

**Equity, Capacity and Disability in Commonwealth Laws
Issues Paper**

Submission – January 2014

Attention: Australian Law Reform Commission

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1. Background

The Victorian Disability Services Commissioner (DSC) commenced on 1 July 2007 under the *Disability Act 2006* (Victorian Disability Act) to improve services for people with a disability in Victoria.

This independent statutory office works with people with a disability and disability service providers in Victoria to resolve complaints.

Our complaints resolution process is free, confidential and supportive and we encourage and assist the resolution of complaints in a variety of ways including informal approaches to resolution, assessment conferences, conciliation processes, or under certain circumstances through investigations.

We research ways to improve outcomes for people with a disability and improve disability services' complaints systems. We also provide capacity development activities for people with a disability, their families and disability services through a variety of education and information. Our approach to our work reflects the objectives of the Victorian Disability Act and our values and principles that are aligned to the *United Nations Convention on the Rights of Persons with Disabilities*.

Since the establishment of this office some six and a half years ago we are able to provide comments and proposals based on the evidence and knowledge we have gained in responding to over 3,500 matters to date. Victorian disability service providers also readily contribute to our growing body of knowledge by (as provided for in the Victorian Disability Act) reporting each year on the number and types of complaints they received and how they were resolved. This information is used to identify systemic issues and inform the ongoing development of the disability service system.

The comments and proposals outlined in this submission are informed by our experience in applying the Victorian Disability Act and the lessons learnt from complaints, which we have identified from service provider's data and our own data and experience in resolving complaints. We provide these for the consideration by Australian Law Reform Commission in order to achieve the best possible outcomes for people with a disability.

2. Summary of key areas addressed by this submission

We commend the examination of legal frameworks that either directly or indirectly impact on the recognition of the equal rights of people with disability before the law, and we note the breadth of the issues dealt with by this Inquiry.

Over time, our office has become aware of systemic issues and practices that impact the rights of people with a disability, some of which are associated with gaps within existing legal frameworks. We have taken the opportunity to respond to these matters through submissions and consultation processes. We have included our past submissions for your consideration where this is relevant.

We appreciate the opportunity to contribute to this Inquiry and have provided comment on the following questions posed by the Issues Paper:

- Question 2 What changes, if any, should be made to the National Disability Strategy (NDS) 2010–2020 to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?
- Question 10 What issues arise in relation to competition and consumer law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to competition and consumer law to address these issues?
- Question 12 What changes, if any, should be made to the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?
- Question 23 What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?
- Question 36 In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?
- Question 37 What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?

We trust our comments will be considered in the preparation of the proposed Discussion Paper in April 2014.

We would also welcome any request to provide further information about our submission either personally or in writing.

3. Response to specific areas to be considered by this Inquiry:

The following comments and examples have been drawn from the experience gained from over 3,700 enquiries and complaints dealt with by the Disability Services Commissioner (DSC), and 8,400 complaints reported by disability service providers. Much of the work of the office focuses on promoting the rights of people with a disability to speak up, for their voice to be heard and their individual capabilities recognised. The Disability Services Commissioner has also produced a paper on *'Safeguarding People's Right to be Free from Abuse: Key considerations for preventing and responding to alleged staff to client abuse in disability services'*. June 2012 This paper addresses the role of regulatory and legislative safeguards, including the role of complaints mechanisms and natural supports for people with a disability. A copy of this paper is attached [Attachment 1].

Question 2 What changes, if any, should be made to the National Disability Strategy (NDS) 2010–2020 to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?

- A) The National Disability Strategy (NDS) would benefit from a concerted, joined up, sustained national public awareness campaign that raises the profile and recognition of the human rights of people with a disability (Relates to Article 8 of the UN Convention on the Rights of Persons with Disabilities.)

The promotion of accessible information in private and public entities should also be a feature (refer to Article 21) given the direction of the National Disability Insurance Scheme.

- B) Greater emphasis should be given to the need for improved 'reach and effectiveness of all complaint mechanisms' (NDS 2.6). This would:
- ensure the participation of people with a disability in social and political life;
 - strengthen the capacity of (and awareness in) the community of the rights of people with a disability, and;
 - ensure appropriate safeguards are in place for equal recognition before the law in accordance with Article 12.

