VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

GUARDIANSHIP LIST VCAT REFERENCE NO. G93966

CATCHWORDS

Guardianship List – application for advice – relevant principles under the *Guardianship and Administration Act 2019* (Vic) – will and preferences of the person – powers and duties of an appointed guardian – whether power to make decisions about medical treatment extends to physical restraint – whether 'physical restraint' falls within the definition of 'personal matter' over which a guardian can provide consent – whether 'physical restraint' falls within s 38(1)(b) of the *Guardianship and Administration Act 2019* (Vic) – whether 'physical restraint' can by authorised under section 45 of the *Guardianship and Administration Act 2019* (Vic) – whether interpretation compatible with the *Charter of Human Right and Responsibilities Act 2006* (Vic) – adopting the interpretation least incompatible with the '*Charter' – Guardianship and Administration Act 2019* (Vic) sections 3, 4, 8, 9, 32, 34, 38, 39, 41, 44, 45 – *Charter of Human Right and Responsibilities Act 2006* (Vic) sections 8, 9, 10, 12, 13, 32, 38 – *Medical Treatment and Planning Decisions Act 2016* (Vic) sections 55, 61, 63, *Disability Act 2006* (Vic) and *Mental Health Act 2014* (Vic) referred to.

REPRESENTED PERSON	HYY (a pseudonym)
WHERE HELD	Melbourne
BEFORE	President Justice Quigley and Deputy President Nihill
HEARING TYPE	Videoconference
DATE OF HEARING	10 November 2021
DATE OF ORDER	27 January 2022
DATE OF WRITTEN REASONS	27 January 2022
CITATION	HYY (Guardianship) [2022] VCAT 97

ORDER

The guardian has applied for advice pursuant to section 44 of the *Guardianship and Administration Act 2019* (Vic) (**GA Act**). The Tribunal gives the following advice, with respect to each of the questions asked:

a. Does the scope of a guardian's power to make decisions about medical treatment extend to making decisions about restraint (in this case physical restraint), if that restraint is required to provide medical treatment?

   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.

b. If the use of restraint for the purposes of providing medical treatment is not within the scope of a guardian's medical treatment authority, is the use of restraint a personal matter for which VCAT may appoint a guardian?

   No.

c. Is restraint a matter caught by section 38(1)(b) of the GA Act as a "thing necessary to be done to give effect to the power of the guardian" to consent to medical treatment?

   No.

d. Does the use of restraint for the purposes of providing medical treatment require an application to be made under section 45 of the GA Act for an order for the represented person to comply with the guardian's decision?

   Yes, to the extent that the restraint is forcible physical restraint proposed to be authorised in order to overcome resistance to medical treatment.

Justice Michelle Quigley
President

Genevieve Nihill
Deputy President

APPEARANCES:

Dr Freckelton AO QC, of counsel for the Office of the Public Advocate

Mr L Brown, Crown Counsel and Ms L Hilly of counsel for the Attorney-General

Ms S Fitzgerald, of counsel for the Victorian Equal Opportunity and Human Rights Commission

Ms P Knowles, of counsel for the Secretary to the Department of Health

REASONS

The Victorian Civil and Administrative Tribunal (VCAT) is providing these reasons on a confidential basis. Clause 37(1) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that unless VCAT orders otherwise, a person must not publish or broadcast any report of a proceeding under the *Guardianship and Administration Act 2019* that identifies or could lead to the identification of a party to the proceeding.

INTRODUCTION

1 In these written reasons for decision, we refer to the person who is the subject of the application as HYY. The Victorian Civil and Administrative Tribunal (**VCAT**) has given the person that anonymised name to protect their identity and the confidentiality of their personal information.

2 The Public Advocate (**PA**) has been appointed as the guardian of HYY. The PA was appointed on 20 July 2021. The PA applied under section 44 of the *Guardianship and Administration Act 2019* (**the GA Act**) for VCAT's advice with respect to the following:

a. Does the scope of a guardian's power to make decisions about medical treatment extend to making decisions about restraint (in this case physical restraint), if that restraint is required to provide medical treatment?

b. If the use of restraint for the purposes of providing medical treatment is not within the scope of a guardian's medical treatment authority, is the use of restraint a personal matter for which VCAT may appoint a guardian?

c. Is restraint a matter caught by section 38(1)(b) of the GA Act as a "thing necessary to be done to give effect to the power of the guardian" to consent to medical treatment?

d. Does the use of restraint for the purposes of providing medical treatment require an application to be made under section 45 of the GA Act for an order for the represented person to comply with the guardian's decision?

3 There is an inter-relationship between the questions posed in relation to the powers of a guardian appointed under the GA Act and the exercise of such power for the purposes of a medical treatment decision and a decision maker for the purposes of the *Medical Treatment Planning and Decisions Act 2016* (**MTPDA**). The advice sought by the PA raises several issues for determination which may involve consequences more broadly for the administration of the GA Act in respect of the concept of restraint. For this reason, and the novel nature of the advice sought by the PA in the context of this relatively new version of the GA Act, the Tribunal invited the Attorney-General, the Secretary to the Department of Health (**Secretary**) and the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to participate in the hearing.

4 Written submissions were filed on behalf of each of the PA, the Attorney-General, the Secretary and VEOHRC and each were represented by counsel.

at the hearing. For the purposes of this determination only, each invited entity was joined as a party at the commencement of the hearing. The Attorney-General, the Secretary and VEOHRC will be removed as parties to the proceeding now this application for advice is determined. Orders will follow.

5 The Tribunal gratefully acknowledges the assistance provided to it in its task by the submissions made by all parties, both in writing and orally at the hearing.

BACKGROUND

6 HYY is a 73-year-old woman who was admitted voluntarily to an aged person's mental health unit (**APMHU**) in March 2021 after presenting to Royal Melbourne Hospital (**RMH**) having taken an overdose of melatonin. In May 2021, HYY was transferred from the APMHU back to RMH for investigation and management after six weeks of increasing behavioural disturbance. HYY has a long-standing diagnosis of depression with paranoid themes and previous suicidal ideation. HYY is not subject to a treatment order under Part 4 of the *Mental Health Act 2014* (Vic) (**MHA**).

7 HYY has various medical conditions including atrial fibrillation for which she underwent a mechanical heart valve replacement in 2007. She requires ongoing daily anticoagulant medication to reduce the serious risk of stroke or thrombosis.

8 On 30 June 2021 the Advice Service at the Office of the PA (**OPA**) was contacted by a doctor from RMH advising that HYY had been refusing anticoagulant medication and seeking direction from the PA as to how and under what authority the medications could be administered as they had been using physical restraint in order to do so. Advice was provided and the doctor was directed to submit a request pursuant to section 63 of the MTPDA.

9 On 6 July 2021, the OPA Medical Decisions Team received a section 63 request for the PA to make a decision about an MRI of the brain, plus lumbar puncture, under general anaesthetic, inclusive of the use of sedation and/or physical restraint. Consent was provided for the medical treatment and restraint.

10 On 13 July 2021, the Medical Decisions Team received a further section 63 request for the PA to make a decision about the continuation of the administration of daily anticoagulant medication by injection, inclusive of the use of physical restraint, if required. A decision was made to consent to the treatment, for one week (to 20 July 2021) when an application for guardianship submitted by RMH was to be heard by the Tribunal.

11 On 13 July 2021, the PA made a request to the Tribunal to be joined as a party to the proceedings initiated by RMH.

12 At the hearing on 20 July 2021, the Tribunal made a guardianship order appointing the PA as HYY's guardian with decision-making authority in relation to accommodation, medical treatment and access to services. The orders did not include any explicit authority to make decisions about restraint. The Tribunal member indicated that restraint decisions may be "ancillary" to that of the medical treatment decision pursuant to provisions of the GA Act but that the issue was uncertain. The proposed course was that legal submissions be provided in writing and a further hearing listed for advice or opinion on the issue of restraint as a restrictive practice to determine the scope of authority for a guardian to make such restrictive practice decisions.

13 On 20 July 2021, subsequent to that hearing, the PA sought and was granted an order from the Tribunal under section 45 of the GA Act requiring HYY to comply with the guardian's decision. This order was made by Deputy President Nihill and allowed for the guardian or health practitioner authorised by the guardian to "*as a last resort, apply the use of physical restraint if there is no other, less restrictive way of administering anticoagulant medication to the represented person*."

14 On 20 July 2021, the delegated guardian made a decision to consent to the use of anticoagulant medication via injection, inclusive of use of physical restraint if required for a seven-day period until 27 July 2021.

15 On 20 July 2021, the guardian was advised that HYY had not refused the anticoagulant injection for the previous 10 days. The hospital had adopted a less restrictive approach to medication administration whereby a familiar nurse would ask HYY on three separate occasions if she agreed to the injection. If she refused on all three occasions, treatment would be provided using physical restraint.

16 On 27 July 2021, the guardian made a decision to consent to the use of anti-coagulant medication via injection. Consent for the use of physical restraint was not provided as it had not been required. However, consent had been provided for the administration of anti-psychotic medication and seizure medication.

17 On 27 July 2021, consent was provided by the guardian for HYY to be transferred back to the APMHU.

18 On 30 July 2021, the guardian made a decision to consent to the treatment of the wound on the back of HYY's hand including the use of physical restraint as a last resort once all the less restrictive attempts had been exhausted. Physical restraint was not needed on this occasion.

19 On 23 August 2021, HYY sustained a fracture following a fall and was transferred to Northern Hospital and underwent surgery to repair the fracture on that day.

20 By 31 August 2021, HYY was reported to be refusing medical reviews including examinations and allied health therapies. She was however

accepting medication prescribed for her although she was eating little. At that time it was not necessary to employ restraint although nurses needed to hold her hands and stop them waving about when they administered her anti-coagulant medication.

21 At the time of the hearing on 10 November 2021 the current status of HYY was reported to be of a fragile nature. Her physical state was poor and she had not engaged in rehabilitation for three weeks. Over the same period though, her mental state was said to be improving. HYY was described as more alert, engaged and calm. Despite this, her executive function remained impaired. She lacked insight into her health condition and had poor memory, as reflected in the fact that she was unaware she had been unwell for much of 2021. Plans were afoot to move HYY from her current residence at a geriatric management centre, into an aged care facility, but there were concerns this news might distress her and trigger a deterioration in her mental state. HYY had expressed a desire to move home before 2022 but this was considered not feasible.

THE ISSUES

22 The issues for determination in providing the requested advice to the PA raise questions of interpretation of the ambit of a guardian's power under the GA Act to consent to restraint of a represented person. In particular:

a. whether this power arises from the scope of the definition of a "personal matter" under the GA Act;

b. whether all or some restraint falls within the definition of medical treatment;

c. whether restraint can be interpreted as a thing "necessary to give effect to any power or duty vested in the guardian"; and

d. whether section 45 of the GA Act was the appropriate and lawful mechanism for restraint to be authorised.

23 These questions of interpretation must be approached with compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) in mind.

THE STATUTORY CONSTRUCTION PRINCIPLES

24 The principles of statutory construction are well-known. The starting point is the text of the legislation but that text is to be considered in light of its context and purpose and by reference to the legislation as a whole.[1]

25 A purposive interpretation is reinforced by section 35(a) of the *Interpretation of Legislation Act 1984* (Vic). A construction which would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.

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[1] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–47 [47]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69].

