Australian Law Reform Commission

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Issues Paper: Review of the Family Law System

# About PWDA

**People with Disability Australia** (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA’s primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, belonging, contribution, potential and diversity of all people with disability are recognised, respected and celebrated with pride. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

PWDA is a NSW and national peak organisation and founding member of [Disabled People’s Organisations Australia](http://dpoa.org.au/) (DPO Australia) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. Disabled Peoples Organisations (DPOs) are organisations that are led by, and constituted of, people with disability. The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability In Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities.



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# Introduction

PWDA welcomes the opportunity to contribute to the Australian Law Reform Commission’s (ALRC) Review of the Family Law System Issues Paper.

PWDA has extensive expertise in the area of violence, including domestic and family violence, against adults, young people and children with disability. Our response to this issues paper draws upon this long history of representation and advocacy. PWDA’s contributions to the Senate Inquiry into Violence, Abuse and Neglect of People with Disability in Institutional and Residential Settings[[1]](#footnote-1) and the 2014-15 Senate Inquiry into Domestic Violence[[2]](#footnote-2) have contributed to the development of this submission.

This comprehensive review of the family law system is significant given the fact that while some important changes have been made, the *Family Law Act (1975)* (Cth) has not been systematically reviewed since its commencement. Undertaking a review of this magnitude requires extensive input from those who engage with the family law system, including children, young people and adults with disability. As a representative organisation, PWDA offers the voices and experiences of our members and constituents with disability throughout this submission.

Finally, PWDA endorses the recommendations made in [Women’s Legal Services Australia](http://www.wlsa.org.au/)’s (WLSA) submission to this review. We also endorse WLSA’s Safety First in family law document,[[3]](#footnote-3) which outlines five steps towards a safer family law system. Furthermore, we also endorse the [Intersex Human Rights Australia](https://ihra.org.au/) (IHRA) submission to this review.

# Recommendations

PWDA makes a number of recommendations that respond to the issues we raise in this submission. We recommend:

1. That the *Family Law Act 1975* and the Family Law Rules are amended to be wholly compliant with the Convention on the Rights of Persons with Disabilities (CRPD), including by:
   1. Clearly reflecting the social model of disability;
   2. Enshrining the CRPD principle, ‘Respect for the evolving capacities of children with disabilities’;[[4]](#footnote-4)
   3. Enshrining the National Decision-Making Principles recommended by the ALRC in relation to recognition of legal capacity for people with disability, as required by the CRPD.[[5]](#footnote-5)
2. That the *Family Law Act 1975* and the Family Law Rules are amended to be wholly compliant with the Convention on the Rights of the Child (CRC).
3. That the *Family Law Act 1975* and the Family Law Rules are amended to include recognition and an understanding of intersectional discrimination.
4. That all staff involved with the family law system (including police, family law professionals and domestic and family violence workers) receive repeated and nationally consistent training and awareness raising, on:
   1. Disability awareness and human rights
   2. Intersectional discrimination
   3. The nature and impacts of violence against people with disability, including the specific nature and impacts of violence on women and girls with disability, children and youth with disability, Aboriginal and Torres Strait Islander people with disability, people with disability from culturally and linguistically and non-English speaking backgrounds and people with disability from LGBTIQ communities
   4. Identifying and supporting people with disability who are experiencing violence
   5. The barriers to reporting violence experienced by people with disability
   6. The barriers to accessing justice experienced by people with disability
   7. Working with people with disability who have experienced violence or trauma
   8. Providing timely, culturally safe and appropriate supports to improve access to justice for people with disability within their different communities
5. That all information about family law, family law services and domestic and family violence services be made available in a range of accessible digital and non-digital formats.
6. That all courts perform an audit of their facilities to assess accessibility for people with disability.
7. That all courts, where one is not already in existence, create, implement and publicly report against a disability inclusion action plan.
8. That additional funding be made available to community legal centres and Legal Aid Commissions to ensure appropriate, accessible and affordable legal support is available to people with disability interacting with the family law system.
9. That independent advocacy be embedded within the family law system and funded through a separate access to justice independent advocacy program.
10. That the guidelines for Independent Children’s Lawyers reflect the understanding of the evolving capacity of the child, as outlined in the Committee on the Rights of the Child’s *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence.*
11. That funding be made available to establish an independent children’s advocates program, to ensure all children, including children with disability, are listened to and supported throughout the family law system and relevant proceedings.
12. That an advisory group of children and young people, including children and young people with disability, who have interacted with the family law system be established, to give children and young people a formal voice into systemic changes.
13. That research be performed into the experiences and needs of children and young people with disability in relation to domestic and family violence and the family law system.
14. That research be commissioned into family law systemic abuse and how it can be prevented, particularly for people with disability.
15. That the language of ‘equal shared time’ and ‘equal shared parental responsibility’ be removed from legislation and policy to facilitate a greater focus on the safety of children.
16. That a nationally consistent risk assessment framework be established to ensure earlier identification of violence against those interacting with the family law system.
17. That dedicated funding be made available to improve collaboration and integration between family law, violence and disability advocacy services. This can be achieved by providing funding to embed staff from disability advocacy and representative organisations and from specialist DFV services into the family law system.
18. That forced sterilisation of children with disability and adults with disability in the absence of their prior, fully informed and free consent be prohibited.
19. That non-medically necessary deferrable medical interventions that alter the sex characteristics of infants and children without personal consent be prohibited.
20. That an investigation be performed into discrimination against parents with disability in the family law system.

