

CHILD PROTECTION CLIENTS WITH COGNITIVE DISABILITIES

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE SECRETARY TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

AND

THE PUBLIC ADVOCATE

AND

VICTORIAN ABORIGINAL CHILD CARE AGENCY

AND

BENDIGO AND DISTRICT ABORIGINAL CO-OPERATIVE

Background and purpose

1. The parties are committed to the safety, health and wellbeing of young people with a cognitive disability leaving care services.
2. The parties have developed this memorandum of understanding (MOU) in relation to their respective roles and responsibilities to young people who have a cognitive disability, and who are placed in care on a Protection Order under the *Children, Youth and Families Act 2005* (CYFA) and may need a guardian or administrator upon turning 18 years of age.
3. The objectives of this MOU are to:
 - ensure young people leaving care at age 18 years, who may need a guardian or administrator are identified early to enable discussions between the parties and the young person
 - outline the processes the Secretary, or authorised Principal Officer of an Aboriginal Children in Aboriginal Care (ACAC) provider, and the Public Advocate will follow to consult as to what is in the best interests of the young person concerned
 - provide a collaborative approach to ensure young people are protected and supported before and during any transition from being under the parental responsibility of the Secretary or the Principal Officer of an ACAC provider to having the Public Advocate appointed as their guardian.

4. The parties recognise the protective regimes established by the CYFA and the *Guardianship and Administration Act (GAA)* differ greatly. They also recognise child protection practitioners may not be familiar with the legislation, policies and procedures that govern the actions of Office of the Public Advocate (OPA) staff and that OPA staff may not be familiar with the legislation, policies and procedures that govern the actions of child protection.
5. This MOU was first developed in 2017 and revised in 2019.

DEPARTMENT OF HEALTH AND HUMAN SERVICES Child Protection Program

6. The Secretary is responsible for the protection of children under the CYFA. Child protection practitioners, as protective interveners and delegates of the Secretary carry out the Secretary's responsibilities under the CYFA.
7. The Secretary may contract a Community Service Organisation (CSO) or ACCO to undertake case management or specified functions only for young people in care services. A CSO or an ACCO may be contracted to:
 - implement all or part of the case plan;
 - organise and supervise contact consistent with the case plan; and
 - liaise with services.
8. Where a protection order for an Aboriginal child has been made by the Children's Court, the Principal Officer of an ACAC provider may be authorised to carry out the Secretary's responsibilities under the CYFA in relation to a protection order in respect of an Aboriginal child.
9. A protection application cannot be made in respect of a young person who is of, or over the age of, 17 years. However, where a young person is already subject to a protection order, the protection order may remain in force until the young person turns 18 years.

VICTORIAN ABORIGINAL CHILD CARE AGENCY (VACCA) and BENDIGO AND DISTRICT ABORIGINAL CO- OPERATIVE (BDAC)

10. At the time of signing this MOU, the ACAC providers in Victoria are VACCA and BDAC. It is anticipated that additional ACCOs will be authorised to deliver ACAC service provision in the future.
11. Other ACCOs who are authorised to deliver ACAC in the future may be added as a party to this MOU should they wish to do so by making a written request to the signatories of this MOU.

OFFICE OF THE PUBLIC ADVOCATE (OPA)

12. The Public Advocate is an independent statutory office holder established under the *Guardianship and Administration Act 1986* (GAA) to promote and safeguard the rights and interests of people with a disability. This role includes engaging in systemic advocacy and may include advocating for individuals with a disability where other advocacy options are limited or do not exist.
13. A statutory guardianship scheme for people who lack capacity to make their own decisions about personal or lifestyle matters is set out in Part 4 of the GAA. Under section 22(1), the Victorian Civil and Administrative Tribunal (VCAT) can appoint a guardian if satisfied that a person about whom an application is made:
 - is a person with a disability;
 - is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances
 - is in need of a guardian; and
 - it is in the person's best interests.
14. VCAT can appoint as guardian an eligible person as defined in section 23(1) of the GAA. Family members are often appointed. If there is no-one who is eligible to be appointed, VCAT can appoint the Public Advocate.
15. The Public Advocate's statutory role as set out in the GAA includes:
 - conducting investigations to assist VCAT to determine whether a guardian and/or administrator should be appointed;
 - acting as guardian of last resort for people with a disability who lack decision-making capacity and need a guardian, where appointed by VCAT;
 - providing education and advice on guardianship and administration and related matters.
16. Guardianship orders are usually of limited duration (12 months) and, in accordance with section 61 of the GAA, guardianship orders are reassessed annually unless VCAT orders otherwise. Once major decisions have been made and implemented, there is usually no need for guardianship to continue for any extended period.
17. Section 4(2) of the GAA provides that "it is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that:
 - the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
 - the best interests of a person with a disability are promoted; and

