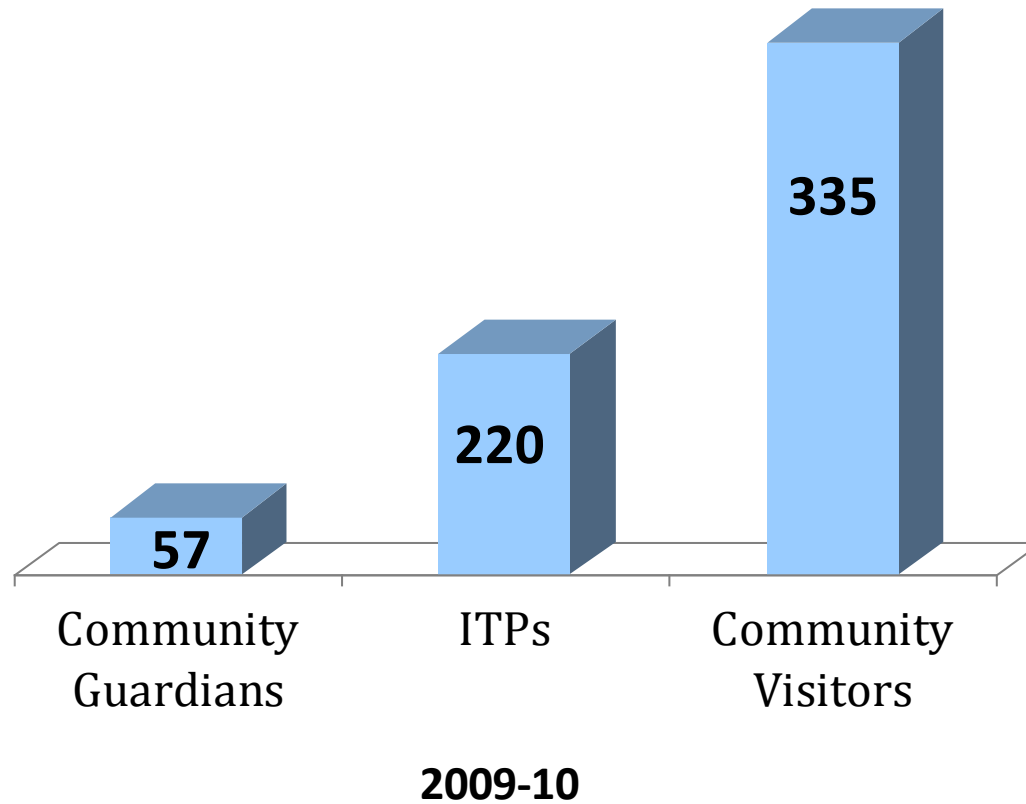
Our services

Volunteer programs

- Community Visitors Program
- Independent Third Person Program
- Community Guardianship Program



Volunteer statistics





Why have enduring powers of attorney?

- life is unpredictable
- general power of attorney invalid if you lose capacity; 'enduring' means the power continues
- gives you control over who makes decisions on your behalf in the event that you cannot
- creates formal relationship with someone who knows your wishes for financial, medical or lifestyle matters
- avoids family application to VCAT for guardian/administrator



Powers of attorney

Definition

A legal document where you ('the donor') gives someone ('the attorney') the power to make decisions for you.

There are four powers

1. general power of attorney
2. enduring power of attorney (financial)
3. enduring power of attorney (medical treatment)
4. enduring power of guardianship.



Enduring powers of attorney

Who can make one?

You must be 18 years of age and have capacity.

- ‘Capacity’ or ‘legal capacity’ means you have the ability to reason things out.

You can understand, retain, believe, evaluate (that is process) and weigh up relevant information.



Enduring powers of attorney

At the time of making the appointment, the donor must be able to understand matters such as:

- the sorts of powers the attorney will have
- the sorts of decisions they will have the authority to make
- the effects that their power could have on the donor
- how to cancel the arrangement in the future



Enduring powers of attorney

Choosing an attorney

- must be 18 and have capacity themselves
- know and understand the donor's interests and wishes
- have the necessary skills
- be trustworthy
- be available and prepared to do the job
- donor can revoke EPA while competent and appoint someone else.



Enduring power of attorney (financial)

Instruments Act 1958 (amended 1 April 2004)

for financial and legal decisions only

e.g. managing your banking, property or paying bills

Note: existing enduring power of attorneys remain valid



Enduring power of attorney (financial)

Making the appointment

- can specify when the power begins
- can appoint more than one attorney
 - joint
 - joint and severally
 - alternative
- can place conditions/limitations on the operation of the power
- signing of the form must be witnessed
- attorney(s) must formally accept the appointment
- review the appointment with the donor while competent at least every two years.



Enduring power of attorney (financial)

Responsibilities of the attorney

The attorney must:

- act in the donor's best interests
- wherever possible, make the same decision the donor would have made
- keep accurate records of dealings and transactions made under the power
- keep the donor's property and money separate from their own
- avoid any conflicts of interest



Enduring power of guardianship

Guardianship and Administration Act 1986

for lifestyle decisions only

e.g. where the person lives or healthcare they receive

- attorney is known as ‘the guardian’



Enduring power of guardianship

Making the appointment

- can only appoint one guardian
- can appoint an alternative guardian
- cannot appoint professional carer
- power begins when donor loses capacity
- recommend to review appointment every two years



Enduring power of guardianship

Making the appointment (cont.)

- can specify the guardian's powers
 - accommodation
 - healthcare
 - access to persons
 - employment
- can state wishes for your guardian to take into account when making decisions.



