



# PG 19 Access to and by persons

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|          |   |          |
|----------|---|----------|
| <b>1</b> | <b>INTRODUCTION - THE ISSUE</b>   | <b>1</b> |
| <b>2</b> | <b>RELEVANT LEGISLATION</b>   | <b>2</b> |
| <b>3</b> | <b>POLICY STATEMENT</b>   | <b>2</b> |
| <b>4</b> | <b>CONSIDERING, MAKING AND RECORDING ACCESS DECISIONS</b>   | <b>3</b> |
| <b>5</b> | <b>CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006</b>  | <b>4</b> |
| <b>6</b> | <b>FAMILY VIOLENCE PROTECTION ACT 2008</b>  | <b>4</b> |
| 6.1      | Comparison of family violence intervention orders and decisions by a guardian in relation to access to the represented person | 4        |
| 6.2      | Who can apply for a family violence intervention order?   | 5        |
| 6.3      | Role of police  | 6        |
| 6.4      | Definitions   | 6        |
| 6.5      | What to consider when applying for a family violence intervention order   | 6        |
| 6.6      | Consulting legal unit/team leader   | 6        |
| <b>7</b> | <b>STALKING INTERVENTION ORDERS ACT 2008</b>  | <b>7</b> |
| <b>8</b> | <b>RESOURCES/AGENCIES</b>   | <b>7</b> |

## 1 Introduction - the issue

Decision-making in relation to access to a person under guardianship may involve consenting or withholding consent, to proposals about whom a person should see, visit, be visited by or otherwise have contact with (eg through writing or by telephone). It may also involve deciding where, when and how this contact should occur. It is important that any restrictions on a person's freedom to interact with another individual not only have the requisite legal authority, but are also carefully considered and applied in a reasoned and sensitive manner to a particular individual circumstance.

## 2 Relevant Legislation

- *Guardianship and Administration Act 1986* (hereinafter referred to as “the GAA”)
- *Charter of Human Rights and Responsibilities Act 2006* (hereinafter referred to as “the Charter”)
- *Family Violence Protection Act 2008*
- *Stalking Intervention Orders Act 2008*

## 3 Policy Statement

The Public Advocate strongly endorses the rights of people with disabilities to see or have contact with family, friends and associates of their choice and as far as possible to be able to access the range of activities and services available to them within the community.

The Public Advocate also acknowledges the right of a person under guardianship to be protected from harm, conflict, undue influence or other unreasonable pressures. This right to protection is a basic principle, underlying all access decisions.

At the same time, and in accordance with the other principles of the Act, the guardian will, in considering the question of access, pursue the option that is least restrictive of a person’s freedom of action and decision and of their independence to the extent that is consistent with the person’s best interests.

If a guardian is proposing to restrict access, the guardian must ensure that s/he has the necessary authority to do so and cannot restrict access to a person without that authority. In practice this means that the Victorian Civil and Administrative Tribunal (Guardianship List) must have made either a plenary order or a guardianship order which includes the authority to make decisions about access to persons.

A guardianship order with authority to make access to persons decisions will generally be made by VCAT when there is conflict about the nature and extent of the contact which should take place.

Whilst the history of a person’s relationships may be relevant, earlier decisions made by the Represented Person when competent should not necessarily dictate the decisions made by the guardian especially if the Represented Person is now happy to see the other party. A guardian will attempt to hold open the opportunity for reconciliation.

In making decisions about access, it is the Represented Person’s wishes and interests which are paramount rather than those of other parties. At the same time, it is acknowledged that many of the circumstances which give rise to access orders can be painful and difficult for other parties.

Where possible, the guardian will seek informal consensual solutions to visiting and contact issues. However, where the guardian is satisfied that a client is distressed or will suffer significant detriment under informal arrangements or where no agreement can be reached, then the guardian will need to make a formal decision in regard to access conditions.

Possible access arrangements include a total restriction of access, limited supervised access, access without formal supervision but within a public area and limited access without supervision. In some circumstances, access arrangements may provide for the Represented Person to be asked on each occasion whether s/he wishes to see the other person. Access arrangements less commonly may include conditions on visits eg that the visitor not feed the person or provide medication, that s/he not discuss certain topics, that s/he not remove or put up pictures in the person’s room.

The cessation of all contact should be seen as undesirable but may be necessary in some instances. Where contact is completely suspended it should initially be for a limited time, and be subject to review.

