

**THE POWERS OF ENTRY, SEARCH, SEIZURE AND QUESTIONING BY
AUTHORISED PERSONS**

**Submission to the Law Reform Committee of the Parliament of Victoria by the
Public Advocate of Victoria.
Response to issues raised by Victorian Legal Aid.**

Date: 10 February 2005

**Orders made pursuant to section 27 of the
*Guardianship and Administration Act 1986***

Introduction

Section 27 of the *Guardianship and Administration Act 1986* contemplates the making of two orders.

- The first order that can be made is an order to visit the person understood to be at risk.
- The second order, to place a person, is made by VCAT only when it is satisfied that the person is being unlawfully detained against their will or is likely to suffer serious damage to their physical, emotional or mental health or well-being unless immediate action is taken.

A visiting order permits the Public Advocate (or some other person) to visit a person who has a disability in the company of a member of the police for the purpose of preparing a report to VCAT.

The order cannot be made unless VCAT has already received an application for the appointment of a guardian and has received information on oath that a person with a disability is

- (a) is being unlawfully detained against her or his will; or
- (b) is likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken¹.

In its submission to the Parliament's Law Reform Committee, the Public Advocate highlighted that

It is often difficult to meet this requirement [that a person has a disability] as the person is refusing any involvement with any service to establish their needs.

The Public Advocate submitted that "It would be better if it were only necessary to establish that the applicant for the order has a reasonable belief that the person has a disability".

¹ It is noted that this involves an opinion rather than a simple observation.

In its submission to the Law Reform Committee, Victoria Legal Aid did not support the removal of the disability requirement from section 27 –

This could lead to warrants being issued where the only evidence of disability is uncorroborated family or neighbour evidence that may be tainted or unreliable. A warrant permitting significant violation of privacy is not justified in these circumstances.

The Public Advocate is mindful of the civil liberties of people and is not wanting to unnecessarily encroach on the right of people to live peaceably in their own homes.

Nonetheless, it is submitted that the change to a requirement that an order can be made when there is evidence of a reasonable belief that the person has a disability is necessary to ensure that this law achieves its purpose.

Further, the Public Advocate submits that the proof requirements of information that a person -

- is being unlawfully detained against her or his will; or
 - is likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken,
- can only be met practically if the standard is that of a reasonable belief and not knowledge.

Reasonable belief

At present, if a medical expert such as a psychiatrist or a geriatrician expresses a view that a person has a disability, it is just that - an expression of opinion or, in other words, a belief based on professional expertise. A report from such an expert, if provided to VCAT, is expert evidence that VCAT takes into account in making a finding as to whether or not that person has a disability.

In other words, in the context of the *Guardianship and Administration Act 1986* it is not the opinion but the finding by the VCAT that causes it to be said that a person has a disability.

Given this, it is very difficult to get the expert evidence required by VCAT in circumstances in which someone is being held against their will or for other reasons is at risk of serious harm but cannot be clinically assessed without the protective intervention of the law.

The current law requires the applicant for a section 27 order to prove, on the balance of probabilities, that the person has a disability. When social workers or carers or family or friends raise concerns about a person it may well be therefore that is in the absence of clinical evidence. That is the very reason for the enactment of s27 – namely to provide a mechanism, in the restricted circumstances of the section, in which an assessment of the person's condition can be made. That assessment is then put before VCAT in its consideration of the original application under s19.

Disability is defined in the *Guardianship and Administration Act 1986* as:
intellectual impairment, mental disorder, brain injury, physical disability or dementia.

These categories seem clear cut, as having clear boundaries. However, some of these disabilities develop over time: for example dementia, Huntington's Disease and some forms of brain injury that result from alcohol use. Such progressive conditions make it even more problematic for a lay person to be able to swear on oath that a person has a disability. The definition of intellectual disability found in the *Intellectually Disabled Persons' Services Act 1986* is not reproduced in the *Guardianship and Administration Act 1986* leaving some scope for flexibility and uncertainty as to what constitutes an intellectual disability for the purposes of that Act. . As said above the question of whether a person has a disability is usually a matter of professional evidence provided to VCAT at a guardianship or administration hearing.

To impose the stricture of establishing disability definitively on members of the public who raise concerns for fellow members of their community in the context of applying for a visiting order under section 27 order is unrealistic.

The law recognizes various degrees of 'knowledge':

- conjecture
- reasonable suspicion
- reasonable belief
- knowledge on the balance of probabilities
- knowledge beyond a reasonable doubt.

The Public Advocate proposes an amendment to section 27 so that the third level, reasonable belief, is the appropriate standard in these cases.

The difference between conjecture and suspicion was enunciated in Hughs v Dempsey (1915) 17 WAR 186 at 187 by McMillan CJ:

It seems to me that reasonable suspicion means that there must be something more than mere imagination or conjecture. It must be the suspicion of a reasonable man warranted by facts from which inferences can be drawn; but it is something which falls short of legal proof.

