



**Submission to the Australian Law Reform Commission:  
Inquiry into Reducing Legal Barriers for People with  
Disabilities**

**Carers Victoria**

**Submission 27 June 2013**

#### About Carers Victoria

Carers Victoria is the state-wide peak organisation representing those who provide care. We represent more than 700,000 family carers across Victoria – people caring for ageing parents, people with disabilities, and people with mental illness or chronic health issues.

Carers Victoria is a member of the National Network of Carers Associations, as well as the Victorian Carer Services Network. Carers Victoria is a non-profit association which relies on public and private sector support to fulfil its mission with and on behalf of carers.

Carers Victoria is a membership based organisation. Our members primarily consist of family carers, who play an important role in informing our work, contributing to advocacy and strategic aims, and distributing information more widely to other carers.

This submission was prepared by Carers Victoria's Policy Team.

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## **Introduction**

Carers Victoria thanks the Australian Law Reform Commission for the opportunity to make a submission to the Inquiry into Reducing Legal Barriers for People with Disabilities.

Carers Victoria's priorities has prevented it from addressing a broad range of Commonwealth laws and legal frameworks that impact on people with a disability's recognition before the law and exercise of legal capacity. However, Carers Victoria has been able to address the following issues:

- supported and substitute decision making (including the proposed Victorian guardianship reforms and constraints of the privacy regulations)
- electoral matters, and
- access to justice and legal assistance.

This submission highlights Carers Victoria's work in these areas in Victoria, which may be useful to the inquiry.

## **Supported and substitute decision making**

### **For people with lifelong decision making disabilities**

Together with caring families, Carers Victoria has advocated to reduce the barriers currently experienced by people with a disability and their families in current adult Guardianship and Administration mechanisms. There are significant differences in the needs of:

- people with a disability who have had, but lose, decision making capacity, and
- people with a disability who have always needed support to make and communicate decisions.

The nature of support provided by friend or family decision makers to these respective groups must be different. For the former group, people who act as enduring guardians for them can make decisions in terms of knowledge of, and communication about, the person's likely preferences; whereas, for the latter group, often parents, other family members or significant friends or paid staff may need to make judgements informed by their knowledge of the individual's personality, history, and potential for informed decision making – perhaps a more difficult task.

We are pleased that DisabilityCare Australia will operate using an assumption of capacity and introduce supported and substitute decision making, using as-required, appropriate tools to assist communication. The introduction of 'plan' and 'communication' nominees will assist this process, but only in relation to the operation of the DisabilityCare Australia services. It will also use the process of substituted judgement.

Barriers which exist for families of people with significant decision making disabilities in relation to other social and civic institutions remain unaddressed.

Under the current regime adults with lifelong disability are in legal limbo. They do not have the legal supports that the rest of us take for granted. Once over eighteen years of age, they are regarded as 'independent adults'; therefore, privacy laws impact on whether or not families are involved in, or are informed about, key decisions.

The Victorian Civil and Administrative Tribunal's (VCAT) appointment of guardians is limited due to the 'last resort' nature of guardianship orders. Guardianship orders are limited

to single, short-term life decisions. People with lifelong decision making disabilities cannot appoint, or be supported to appoint, someone else to act or speak as their Enduring Power of Attorney (EPA) or Guardianship.

While families generally look out for their best interests and support their decision making, people with lifelong disabilities are open to very poor decision making by public instrumentalities such as health services, Centrelink and landlords. They have no one who can legally speak on their behalf.

***Proposed Victorian reforms in the Guardianship and Administration Act 1986 will address some of these barriers.***

Examples are of these reforms are:

- Allowing applications to VCAT for supported decision making, co-decision making or substitute decision making orders, including a proposed mechanism for prehearing meetings of significant people. This will allow for the formalisation of representation arrangements when informal family support with decision making is insufficient in representing the needs of the person to public institutions.<sup>1</sup>
- Improved communication and education of families or friends concerning specified orders and how their role is exercised.
- Ongoing training for health professionals in understanding the new representation system.
- Capacity for families to file succession documents with VCAT outlining their wishes about future decision making for their family member when they can no longer care.
- The recommendations allow effective advance planning for people with significantly impaired decision making capacity who are unlikely to be able to make their own decisions in the future. This includes orders for substitute decision makers.
- Allowing personal appointments (by the person with a disability) or VCAT appointments of substitute, and supported decision makers, in advance. E.g., Enduring Guardians and Enduring Attorneys. This allows people with less significant decision making disabilities to be supported to make personal appointments of people to represent them in the future.<sup>2</sup>
- State and territory tribunals must increasingly meet and engage with the person with a disability, their family (as appropriate), and significant others when hearing or prehearing meetings are arranged.

