

GUARDIANSHIP AND ADMINISTRATION

This chapter examines the roles and responsibilities of both guardians and administrators under the *Guardianship and Administration Act 1986* (Vic) and the criteria used by the Victorian Civil and Administration Tribunal (**VCAT**) in making determinations under that Act. The chapter also examines the process for making an application to VCAT and the procedures during and after the hearing.

Table of Contents

1. Executive Summary	3
2. The Law	5
2.1 Overview	5
2.2 Guardianship	5
2.3 Administration.....	6
2.4 When is a guardian or administrator appointed?	7
2.5 Who may be appointed as a guardian or administrator?	9
2.6 Powers of a guardian/administrator	10
2.7 Special provisions regarding consent to medical and other treatment.....	10
2.8 The Public Advocate.....	11
3. VCAT Hearings.....	12
3.1 The Guardianship List.....	12
3.2 The general approach of the Guardianship List	13
4. Before the VCAT Hearing	14
4.1 How is an application made?	14
4.2 Different types of hearings	15
4.3 Parties to the hearings and attendance at the hearing.....	15
4.4 At what time are hearings held?	15
4.5 Notices of hearings.....	15
4.6 Representation	16
4.7 Can hearings be adjourned?.....	17
4.8 Is an interpreter required?.....	17
4.9 Assessing VCAT proceeding file.....	18
4.10 Discussions with the person who has lodged the application	18
4.11 Discussions with the client	19
4.12 Experts' reports	19
4.13 Providing the required information to VCAT in advance.....	20
5. At the VCAT Hearing.....	21
5.1 Representation	21
5.2 Must the client attend the hearing?	21
5.3 Who will hear the case?.....	21
5.4 What can be expected at the hearing?	21
5.5 Natural justice.....	22
5.6 Rules of evidence	22
5.7 Content of oral submissions to VCAT	22
6. After the VCAT Hearing	23
6.1 The outcome of the hearing	23

6.2	Rehearing of orders and appealing VCAT decisions	23
6.3	Reassessment of orders	25
6.4	Moving forward once an order is in place	26
7.	Useful Contacts.....	26
7.1	Complaints	26
7.2	Legal services	27
7.3	Mental health and neuropsychological assessments	27
7.4	Support for guardians of clients	28
7.5	VCAT guardianship and administration hearings	28

1. Executive Summary

The *Guardianship and Administration Act 1986* (Vic) (**the Guardianship Act**) allows for guardians and administrators to be appointed to make decisions for people with a disability (**clients**) in relation to:

- for guardians — health care, accommodation, employment and access to services and people; and
- for administrators — legal and financial matters such as access to money, managing investments, selling property or paying bills.

Guardianship and administration matters are heard by the Victorian Civil and Administrative Tribunal (**VCAT**).

The criteria that VCAT must consider (and that must be satisfied) before a guardian or administrator can be appointed are whether the client is:

- a person with a **disability**, which, in accordance with section 3 of the Guardianship Act, includes any intellectual impairment, mental disorder, brain injury, physical disability or dementia;
- unable by reason of the disability to make reasonable judgments in respect of matters relating to their person, circumstances or estate; and
- in need of a guardian or administrator.

The Guardianship List, which is part of the Human Rights Division of VCAT, conducts all hearings to determine whether a person (aged 18 years or over) with a disability should have a guardian and/or administrator appointed.

The Guardianship Act:

- prescribes that its provisions must be interpreted in a manner that gives effect to the wishes of the client wherever possible;
- emphasises the importance of VCAT not imposing administration orders if it would be unduly restrictive or otherwise inappropriate; and
- should be interpreted so that the approach that is least restrictive of a person's freedom of decision and action that is possible in the circumstances is adopted.

Hearings held before VCAT in the Guardianship List are informal. You should be aware that the jurisdiction is not adversarial, there is no need to stand up in hearings and the VCAT Member will control the proceedings and may at times choose to speak directly to the client, rather than through their advocate.

Before a VCAT hearing, as an advocate you:

- should notify VCAT in writing if you are representing a client and provide written authority to act on the client's behalf;
- must act on instructions and not in what you perceive to be the client's best interests;

- should remember that the lead-up to the hearing can be quite emotional for the client and you should educate them about the process and, if required, assure them that they are not at VCAT because they have done something wrong;
- should explore less restrictive options available for the client;
- should obtain all necessary paperwork from VCAT;
- should, if the client's disability is in dispute, obtain an independent medical report;
- should, if the client agrees, contact the applicant, family members, carers and other interested parties to assist in your preparation for the hearing; and
- should check the date, time and location of the hearing and inform the client of these details in writing.

During the VCAT hearing, you should:

- seek leave to appear;
- remember that the hearing is not adversarial;
- be aware that the VCAT Member will probably want to speak with the client directly (remember that their role is to facilitate the hearing and that direct communication between the VCAT Member and the client is encouraged because it often increases the client's feeling of autonomy);
- raise with VCAT the client's activities and interests and make sure that these are taken into account in any order made; and
- at the end of the hearing, explain the outcome to the client and make sure the client understands what has taken place.

After a VCAT hearing, you should:

- arrange a time for the client to meet with the guardian or administrator if one has been appointed;
- seek instructions to obtain a statement of reasons;
- speak to the client about their appeal rights;
- if an administrator is appointed, find out any fees or charges for the service and inform the client; and
- if a guardian or administrator is appointed, contact the client within two to three months after the order has been made to see if their circumstances have changed.

2. The Law

2.1 Overview

The Guardianship Act allows for and regulates the appointment of guardians and administrators generally.¹ The Guardianship Act also creates the role of the Public Advocate, who has various delegable functions relating to the appointment of guardians and administrators.

Other relevant instruments regarding the appointment of guardians and administrators include:

- the *Guardianship and Administration (Fees) (Interim) Regulations 1986* (Vic);
- the *Victorian Civil and Administrative VCAT Act 1998* (Vic) (**the VCAT Act**);
- the *Medical Treatment Act 1988* (Vic) (**the Medical Treatment Act**); and
- the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).

The VCAT Act legislates for the constitution and procedure of VCAT,² which hears guardianship and administration proceedings in its Guardianship List.

The Medical Treatment Act is relevant to issues of consent to medical treatment on behalf of clients by guardians and VCAT.

The Charter, which regulates human rights in Victoria, may also impact upon the interpretation of the Guardianship Act and the Medical Treatment Act, in so far as it expressly requires that:

[S]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.³

2.2 Guardianship

Guardians are appointed by an order of VCAT (**guardianship order**) to make certain decisions about a person's lifestyle. These decisions can relate to health care, accommodation, employment and access to services and people.⁴

The definition of **guardian** in section 3(1) of the Guardianship Act includes the following types of guardian that may be appointed by VCAT:

- the Public Advocate;
- a **plenary guardian**, to whom all the powers and duties in respect of the client that a parent would have are conferred;⁵

¹ *Guardianship and Administration Act 1986* (Vic), s 1.

² *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Sch 1, Pt 9 (among other provisions).

³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).

⁴ See generally, Office of the Public Advocate, *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act 1986* (2005) at <http://www.publicadvocate.vic.gov.au/media/docs/Good-guardianship-3b7b5bde-3a31-4ff0-9455-2593724d6236.pdf>.

⁵ *Guardianship Act*, s 24(1).