# Overarching Comments

1. PWDA believes that this review offers important opportunities for legislative change to ensure that the family law system appropriately reflects the diversity and needs of all Australians. In order to achieve such reform, this review must be firmly grounded within an intersectional, human rights based framework.
2. The family law system should work from a robust understanding of intersectional discrimination and marginalisation. ‘Intersectional discrimination’ refers to the unique forms of discrimination that people experience based on different layers of identity, social position and experiences.[[6]](#footnote-6) This includes, for instance, an understanding of the unique ways in which a person’s sex, gender identity, age, disability, ethnicity, cultural background, sexual orientation, religion, economic status, immigration status or social situation intersect to create new forms of discrimination.[[7]](#footnote-7)
3. An intersectional framework would assist those working within the family law system to better understand the different manifestations and experiences of violence and the experiences of parenting, and how these may influence how different people, particularly women and children, interact with the family law system. This approach would recognise the varied impacts of violence, not only on the person being subjected to the violence but also on any children who may have witnessed violence, and would ensure appropriate supports and services are available to assist them to participate in the system. In addition, this would help to bring together services and supports from different sectors to achieve a common goal of appropriately and adequately supporting families through the family law system. Such collaboration must be the norm within the reimagined family law system.
4. Furthermore, approaching this review from a human rights perspective will ensure that issues such as equality before the law, access to justice, and violence, abuse, neglect and exploitation are appropriately addressed. Otherwise, the family law system will continue to perpetrate an additional form of violence, by way of human rights violations, against people with disability.[[8]](#footnote-8)
5. We call for the *Family Law Act 1975* to be amended to be wholly compliant with the Convention on the Rights of Persons with Disabilities (CRPD),[[9]](#footnote-9) as well as the Convention on the Rights of the Child (CRC).[[10]](#footnote-10) Now is the time to ensure the obligations set out in these human rights instruments are appropriately met.
6. Finally, a note on language. In our following responses, we use the term ‘violence’ to encompass all forms of violence, including domestic and family violence and child abuse. We also use the social model of disability to emphasise that disability arises from the interaction between impairment and disabling physical, environmental, social, attitudinal and communication barriers. This is the understanding of disability within the CRPD, and we recommend that the *Family Law Act 1975* and the Family Law Rules be updated to reflect this.

## Equality and non-discrimination

1. Article 5 of the CRPD articulates that all people are equal before and under the law, and that discrimination on the basis of disability must be prohibited. Where necessary, people with disability must be provided with reasonable accommodations to facilitate this equality before the law. Within the family law system, this involves ensuring adults and children with disability who are interacting with the system have access to the supports they require to participate equally.
2. In relation to non-discrimination, as suggested in the issues paper, we concur that equality of treatment for children must be ensured, regardless of family structure.[[11]](#footnote-11) We further argue that the inclusion of any child-focused principle must also outline that children be treated equally regardless of other identity markers, such as disability, ethnicity, sex or gender identity. This would help to embed respect for diversity, inclusivity and non-discrimination within the foundation of a redeveloped family law system.

