



Submission No. 64



Submission by

Women with Disabilities Victoria

to

Victorian Law Reform Commission's  
Review of Guardianship and  
Administration Act 1986

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## Introduction

**Women with Disabilities Victoria** is an organisation of women with disabilities who support women with disabilities to achieve their rights in Victoria. Our vision is "a world where all women are respected and can fully experience life". Our Mission is to lead the way for Victorian women with disabilities and to improve women's choices by building partnerships and providing a voice for women with disabilities, information and community education.

We welcome this opportunity to provide this submission to the Victorian Law Reform Commission (the Commission) Review of Guardianship Law, and thank the Commission for their support in enabling in depth discussion to ensure that the needs of women with disabilities is included in the process, thereby enabling the impact of gender to be considered.

We will not be answering all the questions posed by the Commission, but rather will focus on those areas where we believe there is a particular concern for women with disabilities.

### 1. Supported Decision making

While the Commission's proposals are a great step forward there is concern that the practical application of how they will work for women with disabilities needs some further thought.

#### a. Assistance to Select a Supporter

While it is appropriate that people with disabilities are able to choose who will assist them to make decisions, experience has shown that women with disabilities may need an independent assessment process to assist them to decide who that person should be. A family member may not always be the best person. For example, dependence on a parent for care coupled with a long history of natural parental authority may render it difficult for women with disabilities to choose against having a parent as supported in decision making.

**Case study:** Terri has Down Syndrome and is aged 57. She has lived at home with Mum and Dad and since leaving special school, has never participated in any activities such as Day Programs or other activities that are not attended by her family. Terri has all of her needs provided by her family, and her disability support pension is managed by her family. Terri's parents are overprotective, which as impacted on her ability to live independently. All decisions about Terri's life are made by her mother. Terri's sister is aware that Terri would like to have more independence and to do some things separate to the family, and would like to assist her to make her decisions. However, because of Terri's dependence on her mother, it is unlikely that she would be able to express that she would like her sister to be the person who assists her to make decisions, particularly if her mother is present.

An independent assessment process is required which will assist women like Terri to explore their wishes in depth without the presence of a carer. As this example illustrates a carer may unwittingly but significantly influence a woman's choice as to who will help her make decisions about her life. An independent assessment process should provide an opportunity for women with disabilities to communicate who they want to take on the role of supporter.

A similar process of interviewing the person with a disability separately of family members who may influence their choice should be undertaken to encourage a proper assessment for all decision-making determinations.

#### **b. Co- Decision Making**

Supported decision making should be available for both personal and financial decisions. Co-signing arrangements currently work well for banking, and it should be possible to extend this concept.

However, it must be noted that there is a danger that the process may not empower the person with a disability if it is not acknowledged that there is a power imbalance. There is concern that if there is a "two to sign" arrangement in place, and there is disagreement about the decision to be made, there needs to be a clear understanding that it is the rights of the person with a disability that is paramount. Co-decision Risk taking should be factored into the decision making process.

## **2. Education for women with disabilities and Advocates**

Education and advocacy are very important aspects that must be included in the implementation of any new laws or processes. Women with disabilities need education about their rights and this should be provided from an independent party. This is of particular importance in relation to reproductive issues and barriers to accessing justice. It is important to recognise the 'ownership' of a woman's body is unique to the woman herself. Historically this has not been the case with a plenitude of examples of violations of women's reproductive rights.

Any information provided needs to be provided in a way that people with disabilities can access and understand, including easy English, plain English, Braille, audio and where necessary through face to face conversations.

Specific education for women with disabilities is required. This could be undertaken by peers such as through the ARCHS Living Safer Sexual Lives program or through a specially funded tailored program.

Further, more increased advocacy is needed for women with disabilities, with assistance for self advocacy and training to ensure that general disability advocacy includes a gender lens.