Appeal and /or complaint provisions should be provided to interested parties if they indicate they are aggrieved by the access decision.

A guardian should be aware of relevant issues relating to people from culturally and linguistically diverse backgrounds (including indigenous backgrounds) when making access decisions, however the basic principles should always be applied. Facilities and services set up for people from particular groups should be sought out and discussed with the represented person and their family.

The Public Advocate does not take the place of relatives, friends, carers or other service providers. It is important as far as possible that the person continues to receive the services, support and care provided by these people and decisions around access should be made which try to maintain the exiting family and social linkages wherever possible.

## 4 Considering, Making and Recording Access Decisions

1. When a delegated guardian is empowered to make a decision about access he or she will listen to, and take account of the Represented Person's wishes, and endeavour to pursue the option which is most consistent with these wishes, within the framework of their best interests.
2. Does the guardian believe that the Represented Person's views have been freely expressed without undue influence?
3. Has the Represented Person previously expressed his/her views in relation to access and has s/he acted upon these views? Are their previous views different from their current views? Is s/he expressing different views to different people?
4. The guardian may only make a decision contrary to the currently expressed wishes of the represented person if the guardian believes this is necessary to protect the best interests of the represented person. Best interests should be considered with reference to the Best Interests checklist.
5. Is there any information which can be gathered about the Represented Person's responses and interactions from those who have independently observed recent contact?
6. What are the views of the interested parties regarding their contact with the Represented Person and why do they hold concerns, if any, regarding contact by others?
7. What are the views of other relevant professionals?
8. Will other relationships or services being received by the Represented Person be jeopardised by the proposed access arrangements?
9. What is practical and achievable?
10. Are there known issues, such as the existence of Family Violence Intervention Orders which may impact upon the guardian's decision?
11. If it is proposed to limit a human right, as defined in the Charter, of the Represented Person, are these limits reasonable and can they be demonstrably justified in a free and democratic society based on human dignity, equality and freedom?

**In making access decisions**, the guardian should :

12. Fully explain the role and responsibilities of a guardian to the Represented Person and to relevant interested parties. It is important that as far as possible the represented person understands that a guardian may need to make a decision on their behalf which involves restricting access to persons.
13. Check that less formal access options have been thoroughly explored.
14. Assess the evidence of risk of injury, harm or distress to the person or others against the impact on the person if they are denied the opportunity to access family and friends.
15. Liaise with the service providers and carers to ensure that access proposals are feasible and workable in the context.
16. Ensure adequate monitoring arrangements are in place should the situation deteriorate, such as the person becoming distressed or being at risk of harm or injury during an access visit.
17. Except in exceptional circumstances, talk to the Represented Person about the decision made.



18. Inform all parties in writing of the access decisions and any conditions attached to the decision. Ensure that the facility where access is to occur has appropriate written notification of the access guidelines. The guardian should also have discussed, and preferably documented, with the facility what action is to be taken should access conditions not be followed.

**In the course of their decision-making**, the guardian must:

19. Document their reasoning and evidence in the case plan which is a working document.
20. Document interim and final decisions. The document should clearly indicate the reasons for the decision.
21. Except in exceptional circumstances the document must be discussed and talked through with the Represented Person. The document should also be sent to interested parties, although circumstances may dictate that it is inappropriate to release some material to interested parties. This document is to be attached to the case plan.
22. Ensure that all access agreements have a period of review. Access restrictions shall not continue indefinitely without review. Case plans should indicate the date of the review and interested parties should be advised of this. The period of review shall be determined by circumstances but should not exceed 12 months.
23. If monitoring is part of the arrangement, the guardian will ensure he or she receives appropriate feedback from service providers or carers on the progress of access arrangements.

**A guardian will not normally:**

24. take the person to access visits
25. supervise access visits

## 5 Charter of Human Rights and Responsibilities Act 2006

The *Charter of Human Rights and Responsibilities Act* sets out a number of human rights, including, most relevantly:

- freedom of movement (s.12)
- freedom of association (s.16)
- protection of families (s.17)
- cultural rights (s.18)

Any of these human rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Refer to the Practice Guideline on *Charter of Human Rights and Responsibilities* and *the Guardianship and Administration Act*).

