

Guardianship and HYY

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Public Advocate

Outline



Part 1:

- ◆ HYY's pathway to guardianship and why OPA sought advice from VCAT

Part 2:

- ◆ VCAT's advice

Part 3:

- ◆ making decisions
- ◆ what might the future hold



HYY'S PATHWAY TO GUARDIANSHIP

Who is HYY



- ◆ HYY is a 73 year old woman who lived home alone
- ◆ no family members other than a supportive and involved cousin
- ◆ aged care case manager and services in place
- ◆ engaged with a GP:
 - ◆ longstanding diagnosis of depression with paranoid themes and previous suicide ideation
 - ◆ longstanding diagnosis of atrial fibrillation, requiring heart surgery (2007) and subsequently lifelong anticoagulant medication
- ◆ admitted to hospital post overdose of insomnia medication and subsequently needed investigations of deteriorating behaviours, cognition and paranoia

Timeline



- ◆ *30 June 2021*: contact from hospital to OPA's Advice Service seeking direction regarding their use of physical restraint to administer anti coagulant medication
- ◆ *6 July 2021*: OPA receives a s.63 request in relation to MRI and lumbar puncture under general anaesthetic +/- use of sedation and/or physical restraint
- ◆ *7 July 2021*: OPA opens an individual advocacy matter
- ◆ *13 July 2021*: OPA receives a s.63 request in relation to the continuation of administration of anticoagulant medication, inclusive of use of physical restraint
- ◆ *13 July 2021*: OPA requests VCAT to be joined as a party to the application lodged by the hospital
- ◆ *20 July 2021*: guardianship order to OPA made
- ◆ *20 July 2021*: OPA seeks s.45 order
- ◆ *13 August 2021*: OPA seeks advice from VCAT

Prior to the appointment of a guardian



- ◆ 2 x s.63 matters (MTPDAAct)
 - ◆ MRI and lumbar puncture under general anaesthetic
 - ◆ administration of anticoagulant medication, inclusive of possible use of physical restraint
- ◆ attempt to ascertain HYY's preferences or values
 - ◆ visit to HYY in hospital
 - flat in affect; intermittent aggression; paranoid and suspicious; frustration at not remembering things; frustration at lengthy hospital admission; wanted to go home; unable/unwilling to engage in any type of discussion
 - ◆ contact with HYY's cousin and case manager
 - history of paranoia and suspicion; takes a lot of time to build rapport; history of regularly taking medications (particularly those for her heart condition); engaged with a GP and medical recommendations; engaged with support services; challenging behaviours likely because of fear and confusion
 - ◆ discussion with HYY's doctors and nurses
 - fluctuating aggression and engagement in discussions; inconsistent accepting one or all medications

Why was advice sought from VCAT?



- ◆ neither the *Medical Treatment Planning and Decisions Act 2016* or *Guardianship and Administration Act 2019* contains any definition or safeguards in relation to restraint
- ◆ the guardian was unclear what authority they did and did not have to make decisions about restraint

(the issue of authority would also be relevant to all medical treatment decision makers)

- ◆ the guardian wanted to ensure HYY's human rights were being considered and safeguarded

Public Advocate's questions to VCAT



1. Does a guardian's power to make medical treatment decisions extend to restraint required to provide medical treatment?
2. Can 'restraint' be a personal matter specified in a guardianship order?
3. Is 'restraint' a thing 'necessary to give effect to any power or duty vested in the guardian'?
4. Does restraint for medical treatment require a s 45 order?



Intervening parties and submissions



Party	1. Medical treatment?	2. Personal matter?	3. Thing necessary?	4. s45 order?
Public Advocate	x	x	x	Not possible?