- a **limited guardian**, who is conferred limited powers and duties in respect of the client as are specified in an order of VCAT;⁶
- an **enduring guardian**, who is authorised to exercise the powers and duties of a guardian in relation to the matters specified in an order of VCAT (or plenary guardian if the order does not specify any matters) if, and only to the extent that, the client subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of those matters;⁷ or
- an **alternative guardian**, who is appointed in the place of a previously appointed guardian and conferred the same powers and duties as the previous guardian.⁸

It is possible to apply for a temporary guardianship order in the above classes for a period not exceeding 21 days.⁹ Such an order might be imposed in the case of an immediate risk, for example, when a person is housebound, immobile and/or refusing other care. There are no costs associated with the appointment of a temporary guardian.¹⁰ Joint guardians may also be appointed. Depending on the circumstances, two or more people can be appointed as joint guardians, in which case all of the guardians must agree for a decision made on behalf of a person to be legally enforceable.¹¹

2.3 Administration

Administrators are appointed by an order of VCAT (**administration order**) to make decisions about a client's legal and financial matters, including access by the client to their money, managing investments, selling property or paying bills.¹²

The definition of **administrator** is 'the person named as administrator in an administration order'.¹³

It is also possible to apply for a temporary administration order to be imposed for a period not exceeding 21 days.¹⁴ Such an order might be imposed in the case of an emergency financial situation, for example, when an auction needs to be stopped or an account frozen.¹⁵ Note that there may be extra costs associated with a temporary administration

⁶ Guardianship Act, s 25(1).

⁷ Guardianship Act, s 35A(1B).

⁸ Guardianship Act, ss 35(3) and 35A(1A).

⁹ See generally, Guardianship Act, Pt 4, Div 4.

¹⁰ See Office of the Public Advocate, *Temporary Orders: Guidelines for applying to the Victorian Civil and Administrative Tribunal - Guardianship List (For social, health care and community workers)* (26 August 2006) at <http://www.publicadvocate.vic.gov.au/Publications/Administration-Guardianship/Temporary-orders.html> at 29 January 2008.

¹¹ See Office of the Public Advocate, *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act 1986* (2005) at <http://www.publicadvocate.vic.gov.au/media/docs/Good-guardianship-3b7b5bde-3a31-4ff0-9455-2593724d6236.pdf>.

¹² See generally, Office of the Public Advocate, *Administration: A Guide for People Appointed as Administrators under the Guardianship and Administration Act 1986* (2002) at <http://www.publicadvocate.vic.gov.au>.

¹³ Guardianship Act, s 3(1).

¹⁴ See generally, Guardianship Act, Pt 4, Div 4.

¹⁵ See Office of the Public Advocate, *Temporary Orders: Guidelines for applying to the Victorian Civil and Administrative Tribunal - Guardianship List (For social, health care and community workers)* (26 August 2006) at <http://www.publicadvocate.vic.gov.au/Publications/Administration-Guardianship/Temporary-orders.html> at 29 January 2008.

order in that, if appointed, State Trustees may charge \$140 per hour for action taken under a temporary administration order.¹⁶

2.4 When is a guardian or administrator appointed?

To make a guardianship order under section 22(1) of the Guardianship Act, or administration order under section 46(1) of the Guardianship Act, VCAT must be satisfied that the client:

- is a person with a disability; and
- is unable by reason of the disability to make reasonable judgments in respect of:
 - **(for guardianship)** all or any of the matters relating to their person or circumstances; or
 - **(for administration)** all or any part of their estate; and
- is in need of a guardian and/or an administrator of their estate; and
- **(for administration only** if the client does not reside in Victoria) is not a person for whom State Trustees have been authorised under section 12 of the *State Trustee (State Owned Company) Act 1994* (Vic) to collect, manage, sell or otherwise dispose of or administer any property in Victoria that forms part of the estate of the client.

Each of the criteria above must be assessed individually.¹⁷

What is 'a disability'?

Disability is defined in the Guardianship Act to mean intellectual impairment, mental disorder, brain injury, physical disability or dementia.¹⁸ VCAT typically requires a current medical report or reports supporting the view that the client has a disability.¹⁹ The form required for a report is available on VCAT's website at

[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/\\$file/medical-psychological_report-guardianship_list.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/$file/medical-psychological_report-guardianship_list.pdf).²⁰

When is a person 'unable to make reasonable judgments'?

Whether the client is unable to make reasonable judgments is assessed by VCAT with the assistance of professional assessments and testimony of friends and family of the client. It should not be presumed that simply because a person has a disability, they are unable to make reasonable judgments. The client's **inability to make reasonable judgments**:

- must be related to the disability;²¹

¹⁶ See Office of the Public Advocate, *Temporary Orders: Guidelines for applying to the Victorian Civil and Administrative Tribunal - Guardianship List (For social, health care and community workers)* (26 August 2006) at <http://www.publicadvocate.vic.gov.au/Publications/Administration-Guardianship/Temporary-orders.html> at 29 January 2008.

¹⁷ *XYZ v State Trustees Ltd & Anor* [2006] VSC 444, [43]-[46] (**XYZ**).

¹⁸ Guardianship Act, s 3(1).

¹⁹ Guardianship Act, s 94.

²⁰ The report is entitled *Medical/Psychological Report*. See also to section 7 below for contact details for VCAT

²¹ See Guardianship Act, ss 22(1)(b) and 46(1)(a)(ii).

- does not require complete ‘incapacity’, but must be ‘lacking or severely impaired’;²² and
- is assessed for all aspects of the potential order (health care, financial matters, accommodation, employment, etc).

The leading authority on the meaning of, and test for, ‘inability to make reasonable judgments’ is the decision of Cavanough J in *XYZ v State Trustees Ltd (XYZ)*.²³ In that case the plaintiff had suffered a serious stroke, but after some time successfully appealed to the Supreme Court challenging an administration order on the basis that VCAT did not properly consider the matters in section 46(1) of the Guardianship Act, particularly the degree of **inability to make reasonable judgments** anticipated by the Guardianship Act. The administration order was sent back to VCAT to be reheard.

While it is a matter of fact for VCAT to address specifically on the evidence,²⁴ most VCAT decisions follow and apply the ‘lacking or severely impaired’ capacity test preferred by Cavanough J in *XYZ*.²⁵

When is there a ‘need’ for a guardian or administrator?

The question of **need** will generally be answered primarily by reference to the availability of alternative arrangements outside guardianship (such as family support) to compensate for or deal with the client’s ‘inability’.²⁶

In determining whether or not a client **needs** a guardian or an administrator (or both), VCAT must consider the following matters:

- whether the needs of the client could be met by means less restrictive of their freedom of decision and action;²⁷
- the wishes of the client, so far as they can be ascertained;²⁸
- (**guardianship only**) the wishes of family members of the client;²⁹ and
- (**guardianship only**) the desirability of preserving existing family relationships that may be affected by the making (or not making) of a guardianship order.³⁰

Existence of arrangements such as an enduring power of attorney (medical treatment) or informal arrangements between family members and service providers are factors that

²² Referred to by Cavanough J in *XYZ* [2006] VSC 444, [72] citing E Cocks (Chairman), *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (Melbourne, December 1982), 95-96.

²³ *XYZ* [2006] VSC 444.

²⁴ *XYZ* [2006] VSC 444, [54].

²⁵ See eg, *JD (Guardianship)* [2007] VCAT 2176 (which followed *XYZ*, involved a reassessment of a guardianship and administration order where, inter alia, the phrase ‘unable to make reasonable judgments’ was considered. In that case, the plaintiff struggled to live independently due largely to alcohol abuse and its consequences resulting in multiple admissions to hospital for self neglect, malnutrition, dehydration, incontinence and alcohol related medical conditions.)

²⁶ *XYZ* [2006] VSC 444, [44].

²⁷ Guardianship Act, ss 22(2)(a) and 46(2)(a).

²⁸ Guardianship Act, ss 22(2)(ab) and 46(2)(b).

²⁹ Guardianship Act, s 22(2)(b).