## Women with disability

1. The unique experiences of women with disability must be recognised and appropriately addressed by the family law system. This includes, for instance, acknowledging the higher rates of violence experienced by women with disability, and the impact this may have on their safety when interacting with the family law system. Domestic and family violence services, family law services and family law professionals must be cognisant of these higher rates of violence and must be trained to identify and appropriately address the subsequent risks to safety that women with disability may experience.
2. People with disability are more likely to live in poverty than the general population,[[12]](#footnote-12) and for women with disability, this is exacerbated by the fact that they are more likely to be unemployed and have lower incomes than men with disability.[[13]](#footnote-13)
3. These higher rates of violence and unemployment for women with disability can contribute to a lack of financial independence. This can leave women with disability not only unable to leave violence, but also unable to afford to engage with the family law system.[[14]](#footnote-14)
4. It is therefore vital that, as previously recommended by WLSA,[[15]](#footnote-15) additional funding be made available to legal assistance services. This additional funding must be provided to Legal Aid Commissions and community legal centres, including specialist women’s legal services, specialist Aboriginal and Torres Strait Islander legal services and specialist legal services for members of LGBTIQ communities.
5. PWDA strongly believes that a robust understanding of the gendered and intersectional experiences of violence, poverty and employment, and the timely provision of appropriate, accessible and affordable legal assistance, would better support women with disability to exercise their rights within the family law system.

## Children with disability

1. Many of the people with disability we spoke to in relation to this review were parents, and they were particularly concerned by the impact that family law proceedings had on their children specifically, but also children in general. Parents recalled long and traumatising court proceedings, and their concern regarding the lack of support and protections available for their children.
2. Some parents with disability spoke about family law professionals assuming that their child with disability would not understand the family law proceedings, and that they therefore did not require any supports or did not even need to participate. Such assumptions have no place within the justice system, and in line with Article 7 of the CRPD and Article 12 of the CRC, all children must be given the opportunity to express their views on matters that affect them.
3. In all instances, the family law system must ensure that children with disability are afforded equal opportunities and supports to participate in family law processes.[[16]](#footnote-16) Currently, it seems that many children with disability continue to face barriers to accessing such supports or having their voices heard in family law proceedings.
4. For instance, Independent Children’s Lawyers (ICLs) are required to inform the court about the child’s view and attitudes. However, the people with disability we spoke to raised concerns about the conduct of some ICLs. They called for greater scrutiny of these professionals, in particular to see how well they interact with children with disability and how responsive they are to their varied needs.
5. Those we spoke with felt keenly that while there are really good, responsive and trauma-informed ICLs, there are also those who do not represent the voices of children, sweep disclosures of violence under the rug and do not respond in a trauma-informed nor disability inclusive manner. The parents with disability we talked to recounted instances in which ICLs only met with children once, and for a very short time. This did not promote a willingness to share their honest views and opinions with the ICL. People also informed us about ICLs who focused on the child’s disability to the detriment of all else, wrongly assuming that the child’s disability precluded them from having a say in proceedings.
6. We were also told that some ICLs failed to validate or reflect the views and feelings of children with disability. This led children to feel misrepresented, and as though their views and attitudes regarding the proceedings were inconsequential.
7. While ICLs are required to inform the court about the child’s views and attitudes, they must ultimately represent and promote the best interests of the child. However, we feel that there is scope for formal guidance for ICLs on the evolving capacities of children and young people, as an underpinning principle of the CRPD.[[17]](#footnote-17) As children and young people begin to progressively exercise their rights, they should similarly be ‘enabled to exercise agency progressively in their own protection.’[[18]](#footnote-18) At the very least, the guidelines for ICLs must reflect the understanding of evolving capacity provided in the Committee on the Rights of the Child’s *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence.[[19]](#footnote-19)*
8. PWDA sees merit in establishing the role of a child’s advocate. Indeed, this is a role that PWDA’s individual advocates perform when providing advocacy support to children with disability - listening to and supporting children with disability in various settings to support them to voice and exercise their will and preferences. In the context of the family law system, a child’s advocate would have disability expertise and would have experience working with Aboriginal and Torres Strait Islander children, children from culturally and linguistically and non-English speaking backgrounds and children from LGBTIQ communities. Child’s advocates would take the time to talk to children, and where necessary, would support them to tell the solicitor or the ICL what they want and need.
9. Furthermore, in order to improve children’s experiences in the family law system, PWDA recommends the establishment of an advisory group of children and young people, including children and young people with disability, who have interacted with the family law system. This group must include a diverse range of children and young people with disability, and where appropriate, their representative organisations. This advisory group must be involved in the design and implementation of family law services and reforms to legislation and policy. It is vital that the voices and experiences of children and young people are validated by this process, and that appropriate supports to participating are readily provided.
10. However, some of the parents with disability we spoke to in relation to their experiences with the family law system told us that the potential risks to children must be carefully managed. One mother with disability recalled her own experience, in which she encouraged her child to speak freely to the ICL about their thoughts and feelings in relation to the family law proceedings. The child did so, however the child’s father (who was a perpetrator of domestic and family violence) heard everything as the ICL’s office was not soundproof. He reacted horrifically. The child subsequently lost the nerve to speak out, and when put in the same position by the expert report writer, felt as though they could not safely disclose about the violence as both parents would be able to read the resulting report.
11. To ensure children and young people are appropriately supported, research must be performed into the experiences and needs of children and young people with disability in relation to both domestic and family violence[[20]](#footnote-20) and the family law system. Such research must be inclusive, with children with disability, and representative organisations of children and young people with disability being involved at all stages.
12. Finally, PWDA feels strongly that the safety of women and children must be paramount within family law proceedings. In order to achieve this, we believe that the presumption of equal shared parental responsibility must be removed, in favour of a greater focus on the safety of children. We have spoken to mothers with disability who disclosed about the violence they experienced at the hands of (predominantly) fathers without disability. Despite evidence of violence, in many of these cases recommendations were still made whereby the perpetrators of violence were permitted ‘substantial time’ with their children. These mothers felt that such recommendations were made on the basis of the presumption of equal shared parental responsibility, as well as the discriminatory beliefs held by family law professionals regarding the impact of disability on the parenting capacity of the mothers. This is despite the fact that the presumption of equal shared parental responsibility is not meant to apply in cases involving violence.[[21]](#footnote-21)