26 It is permissible in determining competing interpretations of the statute to have regard to the consequences of each interpretation[2] and to have regard to extrinsic materials in resolving the meaning of the text.[3]

27 While extrinsic materials cannot change the meaning of the text they can be illuminative. However, extrinsic materials cannot be used to give a meaning to the words that they cannot reasonably bear.[4]

28 Section 32(1) of the Charter requires that, as far as possible to do so consistently with its purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. Section 32(1) does not overtake or supplant the ordinary principles of statutory construction.[5] The Charter forms part of the context in which the statute is to be construed.[6] Where a statutory construction has more than one meaning the meaning to be preferred is that which is consistent with the purpose of the provision and is least incompatible with human rights.

29 These principles are not in dispute.

RELEVANT LEGISLATIVE FRAMEWORK

Guardianship and Administration Act 2019 (Vic)

30 The GA Act provides a source of power for appointed guardians to make decisions on behalf of "represented persons".

31 The primary object of the GA Act[7] is to protect and promote the human rights and dignity of persons with a disability by having regard to the Convention on the Rights of Persons with Disabilities (**CRPD**), recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives. If a guardianship order is made in respect of such a person, the GA Act requires the Tribunal to regularly review such orders and provides guidance for guardians when making decisions about represented persons.

32 Section 8 sets out the general principles to which regard must be given by a person exercising a power, carrying out a function or performing a duty under the GA Act, when exercising that power, carrying out that function or performing that duty.

33 Section 9 sets out the relevant decision-making principles in the context of the GA Act.

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2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [78] ('*Project Blue Sky*').
3 *Interpretation of Legislation Act 1984* (Vic) s 35(b).
4 *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551 [52].
5 *Momcilovic v The Queen* (2011) 245 CLR 1 [20], [38]–[40], [50]–[51], [61]–[62] (French CJ) ('*Momcilovic*').
6 Ibid [47]–[51] (French CJ).
7 *Guardianship and Administration Act 2019* (Vic) s 7 ('*GA Act*').

8 General principles

(1) A person exercising a power, carrying out a function or performing a duty under this Act must have regard to the following principles—

(a) a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances—

(i) to make and participate in decisions affecting the person; and

(ii) to express the person's will and preferences; and

(iii) to develop the person's decision-making capacity;

(b) the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person;

(c) powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances.

(2) In subsection (1), the reference to a person exercising a power, carrying out a function or performing a duty under this Act includes VCAT.

9 Decision-making principles

(1) A person making a decision for a represented person must have regard to the following principles—

(a) the person should give all practicable and appropriate effect to the represented person’s will and preferences, if known;

(b) if the person is not able to determine the represented person’s will and preferences, the person should give effect as far as practicable in the circumstances to what the person believes the represented person's will and preferences are likely to be, based on all the information available, including information obtained by consulting the represented person's relatives, close friends and carers;

(c) if the person is not able to determine the represented person's likely will and preferences, the person should act in a manner which promotes the represented person's personal and social wellbeing;

(d) if the represented person has a companion animal, the person should act in a manner that recognises the importance of the companion animal to the represented person and any benefits the represented person obtains from the companion animal;

(e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person.

34 Under section 44 of the GA Act a guardian may apply to VCAT for advice on any matter relating to the scope of the guardianship order or the exercise of any power under the order. It is on that basis that the PA made this application.

35 The GA Act provides the source of power for appointed guardians to make decisions on behalf of represented persons. Pursuant to section 38(1) of the GA Act, a guardianship order confers on the person appointed as a guardian the following broad powers:

> (a) a power to make decisions about the personal matters in relation to the represented person that are specified in the order; and
>
> (b) the power to sign and do anything that is necessary to give effect to any power or duty vested in the Guardian; and…

36 A "personal matter" for the purpose of section 38(1) is defined in section 3 of the GA Act as follows:

> ***personal matter***, in relation to a person, means any matter relating to the person's personal or lifestyle affairs, and includes any legal matter that relates to the person's personal or lifestyle affairs;
>
> **Examples**
>
> The following are examples of personal matters—
>
> (a) where and with whom the person lives;
>
> (b) other persons with whom the person associates;
>
> (c) whether the person works and, if so, the kind and place of work and employer;
>
> (d) whether the person undertakes education or training and if so, the kind of education or training and the place where it takes place;
>
> (e) daily living issues such as diet and dress;
>
> (f) medical treatment decisions, excluding decisions about matters provided for in Part 6.

37 "Medical treatment decisions" referred to in the examples of a "personal matter" for the purposes of section 38 is defined by reference to the definition in section 3 of the MTPDA as a "decision to consent or refuse the commencement or continuation of medical treatment or a medical research procedure."

38 Section 34(1) of the GA Act describes the matters that must be specified in guardianship orders. This includes relevantly "the personal matters in relation to which the guardian has powers". Further the order must specify any restrictions on the guardian's exercise of powers in relation to personal matters.

39 Section 4 of the GA Act provides that:

… the personal and social wellbeing of a person is promoted by –

(a) recognising the inherent dignity of the person; and

(b) respecting the person's individuality; and

(c) having regard to the person's existing supportive relationships, religion, values and cultural and linguistic environment; and

(d) respecting the confidentiality of confidential information relation to the person;

…

40 The exercise of power by a guardian must also comply with section 41, which provides:

41 Exercise of power by guardian

(1) A guardian—

(a) must act in accordance with the general principles set out in section 8 and the decision-making principles set out in section 9; and

(b) must act as an advocate for the represented person; and

(c) must encourage and assist the represented person to develop the person's decision-making capacity in relation to personal matters; and

(d) must act in such a way so to protect the represented person from neglect, abuse or exploitation; and

(e) must act honestly, diligently and in good faith; and

(f) must exercise reasonable skill and care; and

(g) must not use the position for profit; and

(h) must avoid acting if there is or may be a conflict of interest; and

(i) must not disclose confidential information gained as a guardian unless authorised to do so under the guardianship order or by law.

(2) A guardian who has the power to make medical treatment decisions for a represented person must comply with the **Medical Treatment Planning and Decisions Act 2016** in relation to those decisions.

41 Section 45 of the GA Act allows for the making of an order for a represented person to comply with their guardian's decisions and is as follows:

(1) VCAT may make an order at any time while a guardianship order is in force that gives the guardian or another specified person power to take specified measures or actions to ensure that the represented person complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.

(2) VCAT must hold a hearing to reassess an order made under subsection (1) as soon as practicable after making the order but within 42 days after making the order.

(3) A guardian or other person specified in an order made under subsection (1) is not liable to any action for false imprisonment or assault or any other action, liability, claim or demand arising out of the taking of a measure or action under the order if the guardian or other person takes that measure or action in the belief that it will promote the represented person's personal and social wellbeing.

(4) Subsection (1) does not limit section 38.

42 The GA Act does not refer to or define "restrictive practice" or another similar term. This contrasts with the *Disability Act 2006* (Vic) (**DA**) which at section 3 defines "restrictive practice" as "any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with a disability or of an NDIS participant". In addition, the MHA at section 3 defines "restrictive intervention" as "seclusion or bodily restraint".

43 The DA has as its stated purposes to provide a legislative scheme for persons with a disability which affirms and strengthens their rights and responsibilities and which is based on the recognition this requires support across the government sector and within the community, and to provide a mechanism by which NDIS participants' rights are protected in relation to the use of restrictive practices and compulsory treatment.[8]

44 The MHA has as its stated purpose to provide for a legislative scheme for persons who appear to have mental illness and for the treatment of persons with mental illness. In the MHA at section 3 "medical treatment" is defined as having the same meaning as in the MTPDA.

45 A guardian who has the power to make medical treatment decisions for a represented person must comply with the MTPDA in relation to those decisions.[9]

46 For the purposes of this decision, restraint refers to physical restraint only. We note that the PA's application for advice referred to physical restraint as this was relevant to HYY. Whilst there is some reference in HYY's history to chemical restraint, our advice is restricted to physical restraint as that directly responds to the request for advice. In addition, all four parties made submissions about physical restraint.

47 Within this context, we understand restraint to be that which is outside the usual course of conduct required to effect medical treatment, depending on the nature of the medical treatment. For example, general anaesthetic is a severe restraint on a person, but is a necessary condition to enable the conducting of certain types of surgery. It is therefore within the usual

8 *Disability Act 2006* (Vic) s 1.
9 *GA Act* (n 7) s 41(2).

course of conduct for certain types of surgery, but not necessarily for less invasive medical treatment. Similarly, calming or pain-relieving medication is commonly used to ensure medical treatment may be safely, comfortably and accurately provided. It may be commonplace for some mild form of physical restraint to be used, such as firmly holding a hand or arm steady to enable a catheter, or injection to be administered. Such physical intervention is likely to fall short of being a form of forcible physical restraint. We will address this in more detail later.

48 In HYY's circumstances, she required medication to control an ongoing serious medical condition. Without the medication given regularly she was at serious risk of stroke or other serious medical emergency. However, the medication was not required as an immediate or emergency response. Rather, it was required as part of her ongoing medical care to prevent thrombosis or stroke which would be a catastrophic event. The medication was intended for a preventative and not acute purpose.

Medical Treatment Planning and Decisions Act 2016 (Vic)

49 The main purposes of the MTPDA include:

a. to provide for a person to execute in advance a directive that gives binding instructions or expresses the person's preferences and values in relation to the person's future medical treatment;

b. to provide for making medical treatment decisions on behalf of persons who do not have decision-making capacity;

c. to provide for a person to appoint–

   i. another person to make medical treatment decisions on behalf of the person when the person does not have decision-making capacity;

   ii. another person to support the person and represent the interests of the person in making medical treatment decisions; and

d. to provide for a process for obtaining approval and consent for medical research procedures where a person does not have decision-making capacity;[10]

…

50 Section 3 of the MTPDA defines "medical treatment" as:

a. Any of the following treatments of a person by a health practitioner for the purposes of diagnosing a physical or mental condition, preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort and quality of life-

   (a) treatment with physical or surgical therapy;

   (b) treatment for mental illness;

   (c) treatment with prescription pharmaceuticals;

[10] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 1(a)-(d) ('*MTPDA*').

(d) dental treatment;

(e) palliative care—

but does not include a medical research procedure.

51 Section 53 of the MTPDA provides that a health practitioner may administer medical treatment to a person without consent if the practitioner believes that the medical treatment is necessary, as a matter of urgency, to save the person's life, prevent serious damage to the person's health, or prevent the person from suffering significant pain and distress.

52 Section 61 of the MTPDA requires that the medical treatment decision maker "must make the medical treatment decision that the medical treatment decision maker reasonably believes is the decision that the person would have made if the person had decision making capacity". They must consider any preferences the person has expressed, whether by way of a directive or otherwise, the likely effects and consequences of the treatment and whether these are consistent with the person's preferences or values. If it is not possible to ascertain or apply the person's preferences or values, then the medical treatment decision maker must make a decision that promotes the personal and social wellbeing of the person, having regard to the need to respect the person's individuality, taking certain matters into consideration.

53 Section 55 of the MTPDA outlines a hierarchy of who is a person's medical treatment decision maker. Section 55(1) states that if an adult has an appointed medical treatment decision maker, the appointee is responsible for making medical treatment decisions if they are reasonably available, willing and able to do so. Section 55(2) provides that, where section 55(1) does not apply, a guardian appointed by VCAT pursuant to the GA Act may be given the power to make medical treatment decisions on behalf of the represented person. If there is neither an appointed medical treatment decision maker nor a guardian with power to make medical treatment decisions, then section 55(3) sets out a list of those who may make the decisions if reasonably available, willing and able. That list includes, in order, the spouse or domestic partner, primary carer, adult child, parent, and adult sibling.