³⁰ Guardianship Act, s 22(2)(c).

should be considered in determining whether there exists a need for a guardian or administrator.³¹

Administration orders can be made where there is no current financial enduring power of attorney. However, if there is a conflict between the decision made by the attorney and the decision made by a guardian, then the decision of the guardian prevails.³²

2.5 Who may be appointed as a guardian or administrator?

Guardians and administrators must be at least 18 years of age.³³

VCAT must be satisfied that the proposed guardian or administrator:

- will act in the best interests of the client;³⁴
- is not in any position where their interests conflict or may conflict with the interests of the client;³⁵
- is a suitable person to act as the guardian of the client or the administrator of the estate of the client;³⁶ and
- **(administration only)** has sufficient expertise to administer the estate of the client, or that there is a special relationship or other special reason why that person should be appointed as administrator.³⁷

The fact that the person is a parent or nearest relative to the client is not in itself a conflict of interest.³⁸

Further, when assessing the eligibility of a proposed guardian or administrator VCAT will consider:

- the wishes of the client, insofar as they can be ascertained;³⁹
- the compatibility of the proposed guardian with the client or of the proposed administrator with the client and with the guardian (if any) of the client;⁴⁰
- **(guardianship only)** the desirability of preserving existing family relationships that may be affected by the making (or not making) of a guardianship order;⁴¹
- **(guardianship only)** whether the proposed guardian will be available and accessible to the client to fulfil the requirements of guardianship;⁴² and
- **(administration only)** whether the person was a Member of VCAT as constituted for a proceeding under the Guardianship Act⁴³ (VCAT may appoint one of its Members

³¹ *Public Advocate v RCS (Guardianship)* [2004] VCAT 1880 at [9] per Morris J.

³² *Instruments Act 1958* (Vic), s 125F(2)

³³ Guardianship Act, s 19(1).

³⁴ Guardianship Act, ss 23(1)(a) and 47(1)(c)(i).

³⁵ Guardianship Act, ss 23(1)(b) and 47(1)(c)(ii).

³⁶ Guardianship Act, ss 23(1)(c) and 47(1)(c)(iii).

³⁷ Guardianship Act, s 47(1)(c)(iv).

³⁸ Guardianship Act, s 47(3).

³⁹ Guardianship Act, ss 23(2)(a) and 47(2)(a).

⁴⁰ Guardianship Act, ss 23(2)(c) / 47(2)(b).

⁴¹ Guardianship Act, s 23(2)(b).

⁴² Guardianship Act, s 23(2)(d).

as constituted for the proceeding only if VCAT considers it appropriate in the circumstances).⁴⁴

2.6 Powers of a guardian/administrator

The powers of a guardian/administrator include the following:

Guardianship	Administration
<ul style="list-style-type: none"> • to choose the client's residence⁴⁵ and decide with whom they are to live;⁴⁶ • to decide whether the client should work, and if so, the nature of such work and the potential employer;⁴⁷ • to consent to certain medical treatment in the best interests of the client;⁴⁸ and • to restrict or prohibit certain visitors to the client.⁴⁹ 	<ul style="list-style-type: none"> • to invest money⁵⁰ and make gifts or donations;⁵¹ • to sign and do what is necessary to give effect to any power or duty;⁵² • to care for and manage the estate⁵³ • to exercise all rights, statutory or otherwise, that the client has;⁵⁴ • to carry out the matters in section 58B(2) of the Guardianship Act; and • to pay money and give property to the client for personal use.⁵⁵

2.7 Special provisions regarding consent to medical and other treatment

Part 4A of the Guardianship Act deals specifically with medical and other treatment.

A **person responsible**⁵⁶ or VCAT may make decisions regarding **medical and dental treatment**. The term **medical and dental treatment** is defined in section 3(1) of the Guardianship Act to include medical and dental treatments that are able to be carried out by, or under the supervision of, a registered practitioner, or a treatment specified in the regulations. These are typically more procedural treatments rather than major or **special procedures**, to which a person responsible cannot consent.

Only VCAT has authority to make decisions regarding **special procedures**, which is defined in section 3(1) of the Guardianship Act to include:

⁴³ Guardianship Act, ss 47(2)(c).

⁴⁴ Guardianship Act, s 47(2A).

⁴⁵ Guardianship Act, s 24(2)(a).

⁴⁶ Guardianship Act, s 24(2)(b).

⁴⁷ See Guardianship Act, s 24(2)(c).

⁴⁸ Guardianship Act, s 24(2)(d).

⁴⁹ Guardianship Act, s 24(2)(e).

⁵⁰ See Guardianship Act, s 51.

⁵¹ See Guardianship Act, s 50A.

⁵² See Guardianship Act, s 58B(1)(c).

⁵³ See Guardianship Act, s 58B(1)(a).

⁵⁴ Guardianship Act, s 58B(1)(b).

⁵⁵ Guardianship Act, s 58B(3).

⁵⁶ Defined for the purposes of Pt 4A in the Guardianship Act, s 37.

- any procedure that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out;
- termination of a pregnancy;
- any removal of tissue for the purposes of transplantation into another person; or
- any other medical or dental treatment that is prescribed by the regulations to be a special procedure for the purposes of Part 4A.

VCAT is required to interpret the provisions under the Guardianship Act in accordance with the Charter (see Chapter 3 of this Manual). Accordingly, when making decisions regarding special procedures, VCAT should consider any impact on the individual's human rights.

2.8 The Public Advocate

Section 14 of the Guardianship Act creates the role of the Public Advocate. In accordance with section 15 of the Guardianship Act, the functions of the Public Advocate include:

- to promote, facilitate and encourage the provision, development and coordination of services and facilities provided by government, community and voluntary organisations for people with a disability with a view to:
 - promoting the development of the ability and capacity of people with a disability to act independently;
 - minimising the restrictions on the rights of people with a disability;
 - ensuring the maximum utilisation by people with a disability of those services and facilities;
 - encouraging the involvement of voluntary organisations and relatives, guardians and friends in the provision and management of those services and facilities;
- to support the establishment of organisations involved with people with a disability, relatives, guardians and friends for the purpose of:
 - instituting citizen advocacy programs and other advocacy programs; and
 - undertaking community education projects; and
 - promoting family and community responsibility for guardianship; and
- to arrange, coordinate and promote informed public awareness and understanding by the dissemination of information with respect to-
 - the provisions of the Guardianship Act and any other legislation dealing with or affecting people with a disability;
 - the role of VCAT and the Public Advocate;
 - the duties, powers and functions of guardians and administrators under the Guardianship Act; and
 - the protection of people with a disability from abuse and exploitation and the protection of their rights.

The powers given to the Public Advocate under the Guardianship Act include the power to:

- be appointed as a guardian by VCAT;⁵⁷
- make an application to VCAT for the appointment of a guardian or administrator or the rehearing or reassessment of a guardianship order or an administration order;⁵⁸
- submit a report to VCAT on any matter referred to the Public Advocate for a report by VCAT;⁵⁹ and
- investigate, if appointed by VCAT, any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.⁶⁰

The Office of the Public Advocate is also a statutory body accountable to the Victorian Parliament and has the power to investigate, report and make recommendations to the Minister on any aspect of the operation of the Guardianship Act referred to the Public Advocate by the Minister.⁶¹

As a statutory authority, the Office of the Public Advocate is a public authority under the Charter. Accordingly, the Office of the Public Advocate is required to act compatibly with human rights when making decisions and when acting under the Guardianship Act (see Chapter 3 of this Manual).

3. VCAT Hearings

3.1 The Guardianship List

The Guardianship List, which is part of the Human Rights Division of VCAT, conducts hearings to determine whether a person (aged 18 years or over) with a disability should have a guardian and/or administrator appointed. Under the Guardianship Act, the Guardianship List also has the power to review, suspend, amend and revoke existing orders. As noted in section 0 above, hearings are governed primarily by the VCAT Act.

Hearings before the Guardianship List

Guardianship List hearings are held at the VCAT hearing rooms at 55 King Street, Melbourne on a daily basis, and at certain suburban and regional locations when required.⁶² VCAT will normally schedule the hearing as close as possible to the place

⁵⁷ Guardianship Act, s 16(1)(a)(i).