## 6 Family Violence Protection Act 2008

Family Violence Intervention Orders are made under the *Family Violence Protection Act 2008* (a copy of which is on the G Drive). Family Violence Intervention Orders are made by the Magistrates' Court when the order is made for or against an adult, or it is made by the Children's Court when the order is made for or against a child.

### 6.1 Comparison of family violence intervention orders and decisions by a guardian in relation to access to the represented person

Guardians should be aware that there can be some confusion in the public mind between a family violence intervention order and a guardianship order for access to the represented person. The following distinctions are important:



Family violence intervention orders ....

1. It is a Magistrate who determines whether an order should be made and can do so if satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to do so again.
2. An order can be made for a specified time or indefinitely ('until further order').
3. If an order is made and the respondent contravenes the order then they can be charged by the police with a criminal offence.
4. It is possible there are conditions which can be included in a family violence intervention order allowing for options which may not otherwise be available to a guardian. For example, a guardian cannot require a person to vacate property which they have a legal right to occupy but a Magistrate could include a condition in a family violence intervention order that the respondent be excluded from a property (even if they are a tenant or a registered proprietor).
5. If the Magistrates Court is aware that the affected family member has a guardian then a copy of the application for the family violence intervention order and any orders should be served on the guardian.
6. A Magistrate can make a family violence intervention order even if a guardian has not made any decisions to curb/prevent the respondent's contact with the affected family member or even if the guardian does not agree that the order would be in the best interests of the represented person.
7. If an application was made by the guardian and a family violence intervention order made, the order will continue notwithstanding that the guardianship order may subsequently be revoked.
8. A respondent can appeal a decision of the Magistrates' Court to the County Court.

Decisions by a guardian in relation to access to the represented person ....

1. A guardian makes decisions about access to a represented person subject to s.4 (objects) and s.28 (exercise of authority by a guardian) of the GAA and with regard to any human rights which may be engaged via the Charter.
2. A guardian may make such decisions whether or not there is family violence involved.
3. A guardian may set conditions in relation to a person's access to a represented person but if the person fails to comply with the requirements, it does not become a police matter or a matter for the Courts. In such circumstances, the guardian would need to reconsider options available to them to ensure the best interests of the represented person are met, including making an application for a family violence intervention order.
4. A guardian can apply for a family violence intervention order if they consider it is in the best interests of the represented person to do so. A family violence intervention order can be made by the Magistrates' Court even if the represented person opposes this, although the Magistrate is required to ensure that the represented person's views are represented.
5. If there is no longer a need for a guardian to make decisions about access to the represented person then the order should be reassessed/revoked; the represented person will then be free to make their own decisions.

Guardianship orders and family violence intervention orders are not mutually exclusive. The purpose of a family violence intervention order is not to give effect to a guardian's decision but because the Court determines that the affected family member is in need of the protection that such an order can provide. The Court is focussed on whether there has been family violence; the guardian is focussed on the best interests of the represented person.

## **6.2 Who can apply for a family violence intervention order?**

*The Family Violence Protection Act* specifies that a guardian is empowered to apply for a family violence intervention order on behalf of the represented person if they have authority to make decisions about where or with whom the person is to live or with whom the person is to have contact. Although on the wording of the legislation it seems possible a guardian with accommodation decision-making powers only could be empowered to make an application, it is recommended that only a guardian who specifically has powers to make decisions with whom the Represented Person is to live or to make decisions concerning



access to the Represented Person should consider they are empowered to make an application. Consult the Legal Unit for advice if you are unclear about whether the guardianship order empowers you to make an application.

Apart from guardians, an application for a family violence intervention order may also be made by –

- a member of the police force;
- the affected family member (that is, the represented person themselves);
- any other person with the written consent of the affected family member (this could include an advocate or a guardian who does not have the relevant decision-making powers to apply otherwise);
- any other person with the express leave (or permission) of the Court.

### **6.3 Role of police**

A guardian should consider liaising with police for them to exercise the powers they have under the *Family Violence Protection Act* which include holding powers (directing people to remain in a place or detaining them at a police station) and family violence safety notices which can be made in urgent circumstances outside of ordinary court hours. The police can apply for family violence intervention orders and, in some circumstances, it may be considered more appropriate for the police to make an application, rather than for a guardian. It is recommended that Advocate/Guardians refer to the Victoria Police Code of Practice for the Investigation of Family Violence (a copy of which is on G drive).

