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Mr Graeme Innes AM
Part-time Commissioner
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: disability@alrc.gov.au

Dear ~~Mr~~ Graeme Innes

Equality, Capacity and Disability in Commonwealth Laws

Thank you for the opportunity to provide a submission in response to the Issues Paper entitled *Equality, Capacity and Disability in Commonwealth Laws*.

Victoria Legal Aid is a leader in the provision of legal services to people with a disability and people with mental illness, with one in five of our clients disclosing that they fall within this category. We prioritise a people with mental illness or disability requiring legal assistance with criminal charges, family law matters or legal problems that fall within our diverse civil law practice.

The attached submission responds to the questions posed in the Issues Paper that relate to priority areas of concern for Victoria Legal Aid. These relate to the recognition of legal capacity, improvements to our disability discrimination regime and eligibility requirements for the Disability Support Pension. In the section which follows, we have highlighted priority issues relating to accessibility of legal services and remedies.

If you have any queries about this submission or wish to discuss its content further, please contact Dan Nicholson, Director of Civil Justice Access and Equity on (03) 9269 0679.

Yours faithfully

Bevan Warner

BEVAN WARNER
Managing Director

Victoria Legal Aid

Lawyers And Legal Services

Equality, Capacity and Disability in Commonwealth Laws

Submission to the Australian Law Reform Commission's Issues Paper

January 2014

Civil Justice – Victoria Legal Aid

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About Victoria legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority with a mandate to promote social justice and protect legal rights in Victoria, particularly the rights of those who are marginalised or disadvantaged in our community. We do this through our access and equity, civil, criminal and family law programs. We also deliver early intervention programs, including community legal education, and assist more than 80,000 people each year through Legal Help, our free phone advice service.

VLA is a leader in the provision of legal services to people with a disability and people with mental illness, with one in five of our clients disclosing that they fall within this category.[1] VLA assists those with mental illness or disability facing criminal prosecution, in family law and across our civil law practice.

Across all of our practice areas, we prioritise clients with a disability (physical, intellectual, or cognitive) and clients who experience mental illness. In practice, this means that people with a disability are prioritised for grants of assistance, representation by duty lawyers, advice and minor assistance. Our prioritisation recognises the increased vulnerability to legal problems and the barriers which this client group face in accessing the justice system without legal help.

VLA has a dedicated Mental Health and Disability Advocacy team in our Civil Justice program. We are the largest provider of legal advice and representation in matters relating to the *Mental Health Act 1986* (Vic) and the *Disability Act 2006* (Vic). On a daily basis, we protect the rights of our clients to participate in decisions that affect them. More specifically, we provide specialist assistance people with disabilities in matters relating to:

- Involuntary mental health treatment;
- Guardianship and administration orders;
- Supervised treatment orders and other compulsory disability treatment under the *Disability Act 2006* (Vic);
- Supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic);
- Disability discrimination;
- Infringements and debt; and
- Social security.

VLA also provides targeted community legal education to people with a disability. This work includes partnering with Victoria's Department of Education and Early Childhood Development to create a suite of teaching tools for high school special education teachers on three key legal topics relevant to young people with a mild intellectual disability, and producing and distributing a range of free legal information materials on a variety of legal topics, including Securing Their Future, a publication about financial planning for parents of children with a decision-making disability.

[1] VLA Eighteenth Statutory Annual Report 2012-2013, p 6.

Structure of this submission

Our submission draws from the diverse experiences of our lawyers in assisting Victorians with a disability. In order to frame our response, we have highlighted up front the prevalence and depth of legal difficulties for this client group.

We have sought to focus the ALRC's attention on a small number of law reform suggestions which we consider to be particularly pressing. These relate to the recognition of legal capacity, improvements to our disability discrimination regime and eligibility requirements for the Disability Support Pension. In the section which follows, we have highlighted priority issues relating to accessibility of legal services and remedies. Here, the focus is on the indispensability of adequately resourced legal services and community legal education as well as steps which courts and tribunals could take to improve accessibility for people with a disability.