- the wishes of a person with a disability are wherever possible given effect to.
18. The Public Advocate also has a broad advocacy role under sections 15 and 16 of the GAA and, at times, the Children's Court seeks the involvement of the Public Advocate where a parent with a disability is involved in court proceedings. In such cases, the Children's Court magistrate may ask child protection practitioners to contact OPA and make inquiries about litigation guardianship or other forms of support. Such inquiries are not dealt with under this Protocol and should be addressed to the Principal Legal Officer at OPA, accompanied by background information including relevant information, court orders and any evidence of lack of capacity to instruct a solicitor.

LEGISLATIVE RESPONSIBILITIES

Department of Health and Human Services (*Children, Youth and Families Act 2005*)

19. Section 172 of the CYFA sets out the powers of the Secretary when the Secretary has parental responsibility for a child. Where the Secretary has sole parental responsibility for a child, the Secretary has the same rights, powers, duties, obligations and liabilities as a natural parent of the child would have. In circumstances where the child is Aboriginal and the Principal Officer of an ACAC provider has been authorised under section 18 of the CYFA, the Principal Officer of the ACAC provider assumes the same rights, powers, duties, obligations and liabilities as the natural parent.
20. Section 16(1)(e) requires the Secretary to work with other government agencies and community services to ensure that children in care services receive appropriate educational, health and social opportunities.
21. Under Section 16 (1) (g), the Secretary must provide, or arrange the provision of, services to assist a person under the age of 21 years to transition to independent living where the Secretary has had parental responsibility for the person and on the Secretary's parental responsibility ending, the person is of an age, or intends, to live independently. The authorised Principal Officer of an ACAC provider may refer to these post care support services as required. The Secretary fulfils this obligation by funding post care services to support young people who intend to, live independently. Section 16 (1) (g) confers no right or entitlement to support.
22. For a young person who will transition to independent living once the young person's protection order expires, the case plan provides the foundation for leaving care planning. Case plans are regularly reviewed as the needs of children change over time.

Office of the Public Advocate (*Guardianship and Administration Act 1986*)

Guardianship (see appendix A for definition)

23. Part 4 of the GAA provides for the making of guardianship orders for a person with a disability who is 18 years of age or older (or to take effect upon the person turning 18). A guardianship order under the GAA may appoint a plenary or limited guardian. The vast majority are limited orders. A plenary guardian has all the powers and duties that a parent of a child has. A limited guardian only has one or more of the powers and duties that a plenary guardian may have, as specified in the order.
24. A guardianship order empowers the guardian to make decisions about personal matters. Commonly, orders may authorise a guardian to decide such things as where the person lives, what services they receive, and/or their medical and dental treatment and other health care. Where a guardianship order contains decision making powers about a young person's medical treatment, such decisions must meet the requirements of the *Medical Treatment Planning and Decision Act 2016*.

Administration (see appendix A for definition)

25. Part 5 of the GAA provides for the making of administration orders for a person with a disability who is 18 years or older (or to take effect on the person turning 18 years). Administration orders deal with financial and legal authority. The Public Advocate does not act as an administrator, however VCAT can refer applications for the appointment of an administrator to the Public Advocate for investigation.
26. Under section 46 of the GAA, VCAT can appoint an administrator if satisfied that the person has disability and is unable to make reasonable judgments in respect of the matters relating to all or any part of her or his estate by reason of the disability. An order can only be made if there is an identified need for an administrator.
27. VCAT requires that medical or similar evidence be submitted to VCAT as part of the application to assist in determining whether the conditions for the appointment of a guardian and/or an administrator are met.