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Public Advocate	x	x	x	Not possible?
VEOHRC	x	x	x	Possible, required



Intervening parties and submissions



Party	1. Medical treatment?	2. Personal matter?	3. Thing necessary?	4. s45 order?
Public Advocate	✗	✗	✗	Not possible?
VEOHRC	✗	✗	✗	Possible, required
Attorney-General	✓	✓	✓	Possible, not necessary
Secretary Health	✓	✓	✓	Possible, may be necessary



VCAT's advice



1. The guardian's power to make decisions about medical treatment decisions does **not** extend to making decisions authorising forcible physical restraint in order to overcome resistance to medical treatment



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3. 'Restraint' is **not** a thing 'necessary to give effect to any power or duty vested in the guardian'





1. The guardian's power to make decisions about medical treatment decisions does **not** extend to making decisions authorising forcible physical restraint in order to overcome resistance to medical treatment
2. 'Restraint' **cannot** be a personal matter specified in a guardianship order
3. 'Restraint' is **not** a thing 'necessary to give effect to any power or duty vested in the guardian'
4. A **s 45 order is required** for any forcible physical restraint to overcome resistance to medical treatment (unless emergency)



VCAT's advice



Party	1. Medical treatment?	2. Personal matter?	3. Thing necessary?	4. s45 order?
Public Advocate	✗	✗	✗	Not possible?
VEOHRC	✗	✗	✗	Possible, required
Attorney-General	✓	✓	✓	Possible, not necessary
Secretary Health	✓	✓	✓	Possible, may be necessary
VCAT	✗	✗	✗	Possible, required



Section 45 orders



- ‘not common or routine’ for VCAT to make s 45 orders - every less restrictive alternative must be explored first
- Order should include ‘detailed prescription about the use of the power and how [the restraint] is reported and monitored’
 - Applicants will need to provide evidence
- Keep exploring less restrictive options
- Order must be reassessed at least every 42 days, often the timeframe is shorter



Intervention in G93966 - HYY (Guardianship) [2022] VCAT 97

Gabby Watson-Munro, Senior Legal Adviser

Victorian Equal Opportunity and Human Rights Commission

6 April 2022



Session today:

1. Why the Commission intervened
2. Charter rights engaged by the use of restraint in medical treatment
3. How the Charter helped VCAT



1. Why the Commission intervened



2. Charter rights engaged by the use of restraint in medical treatment



Protections from
medical or scientific
experimentation or
treatment without
consent

Equality

Liberty and security
of person

Protection from
cruel, inhuman or
degrading
treatment

Life

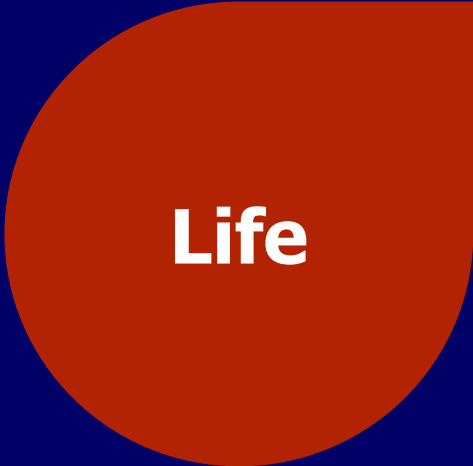
Human treatment
when deprived of
liberty