VLA welcomes the opportunity to comment on the ALRC's Issues Paper and would be open to providing further information or responding to any specific questions that the ALRC may have in the course of its inquiry.

For ease of reference, the following VLA submissions may be of interest to the ALRC:

- *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) – Victorian Law Reform Commission, August 2013.
- The National Disability Insurance Scheme Bill 2012 – Commonwealth Senate Community Affairs Committee, January 2013.[2]
- Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2013 – Senate Legal and Constitutional Affairs Committee, December 2012.
- Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers – Parliament of Victoria Law Reform Committee, November 2011.
- Guardianship Review – Victorian Law Reform Commission, June 2011.

[2] We note that this submission on the NDIS made recommendations on various matters relevant to questions 12, 13 and 14 of the ALRC's Issues Paper.

The prevalence of legal problems for people with a disability

People with a disability are overrepresented in the justice system. According to the Law and Justice Foundation's 2012 Australia wide survey into legal needs in Australia (the LAW Survey), they are twice as likely to experience legal problems than those who do not have a disability.[3] People with a disability are also:

- More likely to experience **substantial legal problems**;
- More likely to experience **multiple legal problems**;
- **More likely to take action** in response to a legal problem; and
- **Less likely to achieve a resolution** to their legal action once taken.

The study also highlights the interrelated challenges commonly experienced by those with a disability. This group is more likely to suffer multiple types of disadvantage, including poverty, unemployment, poor housing, homelessness, low educational attainment and (other) health problems.[4]

In addition, this client group experiences some of the greatest challenges accessing the justice system. Some of the systemic barriers that may impede access and participation in the legal system include:

- Stress which may hamper the ability of people with mental illness and intellectual disability to manage legal issues;
- Cognitive impairment which can create barriers in understanding legal documents and processes;
- Problems with time management which can lead to difficulties managing documents and appointments, and complying with timeframes;
- Communication problems associated with the symptoms of mental illness;
- Lower than average education levels;
- Features of the courtroom environment such as the formality and structure of courtrooms, can intimidate people with a disability and at times even exacerbate their symptoms;
- A perceived lack of credibility linked to the perception that people with mental illness are less honest and less credible as a result of their illness; and
- Failure to identify or recognise a person's mental illness resulting in no allowance being made to cater to the individual's needs, or the illness not being taken into consideration in determining the outcome of the matter.

[3] Law and Justice Foundation (2012) *Legal Australia-Wide Survey – Legal Need in Australia* (the LAW Survey), p 68.

[4] Ibid; Law and Justice Foundation (2013) *Law and disorders: illness/disability and the experience of every day problems involving the law*, p 6-7.

Law reform

The presumption of capacity[5]

VLA welcomes the Review's emphasis on the foundational principles outlined in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), particularly in relation to a presumptive right to legal capacity and the importance of systems which enable supported rather than substituted decision making.

Our experience representing clients with disability confirms that people are disempowered when their freedom to make decisions concerning health care, accommodation or finances is taken away and are frequently distressed and frustrated by the experience. This has been observed for example in the advice and representation which we regularly provide regarding decisions made under the *Guardianship and Administration Act 1986* (Vic) as well as involuntary treatment orders made under the *Mental Health Act 1986* (Vic). In our experience, our clients have better outcomes where they are given the opportunity to meaningfully participate in decisions about the matters that impact on their lives. We give effect to the individual autonomy of our clients when receiving client instructions and acting upon those instructions.

NDIS

VLA welcomes the inclusion of a presumption of capacity within the *National Disability Insurance Scheme Act 2013*, s 17A(1)[6] but expresses disappointment that the presumption was qualified by the phrase "so far as is reasonable". Presumptions are rebuttable. For the presumption of capacity to significantly improve standards, it should be allowed to stand until there is a basis for it to be rebutted. Our concern is that a presumption which only applies "so far as is reasonable" in the first instance will be too easily dismissed by decision makers, resulting in only a limited shift towards recognition of capacity in practice.