## Awareness raising

1. Article 8 of the CRPD refers to the need to raise awareness about the rights and dignity of people with disability, to dispel stereotypes and prejudices against people with disability and to promote awareness of the capabilities of people with disability. PWDA recommends that such awareness raising activities be championed within the family law and associated systems, to address attitudinal barriers that currently exist and create barriers to equal access for people with disability.
2. If the attitudes of family law system personnel and staff from other support services are exclusionary, discriminatory or based on outdated and inaccurate stereotypes, this can limit access to the family law system for people with disability. We have been told that services, including family law services, have been found to be lacking disability awareness and continue to hold discriminatory assumptions about people with disability. Some of the women with disability we spoke to reported that workers at these services seemed shocked that they had children, and that they needed access to the family law system. The people we spoke to felt there was a real and embedded stigma against people with disability, and parents with disability in particular, within the family law system.[[22]](#footnote-22) This was felt to be especially the case for parents with intellectual disability.
3. Information and training must be provided to family law and other relevant professionals about the rights of people with disability to participate fully and equally in all aspects of life, including as parents. This includes the need to understand the different approaches that parents with disability may take to parenting, recognising that such diversity is not inherently problematic. For instance, a parent with vision impairment may change a nappy differently, but that does not automatically mean that they’re doing it wrong, or doing it in a way that is unsafe for the child. Likewise, a child with autism may demonstrate the bond they share with their parents in a different way to a child without autism. As discussed further below, it is vital that expert witnesses, report writers and family consultants respect such diversity, and respect the right of people with disability to parent.
4. Consequently, repeated training on disability awareness, culturally safe practices and working with people who have experienced trauma must be made mandatory for those working within the family law system. This must be in addition to training on identifying and supporting women with disability who are experiencing violence.[[23]](#footnote-23) Such extensive training must be made nationally consistent to ensure equal access to justice for all those engaging with the family law system. This would help to address a key barrier to accessing the family law system: the persistent implicit and/or explicit prejudicial and discriminatory attitudes about and towards people with disability.