Movement

Privacy

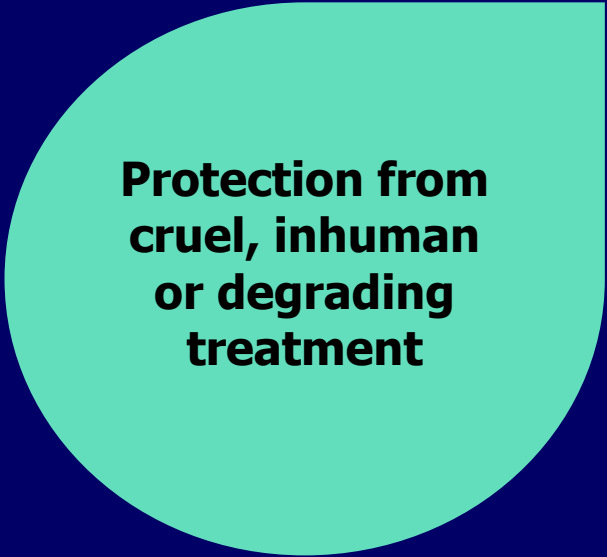
Equality





Life





**Protection from
cruel, inhuman
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treatment**



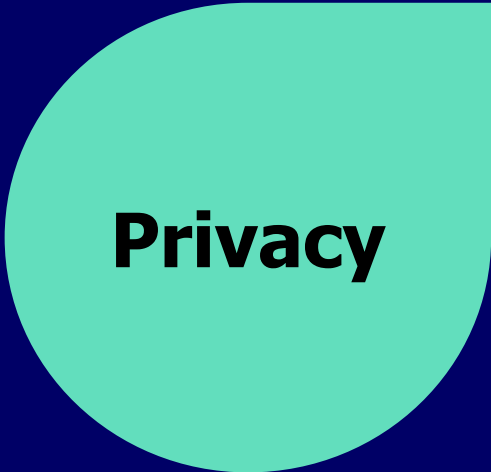
**Protection from
medical or scientific
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Movement



A teal-colored rounded square graphic with a flat top and a curved bottom, containing the word "Privacy" in bold black text.

Privacy



**Liberty and
security of
person**



3. How the Charter helped VCAT



Key takeaways

Guardians must have VCAT order

Charter rights are engaged

OPA and VCAT are public authorities

Not all physical restraint requires a VCAT order

Limitations on rights must comply with s 7(2) of the Charter



MAKING GUARDIANSHIP DECISIONS

Making decisions



- ◆ discerning the “spectrum” of physical restraint:
 - ◆ what is proposed by doctors
 - ◆ what is the *medical treatment* the restraint is to be used for

- ◆ considerations by the guardian:
 - ◆ what less restrictive options have first been undertaken by doctors/hospital; why have they not worked
 - ◆ how long is the restraint proposed for/how many occasions is it proposed for
 - ◆ who would be undertaking the restraint; how have they been prepared to do this
 - ◆ what are the consequences if restraint was not used
 - ◆ is there time to wait and see if the patient’s mental/cognitive health improves first
 - ◆ what has the patient said about any of this, or demonstrated in her body language

Following the law to make a decision



- ◆ ascertaining the patient's *preferences and values*
 - ◆ what does the say/demonstrate about their preferences to the guardian, to others; are they consistent or do they fluctuate
 - ◆ what have they said/demonstrated in the past to GP, services, friends etc
 - ◆ what has been important in their life, what have they valued about their health or lifestyle
 - ◆ what medical interventions have they accepted at this time; what interventions have they accepted/refused in the past

- ◆ current preferences and values could contradict previously known preferences and values

- ◆ information obtained may be unable to substantiate clear preferences or values relevant to the particular medical treatment and use of restraint

- ◆ therefore rely on *personal and social wellbeing*, having regard to their individuality



WHAT MIGHT THE FUTURE HOLD?

For HYY



HYY's physical and mental health has stabilised. Her sense of humour has returned.

She has no recollection of issues in her hospital admission or VCAT orders, but is able to reflect on times before and after she was unwell.

She has moved in to residential care, which she is satisfied with and identified is needed. She is enjoying playing bingo and going out to community activities.

Her cousin remains involved and *willing* to undertake role of (appointed) medical treatment decision maker.

The intention will be for the guardianship order to be revoked.

Considerations for the future



- ◆ application to VCAT for a guardian with s.45 order should still be the last resort
- ◆ when should a guardianship order with s.45 order be applied for?
- ◆ discerning the 'spectrum'
- ◆ *emergency treatment*: when is this applicable?
- ◆ education
- ◆ reflections on chemical restraint