54 We note here that, on the day of the hearing, the PA advised the Tribunal that HYY had appointed a medical treatment decision maker, her cousin, on 25 March 2021. HYY's cousin gave evidence at the hearing that she did not feel confident to make the complex medical treatment decisions that were currently required for HYY, and was grateful that the PA had been appointed as guardian to do so. The delegated guardian gave evidence about how she would proceed if a medical treatment decision were required for HYY. In accordance with section 55 of the MTPDA, she would first invite HYY's cousin to make the decision as the appointed medical treatment decision maker. If HYY's cousin was not willing or able to make that decision, as she indicated was likely given the current complexities, then

the guardian would make the decision. The delegated guardian also gave evidence that HYY had, on 25 March 2019, made an Advance Care Directive. This document does not make any reference to the kinds of medical treatment decisions currently being made about HYY.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

55 Charter rights are engaged whenever a human right is relevant to a decision or action that a public authority has made, taken, proposed to take or failed to take arises. After construing rights "in the broadest possible way"[11] a public authority must understand in general terms how Charter rights may be relevant to the action.

56 The PA and the Tribunal are both public authorities subject to the Charter.

57 Amongst the rights potentially engaged are sections 8(2)[12] and 8(3),[13] particularly so in circumstances where specific provision is made for the regulation of use of restraint under other legal regimes which apply in Victoria such as the MHA and the DA. The absence of similar legislative protections in the GA Act may require VCAT to provide those protections through its orders when authorising the use of restraint in order to ensure a represented person receives equal protection.

58 Section 9 of the Charter provides every person has the right to life and the right not to be arbitrarily deprived of life. This is engaged in circumstances where legislation provides for beneficial interference with a person's autonomy with respect to medical treatment decisions.

59 Section 10(b) of the Charter provides that a person must not be treated or punished in a cruel, inhumane or degrading way. Whether this right is engaged requires that the treatment reach a minimum level of severity or intensity before it can amount to cruel, inhuman or degrading treatment.[14] In the context of the use of force in law enforcement it has been held that the right will not be engaged unless the use of force is grossly disproportionate to the purpose it seeks to achieve and results in pain and suffering which reaches that minimum threshold of severity. It is unlikely in the context of the material before VCAT that this right has been engaged or that there is risk of it being engaged.

60 Section 10(c) provides that a person must not be subjected to medical treatment without their full, free and informed consent. Victorian legislation

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11 Application under the *Major Crimes (Investigative Powers) Act 2004* (Vic); *DHS v Victorian Equal Opportunity Commission* (2009) 24 VR 415 [80]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 [126]; *DPP v Ali (No 2)* [2010] VSC 503 [29]; *DPP v Kaba* (2014) 44 VR 526 [108].

12 The right of every person to enjoy his or her human rights without discrimination.

13 Every person is equal before the law and is entitled to the equal protection of the law that discrimination and has the right to equal an effective protection against discrimination.

14 *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [559]–[560]; *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 [250].

makes it unlawful to render medical treatment without the informed consent of the person concerned except in limited circumstances.

61 There is little doubt that since the enactment of the Charter it has been accepted that medical treatment can occur without consent in circumstances prescribed by law such as when a person is mentally ill and requires immediate treatment for their own safety the safety of members of the public.[15] It has been accepted that involuntary medical treatment limits the right in section 10(c) of the Charter but can be justified under section 7(2) where a person's own safety or safety of other people arises. A person's disability will also limit the right in section 8(2) to enjoy human rights without discrimination.

62 Proportionality and reasonableness are considerations in the context of any limitation on a Charter right. Discriminatory limits on rights arguably require greater justification or at least the discriminatory aspect of the limit needs to be specifically justifiable in its own right.

63 Section 12 of the Charter provides for freedom of movement. The right to move freely in Victoria and to enter and leave it and the freedom to choose where to live is protected by section 12.[16] The right is engaged by treatment orders that require patients to attend a health service to take medication and is likely to be engaged where an order of VCAT authorises the use of restraint to force a person to take medication to the extent that the restraint would also prevent a person from removing themselves from the place where they are restrained.

64 Section 13(a) provides for a right to privacy. A lawful and non-arbitrary interference with privacy is not incompatible with the Charter and need not be justified under section 7 of the Charter.[17]The right to privacy has been held to include physical integrity and encompasses the autonomy and inherent dignity of the person.[18]

65 Section 21 of the Charter provides the right to liberty and security of the person. It protects against arbitrary arrest, detention or deprivation of liberty except on grounds in accordance with procedures established by law. A restraint in order to administer medication may not in itself limit the right to liberty. Other aspects of the Tribunal's guardianship orders or decisions made by one's guardian may limit the right expressed in section 21 to the extent that the represented person is required to live in a particular place or is prevented from leaving her residence as she chooses.

66 Section 38 of the Charter imposes two obligations on a public authority. It makes it unlawful for a public authority to act in a way that is incompatible

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15 *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [541]–[547]; *MH6 v Mental Health Review Board (General)* [2008] VCAT 846 [66]–[72]*; MH10 v Mental Health Review Board & Anor (General)* [2009] VCAT 1919 [19]–[21].

16 *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [588] (Bell J) ('*Kracke*').

17 *Grooters v Chief Commissioner of Police* [2021] VSC 329 [87]–[88].

18 *Kracke* (n 16) [619]–[620].

with the human rights and, in making a decision, to fail to give proper consideration to a relevant human right. These obligations do not apply if the public authority cannot reasonably act differently or make a different decision under law.[19]

67 Section 7(2) outlines how human rights may be justifiably limited. Human rights are not absolute. Where a public authority limits a right but that limit is justified, the human right is not breached and there is no contravention of the obligation of a public authority to act compatibly with human rights under section 38 of the Charter.[20]

68 Where an actual decision is shown to limit the exercise of a right or freedom, the onus passes to the party seeking to justify the limitation on a right under section 7(2) of the Charter.[21] An assessment must be made by reference to the matters set out in section 7(2) of the Charter including :

a. the nature of the right;

b. the importance of the purpose of limitation;

c. the nature and extent of limitation;

d. the relationship between the limitation and its purpose; and

e. any less restrictive means reasonably available to achieve the purpose of the limitation seeks to achieve.

69 Section 7(2) embodies a proportionality test and a legality requirement that also requires that limits be "under law".

70 Section 32(1) of the Charter provides that so far as it is possible to do so consistently with their purpose statutory provisions must be interpreted in a way that is compatible with human rights. The purpose of a provision is to be interpreted in accordance with the ordinary techniques of statutory construction. In determining what interpretations are possible the court or tribunal should apply ordinary statutory construction techniques including the presumption against interference with rights in the absence of express language or necessary implication in the statutory provision. When the meaning of the relevant provision has been ascertained, the court or tribunal must then consider whether the relevant provision so interpreted breaches or limits a human right protected by the Charter. If such a breach or limit is identified, one must then have regard to section 7(2) to consider whether the limit on the relevant human right is justified.[22]

71 When more than one interpretation is available on a plain reading of the statute that which is least incompatible with rights protected under the Charter is to be preferred.[23]

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19 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2) ('*Charter*').
20 *Baker v DPP* [2017] VSC 58 [57] (Tate JA) .
21 *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 [175].
22 *Slaveski v Smith* [2012] VSCA 25 [20], [35] ('*Slaveski*').
23 *Nguyen v Director of Public Prosecutions* [2019] VSCA 20 [103]; *Momcilovic* (n 5) [103].

THE SUBMISSIONS OF THE PA AND VEOHRC

72 The positions of the PA and VEOHRC at the hearing were largely aligned and we shall deal with their submissions together. In summary, the position taken by the PA and VEOHRC was that in respect of whether the use of restraint could be encompassed by the term "medical treatment":

a. there was a conceptual distinction to be drawn between "medical treatment" and the use of "restrictive interventions";

b. the use of the anti-coagulant treatment was not required as emergency treatment although the treatment was considered necessary (as against urgent) because HYY's ongoing non-compliance with treatment significantly increased her risk of stroke or thrombosis, both of which are life-threatening conditions;

c. in most cases medical treatment can be administered to a person without the need for physical restraint even if they lack capacity to consent to the treatment themselves;

d. there is a specific scheme set up under the MHA regarding the use of restrictive interventions including physical restraint on the person receiving the designated mental health service. There are obligations with respect to authorisation, documentation, communication and reporting of the restrictive intervention under the MHA which are not provided for under the GA Act;

e. if restraint for the purposes of administering medical treatment does not fall within the scope of a medical treatment decision, health practitioners may be exposed to civil or possibly criminal liability unless the restraint is authorised in some way;

f. it would be a strange interpretation of the MTPDA to incorporate the use of restrictive interventions within the meaning of "medical treatment"; and

g. it would be incompatible with section 10(c) of the Charter[24] to incorporate within the notion of "medical treatment" use of coercion, force or subterfuge.

73 In respect of whether the use of restraint is a "personal matter" for which VCAT may appoint a guardian, the PA and VEOHRC argued that the definition of "personal matter" should be narrowly construed in the context of determining whether its definition permits encroachment on human rights such as the use of restraints in the absence of explicit legislative authorisation.

74 The definition of personal matter at section 3 of the GA Act, including the examples provided in that definition, does not include any explicit reference to the use of restraint.

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[24] *Charter* (n 19) s 10 provides a person must not be subjected to medical treatment without their full, free and informed consent..

75 The PA submitted that a decision made by a guardian involving restraint would have to be made in compliance with the general principles in section 8 and the decision-making principles outlined in section 9 of the GA Act. The guardian must have regard to the person's will and preferences so far as they can be ascertained. A person's will and preference can only be overridden if it is necessary to prevent serious harm to the represented person. If a person's likely will and preference cannot be determined, the guardian must act in a way that promotes the represented person's personal and social wellbeing.

76 In determining the scope of a personal matter, the Tribunal must consider the purpose and objectives of the GA Act. The primary objective of the GA Act under section 7 is to protect and promote human rights and dignity of persons with a disability. Restrictive interventions that impact on a person's bodily integrity and control of a person's freedom of movement, unless lawfully authorised and justified, will be in breach of a person's human rights.

77 In interpreting the scope of the term "personal matter" regard must be had to the Charter. Both the PA and VEOHRC submitted that interpreting restraint as a thing which could be considered "necessary to give effect to any power or duty vested in the guardian" was not the correct interpretation to be applied. It would, like the interpretations of "medical treatment" and "personal matter" allow restraint to be used without appropriate safeguards to ensure its use was not arbitrary, and therefore the requirement that the limitation be "under law" would not be satisfied.

78 VEOHRC provided a detailed analysis of the requirement that an interference with a Charter right is only lawful if it is "under law" in accordance with the wording of section 7(2) of the Charter. VEOHRC referred to *Kracke*, in which Bell J noted in *obiter* comments that an interference is lawful if permitted by a law, but the law is required to be precise and appropriately circumscribed.[25] VEOHRC identified the human rights potentially engaged in this application as being sections 8(2), 8(3), 9, 10(b), 10(c), 12, 13(a), 21 and 22(1) and made helpful and detailed submissions in respect of each of them. We have considered these submissions in our discussion of the Charter above.