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<sup>1</sup> Currently family members and friends will often assist people with lifelong decision making disabilities with day-to-day decision making about financial matters, life choices, lifestyle and relationships as informal supported decision makers or informal substitute decision makers.

Family members and/or friends are increasingly experiencing difficulties in representing or supporting the decisions of their adult son, daughter, relative or friend to increasingly risk averse institutions such as Centrelink, banks and other financial institutions, power companies, Medicare, landlords, medical professionals and services providers. This is a consequence of:

- privacy regulations, and
- the lack of family access to enabling and authorised representation mechanisms.

<sup>2</sup> Currently people with lifelong decision making disabilities are legally regarded as adults at eighteen years of age, but:

- They can rarely nominate their own Enduring Attorneys or Guardians. Their ability to understand the nature and effect of nominating people to act as their future Enduring Attorneys or Guardians is commonly queried, even where they understand or can be supported to understand the purpose of such decisions. Their preferences about their future support and representation can be ignored.
- There is no clarity in current law about how it is determined that a person does or doesn't understand the nature and effect of this decision. A clearer definition of capacity in the proposed reforms may clarify this.
- Where family lawyers have witnessed EPA arrangements in good faith, the right of the appointed attorneys can be challenged on capacity grounds.

*The different systems for adult representation in the various states and territories need modification to develop a consistent national approach with orders or appointments of representatives being recognised across state or territory borders. This will require collaboration in working towards a National Legal Representation framework.*

### **For people with acquired decision making disabilities (accident, age or chronic illness related)**

The proposed Victorian online register of substitute, co- or supported decision makers (whether personal appointments or tribunal appointed) should assist with the representation of the person with a disability when appointed enduring attorneys (usually family or friends) are challenged by risk averse institutions.

### **For people who have periods of mental illness**

The proposed advance statements and nominated persons scheme (outlined in the proposed reforms to the Victorian *Mental Health Act 1986*), have the potential to ensure the person with a mental illness can express their preferences concerning the management of their affairs during periods of acute illness.

## **Electoral matters**

Below is a brief list of issues we see as important in electoral matters. We have worked with the Victorian Electoral Commission concerning these matters over the last few years.

- Currently people with decision making disabilities can be exempted (on request) from the electoral roll.
- The Victoria Electoral Commission has made significant efforts to ensure improved access to voting or polling booths by people with physical or sensory disabilities, as well as developing and delivering education programs concerning electoral systems for some adults with decision making disabilities.
- Discriminatory practices of exempting most people with a cognitive disability on the grounds of ‘capacity’ need to be reconsidered with regard to the development of supported decision making practices.

## **Access to justice and legal assistance**

In general terms, Carers Victoria supports the recommendations of the ‘Inquiry into access to and interaction with the justice system by people with an intellectual disability, their families and carers’ (2013), developed by the Parliament of Victoria’s Law Reform Committee.

While it has 47 recommendations, which we broadly support, the key ones for caring families are:

- Recommendation 1. The development of a centralised database for the collection of statistics on people with an intellectual disability or cognitive impairment who come into contact with the justice system, prosecution rates and outcomes. Carers Victoria is aware that the criminal justice system is too often the inappropriate ‘end point’ for ‘offenders’ with an intellectual disability or cognitive impairment.
- Recommendations 7 and 8. The need for police policy manuals to provide guidance (separately) on identifying people with mental illness, intellectual disability or cognitive impairment respectively, and to define appropriate responses. This includes:

- The development of simple indicative screening tests. (Recommendation 9.)
- Regular police revision training on issues surrounding interaction with people with an intellectual disability or cognitive impairment. (Recommendation 12.)
- These recommendations should also apply to the Law Institute of Victoria and Victorian Bar. (Recommendations 22 and 23.)

Carers Victoria is broadly supportive of the volunteer Independent Third Person Program (Office of the Public Advocate) as one option to assist vulnerable people with an intellectual disability or mental illness with police interviews and statement developments. However, we consider that:

- Where people with these conditions live with, or are regularly and positively supported by family carers, these people should be first point of call as an Independent Third Person (unless the person with an intellectual disability or mental illness objects).
- Friend and family carers are frequently better equipped with knowledge of the person's unique needs, communication strengths, 'capacity' and need for assistance.