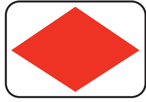 Office of the Public Advocate

What role should VCAT have for persons under the age of 18 years?

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Introduction

The OPA response to the Victorian Law Reform Commission's Information Paper on Guardianship is available on the OPA website.[1] This discussion paper offers an expanded discussion of the points raised in that submission in response to Question 20 of the Information Paper:

> *Should VCAT have the power to appoint a guardian or administrator for a person under the age of 18 years?*

Whilst the VLRC considers this question in relation mainly to the intersection of the *Guardianship and Administration Act* with the *Children, Youth and Families Act* 2005, the Public Advocate believes that the question is currently relevant in three main circumstances.

1. Applications for special procedures.
2. Whether there is a need for guardianship orders for 17-year-olds.
3. Whether there is a need for administration orders for 16 year-olds.

The Public Advocate considers that, if the age limit were to be lowered in any or all of these situations, the other eligibility criteria should still apply. The person for whom an application is made should still have a decision-making impairment and be in a situation where there is a decision that needs to be made and can be made. Decision-making incapacity related to age alone (immaturity) should not be sufficient grounds for the making of an order.

Special procedures

Under the *Guardianship and Administration Act* 1986, VCAT approval must be obtained before a Special Procedure (medical) is carried out on an adult with a disability. Special Procedures currently defined under the Act are sterilisation, termination of pregnancy and removal of tissue for the purpose of transplantation to another person.

The Public Advocate considers that VCAT should be able to provide consent for special procedures for all minors with a disability within the meaning of the Act.

Sterilisation

In Victoria, decisions about sterilisation for persons under the age of 18 for non-medical reasons are considered 'ethically contentious' following the High Court decision in *Marion's Case*[2]. The High Court prescribed guiding principles for these procedures which are dealt with by the Family Court of Australia, exercising its welfare jurisdiction under the *Family Law Act* 1975. Usually, such applications are brought to the Court for the purposes of menstrual management, burden of care, contraception or 'social' purposes, in association with medical issues.

[1] http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2010/OPA-Submission-to-VLRC-May-2010.pdf

[2] *Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218

Sterilisation of minors is lawful in Australia when it is the 'by-product of surgery appropriately carried out to treat malfunction or disease'.[3] It is commonly assumed that the only sterilisations performed on children and young persons under the age of 18 who do not have a disability are performed for serious medical reasons and that there are very few such procedures.

Research undertaken by the Australian Human Rights Commission in 1997 suggested that a far greater number of procedures resulting in sterilisation of people under 18 years were being performed than the number of applications being brought to the Family Court.[4] The Public Advocate fears that numbers of sterilisations are still carried out on girls with disabilities on supposedly therapeutic grounds that would not be carried out on girls with the same medical conditions but without a disability.

By contrast, all applications for sterilisation of Victorian adults with a disability must be taken to VCAT, whether or not the procedure is for therapeutic reasons. VCAT will give consent to the procedure if it determines that it is in the best interests of the person under s28 of the Act. No other person may give substitute consent to the procedure.

State guardianship jurisdictions vary in legislation on sterilisation with New South Wales, South Australia, Queensland and Tasmania having concurrent jurisdiction with the Family Court on sterilisation of minors and the Family Court of Australia retaining sole jurisdiction in Western Australia, Victoria and the Northern Territory.

In 2006, the Standing Committee of Attorneys-General (SCAG) sought to bring consistency across the States by developing consistent procedures in relation to the sterilisation of intellectually disabled minors.[5] A working group was set up, a discussion paper and a Model Bill was developed and submissions made by a range of organisations and individuals. The issue was removed from the SCAG agenda in March 2008 following advice to SCAG from the Working Group that the numbers of sterilisations have gone down since 1997 and that better alternatives are now available.[6]

The Public Advocate considers that VCAT should have concurrent jurisdiction with the Family Court of Australia in relation to the sterilisation of minors who have a disability within the meaning of the Act.

Termination of pregnancy

Whether or not the girl has a disability, the termination of pregnancy is not a matter that requires Family Court approval. Consent to a termination of pregnancy for a girl under 18 will generally be provided by her parent or guardian or, in some cases, by the girl herself if she has the maturity to make such a decision.[7]

Whilst it appears to be established practice for parents or the mature minor herself to provide consent for termination of pregnancy, a recent case in the Queensland Supreme Court may call this

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[3] *Marion's case* [1992] HCA 15 : 48

[4] Brady S, Briton J, Grover S: *The Sterilisation of Girls and Young Women in Australia: issues and progress* Australian Human Rights Commission 2001.