⁵⁸ Guardianship Act, s 16(1)(b).

⁵⁹ Guardianship Act, s 16(1)(d).

⁶⁰ Guardianship Act, s 16(1)(h).

⁶¹ Guardianship Act, s 15(d).

⁶² Regional and suburban locations include: Ararat; Bairnsdale; Ballarat; Benalla; Bendigo; Colac; Collingwood; Dandenong; Dromana; Echuca; Frankston; Geelong; Hamilton; Horsham; Kerang; Kew; Mildura; Moorabbin; Morwell; Richmond; Ringwood; Sale; Seymour; Shepparton; Sunshine; Swan Hill; Wangaratta; Warrnambool; Wodonga; and Wonthaggi. See VCAT's Law Calendar at <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Law+Calendar?OpenDocument&1=60-Guardianship+and+Admin~&2=50-Law+Calendar~&3=-> at 29 January 2008.

where the client lives.⁶³ It is also possible for a client to apply to be heard by telephone or video link up if they are unable to travel to a hearing or for the hearing to occur at a nursing home or a location closer to the proposed client if necessary.⁶⁴

Hearing locations and times are posted on VCAT's website <http://www.vcat.vic.gov.au> the afternoon before the hearing (contact details for VCAT are listed in section 7 below).

VCAT hearings will generally be heard before one VCAT Member and are less formal than court hearings. VCAT Members are drawn from a variety of professions including law, medicine, social work and psychology. Attendees are encouraged to express their views directly to the VCAT Member at the hearing,⁶⁵ and the Member may ask questions of anyone who attends or may telephone a person who is unable to attend.⁶⁶

It is often the case that the VCAT Member will speak directly to the client and your role as the advocate may simply be to clarify issues when asked to do so.⁶⁷ VCAT is not bound by legal rules of evidence and does not use formal legal processes. However, hearings must comply with the principles of natural justice in that they must be conducted fairly and without bias.⁶⁸

3.2 The general approach of the Guardianship List

Giving effect to the client's wishes

The Guardianship Act prescribes that its provisions must be interpreted in a manner that gives effect to the wishes of the client wherever possible.⁶⁹ This requires that VCAT be informed of the views and wishes of the client and the role of the advocate is therefore to ensure that these views are presented properly and fairly. If the client is legally incapacitated at the time of the application, then regard will be had to the client's wishes as recorded or demonstrated before their incapacity (for example, in letters, conversations and power of attorney, if any).

In terms of advocacy, it is important to remember that you, as the legal advocate, are not supposed to act in what you perceive to be the best interests of the client but, rather, your dealings must be directed toward fulfilling the instructions given by the client. Your role is to provide the client with thorough information and advice as to the possible legal

⁶³ VCAT, *Guardianship and Administration: Hearings* at <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Hearings?OpenDocument&1=60-Guardianship+and+Admin~&2=20-Hearings~&3=~> at 29 January 2008.

⁶⁴ A "Notice of application for video-link" form is available at <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Hearings?OpenDocument&1=60-Guardianship+and+Admin~&2=20-Hearings~&3=~> at 29 January 2008. Note that this notice must be submitted 10 days before the date scheduled for hearing; the consent of the other party must be obtained; and there will be a fee for the video link.

⁶⁵ VCAT, *Guardianship and Administration: Hearings* at <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Hearings?OpenDocument&1=60-Guardianship+and+Admin~&2=20-Hearings~&3=~> at 29 January 2008.

⁶⁶ VCAT, *Guardianship and Administration: Hearings* at <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Hearings?OpenDocument&1=60-Guardianship+and+Admin~&2=20-Hearings~&3=~> at 29 January 2008.

⁶⁷ See Villamanta Disability Rights Legal Centre Inc and the Mental Health Legal Centre, *A Guide Written to Assist Advocates Representing People Appearing before the Guardianship List of the Victorian Civil and Administrative VCAT* p. 25.

⁶⁸ See Villamanta Disability Rights Legal Service, *Information Sheet: Guardianship* (September 2004).

⁶⁹ Guardianship Act, s 4(2)(c).

ramifications of their chosen course of action, and to act on the lawful instructions they give in light of this information.⁷⁰

You should seek instructions from the client regarding their ability to manage their own affairs, the impact of a guardianship or administration order on their lives, the appropriateness of an order and viable alternatives to the order. You should then present this information in your written and oral submissions to VCAT.

The least restrictive option

As noted in section 2.4 above, the Guardianship Act requires that, if an administration order is imposed, then it must be the least restrictive option possible in the circumstances.⁷¹ The Guardianship Act emphasises the importance of not imposing administration orders if they will be unduly restrictive or otherwise inappropriate and notes that its provisions should be interpreted so that VCAT adopts the approach that is least restrictive of a person's freedom of decision and action that is possible in the circumstances.⁷²

From an advocate's perspective, it is worth noting that VCAT members are not always aware of the services available to people who appear before them.⁷³ It may be important to inform the member of these services when presenting feasible options that are potentially less restrictive than a guardianship or administration order. Examples of such services might include meal delivery, financial planning assistance, case workers and counselling, all of which can provide the client with necessary support while retaining their independence and possibly avoiding the need for a more restrictive order.

4. Before the VCAT Hearing

4.1 How is an application made?

Any person can lodge an application for a guardianship or administration order. Applications will usually be lodged by health professionals, social workers, family members and other people who have an ongoing relationship with the client.

There is a standard application form for both an application for a guardianship order and an application for an administration order. Among other things, the form requires the applicant to 'briefly outline the issues of problems faced by the person you are applying about which have prompted your application. If you want VCAT to appoint an administrator or guardian, you should explain why they are needed.'⁷⁴

⁷⁰ See Villamanta Disability Rights Legal Centre Inc and the Mental Health Legal Centre, *A Guide Written to Assist Advocates Representing People Appearing before the Guardianship List of the Victorian Civil and Administrative VCAT* p. 10.

⁷¹ Guardianship Act, s 46(4). This approach is consistent with the balancing test that is adopted under s 7(2) of the Charter (see Chapter 3).

⁷² Guardianship Act, s 4(2)(a).

⁷³ Villamanta Disability Rights Legal Centre Inc and the Mental Health Legal Centre, *A Guide Written to Assist Advocates Representing People Appearing before the Guardianship List of the Victorian Civil and Administrative VCAT* p. 9.

⁷⁴ VCAT Application to Guardianship List.

4.2 Different types of hearings

A number of different types of hearings are held before VCAT in the Guardianship List. These include initial hearings, which occur once an application for either a guardianship order or an administration order has been lodged; rehearings and reassessment hearings (both of which are discussed at section 6 below).⁷⁵

4.3 Parties to the hearings and attendance at the hearing

In accordance with sections 19 and 43 of the Guardianship Act, the client and any person proposed as a guardian or an administrator are automatically parties to the proceedings. The person bringing the application is also a party to proceedings.

The applicant must attend the VCAT hearing and it is important that the client is also present (if possible and appropriate) so that they can give their views about the application.⁷⁶ It may be necessary for a carer, relative or friend to arrange transport for the client to the VCAT hearing. If the client needs an interpreter, then it is important to inform VCAT in the application.⁷⁷ Similarly, if the client is, for example, hearing impaired or has any other condition which might affect their behaviour during the hearing, then you make the VCAT Member aware of this before they commence the hearing.

4.4 At what time are hearings held?

The hearing program usually commences at 10.00 am. The hearing notice will state what time the hearing is listed for. However, normally a number of hearings will be listed for the same morning and there may be some delay between the time that the hearing is listed and the time that the application is heard.