The development of nationally consistent capacity development and practice model for the resolution of disability complaints is desirable.

An educative and partnership approach to this is critical to ensure that non-disability complaints system are cognisant of the historical context, fear, engagement and practice strategies.

- C) Refer also to response in Question 10.

Question 10 What issues arise in relation to competition and consumer law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to competition and consumer law to address these issues?

Whilst a person with a disability may have a right to pursue established consumer law pathways, lack of accessible practices and insight into the barriers to people with disability raising issues hinders access to mainstream provisions. [See also to response Question 2B.]

Question 12 What changes, if any, should be made to the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

It is our observation that there has been insufficient attention and conversation around the development of a national approach to the issues of safeguards for people with a disability participating in the NDIS. Whilst we understand the responsibility for safeguards during the NDIS trials falls to States and Territories, it is critical that a national approach is adopted.

The National Disability Complaints Commissioners Group has a shared perspective of the principles of safeguards in an NDIS and this is attached for your reference. [Attachment 2]

In support of this view, we also attach a summary of the references made to the Senate Community Affairs Legislation Committee as part of the public hearings regarding the NDIS Bill [Attachment 3]. The references reiterate the necessity of an independent complaints process.

A national model will ensure that participants of the scheme retain freedom of movement and consistency in protections afforded under the NDIS.

Question 23 What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?

1. The Disability Services Commissioner has made two submissions that are relevant and are attached for your consideration.
 - 1) Submission to the Victorian Parliament Law Reform Committee: *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*, October 2011 [Attachment 4]

- 2) Submission to the Victorian Law Reform Commission: *Review of Guardianship Legislation: Consultation Paper 10*, May 2011 [Attachment 5]

In regards to the Victorian Parliament Law Reform Committee's Inquiry into the access to and interaction with the justice system, the Disability Services Commissioner provided evidence at the Committee's public hearings. The Public Hearing extract [Attachment 6] provides notable examples of systemic issues that prevent access to justice for people with a disability. In reading the final report of that Inquiry, you would also note references to the Disability Services Commissioner's evidence.

In regards to the approaches to supported decision making, DSC supports proposals to have a consistent national approach to supported decision making, with principles as outlined in DSC's submission to the Victorian Law Reform Commission.

Question 36 In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?

The Disability Services Commissioner provided feedback to the draft National Framework in June 2013, a copy of which is attached for your consideration [Attachment 7]. Amongst other things, this feedback highlighted the importance of the development of a consistent legislative basis to underpin the framework. From the experience of our office, both through dealing with complaints about the use of restrictive practices and through our collaboration with the work of the Senior Practitioner in Victoria, we suggest that the framework should explicitly address the role of independent monitoring, and independent processes for dealing with complaints, review and appeal of decisions to use restrictive practices.

Question 37 What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?

The NDIS promotes freedom of choice and movement of supports. It is therefore important that there are no barriers to safeguards for people with a disability being consistently implemented across jurisdictions. Consistent approaches and regulations should sit across government portfolios and jurisdictions. Currently a person living in a supported accommodation has the protections related to restrictive interventions and positive behavioural support (in Victoria), however when the person goes to school or employment this does not apply.

3. Attachments

1. Disability Services Commissioner, Learning from Complaints. Occasional Paper No.1 *Safeguarding People's Right to be Free from Abuse: Key considerations for preventing and responding to alleged staff to client abuse in disability services*. June 2012
2. Safeguards and the NDIS – National Disability Complaints Commissioners Group
3. Extracts from transcripts of Senate Community Affairs Legislation Committee public hearings on the National Disability Insurance Scheme Bill 2012, March 2013: Summary of references to independent complaints
4. Disability Services Commissioner, *Submission to Victorian Parliament Law Reform Committee, Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*, October 2011
5. Disability Services Commissioner, *Submission to Victorian Law Reform Commission: Review of Guardianship Legislation: Consultation Paper 10*, May 2011
6. Public hearing transcript - Victorian Parliament Law Reform Committee *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*
7. Disability Services Commissioner, *Feedback on Draft Proposed Framework for Reducing the Use of Restrictive Practices in the Disability Sector*, June 2013