THE SECRETARY'S PROCEDURES PRIOR TO REFERRAL TO THE PUBLIC ADVOCATE

28. When young people in care services reach 15 years of age, the Looking After Children 15+ Assessment and Progress Record and the 15+ Care and Transition Plan commences, consistent with the young person's case plan.

29. As part of transition planning the young person's case manager will refer the young person to a post-care support, information and referral service.
30. As part of transition planning for young people with a cognitive disability who are unable to transition to independent living, Child protection or the ACAC provider will:
- Make an access request to the NDIA where one has not already been completed and ensure appropriate assessments and referrals regarding disability support need, including housing needs, are completed as early as possible within the transition planning process.
 - Where the young person is already an NDIS participant, ensure appropriate assessments and referrals regarding disability support needs, including housing needs are completed as early as possible within the transition planning process.
31. Child protection or the ACAC provider remains responsible for the endorsement and review of the young person's statutory case plan. Where a young person is in care, it is the responsibility of child protection to ensure the case plan is consistent with the 15+ Care and Transition Plan. Where parental responsibility for the young person has been authorised under section 18 of the CYFA, this responsibility rests with the ACAC provider.
32. Where a young person in care is eligible for services funded by the National Disability Insurance Scheme (NDIS), the Secretary or ACAC provider will ensure all reasonable steps are taken to involve the National Disability Insurance Agency, or relevant disability support provider, in care and transition planning.
33. Where a young person in care is a NDIS participant, child protection or the ACAC provider will ensure a NDIS plan review takes place prior to the child's 17th birthday to support the child's transition to adult disability services.
34. Where a young person in care has a mental illness as defined in section 4 of the *Mental Health Act 2014*, child protection or the ACAC provider will ensure all reasonable steps are taken to involve mental health service providers in care and transition planning.
35. Where a young person in care is Aboriginal and consideration is being given to making an application to VCAT for a guardian or administrator, the Secretary will consult with the Aboriginal Child Specialist Advice and Support Service (ACSASS) unless the young person is already receiving contracted case management from an ACCO or is authorised under section 18 of the CYFA.

36. Throughout the planning process child protection, or the ACAC provider, will actively explore the young person's family and social network to determine if a suitable person is available and willing to undertake the role of guardian or administrator when the young person turns 18 years of age.

THE SECRETARY'S PROCEDURE FOR CONSULTATION AND REFERRAL TO THE PUBLIC ADVOCATE

37. Where child protection or the ACAC provider has a belief that a young person may require a guardian or administrator upon turning 18 years of age, the young person's case manager (child protection, the ACAC provider, or, where the case is contracted, the CSO or ACCO) should consult with OPA as early as possible after the young person's 17th birthday.
38. Consultation will commence by the relevant case manager contacting the VCAT Liaison Officer, who is an experienced Advocate Guardian employed by OPA. This role is based at the William Cooper Justice Centre, Melbourne and can be contacted on 90321161. Phone contact can be made in the first instance to discuss the circumstances and needs of the young person leaving care. As this role is based at VCAT in the Central Business District, it is not possible for the OPA VCAT Liaison Officer to attend care team meetings or case conferences in person.
39. During the consultation, the case manager should provide OPA with the following:
- information known about the type and severity of the cognitive disability and the impact on the young person's functioning including mental health concerns
 - information about other adults in the young person's life, including any family who may be able to be involved in the young person's life after they turn 18 years. (Even where family cannot care for the young person, they may be able to play a role in providing support and decision making on behalf of the young person)
 - existing community supports and linkages with support organisations including any disability support advocacy organisations.
40. The OPA VCAT Liaison Officer or another member of OPA staff will provide advice to case managers regarding applications for guardianship or administration including information about the application process.
41. Child protection or the ACAC provider are responsible for making the application to VCAT for the appointment of a guardian or administrator in relation to young people on a Protection Order that are living in care. This includes young people who are subject to case contracting arrangements.
42. Where a decision to proceed with an application for guardianship or administration is made, child protection or the ACAC provider must consult

with the lawyer for the young person, if any, before making any application to VCAT. Where the young person does not have a lawyer, child protection or the ACAC provider will assist the young person to obtain legal advice in relation to the proposed application.