79 VEOHRC submitted that because the GA Act does not outline specific safeguards for the use of restraint, unlike the MHA and the DA, it is essential that appropriate safeguards are provided through any orders that the Tribunal makes allowing restraint either under section 45(1) of the GA Act or through whatever mechanism the Tribunal uses to authorise any restraint. It was argued that it is necessary to comply with the requirement in section 7(2) of the Charter that any limits on Charter rights occur "under law" and to ensure that HYY has equal protection of the law without discrimination, regardless of whether her disability does or does not bring

[25] *Kracke* (n 16) [162]–[197].

her within the purview of the MHA or the DA (consistent with section 8(3) of the Charter).

80 VEOHRC stated that in this proceeding the obligation to give proper consideration to relevant Charter rights requires the Tribunal to undertake the analysis first stated by the Supreme Court *Castles v Secretary to the Department of Justice* which requires a decision-maker to:

a. understand in general terms which rights would be affected by the decision and how they may be interfered with by the decision;

b. seriously turn their mind to possible impact of the decision on a person's human rights;

c. identify the countervailing interests or obligations; and

d. balance competing private and public interests.[26]

81 Consequently, in this proceeding the obligation to give proper consideration to relevant Charter rights requires the Tribunal to undertake a *Castles* analysis when deciding whether to authorise the use of restraint on the represented party and what orders to make to ensure restraint is only used in a manner that is compatible with her Charter rights.

82 VEOHRC noted that Article 8(2) of the European Convention on Human Rights mirrors section 7(2), and referred to the UK Supreme Court case of *R (CATT) v Association of Chief Police Officers,*[27] in which Lord Sumpton held that certain requirements must be met for a limitation on the right to privacy to be considered "in accordance with law". These include that the law must be accessible and foreseeable, that is that its consequences are foreseeable, that it must afford protection against arbitrariness and be clear as to the manner of its exercise, that there should be safeguards in place where broad discretions are provided, and that there are sufficiently prescriptive guidelines though these need not be statutory or exhaustive.

83 By force of section 38 of the Charter and in accordance with section 7(2), VEOHRC submitted that, when VCAT allows limits on rights it must ensure that any broad discretionary powers it gives are accompanied by sufficient safeguards. By reason of section 32 of the Charter and in accordance with section 7(2) where there is an available interpretation that does not limit rights, that interpretation should be preferred.

84 As to the scope of section 45 of the GA Act, the PA argued that although section 45 is broadly framed it does not explicitly authorise the use of force in respect of a represented person. The use of force is a significant encroachment over, amongst other things, a person's physical integrity and autonomy. Its use has a significant impact on Charter rights. This raises the question, submitted the PA, of how section 45 should or could be interpreted compatibly with section 32 of the Charter.

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26 *Castles v Secretary, Department of Justice* (2010) 28 VR 141 ('*Castles*') [185]–[186].

27 [2015] UKSC 9 [11]–[14] (Lord Sumpton).

85 If the use of force is to be enabled in the state of Victoria, which has a Charter, the legislation providing for it ought to be interpreted so as to be compatible with human rights to the extent possible.

86 VEOHRC took a different view of the operation of section 32(1) of the Charter and submitted that it does not preclude the use of section 45(1) of the GA Act by VCAT to make an order allowing the use of restraint on the represented person in order to compel them to comply with the guardian's decision. VEOHRC argued that the opposing interpretation would be inconsistent with the legislative purpose of section 45. Such an interpretation would also limit the right to life, to the extent that it would prevent VCAT from authorising use of restraint to administer life-saving medical treatments, regardless of necessity or proportionality.

87 Section 32(1) of the Charter requires interpretation consistent with the legislative purpose. VEOHRC submitted that section 45(3) strongly indicates that the power in section 45(1) was intended to be used to authorise physical coercion by providing that a guardian is not liable for false imprisonment or assault, if authorised to take the relevant action under section 45(1).

88 To expand on this position VEOHRC relied upon the Statement of Compatibility for the Bill introducing the GA Act, which clearly anticipated that section 45 would authorise physical coercion.

> Clause 45 may limit a represented person's right to freedom of movement under section 12 of the Charter to the extent that it may authorise a guardian or other specified person to use physical or non-physical measures to force a represented person to comply with the guardians decision, such as a change of accommodation… However in addition to the safeguards outlined above in respect of the duties imposed on a guardian, the Bill provides for oversight of the exercise of the power to enforce compliance by providing that VCAT must authorise a person to take 'specified measures' and must hold a hearing to reassess an order made under clause 45 as soon as practicable after the making of that order, but within 42 days (clause 45(2)). In my view, any limitation of section 12 of the Charter and other Charter rights discussed above imposed by clause 45 is reasonable and justifiable.[28]

89 VEOHRC submitted that whilst section 45(1) ought not be interpreted as excluding the making of orders allowing for restraint, it was clear that Parliament intended that the limits imposed on rights under orders made pursuant to section 45(1) were to be reasonable and justifiable. The regular review function under section 45(2) was intended to be rights-protective. Further, section 32(1) requires the most protective interpretation of section 45(1) that is available to be adopted by VCAT.

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[28] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 49 (Jill Hennessy, Attorney-General, Minister for Workplace Safety).

90 VEOHRC submitted that the phrases "specified person" and "specified measures or action" should be interpreted as requiring a high level of specificity with respect to the persons in the precise measures or actions authorised by VCAT in the context in which they are authorised. In doing so it would be expected that orders should give very clear guidance about what can be done by whom, to ensure that Charter rights are only limited in a proportionate manner for sufficiently important purposes.

91 The balance of the VEOHRC's submission focussed on the nature and content of the rights engaged, to assist VCAT in its compliance with the duties in section 38(1) and to inform the application of section 32 of the Charter.

THE SUBMISSIONS OF THE ATTORNEY-GENERAL AND SECRETARY TO THE DEPARTMENT OF HEALTH

92 The position taken by the Attorney-General and the Secretary took a different path from the OPA and VEOHRC and urged different conclusions on the advice sought.

The Attorney-General

93 The Attorney-General submitted that the answer to each of the four questions posed by the OPA should be answered in the positive.

Restraint as a "personal matter"

94 The Attorney-General submitted that the text, context and purpose of the GA Act suggests that the term "personal matters" is sufficiently broad to include decisions about restraint if that restraint is required to provide medical treatment. It was argued that this was so because:

a. The definition of "personal matter" is broad and inclusive. On its terms, it includes "**any matter** relating to the person's personal or lifestyle affairs" (emphasis added in the submission). It was said that this was plainly wide enough to embrace restraint for the purposes of medical treatment.

b. The examples provided in the definition of "personal matter" form part of the GA Act but do not limit the matters which may fall within that definition.

c. Section 39 of the GA Act provides the matters for which power cannot be given under a guardianship order. This does not include restraint in general or in the case of a necessary step in the delivery of medical treatment.

d. A guardianship order providing the guardian with the power to make a decision about a personal matter is only afforded in limited circumstances. This includes following the satisfaction by VCAT of the matters in section 30(2) of the GA Act and consideration of the matters in section 31 of the GA Act. This was said to be critically when the person does not have decision-making capacity in relation to the personal matter for which the order is sought. In those circumstances a decision made, action taken,

consent given or thing done by a guardian has effect as if it were made, taken, given or done by the represented person.[29]

95 The Attorney-General submitted that in such circumstances it appears consistent with the text, context and purpose of the GA Act for matters capable of being conferred as a "personal matter" to include decisions about the use of restraints necessary to deliver medical treatment. To exclude decisions about restraint from the meaning of "personal matter" requires giving the term meaning that is narrower than its plain meaning.

96 The exercise of the power to make a personal decision by a guardian is conditioned by the matters in section 41 of the GA Act and must be undertaken in accordance with the principles set out in sections 8 and 9 of that Act. This requires that the guardian exercise, carry out and perform their powers in a way which is the least restrictive of the ability of a person with a disability to decide and act as it is possible in the circumstances. In addition the guardian must act in a way so as to protect the represented person from neglect, abuse or exploitation.[30]

97 It was argued that there is no warrant in the text, context or purpose of the GA Act to give section 38(1)(a) anything but the ordinary meaning of the words used by Parliament. It followed, according to the Attorney-General's submission, that section 32 of the Charter has no additional work to do and the term "personal matters" embraces use of restraints that are necessary to deliver medical treatment that the guardian otherwise has power to consent to as if they were the represented person.

"Medical decision" extends to decisions about restraint

98 The Attorney-General submitted that the questions in this case in respect of whether a "medical decision" extends to decisions about restraint are twofold:

a. whether a decision about restraint is a necessary part of administering a medical treatment and is therefore caught by the power to make medical treatment decisions; and

b. even if it is not, whether it is nonetheless a decision "about" medical treatment.[31]

99 Reference was made by the Attorney-General to the decision of *Northern Territory of Australia v EH & Anor*.[32] The Attorney-General acknowledged that there is no Charter legislation in the Northern Territory, and that there

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29 *GA Act* (n 7) s 38(3).

30 Ibid ss 8, 41.

31 This was argued by the Attorney-General to be justified by the power of a guardian to make a decision "about" the personal matters of a represented person (see *GA Act* (n 7) s 38(1)(a)) in circumstances where a "personal matter" is defined in s 3 of the *GA Act* to include "medical treatment decisions".

32 [2021] NTSCFC 5 ('*NT v EH*').

are some differences between the Victorian GA Act and the NT equivalent, but submitted that the case was persuasive authority.

100 In that case, EH was an 80 year-old man with frontotemporal dementia presenting as disinhibition, aggression, agitation and impulsivity. In order for him to receive necessary medical treatment, specifically the changing of a suprapubic catheter every four to six weeks, the treating team held his hands to prevent him from touching and contaminating the site. Sometimes, during this treatment,[33] the treating team needed to administer medication to manage his agitation. The Northern Territory Civil and Administrative Tribunal had determined that the interventions were not "health care", on the basis that "health care" does not include coercive measures.[34] The Supreme Court of the Northern Territory overturned this decision, and held that the kinds of interventions that occurred in the context of EH's medical treatment, described as "modest physical restraint"[35] were within the scope of the guardian's authority to make medical treatment decisions.

101 The Attorney-General submitted that section 38(1)(a) of the GA Act is broad enough to encompass restraints that are necessary to allow medical treatment to occur but it remains the case that VCAT must specify the "personal matters in relation to which the guardian has powers" and it may be more transparent to specify physical restraint as a separate personal matter.

102 The Attorney-General conceded that the question is finely balanced, but submitted that the better argument favours an interpretation of the power to make medical treatment decisions as including a power to make decisions about restraints that are required to provide any relevant treatment.

103 It was submitted that the object of the GA Act and the MTPDA, being to provide for substitute decision-making power, would be frustrated if the power did not include a power to make decisions about steps that are necessary to enable medical treatment to be delivered. It would render futile a decision made by a guardian about medical treatment, a decision properly made under section 38(1) of the GA Act or section 55(2) of the MTPDA, if the power to make medical treatment decisions did not include a power to make decisions about steps that were necessary to enable the treatment to be given.