It is important to remember that it can be very difficult for the client to be present at VCAT after a lengthy wait. Furthermore, elderly clients and clients taking medication may prefer the hearing to be in the morning as they may get tired in the afternoon. It is important to seek instructions from the client in relation to the times that would suit them according to their medical needs. If you call VCAT's listing coordinator and give them enough notice, then you can arrange for a particular hearing to be listed at a time convenient for the client or as the first hearing of a particular morning.

4.5 Notices of hearings

The client, being a party to the proceeding, must be served with a notice. Be aware that notices are often difficult to read and understand and will often need to be explained to the client carefully. Notices may also fail to encourage the client to appear at the hearing. If the client does not appear and fails to provide a reasonable excuse that would justify an adjournment before the hearing, then VCAT will proceed without them.

⁷⁵ See also VCAT *Annual Report* for the financial year ended 30 June 2006, p 26 of which notes that by far the majority of hearing before VCAT on the Guardianship List related to administration orders. In the 2005-2006 financial year, 66% of cases related to administration orders or administration reassessments. In the same period, only 17% of applications were initial hearings for guardianship orders and 26% were initial hearings for administration orders.

⁷⁶ See VCAT, *Guide for Applications to the Guardianship List* at <http://www.vcat.vic.gov.au> at 29 January 2008.

⁷⁷ See VCAT, *Guide for Applications to the Guardianship List* at <http://www.vcat.vic.gov.au> at 29 January 2008

Other people entitled to receive a notice of hearing, in accordance with sections 20 and 62 of the Guardianship Act (in regard to guardianship and administration respectively), are:

- the person proposed as guardian or administrator;
- the nearest relative of the client (who is not the applicant or proposed guardian or administrator);
- the primary carer of the client;
- the public advocate (who is entitled to notice of the application, notice of the hearing and notice of any order);
- an existing guardian or administrator, if the application is for an administration order and there already exists a guardianship order, or if the application is for a guardianship order and there already exists an administration order; and
- any other interested party, which includes any person who has advised VCAT of an interest in the person in respect of whom the application is made (this includes legal representatives of the client).

4.6 Representation

The assistance of a lawyer will still be useful to most clients to enable them to state their case more clearly to the VCAT Member. Legal assistance may also facilitate discussions before the hearing with the other parties to the proceedings, which may resolve (or partly resolve) the application before it reaches the hearing stage. Furthermore, representation is important in ensuring that the client feels that they have 'had their say' and have been heard. The client is therefore more likely to feel empowered in the process.

In accordance with section 62 of the VCAT Act, a party may be represented by a professional advocate only if they are:

- a child;
- a municipal council;
- the State or a Minister or other person who represents the State;
- a public entity within the meaning of the *Public Administration Act 2004*;
- a credit provider within the meaning of the *Consumer Credit (Victoria) Code* or the *Credit Act 1984*; or
- an insurer within the meaning of the *Domestic Building Contracts Act 1995*,

or if:

- another party to the proceeding is a professional advocate;
- another party to the proceeding is represented by a professional advocate;
- all the parties to the proceeding agree; or
- permitted by VCAT.

In many cases, none of the above scenarios, except the last, will be applicable. The best approach therefore, if the client has sought representation, is to contact the other parties

to the proceeding and seek their consent. If this fails, then you should seek leave to appear from the VCAT Member at the initial hearing for the matter. The basis for seeking leave will primarily be that the client is otherwise unable to properly advance their rights under the Guardianship Act without such representation.

It is also worthwhile telephoning the VCAT hearing coordinator as soon as you are representing someone and, if you can estimate the length of the hearing, confirm that estimate in writing. The usual time allocated for a hearing is 45 minutes. The application may be rescheduled if it is going to be contested and if the hearing will take longer than 45 minutes.

4.7 Can hearings be adjourned?

You may be able to have a hearing adjourned, for example to:

- allow for the client to be represented;
- allow time for written or more complex submissions to be made;
- allow time for medical reports or other supporting material to be obtained or witnesses to be available; or
- allow for consideration of material that you have not had sufficient time to read before the hearing and on which VCAT will rely.

A standard adjournment form is available to download from VCAT's website.

It is important to give VCAT as much notice as possible of a request for an adjournment. It will also be far easier to get an adjournment if you have the consent of the other parties. You should telephone the VCAT hearing coordinator to request an adjournment and then fax confirmation of this in writing. If an adjournment cannot be requested until the day of the hearing, then put the request to the VCAT Member on the day of the hearing, either in person or by fax. The request should state reasons and include your contact details.

An adjournment will not necessarily be granted and is less likely to be granted at short notice.

4.8 Is an interpreter required?

If an interpreter is required and you cannot obtain one through your own organisation or Victoria Legal Aid, then it is also possible that the hospital or other institution that initiated the order might arrange one for you. For further advice or information, contact the Translating and Interpreting Service (contact details are listed in section 7 below) and ask to speak to an enquiries officer at Consumer Affairs Victoria.⁷⁸

If you need an interpreter to attend a hearing at VCAT, then you should write or telephone VCAT which will arrange for an interpreter at no cost to any party. Using relatives and friends at the hearing is usually not acceptable.

Although the organisation initiating the proceeding will usually advise VCAT if an interpreter is required, it is a good idea for you to contact the VCAT hearing coordinator yourself to confirm that an interpreter has been arranged.

⁷⁸ See VCAT, *FAQs: VCAT Procedures and Guidelines* at <http://www.vcat.vic.gov.au> at 29 January 2008.

4.9 Assessing VCAT proceeding file

It is important to obtain all necessary paperwork from VCAT before the hearing. The VCAT Act permits a party or other person to have access to documents held by VCAT upon written request (although VCAT does have the power to restrict access).⁷⁹ You can call and ask to view the proceeding file or pay a fee for copying and ask VCAT to send the information to you. These orders can be obtained by contacting the guardianship registrar (see section 7 below for contact details) and requesting these records (often a written application will be required).

The proceeding file contains all documents lodged in the proceeding in relation to the guardianship and/or administration orders.⁸⁰ These may include a statement by the applicant, medical and other expert reports and submissions by interested parties. With a signed authority from the client you can inspect the file or request VCAT to fax or mail a copy of the application form and supporting documents. There is a fee for copying.⁸¹

Any orders issued in the past will have the client's guardianship reference number and the number of that particular order in a series of orders in the top right hand corner (for example, 'G 8900/01'). The guardianship reference number should always be cited in any correspondence with VCAT.

Requests should be made at the earliest opportunity but note that further documents may be filed after your initial request.

If the matter is a guardianship application and VCAT has asked the Office of the Public Advocate to investigate and provide a report,⁸² then advocates do not automatically gain access to this report. You should contact the Office of the Public Advocate to discuss the contents of the report and also formally request the report from VCAT. Generally, Office of Public Advocate investigators welcome such discussions.

4.10 Discussions with the person who has lodged the application

With the client's permission, you should generally contact the person who has lodged the application before the hearing to clarify their position and any matter that might be helpful for the case. It is important to obtain instructions from the client before doing so, particularly if the applicant is a family member, as the issue may be sensitive and the client may not want you to discuss the case with them before the hearing.

You may also wish to discuss whether there is a need for a guardian or administrator or if there are any less restrictive alternatives. In some cases it may lead to the withdrawal of the application. It will also provide valuable information about the issues involved and assist in preparing for the hearing. Even if the client ultimately becomes subject to a

⁷⁹ See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 11AI, which provides that VCAT may order that a person with an intellectual disability not be permitted to inspect a submission or other document if VCAT is of the opinion that such a restriction is necessary to prevent: serious harm to the health or well being of the person with an intellectual disability; exposing another person to a risk of serious harm; the unreasonable disclosure of information relating to the personal affairs of any other person; or the disclosure of information given in confidence.

⁸⁰ VCAT Act, s 146(1).

⁸¹ VCAT Act, ss 146(2) and 146(3).