43. In making an application to VCAT for the appointment of a guardian or administrator, the Secretary or the authorised Principal Officer of the ACAC provider will be mindful of, and the Public Advocate will assist with, advice relevant to:

- the information required by VCAT to determine an application;
- the need for a detailed case plan and other relevant documentation relating to leaving care planning such as the 15+ Care and Transition Plan, prepared in consultation with the care team and other relevant service providers such as NDIS funded providers, post care supports, disability advocacy services and any mainstream services to be included with the application; and
- the timelines of an application to VCAT – generally, an application should be made no later than four months before the young person turns 18 years of age.

44. If a suitable person is identified and is able and willing to assume the role(s) of a guardian or administrator, they will be fully included in the planning process at the earliest opportunity and will be informed of any proposed application to VCAT at least 12 weeks before the application is submitted.

45. OPA may attend care team meetings or case conferences for the young person where appropriate and as resources allow. Where possible an invitation will be provided to the OPA Manager, Advocacy and Guardianship four weeks in advance of the relevant meeting. In the event participation in the meeting cannot be achieved, child protection or the ACAC provider will contact the OPA Manager, Advocacy and Guardianship by telephone to discuss the case to ensure adequate consultation occurs. The contact number for this role is 1300 309 337.

ONGOING ROLES AND RESPONSIBILITIES OF OPA AND THE DEPARTMENT

46. Both the Public Advocate and the Secretary recognise the best interests of young people with a cognitive disability are, in most circumstances, best met through the involvement of a range of agencies. Where relevant, OPA and child protection, or the relevant ACAC provider, will enable and support a young person's involvement with relatives, friends, carers or service providers appropriate agencies.

47. Where the young person may be eligible for State or Commonwealth funded services (including the NDIS), child protection, or the ACAC provider, will refer the young person to such agencies at the age of 16

years or the age of eligibility, consistent with the Secretary's practice with all young people leaving care.

48. Where the Secretary or the Principal Officer of an ACAC provider is considering making a guardianship application to VCAT for a young person, and OPA is involved in transition planning, child protection or the ACAC provider will advise the Public Advocate of all services involved and active referrals for the young person.
49. The Secretary or the Principal Officer of an ACAC provider will only make an application to VCAT for the appointment of a guardian or administrator for a young person with a disability where:
- a) the Secretary or the authorised Principal Officer of an ACAC provider has parental responsibility for the young person and the young person has a disability which affects their capacity to make reasonable judgments about personal and/or financial matters;
 - b) there is medical evidence and other supporting documentation that confirms the young person has a disability and by reason of the disability is unable to make reasonable judgments in respect of their person or circumstances, or their estate;
 - c) one or more decisions need to be made about the young person's personal or financial circumstances;
 - d) less restrictive ways of ensuring ongoing support and protection of the young person have been explored and are considered to be insufficient;
 - e) there is no person in the life of the young person suitable or able to be appointed as the young person's guardian or administrator;
 - f) the young person has been consulted, where possible, and a record has been made of their views about having a guardian or administrator appointed; and
 - g) it is in the young person's best interests.

INFORMATION SHARING

50. Information sharing will occur in a manner consistent with relevant laws, including the CYFA, the *Health Records Act 2001*, the *Privacy and Data Protection Act 2014* and the GAA.

MEASUREMENT AND EVALUATION

51. The parties will evaluate the effectiveness of this MOU on an ongoing basis through twice yearly meetings. This MOU will be formally reviewed by the parties prior to the commencement of the *Guardianship and Administration Act 2019* on 1 March 2020 and then in one further meeting in 2020 as mutually agreed.
52. The terms of the review will be determined by mutual agreement.

DISPUTE RESOLUTION

53. The parties will use their best endeavours to resolve any dispute that arises by negotiation in the cooperative spirit of this MOU and in an expeditious manner.

