



OFFICE OF THE
PUBLIC ADVOCATE

Inquiry into Victorian Acts and Regulations
Submission to the Scrutiny of Acts and Regulations Committee of the
Parliament of Victoria from the Public Advocate
28 May 2004

For further enquiries regarding this submission, please contact:

Natalie Tomas
The Office of the Public Advocate
Level 5, 436 Lonsdale St
Melbourne, Vic. 3000.

Tel: (03) 9603-9558
Fax: (03) 9603-9501
Email: natalie.tomas@justice.vic.gov.au

Introduction

This submission from the Public Advocate to the Inquiry into Victorian Acts and Regulations under section 207 of the *Equal Opportunity Act 1995* (EOA) will address the following issue raised in the discussion paper entitled: *Discrimination in the law* (December 2003):

Whether the minimum age at which an application for the appointment of an administrator or guardian for a person with a cognitive disability should be lowered from the age of 18 years to that of 16 years under the Victorian *Guardianship and Administration Act 1986* (G&A) in line with similar legislative provisions in NSW (pp. 24-5).

Further, we raise another issue relating to section 82 of the *Equal Opportunity Act 1995* which is not raised in the discussion paper.

About the Public Advocate

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act 1986* (Vic). The office represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

The Public Advocate delegates his authority to his staff, who may be advocates, investigators or guardians. The office also coordinates the Private Guardian Support Program, the Community Guardians Program, the Community Visitors Program and the Independent Third Person Program in Victoria. Further material on the role of the office can be provided if required by consulting the Office of the Public Advocate's (OPA's) website:

www.publicadvocate.vic.gov.au.

1. Lowering the minimum age from 18 years to 16 years of age under the G&A

The discussion paper raises the issue as to:

... whether the age of 18 is the appropriate minimum age at which a person can have a guardian and/or an administrator. For example, in the New South Wales Act, an application for a guardianship order may be made for a person who is 16 years and older. In light of the NSW legislation, it is questionable whether 18 years as the minimum age at which one can have a guardian and/or administrator appointed in Victoria, is based on sound policy and representative of community values (p.25).

However, the differences between the two State's respective Acts with regard to the minimum age at which the Acts can apply are one of legal necessity. The variation between the minimum age in NSW and Victoria is based on differences between each State's definitions of "child" in their respective pieces of legislation relating to the care and protection of children and young people. In the NSW *Children and Young Persons (Care and Protection) Act 1998*, a child is defined as a person under the age of 16 years (s. 3), while in Victoria under the *Children and Young Persons Act 1989* a child is someone under the age of 17 years except where the person is subject to a protection order or interim protection order which continues until the age of 18 years (s.3). These are the reasons for the differences between the minimum ages in both G&A Acts rather than issues of sound policy or community values.

Without a lower minimum age in NSW, people in that State with cognitive disabilities and with a demonstrated need for a guardian and/or administrator between the ages of 16 and 18 would be at a significant disadvantage and at possible risk of abuse, exploitation and neglect.

. The Public Advocate prefers that there be legislative changes to the *Children and Young Persons Act* 1998 so that a protection application can be made for children of the age of 17 years rather than lowering of the minimum age for guardianship and administration orders in the *Guardianship and Administration Act* 1986 in Victoria to 17. If this were not to be accepted we would not oppose the reduction of the age for guardianship and administration to 17 as this would be better than to take no action at all.

2. Section 82 of the *Equal Opportunity Act* 1995

Many people who have a disability require the provision of special services. Anti discrimination law has limited effect because of the operation of section 82 of the *Equal Opportunity Act* 1995 in relation to specialist services. This section should be amended to ensure that it does not legitimise discrimination between classes of people who have a disability where one group is treated less favourably than another group by virtue of their disability.

For example, a residential service provider provides accommodation for people who have an intellectual disability. Some of the people in the residence also have autism. If the residential service provider were to treat the person with autism less favourably than those who only have an intellectual disability. The person with autism would be unable to bring an action for discrimination against the service provider because of section 82.

Further, in the decision of *Colyer v State of Victoria*, [1998] 3 VR 759 the Supreme Court found that the meaning of ‘design’ in section 82 of the EOA has a component relating to the intention of the designer. If the designer’s intention is to design a service for a particular purpose (in the case of *Colyer* to construct an institution for people who have an intellectual disability) it is irrelevant that

- the purpose is not achieved by the design; or
- the design is not in the best interests of people for whom it is designed (in the case of *Colyer* it was designed to keep some people out of the community when the prevailing legislation for services for this class of persons required that people who have that disability should live in the community).

Therefore, section 82 should be amended to ensure that welfare measures and special needs are not exempt if they do not benefit the people for whom they are provided or constructed. This means that the subjective intention of the designer should be replaced by an objective assessment of the outcomes for the relevant group of people to ensure that the design does not facilitate negative discrimination. The purpose of that section was to facilitate positive discrimination that would advance the rights of the class for whom the special measure was taken.

Recommendations

1. The Public Advocate recommends that it is preferable that there be legislative changes to the *Children and Young Persons Act* 1998 so that a protection application can be made for

children of the age of 17 years rather than lowering of the minimum age for guardianship and administration orders in the *Guardianship and Administration Act* 1986 in Victoria to 17. If this were not to be accepted we would not oppose the reduction of the age for guardianship and administration to 17 as this would be better than to take no action at all.

2. Section 82 of the *Equal Opportunity Act* 1995 should be amended so that it does not exempt a discrimination claim where all relevant people have a disability but some people with disabilities are treated less favourably than others with different disabilities.

Further, section 82 should be amended to ensure that welfare measures and special needs are not exempt if they do not benefit the people for whom they are provided or constructed. This means that the subjective intention of the designer should be replaced by an objective assessment of the outcomes for the relevant group of people to ensure that the design does not facilitate negative discrimination.