104 The exercise of those decision-making powers is highly conditioned to ensure the rights of a represented person are protected.[36] A guardian, in particular the PA, when exercising the power is required to act in a manner consistent with the Charter. To the extent the powers engaged then limit Charter rights (including the right to move freely), the power can only be exercised lawfully in a manner that is the least restrictive as possible in the

33 Ibid [6].
34 *Re EH* [2020] NTCAT 17.
35 *NT v EH* (n 32) [52].
36 *MTPDA* (n 10) ss 7, 8, 61.

circumstances. Nonetheless, in circumstances where treatment is necessary, and the restraint is the only way of effecting the treatment, then it is likely to be justified under section 7(2) of the Charter. The Attorney-General noted that this will depend on the circumstances of each case.

105 Certain medical treatment decisions which cannot be made by the guardian, being decisions about matters concerning "special medical procedures" are provided for in Part 6 of the GA Act. These provisions recognise legislators' consideration of the limits of substituted decision-making in relation to personal matters and medical treatment decisions.[37]

106 In some circumstances, particularly in relation to the use of pharmacological restraint (such as anaesthetic or sedation) in the context of a surgical procedure, there will be little distinction between the restraint and the treatment. Whether restraint can be conceived as part of the treatment itself is likely to turn on the facts of each case.[38]

107 The fact that VCAT has the power to make an order to *ensure* that a represented person complies with the guardian's decision in the exercise of the powers and duties conferred by the guardianship order does not limit the power of the guardian set out in section 38 of the GA Act.[39] The Attorney-General argued that the use of the objective "ensure" before "complies" in section 45 provides a basis to understand the power of section 38(1)(a) to extend beyond simply the making of the decision, but also to encompass compliance with the decision. Section 45 merely *ensured* compliance rather than *required* compliance.

108 The power given to the PA in this case was to make decisions "about medical treatment". In other words, the power was not limited to medical treatment decisions but also decisions properly characterised as being "about" those decisions in respect of which VCAT had given specific authorisation in accordance with section 34(1)(c).

109 The dictionary definition of "about" includes relevantly "on the subject of, or connected with".[40] Decisions that are authorised by the order need to have sufficiently close connection to a medical treatment decision to be *about* medical treatment.

110 The Attorney-General submitted that decisions "about medical treatment" are of broad enough connotation to encompass a decision about restraint that is required or necessary to ensure that medical treatment is received. Put simply, steps or processes that are necessary to provide medical treatment require a guardian to make decisions about the steps or processes

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37 *GA Act* (n 7) s 8(1)(c); and *MTPDA* (n 10) s 61(3)(b). See also Victoria, *Parliamentary Debates*, Legislative Council, 2 May 2019, 1310 (Adem Somyurek, Minister for Local Government, Minister for Small Business).

38 *SJ and MET* [2006] WASAT 210 [32]; compare *Re MS* [2020] WASAT 146 [115]; and *Re Application for Guardianship Order (BCB)* (2002) 28 SR (WA) 338, 347–348.

39 *GA Act* (n 7) s 45(4) which says that s 45(1) does not limit s 38.

40 Cambridge Dictionary, *Definition of 'about'*, (Web Page) <ABOUT | meaning in the Cambridge English Dictionary>.

that are, therefore, decisions about medical treatment. That is because without making those ancillary decisions, there is in fact no decision to be made on a narrower subject of "medical treatment" and the treatment will be unavailable if these ancillary decisions are not made.

Restraint is "any thing that is necessary"

111 The Attorney-General submitted that if the power to effect compliance is not caught under section 38(1)(a) of the GA Act then the "power to…do any thing that is necessary to give effect to any power…vested in the guardian" in section 38(1)(b) is likely to capture the use of restraint. The purpose of the provision is facultative of the power conferred under section 38(1)(a) .

112 It follows that a decision by the PA to consent to restraint is facultative of the decision to consent to medical treatment and as such falls within the term "any thing that is necessary." The Attorney-General submitted that it is not necessary for a guardian to make an application under section 45 of the GA Act for an order to use restraint for the purpose of providing medical treatment. It is open to VCAT to conclude that the power is available under section 38(1)(a) of the GA Act where there is an order for the guardian to make "medical treatment decisions" or decisions "about medical treatment". If not, it will be encompassed under the power in section 38(1)(b) to do "any thing that is necessary to give effect" to a medical treatment decision.

113 The construction placed on section 45 by the Attorney-General was that Parliament had turned its mind to the type of decisions and conduct that might be necessary to ensure compliance with the decision made by a guardian under section 38(1)(a) and it has for that reason provided guardians with an immunity from liability for conduct that might otherwise be false imprisonment or assault pursuant to section 45(3). However, the fact that Parliament has provided an immunity does not mean that section 38 should be construed more narrowly than the ordinary meaning of the words suggest.

The Secretary to the Department of Health

114 The Department of Health does not administer the GA Act but does have administrative responsibility for the MTPDA, and has statutory responsibilities in relation to health services provision in Victoria. The submissions were made to VCAT in this context.

115 The use of restraint is expressly regulated in the MHA and the DA, both of which provide detailed regimes for the authorisation, supervision and application of any restraints or restrictive practices.[41] In this way the

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41 See Department of Health & Human Services, *Chief Psychiatrist's guideline - Restrictive interventions in designated mental health services* (2 July 2014) ('*Chief Psychiatrist's guideline*'). This provides detailed information on when and how restrictive interventions under the *Mental*

purposes of administering medical treatment and medical treatment itself are separated. Further, those enactments provide for a process of authorisation and supervision of any restraint and this increases the protection of the rights of a person being restrained.

116 The GA Act and the MTPDA do not expressly address restraint.

117 Where medical treatment is a personal matter identified in a VCAT order, VCAT is required to determine, consistent with the GA Act and the Charter, whether the person has decision-making capacity in relation to the medical treatment. In the Secretary's view, as part of that determination, this may include the necessity to use restraint to administer that treatment. This occurs in the limited case of a person already considered to lack capacity to make a free, fully informed decision about whether and how to accept medical treatment.

118 The Secretary submitted that section 34(1)(c) of the GA Act requires the "personal matters" in relation to which a guardian has powers to be specified in the guardianship order. Decisions made by a guardian about medical treatment, including when that power extends to consenting to the use of restraints to administer that treatment, will engage and may limit the represented person's Charter rights. In those circumstances, that limitation should be demonstrably justified and expressed on the order pursuant to section 34(1)(c) of the GA Act. This would ensure that argument can be heard at the Tribunal on the purpose of any proposed use of the restraint and how it is demonstrably justified, consistently with the principles in the GA Act and pursuant to the Charter.

119 The Secretary referred to the State Administrative Tribunal of Western Australia (**WASAT**) matter of *Re MS*[42] which involved an application for guardianship in the context of the NDIS commencing where NDIS service providers require consent of NDIS recipients or their guardians in respect of the use of restrictive practices. WASAT held that decisions about the use of restraint fell within the authority of a plenary guardian. WASAT's order provided that a guardian would have power to give or withhold consent to the use of restrictive practices set out in a behaviour support plan.

120 The Secretary submitted that, having regard to *Re MS*, it was open to the Tribunal to find that the scope of the guardian's power to make decisions about medical treatment, including with respect to restraint, could fall within decisions about the "personal matters" of a person. Further, where there is an anticipated or expected need to use restraint to administer medical treatment this should also be included in an order as a separately

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Health Act 2014 (Vic) might be permissibly used. It acknowledges that restrictive interventions are not therapeutic and are used as a last resort to prevent serious and imminent harm to a consumer or another person. All Victorian designated mental health services are required to have in place policies, procedures and clinical practices to reduce, and where possible, eliminate the use of restrictive practices. See also Safer Care Victoria, *Caring for people displaying acute behavioural disturbance* (April 2020).

42 [2020] WASAT 146 ('*Re MS*').

identified relevant "personal matter". This would enable proper argument and consideration on the matter to occur.

121 At [104] WASAT stated that:

> This Tribunal has recognised, in many cases, that guardians have authority to authorise the use of restrictive practices or "restraints" (as they have been described). There is also ample authority in other jurisdictions, based on legislative provision similar to the GA Act, to the effect that the authority of guardians extends to authorising the use of restrictive practices.

122 As did the Attorney-General, the Secretary identified that where a guardian is making decisions about use of restraint pursuant to an express guardianship order, there remains a requirement to have regard to the principles in sections 8 and 9 of the GA Act. Applying those principles, if restraint was not necessary it would not be administered. If restraint was necessary, it would then be a necessary step to give effect to the power of the guardian to consent to medical treatment.

123 The Secretary agreed with the submissions of the Attorney-General that restraint may also be a thing necessary to give effect to any power or duty vested in the guardian pursuant to section 38(1)(b) of the GA Act. The Secretary referred to *Hunter and New England Area Health Service v A*[43] and the doctrine of necessity which was referred to in the WASAT decision of *Re MS*.[44]

124 In some cases, circumstances of emergency or necessity may excuse the conduct notwithstanding the absence of consent (such as in respect of the provision of medical treatment to a person, in the case of an emergency) so as to relieve the service provider of liability for what would otherwise be an assault to the person. Generally speaking, however, consent to the use of a restrictive practice is essential because consent ordinarily has the effect of transforming what would otherwise be unlawful into acceptable contact.

125 This interpretation may apply to section 38(1)(b) of the GA Act consistently with the Charter where it ensures a person's access to medical treatment is provided when it is necessary.

126 As there is no other legislative source of power for the use of restraint on a person in the limited circumstances that apply here, a narrow interpretation of "necessary" resulting in the non-administration of medical treatment might also be considered arbitrary and engage the person's rights to privacy and to life. The circumstances where it is necessary to make decisions about a represented person's health may be limited, and in all cases other less restrictive measures should first be exhausted.

127 The Secretary submitted that in many cases it may be necessary to seek an order pursuant to section 45 of the GA Act. Alternatively, or in addition to an order from VCAT, there may be lawful justifications to use restraint for

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43 [2009] 74 NSWLR 88.
44 *Re Ms* (n 42) [48].

the purposes of providing medical treatment. The Secretary submitted that if the guardian is the person providing the relevant consent as a "personal matter" then this should be stated on the order pursuant to section 34(1)(c) other than in the limited circumstances where section 38(1)(b) might apply.

128 The Secretary referred to *Autunovic v Dawson & Anor*[45] which supports the proposition that unless a lawful justification exists, a positive sanction of power is required. If there is a reasonable basis to anticipate needing to use restraint to administer medical treatment, providing an express power for that in a guardianship order may be necessary.

129 Other than an express power there can be other lawful justifications for health care professionals to use restraints for the purposes of providing medical treatment, such as in cases of emergency, self-defence or the discharge of some other relevant legal duty. Commonly, those scenarios may arise in an emergency care situation and can apply irrespective of whether a statutory regime is also an operation. Unlike a guardianship order that expressly provides for and permits the use of restraints for the administration of treatment, these concepts are lawful justifications or defences to conduct which may otherwise be unlawful.

130 Section 53 of the MTPDA provides a limited statutory basis upon which a health practitioner can provide treatment to a person without consent in an emergency. This provision may apply to a situation where urgent healthcare is required in view of an imminent threat to life or health of the individual. The Secretary submitted that the purpose of section 53 would be thwarted if it did not also apply to a person that did not have capacity to consent to the administration of medical treatment including where it was necessary to use restraint to do so.

131 The Secretary also identified that healthcare providers owe various duties of care – both under common law and legislation – to their patients, staff and other members of the public within the health service to ensure that reasonable steps are taken to prevent a reasonably foreseeable risk of harm to those individuals. Acts or omissions in breach of the applicable duties may give rise to criminal and civil liability. This means there may be circumstances where a medical health professional is justified in restraining a patient to ensure the patient's personal safety or that of other people. This restraint may be used to address a person's behaviour as opposed to being provided for the purposes of medical treatment, however these purposes may in some cases overlap. In all cases, the relevant statutory regimes, common law justifications and the Charter invariably require that the acts are proportionate and reasonable to the needs and risks posed.