AMENDMENT/TERMINATION OF MOU

54. This MOU may be amended or terminated by the mutual written agreement of both parties.

STATUS OF MOU

55. This MOU is not intended to and does not create legally binding obligations between the parties.

Kym Peake

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Kym Peake
Secretary to the Department of Health and Human Services

Date: *6/2/2020*

Colleen Pearce

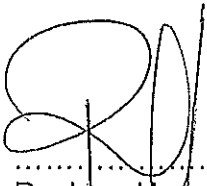
Colleen Pearce
Public Advocate

Date: 10/2/20



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Muriel Bamblett
CEO Victorian Aboriginal Child Care Agency

Date: 17 February 2020



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Raylene Harfadin
CEO Bendigo & District Aboriginal Co-operative

Date: ...13.02.2020.....

APPENDIX A

Key terms and definitions

Aboriginal Children in Aboriginal Care (ACAC): Aboriginal Children in Aboriginal Care is the program name for Section 18 of the Children, Youth and Families Act 2005 which enables the Secretary of the Department of Health and Human Services (DHHS) to authorise the Principal Officer of an Aboriginal agency to undertake specified functions and powers in relation to a Children's Court protection order for a specified Aboriginal child. Once a protection order for an Aboriginal child has been made by the Children's Court, an approved Aboriginal Community Controlled Organisation (ACCO) delivering ACAC may be authorised to take on total responsibility for administration of the child's protection order, including case planning and case management.

Aboriginal Community Controlled Organisation (ACCO): An Aboriginal organisation governed by the local Aboriginal community to deliver holistic and culturally appropriate services to Aboriginal people, children and families.

Administration: Administration orders are also made under the Victorian *Guardianship and Administration Act 1986*. If the Tribunal is satisfied that the person in respect of whom an application for an order appointing an administrator is made:

- (a) is a person with a disability; and
- (b) is unable to make reasonable judgments in respect of the matters relating to all or any part of her or his estate by reason of the disability; and
- (c) is in need of an administrator of her or his estate.

There are similar requirements of administrators as for guardians, primarily to act in the best interests of the represented person and encouraging them to make reasonable judgments about their financial and legal matters. If there is no suitable administrator nominated, the Tribunal usually appoint State Trustees or Australian Unity.

A private administrator is sometimes appointed by the Tribunal, such as a solicitor or accountant who may be known to the represented person or their family. Once an administration order is made by the Tribunal and received, an administrator usually takes over the represented person's bank accounts and other financial assets. This needs to be explained to the proposed represented person, as it often comes as a shock, especially the first time they go to withdraw cash from an ATM and can't do so. If there is an administration order and a guardianship order for a person with a disability, the administrator and guardian need to work together to ensure the best interests of the represented person are looked after. However, just because an administrator is appointed, it doesn't mean a guardian also needs to be appointed by the Tribunal and vice versa.

Care team: Led by the child's care services worker, a care team is the group of people who jointly plan for and support the care of a child or young person in care services. The team work together to determine and undertake the tasks that parents ordinarily do to provide good care for a child or young person.

Case contracting: A case contract is a formal arrangement in the form of a written agreement between child protection and another agency for the provision of case management for a child subject to a protection order. Contracting arrangements are designed to enable the most appropriate agency to support implementation of the case plan.

Case manager: The person responsible for implementing the child's statutory case plan. While case management is most commonly undertaken by child protection, case management of children/young people subject to a Children's Court order can be contracted to a Community Sector Organisation (CSO) or ACCO.

Case plan: It is a legislative requirement that a case plan is prepared at substantiation that guides assessment, planning, and action by case managers and others involved in the life of a child subject to protective intervention. The plan is succinct and high level and is based on the Best Interest Case Practice Model.

Care services: A temporary, medium or long-term living arrangement for children and young people who cannot live with their parents and who are on statutory care orders or voluntary child care agreements. Care services was previously referred to as out-of-home care. Children and young people living in statutory care services may be subject to a child protection investigation, protective intervention or a Children's Court Order (and have oversight by DHHS). Types of care services include kinship, foster, residential, lead tenant and permanent care. Excluded from this definition are children and young people who are in informal care, and who have transitioned from care services to adoption or family reunification.