⁸² Under cl 35 of Schedule 1 to the VCAT Act the VCAT can refer any matter relating to a proceeding under the Guardianship Act to the Public Advocate or a guardian or administrator appointed under that Act for investigation and report.

guardianship or administration order, these discussions may result in a less restrictive order.

For example, particularly if it is raised early in the process, the applicant (and proposed guardian or administrator) may not object to the client having, and the VCAT Member may ultimately give the client, more freedom with their money in relation to shopping for household items or the opportunity to pay their own rent (in the case of administration) or have a greater say as to where they would like to live or in relation to access to people (in the case of guardianship).

4.11 Discussions with the client

It is important to remember that a client may never have been to a court or VCAT before. It is likely that the VCAT Member will want to speak with the client at the hearing. Before the hearing you should inform the client of the process, discuss the type of issues and questions that VCAT will be likely to ask at the hearing and, if required, assure them that they are not at VCAT because they have done something wrong.

You should also obtain detailed instructions from the client in relation to those things that are likely to be raised by the VCAT Member on the day of the hearing. In doing so, you should at all times be clear about the fact that you are representing the client and not their family.

When taking instructions from the client, it is also important to remain patient — it may take time to gain full instructions from a person with a disability. This may mean additional appointments with the person to get full instructions.

This jurisdiction can be very emotional for the client. Trusted family members, friends and medical practitioners may make statements relating to a person's disability and functioning capacity that may be confronting and offensive to the client. The client may become emotional and upset and you should not judge the client or deny them the right to express their feelings.

4.12 Experts' reports

To inform members' decisions as to whether or not to impose an administration or guardianship order or whether to amend or revoke such an order, VCAT requires an expert's report supporting the relevant application.

If you are not able to provide a second medical opinion disputing disability (that is, showing that the person is able to make reasonable decisions for themselves and there is no need for a guardian or administrator), then VCAT will almost certainly accept the medical evidence before it put forward by the applicant, which will no doubt conclude that the client does have a disability.

VCAT's preferred form of substantiating reports are those from a medical practitioner or neuropsychologist. Publicly-funded neuropsychology services are rare and the waiting

periods can be lengthy.⁸³ One such service available in Melbourne is provided by Arbias, a not-for-profit organisation funded by the Department of Human Services.⁸⁴

Given the demand for these services, it will often be necessary to apply to VCAT for an adjournment in order to allow time to obtain the required neuropsychology report.⁸⁵ It is often helpful to send a follow-up letter to Arbias, or any organisation providing similar services, informing them of the adjournment but requesting that the assessment be undertaken a month before the rescheduled hearing date (to allow time for the report to be prepared). The client may then be given an appointment if a cancellation arises.

In the lead-up to the client's neuropsychologist appointment, you should prepare the client for what is often a long and tiring assessment process. Arbias, the Brain Foundation of Victoria and Headway Victoria have a publication titled *Your Guide to Neuropsychological Assessment* that is helpful in this respect (contact details are listed in section 7 below).⁸⁶

It is also important to check the medical report provided to VCAT by the applicant to see if it is up to date. VCAT may be relying on old medical reports. If it is an old report and you do not believe that the person has a disability at the time of the hearing, then obtain a new medical report.

If the person is already known to a particular health professional, then it is also worth talking to them first to assess whether they will give a supportive report before you make a request. Also, ensure that you discuss what you require in the report with the person who will be providing it and inform them that they may be required to give evidence in addition to their report to VCAT. This does not mean that they will have to attend in person. But the VCAT Member hearing the application may still wish to speak with them.

4.13 Providing the required information to VCAT in advance

It is important to provide VCAT with any required information at least three days before the hearing date. Relevant documents (for example, a neuropsychological report or requested bank statements or other records) can be posted, faxed or delivered by hand to VCAT (contact details are listed in section 7 below). These documents should be accompanied by a covering letter citing the VCAT Member's name and the client's reference number.

⁸³ See Headway Victoria for a useful list of both metropolitan and regional services that provide neuropsychological assessments at <http://headwayvictoria.org.au/services/neuropsych/neuropsych.htm> at 29 January 2008.

⁸⁴ An application form for a neuropsychological assessment through Arbias is available from http://www.arbias.org.au/media/downloads/services/assessment_unit_booking_form.pdf at 29 January 2008.

⁸⁵ An application for an adjournment should be made to VCAT in writing no later than three business days before the scheduled hearing date. The application should include the VCAT reference number, the scheduled hearing date, the reasons why the adjournment is necessary, an indication of whether or not other interested parties have been informed that an adjournment is being sought and whether or not they agree to it, and a list of any unsuitable dates. A VCAT "Adjournment request" form is available from the Forms-Guides page at <http://www.vcat.vic.gov.au> at 29 January 2008 (although it is not mandatory to use this form). See VCAT, *Guide for Applications to the Guardianship List* at <http://www.vcat.vic.gov.au> at 29 January 2008.

⁸⁶ Arbias, Brain Foundation Victoria and Headway Victoria, *Your Guide to Neuropsychological Assessment* (2005) at <http://www.arbias.org.au> at 29 January 2008.

5. At the VCAT Hearing

5.1 Representation

As stated above, a party appearing before VCAT may be represented by any person (including a professional advocate) permitted or specified by VCAT. Accordingly, a legal representative should seek leave to appear before VCAT on behalf of a concerned party. Once leave is given to you, you can also request that the client is addressed in the manner they prefer, for example, as 'Jill' or 'Ms Brown'.

5.2 Must the client attend the hearing?

You should ensure the client is aware that failing to participate in the hearing will significantly reduce their chance for success. If VCAT considers it appropriate, then proceedings may be conducted by means of telephone, video conference or, if the parties agree, entirely on the basis of documentation.

5.3 Who will hear the case?

Usually one VCAT Member will hear the case.

VCAT Members often have their own style in running the proceeding and so formalities and procedures may vary. VCAT Members come from a variety of backgrounds including law, psychology, medicine or social work, to name a few.

If the client has been before the appointed VCAT Member previously, then the client may request a different Member. The request should be made in writing to the Deputy President of the Guardianship List.

5.4 What can be expected at the hearing?

Hearings at VCAT are conducted as informally as possible, with participants often being seated around a table. Non-contentious hearings are usually scheduled for 45 minutes⁸⁷ with more time allowed for complex issues. You should remember that the jurisdiction is not adversarial and that there is no need for any of the participants to stand up in hearings.

Hearings at VCAT are public. However, VCAT may, on application of a party or on its own initiative, direct that a hearing or any part of it be held in private⁸⁸. Consider whether it is appropriate for the client to speak to the VCAT Member with no one else present and notify the member in advance if this is the case. Also, if you think the client's attention might lapse or that they might become tired or distracted, then request that they be allowed to speak first.

Family members and other participants are often invited to participate and the VCAT Member will take an inquisitorial role, seeking contributions from those present.

The hearing will begin with introductions by the VCAT Member, a request for those present to identify themselves and a brief explanation of the purpose of the hearing.

⁸⁷ VCAT is under an obligation to determine proceedings with as much speed as possible. See VCAT Act, s 98(1).

⁸⁸ VCAT Act, s 101(1)(2).

If evidence is given by medical practitioners and other experts via a written report, then they are not usually required to attend the hearing. VCAT is also able to take evidence over the telephone and may even spontaneously call a doctor, such is the informal nature of the proceeding. However, you should give VCAT advance notice that you will be relying on witnesses.

If the parties have legal representation, then there will ordinarily be an opportunity for opening and closing submissions as well as cross-examination of any witnesses.

5.5 Natural justice

VCAT is bound by the rules of natural justice.⁸⁹ Natural justice has been described as the right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision-maker and the right to have that decision based on logically probative evidence⁹⁰. Section 97 of the VCAT Act requires VCAT to act fairly and according to the substantial merits of the case.