ANALYSIS

Does the scope of a guardian's power to make decisions about medical treatment extend to making decisions about restraint (in this case

[45] [2010] VSC 377.

physical restraint), if that restraint is required to provide medical treatment?

132 This question is asking, in effect, whether a decision about applying physical restraint that is made in the course of providing medical treatment is within the scope of the power to make the medical treatment decision.

133 In the MHA and the DA there are specific and detailed provisions relating to the authorisation, supervision and application of restrictive practices. Such practices, to the extent that they relate to medical treatment, are distinguished from medical treatment. They are not seen as an element of the medical treatment decision, but as distinctly separate. The MHA and the DA set out specific regimes to manage issues about restraint which arise in the context of these areas of mental illness and disability.

134 The DA provides a detailed framework for the regulation of restrictive practices considered for use by NDIS service providers or disability service providers. There are comprehensive protections in place, including requirements for the development of behaviour support plans or treatment plans, and oversight by the Senior Practitioner, who must authorise or approve the use of restrictive practices.

135 Under the MHA, in respect of people receiving services in a designated mental health service, there are detailed reporting mechanisms in place to ensure that any restrictive intervention is reasonable and is the least restrictive option, and that the person is released from the intervention immediately when it is no longer necessary.[46] The person's needs must be met and their dignity protected.[47] Section 107 requires notification to the person and relevant others, including any guardian or carer, of the use of a restrictive intervention and the reason for using it. Section 108 requires that the use be reported to the chief psychiatrist.

136 Bodily restraint may only be used to prevent imminent and serious harm, or to administer treatment or medical treatment.[48] Bodily restraint is defined in section 3 of the MHA as "a form of physical or mechanical restraint that prevents a person having free movement of his or her limbs, but does not include the use of furniture (including beds with cot sides and chairs with tables fitted on their arms) that restricts the person's ability to get off the furniture".

137 The MHA makes a clear distinction, therefore, between medical treatment and the use of restrictive interventions in order that the person may receive medical treatment. The Chief Psychiatrist's guideline states that: "restrictive interventions are not therapeutic."[49] The guideline also carefully distinguishes the use of medication to treat an illness, from its use to restrict movement:

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46 *Mental Health Act 2014* (Vic) ss 105, 109.
47 Ibid s 106.
48 Ibid s 113.
49 *Chief Psychiatrist's guideline* (n 41) (2 July 2014) 1.

> The use of medication to target symptoms of mental illness and reduce acute arousal and agitation (ie acute sedation) is appropriate. The use of medication to restrict movement (analogous to physical and mechanical restraint) is potentially hazardous and has no defined place in the Act or practice. Acute sedation and pharmacological treatments need to be very carefully considered with clear criteria for use determined by the service, to guide judicious use of medications to relieve distress. Services need to ensure acute sedation policies are developed.[50]

138 By contrast with the DA and the MHA, there is no reference in the GA Act or the MTPDA to the concept of restraint. We note the Attorney-General's submission that the fact that other legislative regimes provide for explicit powers of restraint is not conclusive. The Attorney-General notes, however, that this issue is finely balanced, and accepts that it may be desirable for any authority given to a guardian to impose restraint to be clear, distinct and transparent.

139 The purpose of the DA is said to be to provide a legislative scheme for persons with a disability which affirms and strengthens their rights and responsibilities and which is based on the recognition that this requires support across the government sector and within the community, and to provide a mechanism by which NDIS participants' rights are protected in relation to the use of restrictive practices and compulsory treatment. The purpose of the MHA is said to be to provide for a legislative scheme for persons who appear to have mental illness and for the treatment of persons with mental illness. Both the DA (2006) and the MHA (2014) well pre-date the 2019 GA Act. The MHA and the GA Act post-date the Charter (the DA was legislated shortly before the Charter) and as such should be expected to have been assessed for compatibility with the Charter.

140 We recognise that a number of Charter rights are engaged by a decision to impose physical restraint on a person so as to forcibly overcome his or her resistance to receiving medical treatment. We accept the submission of VEOHRC that these include the rights under sections 8(b) and 8(c) to enjoy human rights without discrimination, and to be equal before the law and be entitled to the equal protection of the law without discrimination. We accept that HYY is entitled to the protection of the law even though she is currently not a person covered by the provisions of the MHA or the DA. She is entitled to receive the benefit of a process that ensures, if physical restraint is to be applied to overcome her resistance to treatment, that there is careful consideration of whether or not such restraint is necessary, that her needs are met and her safety and dignity are supported, and that there is sufficient oversight to ensure that every intervention is reasonable and is the least restrictive option.

141 All parties agreed, in essence, with this principle. We say that it is a necessary and foundational principle. The Attorney-General, the Secretary,

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50 Ibid 6-7.

the PA and VEOHRC all agreed that for the exercise of a power to impose physical restraint, it is at least highly desirable and preferred that there be specific authorisation, set out in an order, with detailed prescription about the use of the power and how it is reported and monitored. Where the parties differed was as to the mechanism for this.

142 The Attorney-General submitted that VCAT could ensure transparency about authorising the use of physical restraint by specifying it as a "personal matter" for which the guardian could be given power. The Attorney-General noted that this may be preferable to the alternative which is that physical restraint could be included within the scope of a power to make medical treatment decisions, even though the Attorney-General considered the latter interpretation legitimate. The Secretary submitted that decisions about physical restraint could be made within the power to make medical treatment decisions, but that if there is an anticipated or expected need for restraint this should be specified in the order as a separate personal matter.

143 VEOHRC submitted that the only Charter-compliant mechanism is section 45 of the GA Act, and the PA queried whether any authorisation of forcible restraint was permissible in the absence of a specific statutory framework.

144 We will address the questions as to the definition of a personal matter and the application of section 45 later. As to the question of whether the use of restraint falls within the power of a guardian who is appointed to make medical treatment decisions, we agree with the parties: this is a complex matter. We note the submission of the Attorney-General that none of us knows exactly what, if any, restraint may need to be imposed upon HYY in the future. As discussed, according to the PA, HYY is currently able to receive the treatment she needs without what anyone is describing as physical restraint.

145 We recognise that there is a spectrum as to the degree of restriction that might apply in a situation where a patient is resistive to treatment. That is clearly the case for HYY. On some occasions it has been considered necessary to use physical force to hold her body, or chemical restraint to calm her, in order that she can have the treatment; on other occasions as apparently at the present time, it is sufficient to talk soothingly with her and hold her hand, presumably in a way that is supportive rather than restraining.

146 At the hearing, we asked Counsel for the parties about this spectrum. There was a shared acknowledgement that compassionate human contact, such as gentle hand holding, or benign encouragement and assistance, is of a different character to the use of force. VEOHRC referred to international human rights jurisprudence dealing with potential limits on rights that occur at a minimal, fleeting level, noting that compassionate human contact in circumstances where a person is being gently encouraged to accept medical treatment is unlikely to be seen as a limitation on freedom of movement or

liberty. It is clear that there is not a bright line between one kind of engagement and another, and health care providers and guardians will need to be able to understand and assess the difference.

147 Counsel for the Secretary referred to the expertise available to health care providers in understanding how to provide encouraging support to patients in a way that will minimise any need to engage more restrictive interventions.[51] This expertise would be supported by guidelines that could be made available to guardians, who will often be private guardians rather than the PA, family members and friends of the person, who do not necessarily have access to the expertise and experience the Secretary described. Readily available guidelines would assist private guardians, who may need assistance to identify what is appropriate support for the provision of medical treatment, and what is forcible physical restraint.

148 It is our view that when gentle, non-forcible, physical support is provided to a person in order to administer treatment, this is not likely to amount to physical restraint. This kind of support might include hand-holding, the holding or steadying of a limb, or the person's head, encouraging the person into a wheelchair for transport to a treatment room, or walking alongside and gently steering the person, providing assistance to get onto a bed, and other potential actions and strategies. These kinds of strategies and forms of support may potentially occur in the context of resistance to treatment; the person may be frightened, or confused, or overwhelmed by a noisy hospital environment, or anxious about needles, the sight of blood, or loud and constricting medical machinery. We say that these kinds of strategies fall short of constituting physical restraint, and can fall within the scope of the power of a guardian to make medical treatment decisions.

149 We say, on the other hand, that decisions about the use of physical restraint that is forcible and applied for the purpose of controlling resistive behaviour are not decisions that are within the scope of the power given to a guardian who is authorised to make medical treatment decisions. Restraint of this kind is distinct from medical treatment, just as it is under the MHA and the DA, not an element of or a step in the provision of medical treatment. The plain meaning of the definition of "medical treatment" in the MTPDA does not, in our view, incorporate physical restraint, that is restraint that is forcible and applied for the purpose of controlling resistive behaviour. We note, also, section 61 of the MTPDA, which sets out how medical treatment decision makers must make decisions. They must consider any relevant values directive, and then any relevant preferences expressed by the person. The principles set out in section 7 of the MTPDA require that, among other matters, a person's preferences and values, as well as their personal and social wellbeing, should direct decisions about their treatment. Decision makers must have regard to the preferences expressed by the person, in the

[51] See for example *Chief Psychiatrist's guideline* (n 41) 6. See also See also Safer Care Victoria, Caring for people displaying acute behavioural disturbance (April 2020) and explanation (n 41).

context where the person is resisting treatment and is thus expressing a preference about it.

150 We refer again to section 32(1) of the Charter, which provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. When more than one interpretation of a provision is available on a plain reading, then adopting the interpretation which least infringes Charter rights is to be preferred.[52]

151 As we have said above, we do not consider that the plain meaning of the definition of "medical treatment" in section 3 of the MTPDA incorporates forcible physical restraint. Even if it could be said, however, that one possible interpretation of the provision is that physical restraint could be incorporated even though it is not specified, we do not consider that it is the interpretation which least infringes Charter rights. To the extent that Charter rights are limited by the authorisation of a guardian to make decisions about another person's medical treatment, so that all interpretations may limit Charter rights, the interpretation of the definition of "medical treatment" that least limits Charter rights is one which does not import into the definition the power to consent to physical restraint.

152 We have not been asked for advice about chemical restraint. We note here, however, that there are parallels in terms of chemical restraint with the distinction we describe between forms of gentle physical support and forcible physical restraint. It is often the case, for example, that a person will benefit from some medication to minimise pain or anxiety before or during medical treatment, just as it is the case that for some forms of medical treatment anaesthesia is essential. We say that the administration of medication of this kind, such that any of us might choose and benefit from when we are undergoing medical treatment, is distinctly different from the use of medication administered solely for the purpose of controlling the resistive movement or behaviour of the person.

If the use of restraint for the purposes of providing medical treatment is not within the scope of a guardian's medical treatment authority, is the use of restraint a personal matter for which VCAT may appoint a guardian?

153 When VCAT appoints a guardian, it must specify the personal matters in relation to which the guardian has powers.

154 The definition of "personal matter" as set out in section 3 of the GA Act and the examples of what falls within its scope reflect day to day lifestyle and routine matters: where and with whom the person lives, with whom the person associates, whether the person works, or undertakes educational training, daily living issues such as diet and dress, medical treatment decisions.