Given the role of the Office of the Public Advocate's Office, staff and Community Visitors should be provided with training regarding the specific gendered issues

affecting women with disabilities to ensure they take power relations and gender disadvantage into consideration in acting on behalf of women with disabilities. Such training could be undertaken in partnership with Women with Disabilities Victoria.

### **3. Monitoring and Regulation**

More checks and balances are needed to ensure that the needs of women with disabilities are understood and are met. Given the high incidence of violence against women with cognitive disabilities Women with Disabilities Victoria is particularly concerned to ensure their safety and freedom from abuse, whether physical, sexual, emotional or financial abuse. A thorough understanding of gender disadvantage and violence prevention practice is a prerequisite for all involved in monitoring and regulation.

### **4. Victorian Civil and Administrative Tribunal (VCAT) processes**

It is essential that women with disabilities are given an opportunity to express their views in a space that is free from coercion, and the VLRC should consider the complaints mechanisms in place at the Victorian Equal Opportunity and Human Rights Commission or the Disability Services Commissioner. An informal dispute resolution process could assist women with disabilities by ascertaining her wishes, evaluate the matter, and determine the most appropriate person to be appointed as the supporter or substitute decision maker. These mechanisms may assist by requiring less dependence on the VCAT process and shift the focus to the rights of the person.

Established relationships of trust are important for women with disabilities to give them the confidence to speak up and freely.

Attending at VCAT can sometimes be intimidating, and it would be more appropriate for using pre-hearing investigations to gather more information before any hearing, with the aim of resolving matters before needing to go to a hearing. A role similar to family law counselors, who make recommendations to the court, may be an option.

### **5. Administration**

With the increasing move towards individualised support packages there is a need to protect against the exploitation of people with disabilities. Currently, where a woman with a disability receives a disability support pension, in some instances, the money is treated as a part of 'consolidated family revenue' and might not directly go to the benefit of the woman with a disability. In such an instance, it may not be beneficial to the family as a whole to enable independent decision-making. There is a concern that in the same way, any payment for support services may also be co-opted into the family income, and lessen the independence of women with disabilities. There is a concern that money provided under the proposed NDIS to assist with social inclusion may go toward the total household expenses.

**Case Study:** Clarice has a disability support pension which is paid into her account, which is authorized for access by her mother who is on an age pension. While all Clarice's needs are met, the money is used to supplement the family income, and Clarice has no access to funds to enable her to select items she may wish to purchase for herself or to save any money. Clarice would like to purchase gifts for her nieces, but is told she can't.

There must be an acknowledgement that when a person with a disability becomes an adult and they are earning/receiving money, that money needs to be separately accounted for in the family unit.

It is noted that while most people are trying to do the right thing, and only a few are deliberately doing abusing those they support deliberately, many people are doing the wrong thing inadvertently. The person administering the financial affairs must be required to keep separate financial records of the transactions they make on behalf of a woman with a disability. Accountability mechanisms do not need to be onerous for guardians and administrators and attorneys – they just need to acknowledge that the needs of the woman with a disability are paramount in the role they are performing. The requirement for oaths, new principles and training and education are a positive step.

## **6. Gender Impact for Women with disabilities**

Women with disabilities are no different to other women in the community, and have a wide range of abilities, skills and needs. They also have the same aspirations as other women, including the need for the opportunity to live the life they want to live, and to participate in relationships.

It is clear that gender is not considered within general disability frameworks, with a belief that the lived experience is the same for men and women with disabilities. However, it is clear that women with disabilities are less likely to be in paid work, are less likely to be educated and are more likely to be at home. They are less likely to be in programs to assist with independence or take part in day programs. Traditionally they have been viewed as needing 'protection' from society and from sexual exploitation.

Cultural change is occurring and parents are now encouraging children with disabilities to be more independent. Institutionalization and institutional thinking is lessening and we are seeing improved education and advocacy for people with disabilities. In the past women with disabilities may have had little choice but to acquiesce, but today younger women are more aware of their rights and are more likely to question.