[5] http://www.wwda.org.au/sterbill06.pdf

[6] http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Summary_of_Decisions_March_08.doc/$file/SCAG_Summary_of_Decisions_March_08.doc

[7] *Gillick v West Norfolk AHA* [1985] UKHL 7; [1986] AC 112

practice into question. The case concerned a girl of 12 and was brought by her litigation guardian (her father) under the *parens patriae* power of the Supreme Court. The judge stated "in my view this is one of those cases where B is incapable of giving informed consent to the termination of her pregnancy and it is beyond her parents' powers to do so". The judge, however, did not explain why he believed it was beyond the parents' power to provide consent.[8]

Girls and women with disabilities are more likely to be subject to sexual abuse than those without disabilities. There is also a firmly held belief in some parts of the community that supports termination of pregnancy wherever the mother may be unable to raise her child or where the baby may have a disability. For these reasons, the Public Advocate considers that the protection currently provided to adults with a disability in relation to the termination of pregnancy should be extended to girls with a disability under 18 years to ensure that their interests are protected.

For a woman over 18 with a disability who is unable to make that decision for herself, the consent of VCAT is required. VCAT will give consent if it decides that the procedure is in the woman's best interests under s38 of the Act.

To illustrate the issue, in a 2005 OPA case a father raped his intellectually disabled 24 year old daughter. She became pregnant and was taken by her parents for a termination of pregnancy at 25 weeks without first obtaining VCAT approval. The father was subsequently convicted of rape and is presently serving a nine-year sentence. OPA was only aware of the termination because the social worker properly made an application to VCAT for consent to the procedure. Had the young woman been under 18 years, the parents would have been able to give consent. There would have been no requirement to report the matter to DHS unless the doctor suspected abuse.

The Public Advocate considers that VCAT should have jurisdiction for termination of pregnancy in relation to all persons with a disability within the meaning of the Act. This would ensure that the best interests of the girl with the disability are the paramount consideration when such decisions are being made.

Transplantation of tissue

A small number of applications are made to VCAT each year for a person with a disability to donate tissue to another person, typically bone marrow donation to a family member. A small number of applications are also received by the Family Court for this purpose, typically for babies or very young children to become bone marrow donors. Under the *Human Tissue Act* 1982, parents may give consent to donations between siblings but the legislation is silent on other relationships. Court authorisation in these circumstances is therefore required.

The Public Advocate considers that the *Human Tissue Act* 1982 should be amended to allow for parents to provide consent for donations within a wider range of relationships than is currently provided. The Public Advocate also considers that VCAT should have jurisdiction for the transplantation of tissue in relation to all proposed donors with a disability within the meaning of the Act that fall outside the *Human Tissue Act.*

Gender reassignment

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[8] *State of Queensland v B* [2008] QSC 231

Gender reassignment, undertaken in relation to gender dysphoria, is not currently a special procedure under the *Guardianship and Administration Act* 1986. The Public Advocate has been involved in a number of cases in the Family Court where applications have been made for procedures associated with gender re-assignment for persons under the age of 18 years.

The Public Advocate suggests that gender reassignment is an irreversible procedure akin to sterilisation and should therefore be defined as a Special Procedure in the Act. It could be argued that because gender re-assignment renders a person unable to have children in the customary manner, it is captured under the sterilisation provisions.[9] However, the Public Advocate considers that it is qualitatively different from sterilisation and therefore should be separately identified. This can be done administratively without the need for legislative amendment.

The Public Advocate considers that gender reassignment should be a Special Procedure under the Act and that VCAT should have jurisdiction to hear applications for gender reassignment for all persons with a disability within the meaning of the Act. The Public Advocate notes that gender dysphoria itself should not be considered a disability under the Act.

Protective orders for young people of 17 years

The question of when childhood finishes has been legally problematic for many years. There is little consistency across the Australian States and within the various areas of State jurisdictions. In 1997, the Australian Law Reform Commission published the report "*Seen and heard: priority for children in the legal process*". Part of Recommendation 190 is:

> *A child for the purposes of care and protection jurisdictions should be defined as a person under the age of 18 and a court should be able to make orders for a young person aged 16 to 18 if it finds, after taking into consideration the wishes of the young person, that the young person is in need of care and protection.* [10]

Under the *Children, Youth and Families Act* 2005, 'child' means anyone under the age of 17 years with the important proviso that a protection order which is in place before the child is 17 years may continue in place until s/he is 18 years.[11] Under the Act, a plan must be developed for young people 'transitioning' from care to independence. The Act also requires support to be provided for young people leaving care until the age of 21 years. This includes help with transitional housing and funding to help with housing costs, education and healthcare. This is in keeping with broader social patterns where the average age of leaving the family home in Australia is now well into the twenties.

Under other Acts, the age of childhood is variously defined depending on the circumstances. For persons alleged to have committed an offence and for proceedings under the *Family Violence Protection Act* and the *Stalking Intervention Orders Act*, childhood is defined as being under 18 years of age. The *Disability Act* 2006 does not have age limitations (except for the definition of intellectual disability which does not include children under five years of age). This means that a

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[9] The Public Advocate is not aware of any applications for sterilisation associated with gender reassignment brought before VCAT.

[10] Australian Law Reform Commission: *Seen and heard: priority for children in the legal process* 1997 http://www.austlii.edu.au/au/other/alrc/publications/reports/84/appd.html

[11] *Children, Youth and Families Act* 2005 Part 1.1 s3(1) and s275(2).

person under 18 years of age who is receiving services under the *Disability Act* may have restrictive interventions or a Supervised Treatment Order.