## Accessibility

1. As discussed in more detail below, substantial changes are required to ensure that people with disability have access to the family law system, and any associated supports, on an equal basis with others. This includes, for instance, changes to the physical environment, to information, to communication, and to the attitudes (as discussed above) of those who work within the family law system. Access must therefore be viewed in an extensive and inclusive manner.
2. Accessibility must be addressed, and must be seen more broadly than just ensuring buildings and their surrounds are physically accessible for wheelchair users. While this is clearly important, additional changes are also required to ensure better access for people with vision impairment and for people who are deaf or have a hearing impairment. This includes, for instance, ensuring signage is larger and more easily accessible, and ensuring systems and processes that allow everyone to know when their matter has been called.
3. Private and safe spaces must all be accessible, to ensure that people with disability who have experienced violence have equal access to the protections afforded to people without disability who have experienced violence. We have heard from one woman who was unable to access a safe space, and who as a result felt the need to be constantly vigilant to keep herself safe from her ex-partner in the court setting. Furthermore, she warned us that people who have experienced psychological or verbal violence also need access to safe spaces, as a comment made by a perpetrator can have a huge impact, even if it seems relatively harmless to those in the vicinity.
4. In addition, all court and service entrances and exits must, where possible, be wheelchair accessible. Having separate entrances and exits for those who have perpetrated violence and those who have experienced violence was generally seen as positive by those we spoke to, yet being able to ensure this in practice was treated with scepticism, as not all courts are fully accessible. PWDA therefore recommends that all courts perform an audit of their facilities and create and implement a disability inclusion action plan (where a current plan is not already in existence).
5. For some people, access to the family law system may require the assistance of an independent advocate. Independent advocates, such as PWDA’s individual advocates, support people with disability to access not only the family law system, but also the broader justice system. Advocates work alongside people with disability to support us through processes, to identify and facilitate access to relevant supports and services, and to ensure our rights are upheld. This includes assisting us to navigate different systems and to access parenting programs and mainstream violence response services, as well as services that address our legal, housing, financial and disability support needs. The people we spoke to felt strongly that the provision of this type of independent support was critical.
6. The role of independent advocates must be appropriately and accurately understood to ensure they are able to perform their mandate effectively. They do not give instructions to lawyers, nor do they speak on behalf of people with disability. Instead, advocates assist, for instance, by clarifying what the legal professionals are saying and by asking whether the person with disability understands what is happening and what the legal professionals meant. Often, the advocate is acting as a conduit between the legal professionals and the person with disability to ensure comprehension, and where necessary, to support people with disability to exercise their will and preference. As discussed in more detail below, access to the family law system could be improved by embedding independent advocates within the system, funded through a separate access to justice program.
7. In order to comprehensively address the numerous access issues experienced by various cohorts, these communities must be actively involved in both designing and implementing solutions that are responsive to their needs. An intersectional approach, as outlined above, would help design and develop creative and responsive ways of supporting those for whom the mainstream family law system and services is currently not working, such as people with disability, people from Aboriginal and Torres Strait Islander communities, people from culturally and linguistically diverse backgrounds and people from the LGBTIQ community.
8. Furthermore, an understanding of intersectionality will assist those working in the family law system to recognise and respond to the unique experiences of different cohorts, acknowledging that their identities may overlap to cause complex forms of discrimination or access barriers that require nuanced responses.