5.6 Rules of evidence

As noted above, VCAT is not bound by the rules of evidence⁹¹ and may inform itself on any matter as it sees fit.

5.7 Content of oral submissions to VCAT

The content of written and oral submissions that you prepare will be specific to the individual client and their circumstances and instructions. However, by way of guidance, a general indication of content that you might consider including is set out below (keeping in mind the terms used and approach prescribed by the Guardianship Act):

- **Evidence of the client's ability to manage their own affairs** — this may include a budget prepared by or for the client, bank statements showing the exercise of reasonable judgement through sensible spending and saving patterns, oral evidence by the client of routines they have developed (for example, shopping and cooking or bill payment methods), evidence of stable employment and any recent achievements of the client.
- **Evidence of the impact that a guardianship or administration order would have on the client's life** — this may include evidence of inconvenience and/or disruption to the client (in some cases this might involve physically collecting an allowance from an administrator), feelings of powerlessness and a lack of independence by the client and a possible deterioration of skills on account of this lack of independence.
- **Viable alternatives to the order, indicating that it is not the least restrictive option available** — this might include the availability of financial support services, such as assistance with budgeting, other support services such as meal provision and cleaning or the existence of a case worker, counsellor or family member who is willing to provide support in a less restrictive manner that better gives effect to the client's wishes.

⁸⁹ VCAT Act, s 98(4).

⁹⁰ *Salemi v MacKellar (No 2)* (1977) 137 CLR 396.

⁹¹ See VCAT Act, s 98(2).

- **Evidence regarding the client's disability** — as discussed above, this will most likely be in the form of an expert's report and you need not necessarily assert that the client does not have a disability, but rather that there is no evidence that, by reason of that disability, the client is unable to make reasonable judgments in respect of matters relating to their lifestyle and/or estate.⁹²

6. After the VCAT Hearing

6.1 The outcome of the hearing

VCAT will usually determine the outcome of the hearing on the day. As an advocate, you should communicate the outcome of the hearing to the client both verbally and in writing. It is also advisable to seek instructions from the client to request a written statement of reasons from VCAT, as this may assist with any future proceedings.⁹³

6.2 Rehearing of orders and appealing VCAT decisions

Rehearings

If a person believes that VCAT has made an error in making its decision to impose a guardianship or administration order (for example, they believe that VCAT failed to take account of relevant evidence or placed too much weight on matters that were not relevant), then they can apply to VCAT for a rehearing of the original decision.⁹⁴

A rehearing is a *de novo* hearing (that is, a completely fresh rehearing of the merits).⁹⁵ A person has a right to a rehearing if they were unaware of the hearing that made the order or there is new evidence. Generally, a rehearing is conducted by a VCAT Member more senior than the original Member who heard the case.⁹⁶

The application for rehearing can be made only by a party to the original hearing or by a person who received notice of the original hearing but was not a party to it, provided that person first obtains VCAT's approval.⁹⁷

The application for rehearing must be lodged with VCAT within 28 days after the day on which the original order was made or, if the party requested written reasons from VCAT for its first decision, then within 28 days after the date those reasons are received.⁹⁸

An application for a rehearing should be made in writing to the registrar, Guardianship List, VCAT and addressed to VCAT. The VCAT reference number, the name of the person about whom the original order was made, the date of the original order and a brief

⁹² See, eg, Public Interest Law Clearing House template document for a submission to VCAT for rehearing pursuant to s 60A of the Guardianship Act, available at <http://www.pilch.org.au> (access login volunteer lawyer passwords, under 'forms'). If you do not have a password, then contact the Homeless Persons' Legal Clinic on tel 9225 6684.

⁹³ Villamanta Disability Rights Legal Centre Inc and the Mental Health Legal Centre, *A Guide Written to Assist Advocates Representing People Appearing before the Guardianship List of the Victorian Civil and Administrative Tribunal*, p. 43.

⁹⁴ See Office of the Public Advocate, *Fact Sheet: Rehearings* (March 2001) at <http://www.publicadvocate.vic.gov.au> at 29 January 2008. The Public Interest Law Clearing House has a useful template document for a submission to VCAT for rehearing pursuant to s 60A of the Guardianship Act.

⁹⁵ See *RL (Guardianship)* [2002] VCAT 12.

⁹⁶ *XYZ v State Trustees Ltd* [2006] VSC 444 (Cavanough J).

⁹⁷ Guardianship Act, s 60A(1) and (2).

⁹⁸ Guardianship Act, s 60A(4) and (5).

summary of the reasons why the original order is believed to be incorrect (for example, a reference to irrelevant information that was relied upon) should be included in the application.⁹⁹

A rehearing application cannot be made in respect of the finding of a previous rehearing, nor can an application for leave to apply for a rehearing be the subject of a further rehearing.¹⁰⁰

In determining a rehearing, VCAT may affirm, vary or set aside the order of VCAT at first instance.¹⁰¹ Pending the rehearing, the order remains in force unless VCAT suspends it.¹⁰²

An application for a rehearing does not affect the operation of any order or prevent the taking of action to enforce the order, unless VCAT makes an order staying the operation of an order pending the determination of the rehearing.¹⁰³

Appeals on a question of law

Under section 148 of the VCAT Act, it is possible to appeal a VCAT decision, on a question of law, to the Trial Division of the Supreme Court of Victoria.¹⁰⁴ The court must first grant leave to appeal, and the application for leave to appeal must be made within 28 days of the VCAT order, in accordance with the rules of the Supreme Court.¹⁰⁵ The proceeding is by way of judicial review rather than by way of appeal and must be instituted within 14 days of leave being granted.¹⁰⁶

On appeal, the Supreme Court may make the following orders:

- an order affirming, varying or setting aside the VCAT order;
- an order that VCAT had the power to make in the original proceeding;
- an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by VCAT in accordance with the directions of the court; or
- any other order the court thinks appropriate.¹⁰⁷

It is not within the scope of this chapter to cover other judicial avenues available to clients following a VCAT decision. However, be aware of your client's ability to appeal a decision of VCAT and inform the client of this.

⁹⁹ See Office of the Public Advocate, *Fact Sheet: Rehearings* (March 2001) at <http://www.publicadvocate.vic.gov.au> at 29 January 2008.

¹⁰⁰ Guardianship Act, s 60A(6)(d). Other circumstances in which a rehearing cannot be applied for include where the order: is a temporary order; suspends an enduring power of attorney; or consents to a special procedure for the purposes of medical research.

¹⁰¹ Guardianship Act, s 60C.

¹⁰² Guardianship Act, s 60D.

¹⁰³ Guardianship Act, s 60D.

¹⁰⁴ VCAT Act, s 148(1).

¹⁰⁵ VCAT Act, s 148(2).

¹⁰⁶ VCAT Act, s 148(3). See also Villamanta Disability Rights Legal Centre Inc and the Mental Health Legal Centre, *A Guide Written to Assist Advocates Representing People Appearing before the Guardianship List of the Victorian Civil and Administrative Tribunal* p. 44.

¹⁰⁷ VCAT Act, s 148(7).

Review hearings

A person in respect of whom an order is made may apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at which the order was made.¹⁰⁸ VCAT may:

- hear and determine the application if it is satisfied that the applicant had a reasonable excuse for not attending or being represented at the hearing; and
- if it thinks fit, order that the order be revoked or varied.

6.3 Reassessment of orders

Section 61 of the Guardianship Act sets out the requirements for VCAT when conducting a reassessment hearing.

VCAT must conduct a reassessment of a guardianship order or an administration order:

- within 12 months after making the order, unless VCAT orders otherwise; and
- in any case, at least once within each three-year period after making the order unless VCAT orders otherwise,

and may at any time conduct a reassessment of any order made by it (either of its own initiative or on application of any person) under the Guardianship Act.