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52 *Momcilovic* (n 5) [103]; *Slaveski* (n 22) [24], [45].

155 We must interpret this statutory provision, consistent with its purpose, in the way that is the least incompatible with the Charter rights that may be at issue.[53]

156 The Attorney-General and the Secretary referred us to several significant cases. In these cases, heard in other Australian jurisdictions, it was determined that the use of restraint *is* a personal matter about which a guardian could be authorised to make decisions.

157 In the case of *Northern Territory of Australia v EH & Anor* the Northern Territory Supreme Court held that in circumstances where a person is unable to consent to medical treatment the treatment is involuntary in nature, whether or not the person resists it. Accordingly, it was anomalous to import a requirement for volition into a process that was in place because a person is unable to exercise decision-making capacity.[54] The Court said that the principles under the relevant legislation in the Northern Territory require consideration of whether the treatment is consistent with the person's wishes, but do not require consistency with those wishes.[55]

158 The Court noted that:

> a person exercising authority under the Guardianship of Adults Act 2016 in relation to an adult must exercise that authority in accordance with the guardianship principles set out in s 4 of the Act and in the adult's 'best interests'[56]
>
> …in determining what is in the adult's best interests, the guardian must take into account the adult's views and wishes as far as it is practicable to do so. That express provision recognises both that it will ordinarily not be possible to ascertain any sort of informed view on the part of the represented adult, and that it may in any event be necessary in the adult's best interests to provide consent which is inconsistent with the adult's expressed or demonstrated views and wishes.[57]

159 The Secretary referred us to *Re MS*, noting that WASAT in that case determined that consent to the use of restrictive practices could be given by a guardian, in circumstances where a young person with disability who was an NDIS recipient did not have capacity to give consent himself. The decision sets out the mechanisms set up within the context of the NDIS for consent to restrictive practices. The circumstances described in Western Australia at that time differ from those in Victoria, where restrictive practices relating to NDIS participants are regulated under the DA. The WASAT noted:

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53 *Charter* (n 19)
54 *NT v EH* (n 32) [32].
55 Ibid [37].
56 Ibid [24].
57 Ibid [34].

> …the GA Act expressly refers to a number of examples of the authority which may be exercised by a guardian, as part of the functions of a parent of a child lacking in mature understanding.[58]

160 Several decisions of the New South Wales Civil and Administrative Tribunal[59] conclude that physical restraint is not a part of medical treatment, and may not be consented to by a medical treatment decision maker as part of the medical treatment decision, but that it can and should be a matter for which a guardian may be given power.

161 We understand and respect the reasoning set out in the decisions of those States and Territories, and have given considerable thought to the question of whether and to what extent the reasoning applies in Victoria. We say that there are two considerations in particular that distinguish the situation in Victoria from that in most other States and Territories. The first is the introduction of the GA Act 2019, which repealed the *Guardianship and Administration Act 1986*, and the second is the operation of the Charter in Victoria.

162 The GA Act came into effect on 1 March 2020. In the Second Reading Speech the Attorney-General noted that the Bill represented "a significant departure from the notion of decision-making in the best interests of people with a disability, which will enhance their autonomy, dignity and equality…"[60] and in summary, that "this Bill represents a milestone in the way that Victoria upholds the rights and meets the needs of people with disability whose decision-making capacity is impaired. It moves away from the old 'best interests' principle that underpinned a paternalistic approach to disability, while retaining the safeguards necessary for them to most fully realise their potential".[61]

163 We note that, in *Northern Territory of Australia v EH & Anor,* the Northern Territory Supreme Court said:

> a person exercising authority under the Guardianship of Adults Act 2016 in relation to an adult must exercise that authority in accordance with the guardianship principles set out in s 4 of the Act and in the adult's 'best interests'.[62]

164 The Court noted that:

> in determining what is in the adult's best interests, the guardian must take into account the adult's views and wishes as far as it is practicable to do so. That express provision recognises both that it will ordinarily not be possible to ascertain any sort of informed view on the part of the represented adult, and that it may in any event be necessary in the adult's best interests to provide consent which is

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58 *Re MS* (n 42) [102].
59 See for example *HZC* [2019] NSWCATGD 8; *BQM* [2019] NSWCATGD 1
60 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy, Attorney-General, Minister for Workplace Safety).
61 See the now repealed *Guardianship and Administration Act 1986* (Vic) s 24.
62 *NT v EH* (n 32) 24.

> inconsistent with the adult's expressed or demonstrated views and wishes.[63]

165 In *Re MS* the WASAT noted, with reference to the guardian's functions being like those of a parent, that:

> The GA Act itself recognises some limitations: for example the functions of a guardian do not include the right to chastise or punish a represented person. Moreover, parental authority itself is not without limits… The limits of parental authority which might be exercised by a guardian may therefore be relevant in relation to the use of some restrictive practices. However, it was not suggested that the present case involves the use of restrictive practices which are outside the limits of parental authority…[64]

166 In a recent decision,[65] the Tasmanian Civil and Administrative Tribunal found that a guardian could consent to restrictive practices in part because section 25 of the Tasmanian equivalent of the GA Act can confer on a guardian all the powers and duties which the full guardian would have in Tasmania if he or she were a parent and the represented person his or her child.

167 In Victoria there is no longer, as there was in the repealed *Guardianship and Administration Act 1986*,[66] and as there is in the legislation of other States, the concept of a plenary guardian, or reference to the powers of a plenary guardian being the powers and duties that a guardian would have if he or she were a parent and the represented person his or her child.[67] The reference made by WASAT in *Re MS* to the role of a guardian as exercising "the functions of a parent of a child lacking in mature understanding"[68] is a concept that is no longer enshrined in Victorian guardianship law.

168 Nor is there any longer in Victorian law reference to the concept of "best interests." Guardians may not make decisions based on what they consider to be the best interests of the person, as they were required to do under the *Guardianship and Administration Act 1986*. The guiding principles have changed.

169 As each of the parties in this proceeding pointed out, the primary object of the GA Act, set out in section 7, is to protect and promote the human rights and dignity of persons with a disability including by having regard to the CRPD, recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives.

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63 Ibid [34].
64 Ibid [103].
65 *CBE (Application for Guardianship)* [2021] TASCAT 5.
66 See s 24 of the (repealed) *Guardianship and Administration Act 1986* (Vic).
67 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 68 (Jill Hennessy, Attorney-General, Minister for Workplace Safety).See also s 24 of the repealed *Guardianship and Administration Act 1986* (Vic).
68 *Re MS* (n 42) [98].

170 Section 8 of the GA Act, set out above, requires that any person exercising powers, functions and duties under the GA Act, including this Tribunal, must have regard to the principles summarised as follows: a person with a disability should be given practicable and appropriate support to make and participate in decisions, express their will and preferences and develop their decision-making capacity; the will and preferences of the person should direct decisions; and powers, functions and duties must be exercised in the way which is the least restrictive of the ability of the person with a disability to decide and act as is possible.

171 These key principles do not include the concept of best interests. Section 30 of the GA Act gives VCAT power to make a guardianship or administration order only if certain criteria are satisfied, including that the order will promote the person's personal and social wellbeing. Section 9 also makes reference to the concept of personal and social wellbeing, in that a person making a decision for a represented person should give all practicable and appropriate effect to the person's will and preferences if known, or to what the decision maker (the guardian or administrator) believes the person's will and preferences are likely to be, based on all the information available. If the decision maker is not able to determine the represented person's will and preferences, then she or he should act in a manner which promotes the represented person's personal and social wellbeing. The decision maker may only override the person's will and preferences if it is necessary to do so to prevent serious harm to the person.[69]

172 Section 4 sets out some of the ways in which the personal and social wellbeing of a person is promoted, including recognising the inherent dignity of the person and respecting their individuality and having regard to their existing supportive relationships, religion, values and cultural linguistic environment.

173 The Attorney-General submitted that the concept of personal and social wellbeing was strongly aligned with the concept of best interests, and therefore the case of *Northern Territory of Australia v EH & Anor* is squarely aligned with the situation before us and is persuasive authority. The Attorney-General and the Secretary submitted that each of the cases in other Australian jurisdictions to which they referred adopted a rights-based approach in their reasoning, and did not need to be distinguished.

174 For the reasons set out above it is our view that the GA Act is framed in different terms from the equivalent legislation in the jurisdictions in which those cases to which we were referred were heard, in particular that the concept of best interests does not apply. We agree with the Attorney-General that there are many circumstances where a protective order may be made that will promote the person's personal and social wellbeing even if their expressed will and preference is that the order not be made. The framework of the GA Act certainly provides for this, in sections 30 and 31

69 *GA Act* (n 7) s 9(1)(e).

in particular, however the GA Act *requires* a rights focus rather than a best interests focus. It requires a primary focus on the person's will and preferences, what is important to them, what they would want. In our view this gives weight to a definitively rights-based interpretation of the meaning of the words "personal matter".

175 We must apply the requirement in section 32(1) of the Charter, that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. We say that it is not the most Charter compatible reading of the definition of "personal matter" to say that it can include the imposition of forcible physical restraint.

176 In this case the decision about whether physical restraint should be applied is not a stand-alone matter. The relevant personal matter about which the guardian is empowered to make decisions is that of medical treatment. The question is how those medical treatment decisions may be enforced, if that is required, rather than whether there is a second and separate personal matter for which the guardian may be given power.

177 We say that these decisions, the medical treatment decision and the decision about authorising the use of forcible physical restraint to ensure its delivery in the face of resistance, are separate. VCAT could, however, consider both at once, and make orders about both at the same hearing. We will discuss this further below, in our discussion of section 45.

178 We recognise that guardians make decisions that may not be in accordance with the will and preferences of the person. Section 9 allows for this, in circumstances where it is necessary to prevent serious harm to the person. This means that a guardian may make a decision that the person is not happy with, and frequently this is a requirement of the role. It is only occasionally, however, that the person has to be physically forced to comply with the guardian's decision. To take as an example the power to make decisions about where a person lives: if the person is agreeing to a necessary change of accommodation, there is usually no need for a guardianship order because the least restrictive option is for there to be no order in place. If the person is opposed, it is usually the case that the order does the work it needs to do without coercion or physical force being required. Often this occurs by persuasion or active encouragement, or by saying such things as "VCAT said I have to make this decision now so that is how it has to be, and this is why…". If coercion or physical force is required, then the only way the guardian's decision can be enforced is by way of an order under section 45.

179 Section 38 of the Charter requires that the Tribunal, a public authority, must not act in a way that is incompatible with a human right, and must, when making a decision, give proper consideration to relevant human rights, following the analysis set out first by the Supreme Court in *Castles*.[70] So

[70] *Castles* (n 26).

must any other authority, including the PA. The Charter does not, however, apply to the many private guardians who are appointed and who may be faced with these complex decisions.

180 Applying the Charter, and the principles under the GA Act, which give primacy to the will and preferences of the person and require consideration of the CRPD, and noting that the primary object of the GA Act is to protect and promote the human rights of persons with a disability, our view is that the definition of "personal matter" does not include the use of physical restraint.

Is restraint a matter caught by section 38(1)(b) of the GA Act as a thing necessary to be done to give effect to the power of the guardian to consent to medical treatment?