Women with disabilities need better opportunities and training to assist them to understand their rights, and to understand healthy relationships. However, women with disabilities still need to have it enshrined in law that they have rights, and that those appointed as guardians are aware of their responsibilities.

The proposed Act should contain positive education requirements. Currently there is a degree of gate keeping by carers and service providers which impact on their lives, and which may put them in danger of exploitation.

**Case Study:** Cassie is 36 years of age, has an intellectual disability and is employed at a supermarket under a supported employment program. When Cassie was at school her parents denied her access to sex education, including contraceptive and healthy living, as they decided that this would encourage her to be sexually active, and that she needed protection. Cassie formed a relationship at her workplace which resulted in pregnancy.

There is a need to ensure that education is provided to women with disabilities and Family Planning Victoria provide good programs which could be expanded. Education needs to occur in schools, institutions, and health services in different regions. At the moment education is ad hoc and is not provided in accordance with an overarching plan.

## **7. Substituted Judgement**

Substituted judgement will remain an issue of concern to women with disabilities. While the shift in emphasis towards putting a woman's interests and wishes first is important there is a concern whether the change will bring about any significant practical difference. Terms such as 'significant harm' and 'significant risk' should be expanded upon to ensure they are clearly understood, and should be articulated in the principles. There needs to be a thorough debate about who gets to decide what significant harm/risk means, with acknowledgement that risk is often used as a restriction and a reason to deny women with disabilities an opportunity to live the lives they want to live, as iterated in the *Disability Act 2006*. Consideration should be given at the time of appointment of an administrator to ascertain the wishes of the person with impaired capacity.

The concept of substituted judgement should apply to financial decisions as well as personal ones. At the moment private administrators appear to consider lifestyle factors when making decisions more than State Trustees, who seem to be more appear to take a restrictive role limiting people on limited incomes to using their income to improve their quality of life.

## **8. Merits Review**

There needs to be an appeal mechanism to challenge unreasonable decisions by administrators. A model similar to that of the Disability Services Commissioner under the *Disability Act 2006* could be implemented. Other appeals mechanisms separate to VCAT should be considered.

## **9. New General Principles**

The principle that "All adults are entitled to the same basic rights" must remain as a stand alone principle. The inclusion of "*and should be empowered to exercise those rights wherever possible*" diminishes the rights of women with disabilities and enables the option of those rights to be dependent on the decisions of others.

An additional principle that states that "All adults who come under the provisions of the Act should be given the opportunity and appropriate information to enable them to understand it" should also be incorporated into the new Act.

A key principle to note that everyone has the right to make decisions that others might consider bad. 'Reasonable' risk should be considered in this context rather than it being the point of difference between the rights of citizens without disability and citizens under the Guardianship Act.

## **10. Mental Health**

We are concerned that extending guardians' decision-making powers to psychiatric treatment may not be in a woman's best interests. Before ascribing decision-making to family regarding psychiatric care there is a need for careful assessment about the woman's social situation and a full violence risk assessment undertaken.

Women who experience violence are more likely to experience and exhibit signs of mental illness. Similarly women who experience violence may in turn 'act out' as a result of this violence. In both instances there is evidence that women with mental health symptoms are less likely to be believed if contradicting the family/partner's view of a situation.

The need for a careful analysis is reinforced by the potential for further abuse when there is no effective gender segregation in psychiatric hospitals. In such situation it is clear that women will continue to be endangered and that seclusion and involuntary treatment will not help the woman reduce the 'acting out' behavior.

## **11. Women's choice to remain with a violent partner**

There are often many complicated reasons why women with disabilities might stay in abusive relationships – it may be more dangerous to leave, there are often threats that there will be the removal of their children, or a lack of options to go anywhere else. A woman with capacity might make the same decisions in the same circumstances. This further reinforces the need for close and collaborative support being provided by family violence, sexual assault and disability support services including guardian services.