The difference between suspicion and belief is expressed in Fisher v McGee [1947] VLR 324 at 327 which approved the words of Angas Parsons J of the Supreme Court of South Australia –

The gradation in mental assent is 'suspicion' which fall short of belief, 'belief' which approaches to conviction, and knowledge which excludes doubt.

The Public Advocate submits that the difference between suspicion and belief is that in regard to a reasonable suspicion the mind can entertain multiple hypotheses for the behaviour. In regard to a reasonable belief, the mind has settled upon one hypothesis as more likely than any other, yet does not rule out the possible validity of other hypotheses.

The requirement of a 'reasonable belief' is a high one, but is less than a requirement that there be knowledge of disability. Whilst one cannot rule out information being tainted or unreliable, as postulated in the Victoria Legal Aid submission, the standard remains sufficiently onerous that a person with a reasonable belief would have regard to the hypothesis that the information is tainted or unreliable but considers that, in the circumstances of the case, a more likely hypothesis is that the person has a disability.

It should be emphasized that it is not enough for the applicant alone to form a reasonable belief. It will still be necessary for the VCAT to be satisfied that there is a sufficient basis for the applicant to claim that their belief is reasonable before it will make an order. This provides an opportunity to assess the information upon which the applicant has relied in forming a reasonable belief.

Once the person has been visited, the OPA visitor may still only have a reasonable belief that the person has a disability. Where the OPA visitor's report recommends that the person be placed somewhere, the proposed place should be able to assess the person to determine whether the person has a disability, what needs the person has and what services they require. Until there is a professional assessment, the reasonable belief that a person has a disability is unlikely to reach the status of knowledge.

Further, an OPA visitor's determination - whether the person is being unlawfully detained or is likely to suffer serious damage to their health or well-being - is more correctly categorized as a matter of reasonable belief than information purporting to be a finding of fact. It may not be until there have been professional assessments or further investigation that there will be knowledge of such matters.

When a placement order is made under section 27, it initiates an application for guardianship under section 19. At the guardianship hearing evidence will be considered whether the person has a disability and whether there is a need for guardianship. At this point VCAT must make a determination as a finding of fact whether a person has a disability.

On the balancing of rights

Article 12 of the Universal Declaration of Human Rights states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Victorian Legal Aid described section 27 orders as "permitting [a] significant violation of privacy" and this would not be justified unless a finding of disability is made out. It is submitted that interference with one's privacy is not an absolute right, and the Universal Declaration prohibits arbitrary interference with this right rather than any interference with the right.

In response, the Public Advocate considers that the use of an order made by VCAT based upon a reasonable belief that a person has a disability is not an arbitrary interference with a person's privacy and does not offend a person's human rights. Arbitrary is defined as "derived from mere opinion or random choice; capricious; unrestrained; despotic" (*The Australian Concise Oxford Dictionary, 1st edition 1987*). As discussed above, a reasonable belief is not an unsubstantiated belief. It does not lead to an arbitrary act of interference.

A section 27 order permits the holder of the order 'to visit' the person. This visit may involve forced entry by police (s. 27(3)). Therefore, rigour is required in assessing the grounds for belief to ensure that they are reasonable. The rigour is required of

both the applicant for the order, who must place the grounds for their belief on oath, and VCAT which makes the order.

The purpose of the OPA visit is to “prepare a report” as to whether the person is being unlawfully detained or likely to suffer serious damage to their mental health or well being unless immediate action is taken.

A section 27 visit order does not permit the removal of the person from their accommodation. Before any further action is taken in relation to the person, VCAT must make a further order “enabling the person with a disability to be taken to a place specified in the order for assessment and placement until the application under section 19 is heard”.

It is submitted that the requirement for the matter to be returned to VCAT for a placement order provides further protection from an arbitrary interference with the person’s privacy and home. The guardianship application provides a further opportunity for consideration of the reasons for interfering in this person’s life.

The Public Advocate submits that section 27 orders differ in intent from orders made pursuant to the criminal law or laws regarding civil debts in that they are protective of the person rather than instruments of law enforcement. Therefore section 27 orders are a more acceptable derogation of the person’s privacy rights because the interference operates to ensure that person’s safety.

In other Victorian laws dealing with privacy, Information Privacy Principle 2.1 (d) and the Health Privacy Principle 2.2 (h) permit the release of information where an organisation considers that there is a serious and imminent threat to an individual’s life, health, safety or welfare.

Conclusion

The Public Advocate submits that the current threshold requirements to obtain section 27 orders are too high and may prevent people who are at serious risk from obtaining help and services. They frustrate the very intent of the provision, namely to provide protection in restricted cases involving unlawful detention or risk of serious damage. The Public Advocate does not seek a threshold which is without scrutiny, but recommends a standard of reasonable belief or, as sometimes expressed, a belief based on reasonable grounds.

The balancing of rights with the need to protect people is difficult. It is submitted that the balance in favour of rights in the current wording of section 27 is too protective of the right. In practice, people act on a reasonable belief and it is this standard that should be the requirement set out in the legislation.

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