## Equal recognition before the law

1. Equal recognition before the law is critical for people with disability. It is vital that any changes to the family law system reflect an understanding, in line with the CRPD, that all people have rights equally (legal capacity), that all people have the capacity to act on those rights (legal agency), and have the right to have those acts (and the decisions that lead to those acts) recognised and respected in law.[[24]](#footnote-24)
2. In its current state, the family law system does not reflect a CRPD compliant understanding of legal capacity. Despite, for instance, Article 12 of the CRPD outlining that States Parties should ensure people with disability have access to whichever supports are necessary to assist us to exercise our legal capacity, the Family Law Rules allow for case or litigation guardians to be appointed to perform substitute decision-making.
3. Case or litigation guardians, as well as other types of substitute decision-making such as trustee or guardianship arrangements, are based on the best interests of the individual for whom decisions are being made. Essentially, the substitute decision-maker makes subjective determinations about what is the most appropriate course of action for the person for whom they are making decisions.
4. However, the ability to make those determinations and decisions may be manipulated to justify the subjective views of decision-makers,[[25]](#footnote-25) potentially resulting in multiple violations to the individual’s human rights (in addition to the violation of their right to express their legal agency). This is especially prevalent when discussing the best interests of children with disability and children born with intersex variations.[[26]](#footnote-26)
5. As previously mentioned, the best interests of the child must be understood within the framework of evolving capacity.[[27]](#footnote-27) Children and young people exercise their rights progressively, and should be similarly supported to be progressively involved in decision-making as their capacity to do so develops. As the capacity of children evolves, decision-making must be framed upon their rights, will and preferences.
6. Guidance for recognition of legal capacity for people with disability is provided by the Committee on the Rights of Persons with Disabilities in its General Comment No 1, *Article 12: Equal recognition before the law*.[[28]](#footnote-28) The ALRC has also undertaken a review of equal recognition before the law and legal capacity of people with disability and made a number of pertinent recommendations that are directly relevant to this review of the family law system. In particular, the ALRC has recommended that ‘laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines.’[[29]](#footnote-29)
7. Compliance with the CRPD requires a substantial shift in both legislation and policy to ensure that each individual is offered accessible and appropriate supports to participate fully in legal and other decision-making processes.
8. As briefly mentioned above, independent advocates often provide informal decision-making support to people with disability. These advocates have relationships with people with disability and are able to understand and support their decisions – even those deemed to be ‘risky’ or not in ‘the best interests of the individual’.[[30]](#footnote-30) This is because unlike case or litigation guardians, independent advocates support individuals to express and exercise their will and preference, rather than merely making best interests based decisions on their behalf.
9. As such, it must be formally recognised within the family law system that all people may require different supports to make different decisions at different times throughout their lives. These decision-making supports will look different for each individual, but may, for instance, include Auslan interpreting, Easy Read information, or a support person or advocate. PWDA recommends that amendments be made to embed supported decision-making principles, such as the National Decision-Making Principles and Guidelines throughout the *Family Law Act 1975* and the Family Law Rules.
10. PWDA firmly believes that formally embedding supported decision-making and the presumption of legal capacity within family law legislation and rules would help to improve the accessibility of the family law system, while also ensuring more accurate and CRPD compliant legislation. Comprehensive reform is required more generally in relation to supported decision-making, and the family law system could pave the way by legislating and implementing this CRPD compliant form of decision-making.