### **6.4 Definitions**

Note that the *Family Violence Protection Act*, which replaces the *Crimes (Family Violence) Act 1987*, has an expanded definition of ‘family member’; it includes a person who is regarded as being like a family member. The Act has also considerably expanded the definition of ‘family violence’; it includes economic abuse and emotional and psychological abuse.

### **6.5 What to consider when applying for a family violence intervention order**

An application for a family violence intervention order should only be made when the guardian considers that this is in the represented person’s best interests. Guardians should pay particular regard to the following –

1. whether the family violence intervention order is sought for the protection of the represented person or for the protection of others; for example, carers of the represented person;
2. whether the represented person will sabotage the order by continuing their association with the respondent to the order;
3. whether the respondent is able to abide by the order, and if not, whether the frequent intervention by the police will ward off the respondent and so protect the represented person.

Guardians are referred to the “Best Interests” checklist when making this decision.

### **6.6 Consulting legal unit/team leader**

**Direction:** If a guardian is considering making an application for a Family Violence Intervention Order, the matter **must** be discussed with their Team Leader and the Legal Unit. There are potentially significant resource implications of making such applications (including applications to vary orders). The legal unit have further information about what is involved in making applications and can advise about the process.

When you consult with the legal unit/team leader you will need to be able to provide information about the following matters:

- the nature of the relationship between the represented person and the person/people against whom the family violence intervention order is sought
- what family violence is alleged and by whom and what evidence there is to support such allegations



- medical
- police involvement
- eye witnesses to any acts of violence
- any hearsay evidence – for example, disclosures made to third parties
- whether there is someone else who could make the application – in particular, the affected family member or the police
- the view of the affected family member/represented person - do they want the family violence intervention order?
- who would be able to attend court to provide evidence
- whether it is anticipated that the person/people against whom the family violence intervention order is sought will contest the application or cross-apply for a family violence intervention order
- whether the affected family member has (or is likely to have) legal representation
- whether the person/people against whom the family violence intervention order is sought has (or is likely to have) legal representation.

## 7 Stalking Intervention Orders Act 2008

If the person against whom an order is sought is not a ‘family member’ within the meaning of the *Family Violence Protection Act* then it may be possible to obtain an intervention order under the *Stalking Intervention Orders Act*.

The court may make a final order in respect of a respondent if satisfied on the balance of probabilities that the respondent has stalked another person and is likely to continue to do so or to do so again. Stalking is when a person engages in a course of conduct with the intention of causing physical or mental harm to the affected person or of arousing apprehension or fear in the second person for his or her own safety or that of any other person.

A guardian is able to apply for a stalking intervention order. As with applications under the *Family Violence Protection Act*, applications should not be made without consultation with the legal unit/team leader.

Note: this Act is currently under review.

## 8 Resources/Agencies

Resources on G drive

- Legislation
  - *Guardianship and Administration Act 1986*
  - *Charter of Human Rights and Responsibilities Act 2006*
  - *Family Violence Protection Act 2008*
  - *Stalking Intervention Orders Act 2008*
- Legal: Family Violence Protection Act (publications from the following agencies are saved here)
  - Community Legal Centres
  - Victoria Police (including the Victoria Police Code of Practice for the Investigation of Family Violence)
  - Dept of Justice
  - Magistrates’ Court
  - Children’s Court
  - Judicial College
  - OPA powerpoint presentation

Agencies

- Victoria Police (local police stations, Family Violence Unit, Sexual Offences and Child Abuse Unit) ([www.police.vic.gov.au](http://www.police.vic.gov.au))



- Department of Justice ([www.justice.vic.gov.au](http://www.justice.vic.gov.au) (select 'crime' and then select 'family violence'))
- Department of Human Services ([www.dhs.vic.gov.au](http://www.dhs.vic.gov.au)). DHS fund the family violence prevention and support program
- Dispute Settlement Centre of Victoria (9603 8370, 1800 658 528)
- Domestic Violence Resource Centre ([www.dvrcv.org.au](http://www.dvrcv.org.au))
- Women's Legal Service (9642 0877, 1800 1330 302)
- Women's Information Referral Exchange (WIRE) ([www.wire.org.au](http://www.wire.org.au))
- Women's Domestic Violence Crisis Service (9322 3555, 1800 015 188)
- No to Violence ([www.ntv.net.au](http://www.ntv.net.au))

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