181 This question in part relates to the first and second questions; that is, is it within the power of a guardian to consent to physical restraint that is forcible and required in order to overcome resistance as part of a medical treatment decision, and is the use of restraint a personal matter. We have said above that we do not consider that the answer to either question is yes, and so to a significant extent this question falls away. We have, however, considered the thoughtful submissions about sections 38(1)(a) and 38(1)(b).

182 Section 38(1)(a) could only apply if decisions about forcible physical restraint (as opposed to the kinds of physical touch, encouragement and support we have referred to above) were part of a medical treatment decision, or if physical restraint were a personal matter.

183 Section 38(1)(b) confers on a guardian:

> the power to sign and do anything that is necessary to give effect to any power or duty vested in the guardian.

184 Applying the same reasoning as above about the application of section 32 of the Charter, we say that if the words of the statute are capable of more than one meaning we should give them the meaning that is the least incompatible with the Charter, if that meaning is not inconsistent with the grammatical meaning and apparent purpose. To read into these words a meaning that would confer on a guardian power to consent to physical restraint is not the reading which least infringes Charter rights.

185 We have regard here to *Project Blue Sky v Australian Broadcasting Authority*;[71] the meaning to be given to the words of a statutory provision must be one that is in line with their usual grammatical meaning. We take account also of the principle of *ejusdem generis.* The words "to sign and do anything" imply that the actions that follow the word "sign" are more likely actions of an administrative nature, rather than decisions that may profoundly impinge upon a person's personal integrity by forcibly overcoming their resistance to a form of medical treatment.

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71 *Project Blue Sky* (n 2).

Does the use of restraint for the purposes of providing medical treatment require an application to be made under section 45 of the Act for an order for the represented person to comply with the guardian's decision?

186 The Attorney-General, the Secretary and VEOHRC all agreed that section 45 provides an appropriate mechanism for the provision of authority to a guardian and others to apply physical restraint if it were required in order to enforce a guardian's decision. VEOHRC submitted that it is the only available mechanism. The Attorney-General and the Secretary submitted that the GA Act provided other pathways, as discussed above, but that there would be circumstances in which section 45 was the most appropriate source of authority. The PA was concerned about the potential use of section 45 for this purpose, given that it does not make any reference to the use of force, and that the Charter demands the most rights-based interpretation. The PA also submitted that section 45 is not ideally suited to the purpose, and any orders would need to be framed in a detailed way.

187 We accept the submissions of the Attorney-General, the Secretary and VEOHRC that section 45 can be interpreted in such a way that it can give power to the Tribunal to make orders authorising the use of restraint.

188 We accept and agree with the submissions of VEOHRC that section 32 of the Charter does not preclude the use of section 45 for this purpose. The words of section 45 on their face indicate that Parliament intended for section 45 to be used to authorise the use of restraint on a person in order to compel them to comply with a guardian's decision. This is particularly clear by virtue of section 45(3), which protects the guardian and any other person specified in the order from liability to any action for false imprisonment or assault, as long as the guardian or other person is taking the measure or action in the belief that it will promote the represented person's personal and social wellbeing.

189 We take account of the Statement of Compatibility made when the GA Act was introduced, which clearly anticipated that section 45 would authorise physical coercion. The Statement of Compatibility also clearly indicated that because section 45 conferred power to enforce compliance, including by physical measures, there was an additional level of oversight required when orders are made under that section.

> Clause 45 may limit a represented person's right to freedom of movement under section 12 of the Charter to the extent that it may authorise a guardian or other specified person to use physical or non-physical measures to force a represented person to comply with the guardian's decision, such as a change of accommodation… However in addition to the safeguards outlined above in respect of the duties imposed on a guardian, the Bill provides for oversight of the exercise of the power to enforce compliance by providing that VCAT must authorise a person to take 'specified measures' and must hold a hearing to reassess an order made under clause 45 as soon as practicable after the making of that order, but within 42 days (clause

> 45(2)). In my view, any limitation of section 12 of the Charter and other Charter rights discussed above imposed by clause 45 is reasonable and justifiable.[72]

190 We refer again to section 7(1)(a) of the GA Act, which requires that we have regard to the CRPD. We note that Article 12(4) of the CRPD states that:

> States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

191 The provisions set out in the MHA and the DA relating to the authorisation, supervision and application of restrictive practices ensure that the practices apply for the shortest time possible and are subject to regular review by an independent authority. We say that section 45 meets these requirements in a like manner. We will set out here some detail about section 45 and how it operates.

192 It is not common or routine for VCAT to make orders under section 45 of the GA Act. When they are made, it is because a person is in a situation of high risk and is, for example, refusing to go to hospital for essential medical treatment without which they may lose their life, or insisting on leaving hospital when to do so would risk their life, or refusing to leave their home when it is dangerous for them to be there, for example in circumstances of immediate danger from bushfire or flood. The applicant for the section 45 order may already be the guardian, or may be applying to be appointed as guardian at the same time. The guardian may be the PA, or a family member or friend. These orders are sometimes made outside normal working hours; that is, at night or on weekends. The Tribunal provides a 24-hour service for this purpose, as does the OPA. Every less restrictive alternative must be explored before such an order is made. The order must be reassessed at least every 42 days. Often the timeframe is shorter, depending on the circumstances. It may be that the order will only be needed for a few days, or weeks. Sometimes the order is made in the context of an application for an urgent guardianship order under section 36 of the GA Act. In that case it may be made initially for 21 days, as that is the timeframe for which an urgent order may be in place without hearing or a request for renewal, which must be justified.

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[72] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 49 (Jill Hennessy, Attorney-General, Minister for Workplace Safety).

193 It is certainly open to VCAT to make an order under section 45 at the same time as an order appointing a guardian to make a medical treatment decision, or indeed a decision about any other personal matter. An application for a guardianship order (urgent or otherwise) can be made at the same time as a section 45 application, and these are commonly made and dealt with in the same hearing.

194 As was said to Parliament by the Minister in the Statement of Compatibility, orders providing for the enforcement of a guardian's decisions are restrictive. They require strong justification and oversight. These requirements are met by the elements of section 45. The measures must be specified, the person who is authorised to take the measures must be specified, and the order must be reassessed within 42 days. They are orders that, typically, authorise an ambulance or police officer to remove a person from their home and take them to hospital for treatment or to another safe place. The question, as put to us in this application, is whether the decision to forcibly restrain a person by physical means falls into the category of matters that require this degree of justification and oversight?

195 We say that it does. We acknowledge and agree with the Attorney-General that the GA Act is framed in such a way that every decision made in the Tribunal's Guardianship List must be justified under the GA Act's principles, and that there is an obligation on the Tribunal as on every decision maker subject to the GA Act to rigorously ensure that every less restrictive alternative is thoroughly considered before a person's autonomy to make their own decision is limited, and to reassess each order so that no substitute decision making arrangement stays in place any longer than is necessary.

196 In our view, however, in the particular circumstances that have led to this application for advice, that is the use or potential use of forcible physical restraint upon a person for the purpose of overcoming their resistance to the administering of necessary medical treatment, the higher degree of justification and oversight is warranted, and section 45 provides for a process which can properly accommodate this oversight in such circumstances.

197 We note the submission of the PA that section 45 is not necessarily suited for this purpose, being primarily used for a less immediate purpose, such as the transfer of a person to hospital. The PA's submissions may be implying that a more appropriate process for the authorisation of physical restraint, or indeed any kind of restrictive intervention, would ideally be provided for in legislative provisions that are enacted for that purpose, as has been the case under the MHA and the DA. That is a matter for Parliament. In any event, our interpretation of the GA Act leads us to the inevitable conclusion that section 45 is the only available option for authorisation of the use of forcible physical restraint, and is the source of the power to authorise restraint consistent with the scheme of the legislation and in particular the requirement to ensure oversight.

198 When emergency medical treatment is required, as the Secretary has explained in detail, consent is not required. Therefore, in circumstances of a medical emergency the need for orders would not arise. The Secretary has also outlined the various other emergency scenarios in which restraint may be imposed.

199 In circumstances such as HYY's where she was at the time resisting essential but not emergency medical treatment, a section 45 order could be made. This is indeed what occurred in HYY's case. The section 45 order provided the authority to the guardian and HYY's health care providers to apply the restraint that was necessary at the time to ensure that she received her life sustaining medication. During the life of the order the guardian and the health practitioners continued to explore all possible less restrictive alternatives, and were successful in doing so. No further order has been needed, even though many months have passed. Had further orders been needed, they could have been made, after consideration on reassessment. There is nothing in section 45 that prevents further orders being made. It is also the case that, with the consent of the parties, a reassessment hearing can be conducted on the papers, without a hearing.[73]

200 We accept that the use of section 45 for this purpose may require more of the Tribunal, the guardian and others involved in the decision-making process. Having regard to the matters discussed above, and in the absence of a specific legislative scheme, we consider that this is what the legislature intended and consistent with the scheme of the GA Act and the Charter principles which must be applied, appropriate and necessary. We also consider that it may be the case, as it has been thus far for HYY, that less restrictive alternatives can be explored and established, whether or not it is the requirements of section 45 that are the encouragement for and cause of this process.

SUMMARY AND CONCLUSION

201 The GA Act provides for the appointment of a guardian to make decisions on behalf of represented persons. The primary object of the GA Act is to protect and promote the rights and dignity of persons with a disability, recognising the need to support them to make, participate in and implement decisions that affect their lives. The scheme of the GA Act provides for such orders to be made, for supervision of the orders and to provide guidance to guardians when making decisions about represented persons.

202 In this proceeding, we have examined the extent of the power under the GA Act of the Tribunal to authorise, and in turn, the guardian appointed to authorise, physical restraint in the context of medical treatment

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[73] Refer here to s 100(2)–(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), though it is likely not usually appropriate to have an on the papers hearing without consent in this kind of case.

203 We have formed the view that on its proper construction the GA Act does not empower a guardian to authorise physical coercion or forcible physical restraint when authorising medical treatment. The definition of "medical treatment" does not encompass the use of physically coercive or forcible physical restraint. Nor do we accept that the authorisation of forcible physical restraint falls within the proper definition of "personal matters" or that it falls within the proper construction of the phrase used in section 38(1)(b) as a "thing necessary done to give effect to the power of the guardian" to consent to medical treatment.

204 The use of restraint for the purposes of providing medical treatment may however, be authorised by way of an application brought pursuant to section 45 of the GA Act. In our view, section 45 was intended by the legislature to allow for the enforcement or implementation of a decision of a guardian in a manner which provides for oversight by the Tribunal.

205 We recognise that an effect of recourse to section 45 may be a perceived added administrative or resource burden on the appointed guardian and the Tribunal, given a section 45 order has a strict time limitation.[74] However, in practical terms, an application can be made at the same time as the application for the appointment of a guardian (if the circumstances so warrant) and the review or extension of the order can be dealt with "on the papers" in many circumstances. We accept, even so, that there may be an increased administrative burden. We do not, however, consider that this can justify a different interpretation of the law from that which we have concluded. If there are resource implications, this is a matter for consideration elsewhere, or potentially for legislative amendment or preparation of protocols as exist under other protective legislation.

206 To conclude, our advice to the specific questions asked by the PA which was sought pursuant to section 44 of the GA Act is as follows:

a. 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.

b. No.

c. No.

d. Yes, to the extent that the restraint is forcible physical restraint proposed to be authorised in order to overcome resistance to medical treatment.

Justice Michelle Quigley
President

Genevieve Nihill
Deputy President

[74] *GA Act* (n 7) s 45 provides that the order may only run for 42 days before it is reassessed.