Capacity assessment principles

The Issues Paper, at [102], refers to the following "capacity assessment principles" outlined in a NSW Government *Capacity Toolkit*:

- Always presume a person has capacity;
- Capacity is decision specific;
- Don't assume a person lacks capacity based on appearances;
- Assess the person's decision-making ability not the decisions they make;
- Respect a person's privacy; and
- Substitute decision-making is a last resort.

VLA supports the introduction of capacity assessment principles – and has previously expressed this view to the Victorian Law Reform Commission's (VLRC's) review of guardianship law. As noted in the Issues Paper, at [103], the VLRC agreed with that submission, recommending that capacity

[5] This section addresses Issues Paper question 4.

[6] In January 2013, Victoria Legal Aid made a submission to the Commonwealth Senate Standing Committee on Community Affairs regarding the National Disability Insurance Scheme Bill 2012. Within that submission, we recommended that the Bill be amended to "give statutory force to the presumption that a person has capacity."

assessment principles similar to those outlined above should be incorporated into Victorian guardianship legislation.

To the extent that Australian legal regimes allow for substituted decision making, it is imperative that a high bar is imposed for the removal of legal capacity and that rigorous scrutiny and regular review is applied to every instance in which a person's legal capacity is denied. In our experience, decisions about capacity often do not go through as rigorous a process as they should with serious consequences for the rights of the person affected.

VLA does not express a preference as to the statutory and constitutional arrangements under which such principles would be introduced into legislation, other than to say that any "principles based regulatory approach" (as discussed at paragraph [105] of the discussion paper) should make clear that their application is mandatory and should allow affected individuals to request reasons for and seek review of decisions which limit capacity.

As noted in the Issues Paper, at [95], the standard for capacity currently varies throughout Australia depending on the area of law and the jurisdiction. A nationally consistent approach to capacity amongst administrative decision makers, health professionals and judicial officers is likely to have benefits including greater accessibility and comprehensibility of the law. VLA considers however the benefits of a nationally consistent approach to be less important than high standards. State or territory based regimes which enforce a presumption of capacity in various forms would be preferable to nationally consistent laws which weakened the presumption.

Disability discrimination[7]

Protection against discrimination ensures an even playing field for those with a disability. The availability of anti-discrimination protections and procedures contained in the *Fair Work Act 2009* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Human Rights Commission Act 1986* (Cth) makes a significant difference to the lives of disabled persons affected by discriminatory practices.

Discrimination law does not accommodate persons unable or unwilling to complain

A significant weakness of Australian anti-discrimination law is its reliance on individuals to hold discriminators to account. This is particularly problematic in situations of workplace discrimination and harassment, where complainants and witnesses are often financially dependent on the discriminator.

The great majority of people with legitimate complaints under Australian anti-discrimination law do not report the conduct or make a complaint. It is our experience that clients are deterred by:

- Fear of negative consequences for themselves, particularly in employment matters, and shame in connection with the conduct;
- Difficulties proving the conduct, particularly due to lack of access to documents, such as emails, and other information held by the perpetrator;
- A lack of understanding of their rights or how to exercise them, in conjunction with the complexity of the law and legal processes;
- Disadvantage due to the difficulties created by their disability;
- The poor cost-benefit of litigation (even if the complaint is successful) due to the fact that compensation payments are low, and in any event, many complainants want non-monetary remedies such as an apology, a policy change or equal opportunity training in their workplace.

The result is that the current regime only operates to effectively protect disabled persons who have been discriminated against in relation to a small minority of cases.