The VLRC Information Paper points out that a 17 year-old in need of a substitute decision-maker falls in a gap between the *Children, Youth and Families Act* 2005 and the *Guardianship and Administration Act* 1986. In NSW, guardianship laws may apply to people over 16 but in other States the age is 18, as it is in Victoria.

The Public Advocate is concerned at several levels about any proposal to lower the guardianship age to fit in with the current provisions of the *Children, Youth and Families Act*.

- The policy direction in both Australia and the UK is towards extending the support that is provided to vulnerable young people in care in keeping with the patterns of support normally provided in the family environment.
- A 17-year old who already has a protective order may have that order continued until s/he is 18 and receives a range of support and funding including a program to transition from care. The Children's Court cannot make an order for a person who is already 17 years old and therefore a 17-year –old cannot receive the protection and benefits associated an order. If the guardianship age was lowered to 17 to fill this 'gap', there would be two classes of guardianship, one with associated benefits and funding and one without.
- Experience in other States suggests that there is limited understanding by child protective services of the legal nature of adult guardianship and what it can provide. Protective workers mistakenly assume that the jurisdictions are similar and that a smooth transition from child protection to adult guardianship will be beneficial to the child and should therefore be sought.[12]
- There is a real risk of blurring the distinction between social problems and disability. The majority of children under protective orders come from difficult social situations. Many have social problems and are not doing as well as their peers. Only a minority, however, have a disability that prevents them from making reasonable judgments about their circumstances. There is a risk of locating social problems with the young person, thereby internalising the issues and abdicating community responsibility.

In the Office of the Public Advocate submission to the VLRC, we acknowledge that it may appear simpler to amend the Act to lower the guardianship age to 17 years but point out the significant service risks that this would entail. For this reason and also those considered above, the Public Advocate suggests that it would be preferable to amend the *Children Youth and Families Act* 2005 to provide coverage to all 17 year-olds rather than to lower the age of guardianship eligibility.

Administration orders for persons under 18 years?

The issue of financial management generally arises when a person with a disability turns 16 and becomes eligible for a Disability Support Pension in their own name if they meet the other eligibility criteria.

[12] Bagdonavicius P, Fallon D, Casey D: *The Development of a Collaborative Approach to Young People with Decision-Making Disabilities leaving State Care*. Paper presented to AGAC Conference 2009. http://www.agac.org.au/images/stories/2009/A%20collaborative%20approach%20to%20young%20incapacitated%20people%20leaving%20State%20care.pdf

In most cases, a family member or next-of-kin becomes their Centrelink nominee and manages the finances informally. The person with a disability may also authorise an organisation to receive Centrelink payments and correspondence on their behalf. Those arrangement can continue successfully well into adulthood. There are, of course, occasions where the nominee exploits the person financially and does not provide for their needs. Where the person is over 18, this can be remedied by the appointment of an administrator but that is not possible under the current legislation for a person under 18 years. In addition, a person under 18 is not able to appoint an Enduring Power of Attorney (financial).

The Public Advocate has been aware of this problem for many years. A situation brought to the attention of the Public Advocate through the Advice Service this month indicates how difficult it can be.

> *Julie is the mother of a boy with an intellectual disability who is 16 years old. The mother suspects that the boy's father (from whom she is estranged) may be financially exploiting him. The boy is receiving a disability support pension from Centrelink (around $400 a fortnight). The boy's father has taken a renewed interest in the boy ever since he started receiving money from Centrelink. The boy's father went to Centrelink with the boy and became the nominated person who can deal with the money. Julie suspects that the father is using the money for himself. She spoke to her son and then changed the nominated person to herself. Centrelink said that she needs to "get Power of Attorney" to retain authority to deal with her son's finances. Otherwise, as far as Centrelink is concerned, her son is the client. If he wants to nominate his father to deal with Centrelink, then he is free to do so. Julie is concerned because she says her son is 'very suggestible' and it is easy for people to take advantage of him. She wants to know what she can do to protect him. Currently, the only available course of action is for her to make an application to the Family Court to have parental responsibility for financial matters, a long and costly process.*

Under section 42N(6)(b) of the *Guardianship and Administration Act*, VCAT may, in relation to people over 18 years, appoint "a person for matters relating to the medical and dental affairs of the patient". This has the effect of VCAT appointing a person responsible for medical treatment who may not be the person who would have that authority under the person responsible hierarchy in s37 of the Act. Such an appointment may be on-going and is less restrictive than a guardianship order.

The Public Advocate proposes that in situations where a person with a disability is being exploited or is at risk of exploitation, VCAT should be able to appoint a nominee to receive and manage Centrelink benefits, whatever the age of the person with a disability. Such a provision in the Act would provide an on-going arrangement that is arguably less restrictive than an administration order. It could also address more broadly the questions around informed consent in relation to the appointment of nominees.

The Public Advocate considers that VCAT should be able to appoint a nominee to receive and manage Centrelink benefits for any person with a disability within the meaning of the Act.