



**SUBMISSION BY MARILLAC TO VICTORIAN LAW REFORM COMMISSION:
REVIEW OF VICTORIA'S GUARDIANSHIP AND ADMINISTRATION ACT**

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Executive summary

As a not for profit provider of support to children, teenagers and young adults with a disability (and often multiple disabilities), Marillac has a number of comments on the current functioning of Victoria's Guardianship and Administration Act (the Act) and suggestions for changes that could improve outcomes for the people we support.

Our overall submission is that while the Act works reasonably well in ensuring the financial security and protection of vulnerable people, and also covers medical and health issues adequately, there are some important gaps in guardianship processes which significantly affect people's quality of life. The major areas for improvement, in our view, are:

- Gaps that leave people over 18 without families in an uncertain position
- Gaps that mean people who need occasional or episodic, rather than permanent, support from a substitute decision-maker do not always get the support they need
- Inconsistencies in systems and approach between OPA and VCAT
- Inadequate education for families, especially as young people with disabilities approach the age of 18, about how guardianship laws will affect their situation
- Lack of understanding among people who interact with people with disabilities, including medical professionals, about individuals' decision-making rights and the varying role guardians may (or may not) have in their decisions
- The variable level of skill and understanding appointed guardians can have, and the lack of time they can or do put into getting a genuine understanding of the needs and wishes of the person they are supporting with their decisions. Especially where people have complex communication needs, there is no substitute for time to give guardians the opportunity to get to know them and what they want to communicate and choose – and with life choices (unlike financial and medical decisions) there are many situations in which guardians, if they know the person well enough, can and should make "best interests" decisions that involve some appropriate risk.

In our submission we have responded to selected questions from the Commission's Information Paper and Terms of Reference. We are very happy to discuss any of the issues further and, within the limits of confidentiality, to provide real examples of the ways in which we have seen the Act limits people's ability to make life decisions and act on their choices to improve their enjoyment and quality of life.

Submission

General questions

1. In our experience supporting people with disabilities, the Act currently works well to:
 - Ensure financial security through the appointment of an administrator (dependent on the skills and suitability of the administrator appointed)
 - Address issues around health and medical decision-making.

The Act's key shortcomings, in our experience, include:

- Difficulty in obtaining temporary guardianship for occasional decisions (such as signing consent forms for activities involving any level of risk) involving a person with a disability who does not need a permanent guardian for their day to day life choices
- Tension between going along with the increasing use of advocates, who are more accessible and more flexibly appointed but often lack the necessary power, or choosing to work through OPA and VCAT's less flexible processes to get guardians with suitable authority
- Gap in coverage for people who were 'wards of the state' but have turned 18 and suddenly gone from permanent guardianship arrangements to nothing at all
- Important gap for people who need a guardian with the authority to sign forms (and have the skills to weigh risks and the person's wishes before they sign to consent to activities carrying risk – a recent example was a young person we support who was unable to pursue her wish to ride horses because of the consent form)
- Variability in the skills of people appointed as guardians, and the need for greater assessment by OPA of people's suitability for the role – particularly when people have complex needs and a guardian needs the time and skills to understand what they are communicating (often non-verbally) and their wishes.

We would make the general comment that while the Disability Act and the clear policy direction has been towards greater independence for people with a disability, the provisions of the Act have not kept up with that direction. The Act, and guardianship processes involving OPA and VCAT, are not flexible enough to serve people who only need occasional and temporary decision-making support but also need that support person to be suitably skilled and invested with appropriate authority.

2. While there is room to improve processes, broadly Marillac is comfortable with the current system of guardianship and administration. We believe the distinction between financial decisions and life decisions is still useful and relevant.
3. We find that guardianship laws are not adequately understood in the community. For example, we see many families who do not know that when their son or daughter with a disability turns 18, they are no longer automatically the guardians. We also had a recent example of a medical practitioner assuming that a person with a disability was not making their own decisions, but had a guardian.

We would like to see more accessible information provided to people with a disability and their families, especially as people near their 18th birthdays. This could be provided with other communication and through existing networks, such as through outreach workers.

We would also suggest there is a need among professionals and organisations who interact with adults with a disability for greater understanding about the decision-making rights of

people with disabilities, and the varying role of guardians, including the fact people with a disability can have different kinds of guardians or no guardian.

5. The increased need for guardians to support people with age related disabilities and acquired brain injuries is raising critical challenges. The guardianship model, and the people who have fulfilled the role of guardians, tend to assume that the disabilities have always existed and have therefore shaped the person's expectations of life and their guardian's role. Experience shows that people who have lived without a disability and never needed decision-making support often have different expectations of their guardian and a different attitude to life decisions – and that the guardian needs to have particular skills and understanding of the person's life, choices and attitude to risk before their disability to be in a position to carry out their role well.

At the same time, the general issues of concern with guardians – that they are suitable people with appropriate skills and understanding, and that they commit time and effort to genuinely understanding the person and their life situation – are constant whether a person has a lifelong disability or a disability acquired through age or injury.

For that reason, Marillac's recommendations for improving the system to better support people with age related disabilities or acquired brain injuries would be consistent with our general recommendations, that is that the review of the Act should aim to:

- Identify and close gaps
- Address the issue of episodic, irregular guardianship needs
- Ensure greater education for guardians and those who appoint them, and a greater emphasis on guardians' skills, understanding and commitment to understanding the person they are supporting
- Improve understanding and consistency of approach between OPA and VCAT – we have had experiences where VCAT acknowledge gaps and the impact the system's shortcomings have on people's quality of life and suggests we should raise our concerns (including to this review process), but they don't have the power to act on the situation and if OPA reach different conclusions we have no practical avenue to improve outcomes for the people we support.

