

**HUMAN RIGHTS****DECISIONS BULLETIN****for the period 1 May 2009 - 31 May 2009**

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 1 May 2009 - 31 May 2009. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

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EQUAL OPPORTUNITY ACT 1984 (WA)**MNYIRRINNA AND BRIGALOW BROOK PTY LTD [2009] WASAT 101****21 MAY 2009****MR M ALLEN (SENIOR MEMBER)**

Equal opportunity - Allegations of direct discrimination on the ground of race in relation to goods and services, racial harassment in relation to goods and services, and victimisation - Finding that the applicants were not harassed but that, in any event, racial harassment in the context of provision of goods and services does not fall within the ambit of the *Equal Opportunity Act 1984 (WA)* - Discrimination on the grounds of race alleged to be constituted by request to search bags at a supermarket and subsequent events - Finding that, on the evidence, the request to inspect bags was in accordance with a policy that was applied in a non-discriminatory way and there was no causal connection between the request to inspect and the race of one of the applicants - Finding that requests to inspect bags were made prior to any assertion of rights based on advice from the Equal Opportunity Commissioner - Finding that there was no intention to cause detrimental consequences to the applicants - Complaints of discrimination dismissed

The applicants alleged discrimination on the grounds of race in connection with a request made by staff of a supermarket to inspect their bags at the check-out of a supermarket and the events that followed a refusal by one of the applicants of that request. They also alleged racial harassment and victimisation arising from the same incident.

In relation to the complaint of racial harassment, the Tribunal found that the *Equal Opportunity Act 1984 (WA)* does not extend to racial harassment in relation to the

provision of goods and services but that, in any event, the applicants were not racially harassed.

In relation to the complaint of discrimination on the grounds of race, the Tribunal was satisfied on the evidence that the requests to inspect the applicants' bags were made in accordance with the supermarket's published policy; that the requests were made in a non-discriminatory way and were not in any way motivated by the race of one of the applicants, and that the applicants were not detained or accused of stealing during the course of their interaction with staff of the supermarket.

In relation to the complaint of victimisation, the Tribunal was satisfied on the evidence that the request to inspect bags had been made prior to any assertion by one of the applicants that the respondent had no right to request to inspect bags and that the applicant had received advice to that effect from the Equal Opportunity Commissioner. Further, the statement by the applicant about advice received was in relation to a general right to refuse inspections of bags, rather than advice in relation to rights under the *Equal Opportunity Act 1984 (WA)*. In addition, the Tribunal was satisfied that the employees of the respondent had not in any way intended to cause any detriment to the applicants and that their request to inspect bags was not in any way connected to any assertion of any rights by the applicants.

Accordingly, the Tribunal dismissed all the complaints.

GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

JS AND CS [2009] WASAT 90

7 MAY 2009

**JUSTICE J A CHANEY (PRESIDENT), MS J TOOHEY (SENIOR MEMBER),
DR B MENDELAWITZ (SENIOR SESSIONAL MEMBER)**

Guardianship - Application by parents of young woman for appointment as her guardians to apply for and consent to hysterectomy - Application for Tribunal's consent to hysterectomy - Hysterectomy proposed to stop heavy and painful menstruation - Not proposed for fertility control - Proposed hysterectomy not a procedure for sterilisation within the meaning of the *Guardianship and Administration Act 1990 (WA)* - Consent of Tribunal not required - Previous treatment had been provided with consent of parents pursuant to s119 of the *Guardianship and Administration Act 1990 (WA)* - Tribunal satisfied in young woman's best interests that parents have formal authority - Parents appointed joint guardians to consent to treatment including hysterectomy

The parents of a young woman with an intellectual disability applied to the Tribunal for an order appointing them her joint guardians and for the Tribunal's consent to her undergoing a hysterectomy.

The hysterectomy was proposed in order to stop the young woman menstruating. For 10 years she had experienced heavy and painful bleeding. Her gynaecologist had tried oral contraceptives, Depo-Provera injections and a Mirena intra-uterine contraceptive device, separately and in various combinations, to limited effect. The young woman was experiencing virtually continuous bleeding, often accompanied by painful cramps. The bleeding distressed her and was affecting her quality of life; she could no longer go swimming and had gained a lot of weight.

The Tribunal was satisfied that the young woman had expressed clearly her wish for the hysterectomy because it would mean an end to her symptoms. It was satisfied that she understood it would stop her menstruating and that she would no longer be able to bear children, but that her understanding was very limited. The Tribunal found she was not able to appreciate the nature, significance and risks of the operation and needed someone to consent to it on her behalf.

The Tribunal found that, as the sole purpose of the hysterectomy was to stop the symptoms associated with menstruation, it was not a procedure for sterilisation within the meaning of the *Guardianship and Administration Act 1990* (WA). It followed that the consent of the Tribunal was not required by the Act.

A range of treatment including surgery had been provided to the young woman over the years with the consent of her parents pursuant to s 119 of the *Guardianship and Administration Act 1990* (WA). It was not clear whether her doctors would agree to perform a hysterectomy on the basis of s 119 authority.

In the circumstances, the Tribunal found it in the young woman's best interests that her parents be appointed her joint guardians for the purpose of consenting to medical treatment and specified in its order that their authority included consenting to a hysterectomy. It was satisfied her parents were suitable to act on their daughter's behalf, and that their appointment and the proposed hysterectomy accorded with her wishes as best as they could be ascertained.

**RE JMM; EX PARTE JMM [2009] WASAT 95
13 MAY 2009
MS F CHILD (MEMBER)**

Guardianship and administration - Application for leave to apply for review - Appointment of the Public Advocate as guardian less than 12 months prior to application - Whether there has been any change in circumstance or any other reason to hold a review of the order - Continuing family conflict - Continuing need for orders appointing independent guardian - Application for leave dismissed

The Tribunal dismissed an application for leave to apply for review of an order which appointed the Public Advocate as limited guardian of an elderly woman with a diagnosis of dementia. The application for leave was made by the daughter of the woman and raised concerns about the quality of care received by the woman.