Community Service Organisation (CSO): Appropriately qualified organisations contracted by government to provide case and care management for children and young people in care services. CSOs may also provide support to carers.

Cultural plan: The CYFA requires a cultural plan for every Aboriginal child in care services that aims to retain connections to family, community and culture regardless of placement.

Disability Advocacy: The Australian Government, and some state and territory governments, fund independent advocacy to help people with disability who face complex challenges or are unable to advocate for themselves, and do not have family, friends or peers who can support them as informal advocates, to access advocacy support.

To find the locations and contact details of government-funded independent advocates in each area, go to <http://disabilityadvocacyfinder.dss.gov.au>.

All Advocate Guardians at the Office of the Public Advocate (OPA) undertake advocacy as part of their role. Sometimes once an order is revoked, the Tribunal will request that OPA remain involved with the represented person for some specific advocacy issue. Sometimes if resources allow, OPA staff will initiate their own advocacy for a person with a disability who may need assistance to address an issue.

Guardianship: The Victorian *Guardianship and Administration Act 1986* provides the legal framework for the appointment of a guardian. If the Tribunal is satisfied that the person in respect of whom an application for an order appointing a guardian is made:

- (a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgments in respect of all or any matters relating to her or his person or circumstances; and
- (c) is in need of a guardian, and
- (d) it is the person's best interests.

The Tribunal may make an order appointing a plenary guardian or a limited guardian in respect of that person. A plenary guardian has all the powers that a parent would have and can only be appointed if the Tribunal is satisfied that a limited guardianship order would be insufficient to meet the needs of the person in respect of whom the application is made.

In determining whether or not a person is in need of a guardian, the Tribunal must consider:

- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
- (b) the wishes of the proposed represented person, as far as they can be ascertained; and
- (c) the wishes of any nearest relatives or other family members of the proposed represented person; and
- (d) the desirability of preserving existing family relationships

Most guardianship orders are limited and commonly provide the power to make decisions on behalf of the represented person regarding their accommodation and access to services. Some orders also include decisions about whom the person may live with or have access to. The Tribunal may also specify that a guardian make decisions concerning medical treatment, as defined in the *Medical Treatment Planning and Decisions Act 2016*, where the person does not have decision-making capacity in relation to that treatment.

Guardians can only make decisions that are specified in the order from the Tribunal. Guardians do not act as case managers, administrators, support coordinators or carers.

Most guardianship orders are made for 12 months before they are required to be reassessed; the longest they can be made is three years before they need to be reassessed. For a further order to be made, it must be demonstrated at the VCAT reassessment hearing that there are still current decisions to be made by a guardian (not decisions to be made sometime in the future).

A guardian can be a suitable person known to the person (known as a private guardian). Where there is no such person, the Tribunal appoints the Public Advocate and she delegates her powers to one of her Advocate Guardian staff members. A guardian must act in the best interests of the represented person and as far as possible act:

- (a) as an advocate for the represented person; and
- (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community; and
- (c) in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person; and
- (d) in such a way as to protect the represented person from neglect, abuse or exploitation; and
- (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.

Looking After Children: Looking After Children provides the practice framework for good care management. Each young person should have up-to-date Looking After Children essential information records, assessment and progress records, and either a Care and Placement Plan (0–14 years) or a 15+ Care and Transition Plan.

VCAT Liaison Officer: OPA has two experienced Advocate Guardians who share this fulltime position based at the William Cooper Justice Centre in the Melbourne CBD. Their duties include; providing support and advice to the VCAT members, registry staff and interested parties at a hearing, representing the Public Advocate when a guardian is unable to attend a hearing and advising professionals and members of the public regarding applications for Administration and Guardianship.

15+ Care and Transition Plan: When young people in care services reach 15 years of age, the Looking After Children 15+ Assessment and Progress Record and the 15+ Care and Transition Plan must be completed as 'living documents', designed to reflect the young person's developmental needs and the actions undertaken to respond to them as they grow and mature through to 18 years of age.