6. As all the people we support have a disability, we will focus our submission on issues relating to people with a disability rather than addressing broader definitions of vulnerability.
7. Issues of decision-making capacity are generally raised by families and other members of people's support networks and assessed by VCAT. The majority of people Marillac supports have significant and complex needs and often no formal communication system, so assessment is relatively clear and disputes are rare. The potential for disputes, where a person does not agree that their capacity to make decisions is impaired, does exist where we support people with milder disabilities, but we are satisfied that VCAT is a suitable body with appropriate processes to make that assessment.
8. Marillac believes "best interests" is an appropriate guide for substitute decision-makers. Our issue is that this is a more flexible concept with life choices than it is for financial and medical decisions, and that appointed guardians need the right skills and level of understanding of the individual and their situation to judge "best interests", for example when weighing risk and personal safety against choice.
9. As we noted above – guardians must be able and willing to weigh competing interests and allow people to make their own choices and take risks with life choices. Guardians tend to err on the side of caution, and we believe this is appropriate especially with financial and medical decisions. But with life choices it is vital that guardians take the time and have the skills to

understand the person, their wishes (however communicated) and, if they have age-related disabilities or acquired brain injuries, their attitude to risk before they had a disability. Guardians need insight into the individual to perform their role well, and this is especially relevant to issues of risk.

10. In Marillac's view the essence of the role of a guardian or other substitute decision-maker is that a person with the right skills and insight takes the time and effort to understand as nearly as possible what the person wants and then follows their wishes wherever this is legal and financially viable.
11. Yes, substitute decision-making laws are still needed.
12. Yes, Marillac believes it is relevant and useful to distinguish financial and life decision-making. The roles require different skills, and having two separate substitute decision-makers also gives the individual additional protection.

We can see some benefit in VCAT having the flexibility and power, in consultation with OPA, to allow single decision-makers in certain circumstances. However, we would want separate decision-makers to continue to be the norm, and protection in the system to make sure single decision-makers aren't being appointed just because it is more efficient – the more critical issues of personal protection for the individual and choosing people with the best possible skills to fill two quite different roles should be the key considerations.

13. We would recommend VCAT have the authority to make broader rulings and get backing from OPA. Under the current system, we find VCAT's decisions are often too limited and specific. It would be appropriate for a maximum range of decisions to be defined, within which VCAT could operate more flexibly. Ultimately each case should be focused on what is right for each individual and what each person wants and needs and the system should work to that end.
14. Marillac is generally comfortable with the current range of decisions that can be made by substitute decision-makers. Again, our issues are more to do with the skills and understanding appointed decision-makers bring to their roles.
15. We think new laws could help the system work more flexibly to meet people's needs without diminishing their rights. Consistent and flexible roles for OPA, VCAT and advocates could be covered by new laws that could allow faster responses, better tailored to the needs and wishes of each individual.
16. While Marillac can see the value in VCAT having the authority to act as a review as well as hearing body, we are less convinced that it should be a power to review every specific decision.
17. Abuse of substitute decision-making power is an extremely serious issue and should be addressed as an offence through a legal process. Marillac would accept that VCAT is an appropriate body to hear claims of abuse, whoever raises them.
18. The key changes we would like to see in relation to OPA are:
 - Greater capacity and flexibility to act on requests for episodic, occasional guardianship needs
 - More education and stringent assessment of guardians
 - Greater consistency of approach between OPA and VCAT.
19. The key changes we would like to see in relation to VCAT are:
 - Greater power and established systems to follow up on the performance of any appointed guardian, including OPA

- Greater consistency of approach between OPA and VCAT.

20. Yes, the need to address financial decision-making for people between 16 and 18 years of age is a significant gap in the current system. A young person with a disability can start getting a disability support pension when they are 16 years old, but unless they are a ward of the state they do not have an independent administrator appointed until they turn 18, leaving them vulnerable to financial exploitation for that interim period. VCAT would be an appropriate body to assess each situation and appoint a financial substitute decision-maker.

If there is a need for a person under 18 years old to have a guardian for life decisions, we believe this should continue to be addressed through the legal system and the Children's Court, rather than becoming an administrative power of VCAT.

22. While Marillac does not have strong views on the terms used for substitute decision-makers, or any better alternatives to suggest, we would acknowledge that the use of the term "guardian" in relation to adults is not ideal, as it carries associations of a child-adult relationship.

Contact details

Marillac is very happy to discuss these points or any other aspect of the review of the Act. Please contact:

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Background on Marillac

Marillac believes every person has a right to develop physically, emotionally, socially, intellectually and spiritually to his or her full human potential. All its services reflect this commitment and respect for every person.

Marillac's services, meeting the needs of children, teenagers and adults with intellectual disabilities and their families, are focused on Melbourne's southern metropolitan region. They include five fully-supported houses, several other types of more independent accommodation, outreach services and training to support people choosing to live independently in the community, respite care and various forms of education and therapy to improve quality of life and outcomes for individuals. Marillac currently serves some 170 people and their families, and employs over 60 staff.

Marillac (previously called Marillac House) has been operating in Melbourne's south-east for over sixty years. Originally a work of the Daughters of Charity, Marillac continues to receive financial and pastoral support from the order although it has been an incorporated company since 1990 and today has mainly lay staff and management.