The issues raised in the application about the accommodation of the woman and family conflict were substantially the same as matters dealt with on periodic review of the guardianship order undertaken by the Tribunal less than 12 months previously. Having considered the application, a report from the Public Advocate and other information, the Tribunal determined that there had been no change in the woman's circumstances or any other reason which required that a review be held and so dismissed the application.

**G AND N [2009] WASAT 99
15 MAY 2009**

MS J TOOHEY (SENIOR MEMBER), MR J MANSVELD (MEMBER), MS S GILLETT (SENIOR SESSIONAL MEMBER)

Administration - Guardianship - Conflict between children and stepchildren - Agreement between parties that Enduring Powers of Attorney should be revoked - Whether attorney should be required to file records and accounts - Tribunal satisfied that attorney had kept records and accounts - Satisfactory accounts of dealings and transactions - Attorney not required to produce records and accounts to Tribunal and applicant - Wishes of the proposed represented person - Appointment of family members as administrator unworkable on account of conflict - Public Trustee appointed administrator - Applicant appointed guardian - Direction to consult with other family members

The applicant sought orders under the *Guardianship and Administration Act 1990* (WA) concerning her elderly father, N, who had dementia.

The applicant sought orders that she be appointed guardian and administrator for N and that an enduring power of attorney by which he had appointed his stepson his attorney

be revoked. She also sought an order that the stepson produce records and accounts of dealings and transactions he had undertaken as attorney.

The stepson had assisted N over many years and the applicant had become involved in his affairs only recently.

There was conflict between the applicant and her sister on the one hand, and N's stepchildren on the other. However, they agreed that N was no longer capable of managing his estate and needed someone to act on his behalf. They agreed that an enduring power of attorney by which N appointed his stepson, and a later enduring power of attorney by which he appointed the applicant, should be revoked. The stepson had acted pursuant to the power for several years; the applicant had not exercised her powers. Each proposed their own appointment as administrator.

The applicant questioned dealings and transactions by the stepson as attorney and sought records and accounts. The Tribunal accepted the stepson's explanations for the transactions. It was satisfied he had kept records and acted properly in exercising his powers as attorney. It did not accept that he should be required to produce records and accounts to the Tribunal and the applicant.

The Tribunal found that, but for the conflict between them, either the stepson or the applicant would be suitable to act as administrator but the conflict would make either appointment unworkable. It appointed the Public Trustee plenary administrator for 12 months after which time the conflict might have resolved itself and the stepson or the applicant might be suitable to act as administrator.

The Tribunal found that N had no immediate need for a guardian but accepted that decisions about his accommodation and treatment would likely have to be made in the foreseeable future. It was satisfied that the applicant was suitable to act as guardian but was not satisfied that she would involve the stepchildren as N would have wanted. It directed the applicant to consult with the stepchildren and keep them informed.

FG AND WHR [2009] WASAT 102

22 MAY 2009

MR J MANSVELD (MEMBER)

Guardianship and administration - Remuneration for administrators - Size or complexity of the estate - Remuneration may be warranted in circumstances where the estate is out of the ordinary or not typical

The joint administrators of the estate of WHR [his sister and brother in law] applied to the Tribunal that they be paid remuneration from his estate for their work as his administrators.

The administrators sought remuneration from the beginning of 2004 (when the sister was sole administrator; the joint administration only coming into force in October 2006), but it was not made clear why it should start for that date and not sooner (or later).

The administrators provided details of the hours spent on the administration from 2004 but their submissions were not entirely consistent. They said they were currently spending an average of seven hours a week on the administration of WHR's estate.

The administrators did not submit that if remuneration were to be paid, at what rate it should be paid. The Tribunal sought assistance from the Public Trustee to give an estimate of the fees he would charge the estate were he the administrator for WHR.

Under the relevant legislation (the *Guardianship and Administration Act 1990* (WA)), remuneration could only be paid to an administrator, other than the Public Trustee, if the Tribunal considered that, because of the size and complexity of the estate, or both, remuneration should be paid.

The Tribunal decided that remuneration should be paid to the administrators of the estate of WHR but only from 2007.

JH [2009] WASAT 106

29 MAY 2009

**MS D DEAN (MEMBER), MS V O'TOOLE (SENIOR SESSIONAL MEMBER),
MS J STANTON (SENIOR SESSIONAL MEMBER)**

Section 84 review of guardianship and administration orders - Capacity of the represented person - Represented person with dementia - Need for an order - Best interests of the represented person - Public Trustee appointed plenary administrator - Public Advocate appointed limited guardian

JH is an elderly woman with Alzheimer's disease. On 9 March 2007, the Tribunal appointed the Public Trustee plenary administrator of her estate and the Public Advocate limited guardian to make decisions as to where and with whom she should live, to consent to medical and dental treatment on her behalf and to determine what contact she should have with others. The orders were to be reviewed in two years.

The Tribunal subsequently received applications for review of the orders from family members and the nursing home where JH currently resides. JH is originally from Victoria, having moved to Western Australia in the last few years, leaving her husband and some of her adult children and extended family in Victoria. JH's family in Victoria wanted her to return to Victoria to live but her family in Western Australia were resistant to the idea.

The Tribunal confirmed the appointment of the Public Advocate as limited guardian to make decisions as to where JH was to live in the long term, her medical treatment, her contact with her ex-husband in Victoria and gave the guardian the additional function of making decisions about the use of chemical and physical restraints.

The Public Trustee was confirmed as plenary administrator.