Enduring power of attorney (medical treatment)

Medical Treatment Act 1988

for medical treatment decisions only

e.g. agreeing to medication or surgery

- attorney is known as ‘the agent’



Enduring power of attorney (medical treatment)

Making the appointment

- can only appoint one agent
- can appoint alternate agent
- power begins when person loses capacity
- review appointment every two years
- signing of the form must be witnessed



Enduring power of attorney (medical treatment)

Agent's powers

- agent can consent to medical and dental treatment, and refuse medical and dental treatment
- agent can only refuse medical treatment on behalf of a patient if:
 - the treatment would cause unreasonable distress, or
 - the agent believes that the donor would consider the treatment unwarranted



EPA (medical treatment)

Limitation on agent's powers

- cannot consent to 'special procedures'
 - sterilisation
 - termination of pregnancy
 - removal of tissue for transplant

These require consent from VCAT.

- cannot consent to psychiatric treatment
 - governed by the *Mental Health Act 1986*



Order *Take Control*

Order Take Control: a kit for making powers of attorney and guardianship from:

- Victoria Legal Aid

Ph: (03) 9269 0223

- online at www.legalaid.vic.gov.au
- by calling OPA (for single copies only, not bulk orders) on 1300 309 337



Office of the Public Advocate

Guardianship and administration

**Protecting the best interests of people with
a decision-making disability**



Guardianship List of Victorian Civil & Administrative Tribunal (VCAT)

VCAT - Guardianship List

Mission

Protect the personal and financial affairs of adults with a disability who are unable to make reasonable decisions about their person, circumstances or affairs.



Guardianship List of VCAT

Role

- appoints guardian and/or administrator for up to 3 years
- consents to special procedures
- safeguards the operation of enduring powers of attorney
- is more informal than a court
- legal representation not required
- tries to make the process accessible



Guardianship & administration

Guardian

- **Appointed to make personal and lifestyle decisions**
 - accommodation, medical treatment they receive, access to services etc
- This often occurs as a result of significant levels of conflict or risk.

Administrator

- **Appointed to make financial and legal decisions**
 - paying bills, or managing property etc



Guardianship & administration

When is a guardian / administrator needed?

When the represented person:

- Is 18 years or over and has a disability
- Cannot make reasonable judgments because of the disability
- Needs to make a decision and there is no less restrictive alternative than appointing a guardian/ administrator
- Needs someone to act in their best interests



Application Process

Application process

APPLICANT ↔ Advice service or website



VCAT



Investigation



ORDER



Administration

- Private administrator
- State Trustees

All financial and legal decisions



Guardianship

- Private guardian
- Public Advocate

Limited to:

- health care
- accommodation
- access to persons
- access to services

Or plenary (all)



Guardianship

A guardian will:

- be an advocate
- protect the person from abuse, exploitation and neglect
- respect family relationships, cultural background and confidentiality
- consider the person's wishes and the least restrictive option
- consult with anyone who has a real interest in the represented person's well being



Guardianship

Who can be a guardian?

- **A relative or friend of the person**
 - who will act in the person's best interest
 - does not have any conflict of interests
 - who is available and accessible
 - is someone familiar with the person's values and beliefs
- VCAT must be assured the guardian will act in the best interests of the person
- If there is no one available or a need for an independent person, Public Advocate can be appointed as guardian



Other VCAT orders

Guardianship matters

- temporary - 21 days
- provide advice to guardians
- consent to special medical procedures

Administration matters

- temporary - 21 days
- provide advice and direction to administrators

Enduring Power of Attorney matters

- various powers to make orders relating to enduring powers of attorney and guardianship



Rehearing and reassessment

Rehearing

- person can apply for rehearing within 28 days of order if believe VCAT has made error

Reassessment

- orders are reassessed by the date specified on the order
- orders can be reassessed sooner at the request of any person



Case study - guardianship

Scenario

Jane is 32 and has an acquired brain injury. After her marriage broke down following her accident, she went to live in a Supported Residential Service (SRS) where she met another resident, Danny. Jane developed a relationship with Danny. They decided to leave the SRS and went to live in a caravan in a country town. Jane's family was worried that she would not be able to look after herself and may become pregnant. They applied to be appointed her guardian with the intention that she be brought back to the SRS.



Case study - guardianship

Resolution

The Public Advocate was appointed guardian (for accommodation) and after consultation with Jane, Danny, their families and service providers, decided that she could cope outside the SRS environment so long as community supports were in place. An urgent application was also made for priority public housing for the couple. A guardian has no authority over another person's sexual life but arranged for Jane and Danny to have counseling, after which they made the decision to use contraception as they did not feel ready to have a child at that time.



Case study - advocacy

Scenario

Mr B is an intellectually disabled young man with significant behavioural problems. He was required to move from one community residential unit to another and had significant difficulties in settling into his new house. His behaviour deteriorated and he assaulted one of the other residents of the facility. The other four residents of the house, through their family members, made application to the Magistrates' Court for intervention orders against Mr B. The Magistrate adjourned the proceedings and referred the matter to OPA for intervention.



Case study - advocacy

Resolution

The OPA advocate undertook extensive consultation with parties, including DHS senior managers and family members. It was clear that there were communication problems and significant distrust between parties. The advocate sponsored a meeting to promote discussion among all parties to clear the air and open up lines of communication. The advocate satisfied himself that difficulties had settled down and that the risk of further incidents had substantially diminished. The Magistrate was provided with a report concerning these actions, accounting for the interests of all of the residents at the Community Residential Unit.



For more information...

OPA Advice Service

1300 309 337

www.publicadvocate.vic.gov.au

Multilingual publications available

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