A positive duty to eliminate discrimination

There is currently a non-enforceable positive duty on duty holders to eliminate discrimination under the *Equal Opportunity Act 2010* (Vic).[8] A positive duty under Commonwealth law to eliminate discrimination would protect individuals who are not able (for the reasons outlined above) to rely on the current complaints based anti-discrimination framework. Such a duty would require existing duty-holders to take proactive action to eliminate discrimination. We note that this obligation is indirectly invoked by the vicarious liability provisions (imposing liability on an employer if disability discrimination is established), however these obligations are only imposed if a complaint is made.

ALRC - own motion investigations and enforcement activity

We further submit that the Australian Human Rights Commission (AHRC) should be empowered to directly encourage and enforce compliance with anti-discrimination obligations. Currently the AHRC are able to ask parties to attend a conciliation and report to the Minister. The AHRC should be given

[7] This section addresses Issues Paper questions 6 and 7.

[8] Subsections 14 and 15.

similar powers and functions to those of state agencies responsible for promoting compliance with workplace safety laws and the Fair Work Ombudsman in relation to breaches of the *Fair Work Act 2009* (Cth). For example, the AHRC should be authorised to:

- Investigate the allegations;
- Compel evidence for investigations;
- Agree to enforceable undertakings;
- Issue compliance notices; and
- Issue administrative penalties.

This would help to remove the burden of enforcing anti-discrimination laws from the individual complainant, and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation. As discrimination does not occur in the workplace only, the AHRC, as the regulatory body administering Commonwealth human rights and anti-discrimination law, should be empowered and resourced to investigate and enforce compliance with disability discrimination law.

While the Fair Work Ombudsman is empowered to undertake own motion investigations and compliance actions in relation to disability discrimination, they are only able to undertake a limited range of activities and actions due to limited resources. Regulators with powers to police discriminatory practices should be adequately resourced to do so.

The Disability Support Pension[9]

Disability Support Pension Impairment Tables

Section 94(1) of the *Social Security Act 1991* (Cth) sets out the eligibility criteria for a disability support pension (DSP). Amongst the requirements are:

- A physical, intellectual or psych iatric impairment;
- That the person's impairment is of 20 points or more under the Impairment Tables; and
- In most cases[10] a continuing inability to work.

The criteria for assessment of 'impairment' changed on 1 January 2012 following the introduction of the *Social Security and Other Legislation Amendment Act 2011* (Cth). The new Impairment Tables[11] impose a higher bar for eligibility for the DSP. As a result, people with serious disability are being excluded from the Disability Support Pension in unacceptable circumstances.

Ineligibility for the DSP means that the applicant is likely to have to rely on the Newstart allowance, acknowledged by both welfare groups and the Business Council of Australia,[12] as being so low that it effectively acts as a barrier to gaining employment. A person relying on Newstart in Australia is living below the poverty line (defined as 50% of median disposable income).

DSP participation requirements

Since September 2011, applicants whose impairment is not of 20 or more points under one of the Impairment Tables, are required to have "actively participated" in a "program of support" as a condition for eligibility for the DSP. A program of support must be designed to assist the person to either prepare for work, find work or maintain work.

In practice, we are seeing numbers of cases where people are forced to meet the program of support requirements in circumstances where it was apparent from the outset that participation in the program of support would not assist the person to find work.

As noted in the Issues Paper, at footnote 262, pensions have traditionally not included participation requirements such as the "program of support" requirements. VLA supports policy design which encourages increased workforce participation amongst disabled Australians. It is well established that employment brings with it health related and socio-economic benefits in addition to the financial benefits of employment.

Noting the desirability of employment, policy design in this area must take account of the realities of the labour market. Welfare policy should be designed to incentivise work where work is realistically attainable. To refuse access to the disability support pension in order to incentivise workforce participation in circumstances where the applicant has no realistic prospects of employment is unreasonably punitive.

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[9] This section addresses Issues Paper question 26.

[10] A continuing inability to work is not required where s 94(1)(c)(2) applies.

[11] Now found within the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*.

[12] ACOSS (2012), *Poverty in Australia*; Business Council of Australia (2012), *Submission to the Senate Education, Employment and Workplace Relations Reference Committee Inquiry into the Adequacy of the Allowance Payment System for Jobseekers and Others*.