The reassessment of orders is important because the client's condition and circumstances may change. The date by which the 'automatic' reassessment of the order will be undertaken is usually recorded in the order itself. Alternatively, any person (including a guardian, administrator or the client) can apply to VCAT seeking a reassessment of the guardianship or administration order if they believe that the order is no longer necessary (because the client has recovered their capacity to make decisions) or that the current administrator or guardian is not acting in the person's best interests.¹⁰⁹

'Application to Guardianship List Form 2' (**Form 2**) should be used to apply to VCAT for a reassessment of a guardianship or administration order.¹¹⁰ Clause 5 of Form 2 states that the applicant is 'responsible for providing VCAT with copies of relevant medical or other expert reports which establish the disability of the person you are applying about'. Applicants must have at least requested (if not received) these expert reports at the time of lodging the application (see section 4 above for more information in relation to obtaining and providing expert reports and in particular, neuropsychological reports). A copy of completed Form 2 must be sent by the applicant to the client, their primary carer, their nearest relative and any existing or proposed guardian or administrator.¹¹¹

¹⁰⁸ VCAT Act, s 120(1).

¹⁰⁹ The Public Interest Law Clearing House has a template submission to VCAT for an application to obtain a reassessment on the grounds that the client is no longer suffering from a disability and the order is no longer necessary.

¹¹⁰ Application to Guardianship List Form 2 is available [at http://www.vcat.vic.gov.au](http://www.vcat.vic.gov.au) at 29 January 2008.

¹¹¹ Guardianship Act, s 62. Failure to provide these people with a copy of the application, or failure to provide a copy of medical or expert evidence to support the application, may result in VCAT adjourning the hearing and making an order to pay any costs sought by the other party.

Upon reassessment, VCAT can by order continue, vary, amend or replace the existing order, subject to any conditions or requirements it considers necessary to revoke the order.¹¹²

6.4 Moving forward once an order is in place

The Office of the Public Advocate has publications entitled *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act*¹¹³ (**Guardianship Guide**) and *Administration: A Guide for People Appointed as Administrators under the Guardianship and Administration Act*¹¹⁴ (**Administration Guide**), which both provide useful information for clients and advocates. Both guides are available at <http://www.publicadvocate.vic.gov.au>.

Be aware of these resources as tools for assisting appointed guardians and administrators (particularly if the person appointed by VCAT is a friend or family member of the client or otherwise inexperienced in performing the role of guardian or administrator) and for making clients aware of their rights and the responsibilities of their guardians or administrators.¹¹⁵ The Guardianship Guide contains a set of standards developed by the Office of the Public Advocate, which provide practical information to clients and interested parties regarding what they can expect of guardians in the performance of their duties.¹¹⁶ The Administration Guide provides a checklist of requirements of accountability, transparency and consultation that should be followed by administrators and with which you and your clients should be familiar.

7. Useful Contacts

7.1 Complaints

Health Services Commissioner

Level 30, 570 Bourke St
Melbourne VIC 3000
Tel: (03) 8601 5200
Toll Free: 1800 136 066
Fax: (03) 8601 5219
Email: hsc@dhs.vic.gov.au

*If a complaint against the Office of the Public Advocate or State Trustees is not resolved by their internal complaints procedure, then the complaint can be lodged with the Health Services Commissioner.

¹¹² Guardianship Act, s 63.

¹¹³ Office of the Public Advocate, *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act* (2005) at <http://www.publicadvocate.vic.gov.au> at 29 January 2008.

¹¹⁴ Office of the Public Advocate, *Administration: A Guide for People Appointed as Administrators under the Guardianship and Administration Act 1986* (May 2002) at <http://www.publicadvocate.vic.gov.au> at 29 January 2008.

¹¹⁵ Office of the Public Advocate, *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act* (2005) at <http://www.publicadvocate.vic.gov.au> at 29 January 2008.

¹¹⁶ These standards conform to the National Guardianship Standards. See Office of the Public Advocate, *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act* (2005) at <http://www.publicadvocate.vic.gov.au> at 29 January 2008.

Ombudsman Victoria

Level 9, 459 Collins Street (North Tower)

Melbourne VIC 3000

Tel: (03) 9613 6222

Toll Free: 1800 806 314

Fax: (03) 9614 0246

Email: ombudvic@ombudsman.vic.gov.au

*Complaints can be made to the Ombudsman regarding the conduct of the Office of the Public Advocate and State Trustees Limited.

7.2 Legal services

PILCH Homeless Persons' Legal Clinic

Level 1, 550 Lonsdale Street

MELBOURNE VIC 3000

Tel: (03) 9225 6684 or 1800 606 313

Victoria Legal Aid

350 Queen Street

MELBOURNE VIC 3000

Tel: (03) 9269 0234

*Victoria Legal Aid may grant assistance for guardianship and administration matters before VCAT and any appeal from VCAT's decision if there are reasonable prospects of removing or preventing the appointment or reappointment of a guardian and/or an administrator.

Villamanta Disability Rights Legal Service

44 Bellerine Street

GEELONG VIC 3220

Tel: (03) 5229 2925

Fax: (03) 5229 3354

Email: legal@villamanta.org.au

Website: <http://www.villamanta.org.au>

Law Institute of Victoria — list of other community legal centres

Website: <http://www.liv.asn.au/public/finda/clc>

*Community legal centres are an important source of legal information and advice and may be able to assist with guardianship and/or administration matters.

7.3 Mental health and neuropsychological assessments

Arbias and ABIAU (Acquired Brain Impairment Assessment Unit)

Acquired Brain Impairment Assessment Unit

27 Hope Street

BRUNSWICK VIC 3056

Tel: (03) 8388 1222

Fax: (03) 9387 9925

Email: arbias@arbias.com.au

Website: <http://www.arbias.org.au>

*Note that this is a publicly funded service. There is a waiting period of up to six months for an assessment. Brain impairments or suspected brain impairments which have been present since birth are within the scope of Arbias's services.

Headway Victoria

86 - 88 Herbert Street
NORTHCOTE VIC 3070
Tel: (03) 9482 2955
Toll free: 1800 817 964
Fax: (03) 9482 5855
Website: <http://www.headwayvictoria.org.au>

* Refer to this website for a list of regional and metropolitan neuropsychological assessment services (some of which are publicly funded).

7.4 Support for guardians of clients

Private Guardian Support Program

Office of the Public Advocate
5th Floor, 436 Lonsdale Street
MELBOURNE VIC 3000
Tel: (03) 9603 9558 or 1300 309 337 (for the cost of a local call)
Fax: (03) 9603 9501
Email: publicadvocate@justice.vic.gov.au
Website: <http://www.publicadvocate.vic.gov.au>

State Trustees Limited

168 Exhibition Street
MELBOURNE VIC 3000
Tel: (03) 9667 6444 or 1300 138 672 (local call outside the metropolitan area)
Fax: (03) 9663 4260
Website: <http://www.statetrustees.com.au>

7.5 VCAT guardianship and administration hearings

VCAT Guardianship List registrar

The Registrar
Guardianship List
Victorian Civil and Administrative Tribunal
55 King Street
MELBOURNE VIC 3000
Tel: (03) 9628 9911
Toll Free: 1800 133 055
Fax: (03) 9628 9932
Email: vcat@vcat.vic.gov.au
Website: <http://www.vcat.vic.gov.au>

Translating and Interpreting Service

Tel: 13 1450
Ask to speak to an enquiries officer at Consumer Affairs Victoria.

8. Disclaimer

This Manual is intended to be used as a resource that introduces different areas of law and provides guidance on how an issue might be addressed. The Manual is not intended to be advice on any particular matter. Readers should not act on the basis of any material in the Manual without obtaining advice relevant to your own particular situations. The authors and publishers expressly disclaim any liability to any person in respect of any action taken or not taken in reliance on the contents of this Manual.

The law in this edition of the Manual is correct as at 30 June 2008