The assessment of eligibility for the DSP should take account of both the person's capacity or 'impairment', as well as the market reality. Sometimes, there is no reasonable prospect that a person could be employed. This may be because of their disability, because of the discriminatory treatment that they face as a result of their disability or because of the unemployment rate. There are factors which determine employability which disabled persons have no control over.

When deciding whether a person has a continuing inability to work because of an impairment under s 94(3), the decision maker is not permitted to consider the availability of work in the person's locally accessible labour market . In VLA's view, the availability of work in a person's locally accessible labour market is a relevant consideration. Decision makers should be allowed to take it into account, particularly where the person has established community or other support networks.

Case study: Jennifer

Jennifer was born with significant impairments and needs to use a wheelchair for almost all facets of daily living especially outside her apartment. With cerebral palsy, epilepsy, and significant hearing and vision impairments, Jennifer has always faced many hurdles in obtaining and keeping employment. She has received the disability support pension more or less continuously since 1988 when she was 18 years old.

In 2012, Jennifer's eligibility was reviewed under the new Impairment Tables. She was assessed as capable of working for more than Centrelink's minimum figure of 15 hours per week.

Jennifer was keen to work, and has occasionally been able to do so part-time with intensive support. Over a two month period prior to her hearing before the Social Security Appeals Tribunal, she had sent out over 100 resumes and applied for over 50 positions; receiving only one response. Unfortunately, this also fell through once the employer became aware of Jennifer's disabilities.

Chronic pain and frequent hospitalisation mean that everyday tasks are exhausting for Jennifer. Her doctor said that Centrelink's judgement that she could work regularly for more than 15 hours was unrealistic.

After two reviews and a hearing before the Social Security Appeals Tribunal supported by VLA, Centrelink's decision was overturned and Jennifer's DSP was reinstated.

Jennifer had a strong network who encouraged and assisted her to take up her rights, but many people get overwhelmed by complex and confusing processes and find the review system hard to navigate alone.

Access to legal help and remedies[13]

Funding for legal advice and advocacy

Victoria Legal Aid's submission to the Commonwealth Senate Standing Committee on Community Affairs regarding the National Disability Insurance Scheme Bill 2012 is noted above. We wish to highlight the aspect of that submission which deals with good administrative decision making, and the indispensability of well funded legal services in ensuring that this is achieved (see particularly pages 8 and 12).

Under the heading "Recognising the role of advocacy under the NDIS", the submission highlights the preventative and remedial value of legal advocacy and notes our disappointment at the limited attention and resources which legal advocacy received within the NDIS regime. While limited funding was allocated for legal assistance over the four year NDIS launch period, the amount allocated will leave a significant number of vulnerable people without legal services.

VLA understands that, given limited government resources, allocating money to health and other essential services provision is more attractive than allocating money to lawyers. This approach is however misguided in relation to the low cost legal services provided by public organisations like VLA and the community legal sector. The scheme will not always be able to help those it's designed to assist if legal assistance is not available. This is because people with a disability often need support to navigate large bureaucratic processes or to challenge an administrative decision. More broadly, legal services are conducive to improved standards as decision makers are held accountable for mistakes and poor practices.

As noted in our submission regarding the NDIS Bill, the consequences of an unrectified mistake can be dire for persons dependent on supports provided by the NDIS or income support payments such as the DSP. Our experience that Centrelink can and does make important mistakes which could not have been rectified without legal assistance is supported by a 2011 Commonwealth Ombudsman's report which highlighted systemic problems in Centrelink's processes.[14]

Finally, legal advocacy can assist to resolve matters before they progress further. In our experience, approximately 95 per cent of matters relating to disability support pensions can be resolved with the support of legal assistance without needing to proceed to hearing. This reduces pressure on court lists and can represent a saving for government.

Funding for community legal education

In addition to legal advice and advocacy, adequate resourcing for community legal education (CLE) has significant repercussions for our disabled clients. CLE is a core preventative legal service of VLA and people with a disability are a priority audience for VLA's CLE work. Proper funding for this work has the capacity to reduce costs, while also improving the lives of persons with a disability.

[13] This section addresses Issues Paper question 23.

[14] Commonwealth Ombudsman (2011), Report No. 04|2011: *Centrelink: The Right Of Review – Having Choices, Making Choices.*

Accessibility of courts and tribunals

As is discussed in the Issues Paper at [189], individuals with a physical disability face significant obstacles in their interaction with Commonwealth courts and tribunals.

Court procedures – accommodating persons with a disability

In VLA's experience, people with intellectual disabilities are extremely reliant on dedicated lawyers to guide them through the court process. People with intellectual disabilities may be inclined to simply agree with directions or say they understand things even when they do not. In our experience, clients with intellectual disabilities often have significant difficulties understanding the court process. More could be done to allow them to participate meaningfully in proceedings.

Flexibility should be encouraged in commonwealth court and tribunal proceedings to adapt procedures (where appropriate) in the following ways:

- Excusing a disabled person from attending administrative mentions or directions hearings where he or she is represented;
- Regular rest breaks during trials and other extended hearings;
- Priority listings;
- The use of clear and simple (rather than esoteric) language;
- The judge or tribunal member sitting at the bar table with the parties to reduce formality and intimidation where appropriate; and
- Regular opportunities for lawyers to explain and clarify understanding during proceedings (akin to the additional time given to language-based interpreters to interpret proceedings).

People with intellectual disabilities may not appreciate the importance of personally attending court at a designated time and may find attending court quite distressing. It is important for courts and tribunals to recognise and be sensitive to the challenges that people with disabilities face when interacting with the justice system. Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach. Registry staff, judicial officers and tribunal members should be educated about the difficulties facing those with a disability and encouraged to exercise discretion in excusing trivial breaches and dispensing with standard protocols where appropriate.

VLA notes the significant effort being made by the AAT to improve accessibility for persons with disabilities, including plain English guides, practice directions relating to NDIS decisions and disability awareness training for staff and members. We strongly support this proposal and consider that it should be endorsed for all federal courts and tribunals.

Judicial recognition/inquiry in relation to intellectual disability or cognitive impairment

People with disabilities which are not immediately apparent (particularly intellectual disabilities) frequently do not volunteer or disclose their disability or may minimise it for a variety of reasons. They may not have been diagnosed, they may not identify as having a disability or they may not wish to highlight it including because they are concerned about potential adverse consequences of doing so.

In addition, people with intellectual disabilities may have some strong functional skills and often develop 'survival' skills, which mask their real difficulties. They may appear, and may strongly desire, to participate in regular activities and transactions, but may not always understand their

obligations or the consequences of their actions. They may also lack confidence and communication skills and so will often depend on family or support people to assist them where such support is available.

The presence of a disability can however be relevant to a correct determination. This was highlighted in the recent case of *Victorian Toll v Taha; State of Victoria v Brookes* [2013] VSCA 37 described in the following case study:

Case study: Taha

Victoria Legal Aid represented Mr Taha who has an intellectual disability and was facing jail because of unpaid fines. In our experience people with disabilities or mental illness receive more fines and have difficulty navigating the system and paying them.

At first instance, a custodial sentence was ordered without the Magistrate being aware of Mr Taha's disability. If the Magistrate had have known, the fines could have been cancelled due to his special circumstances.

VLA successfully argued before the Victorian Supreme Court that magistrates imposing jail terms because of unpaid fines have a duty to make reasonable enquiries about whether people coming before them have special circumstances such as a disability.

Registry staff, judicial officers and tribunal members should be encouraged to give parties and advocates the opportunity to bring to the attention of the court or tribunal a disability while respecting their right not to disclose that disability and not drawing adverse inferences from a decision to provide or not provide that information.