## Access to justice

1. Article 13 of the CRPD outlines that States Parties must ensure people with disability have equal access to justice, and are provided with any accommodations we might require to facilitate such equal access to justice.
2. Recent research performed by PWDA and Monash University found that access to justice can mean drastically different things for different people.[[31]](#footnote-31) While some people with disability conceptualised ‘justice’ as engaging with formal justice systems and structures, such as reporting to the police and participating in civil and/or criminal justice proceedings, others understood ‘justice’ as simply being heard and believed, being able to retain or regain custody of their children and feeling safe.
3. Despite the various perspectives regarding what justice entails, it is important to recognise that people with disability continue to encounter numerous barriers to accessing most forms of justice. Indeed, the experiences of people with disability in relation to accessing justice in Australia have been covered in detail in various reports, research and inquiries.[[32]](#footnote-32) Many of these reports had similar findings, including that access to justice for people with disability is frequently hampered by communication barriers, limited access to necessary supports, and discriminatory stereotypes and attitudes regarding the credibility of people with disability as witnesses.
4. Assumptions regarding the credibility and capacity of people with disability continue to be made by police officers and court staff, including judges and prosecutors.[[33]](#footnote-33) People with disability are often not considered to be reliable witnesses, and we are frequently disbelieved when reporting crime. These attitudes and misconceptions about disability flow throughout the justice system, affecting the safety of people with disability and limiting the services and supports we are able to access.
5. For instance, there are many barriers for people with disability in relation to recognising and subsequently reporting domestic and family violence. These include that people with disability may not have had access to appropriate and accessible sex and relationships education, and may subsequently not understand that we have a right to live free from violence.[[34]](#footnote-34) Furthermore, if information about domestic and family violence and associated support services are not provided in accessible formats, we may go unaware that such services exist.
6. Another barrier to reporting and leaving violence is that we may fear that our supports or services will be withdrawn if we report the violence, and that domestic and family violence services (including refuges) may not be accessible or able to meet our needs.[[35]](#footnote-35) As these services often act as an entry point into other supports,[[36]](#footnote-36) this can render a whole range of services and forms of assistance inaccessible to us.
7. As people with disability, we also fear losing custody of our children, including to the perpetrator of violence. This is directly related to the aforementioned stereotypes and presumptions about our capacity as people with disability, and the subsequent judgements that are made about our parenting capacity.[[37]](#footnote-37) This can mean we stay in violent situations and do not report our experiences. Indeed, the high rates of child removal from parents with disability, usually mothers with disability, makes this a pervasive and substantial fear.[[38]](#footnote-38) We are aware of cases in which children have been removed from a non-offending parent with disability and ordered to live with the offending parent without disability.[[39]](#footnote-39) This does not help facilitate access to justice for non-offending parents with disability.
8. These barriers to reporting or leaving violence must be seriously considered within this review. As a result of these barriers to reporting violence, people with disability may not be linked in with the appropriate services to support them throughout family law proceedings. This can mean that people with disability who have experienced domestic and family violence are not offered the appropriate supports and protections, that their safety concerns are not acknowledged or addressed, and that adequate risk assessments are not performed.
9. As outlined in paragraphs 34 and 35 above, independent advocacy is critical for many people with disability to access justice, and independent advocacy should be embedded with in the family law system and funded through a separate access to justice independent advocacy program.
10. Indeed, family law professionals that lack disability awareness, lack knowledge about domestic and family violence and have limited experience supporting or engaging with people with disability can present significant difficulties for people with disability who are attempting to access the family law system.[[40]](#footnote-40)
11. It is therefore vital that appropriate training occurs to facilitate access to all forms of justice. Article 13 outlines that access to justice for people with disability can be improved through the provision of appropriate training for those involved in justice proceedings.[[41]](#footnote-41) PWDA recommends that this includes disability awareness training, training on the nature and impacts of violence against people with disability, training on the various supports that are available to people with disability within the family law system (and how to access them) and training on risk assessment processes.
12. Finally, PWDA believes that such training must be extended to all workers within the family law system, including but not limited to judicial officers, family consultants, support staff, family law services and domestic and family violence services.

## Freedom from exploitation, violence and abuse

1. People with disability experience higher levels of violence and in more unique ways than people without disability.[[42]](#footnote-42) Women and girls with disability are particularly at risk of violence.
2. Due to the intersection of gender and disability based discrimination, women with disability are approximately 40% more likely to experience domestic and family violence than women without disability.[[43]](#footnote-43) However, as services and surveys are not all accessible to women with disability, it is likely that this figure is higher.[[44]](#footnote-44) Furthermore, women with disability often experience violence for a longer period of time, which can result in more severe injuries for this group of women.[[45]](#footnote-45) Early identification of and appropriate responses to violence against women with disability is therefore vital.
3. As previously outlined, more awareness raising and training is required of family law and domestic and family violence professionals, as well as police officers and all others involved in the justice system to address recognition, response and justice for women with disability.
4. Currently, services are limited in their responses to women with disability by a general lack of awareness about the nature and dynamics of domestic and family violence against people with disability.[[46]](#footnote-46) This in turn leads to an inability to accurately identify and respond to violence, particularly domestic and family violence, against people with disability.[[47]](#footnote-47) Failing to appropriately recognise and respond to domestic and family violence can mean that this violence occurs for a longer period of time than violence against women without disability.[[48]](#footnote-48)
5. As recommended by WLSA in their extensive work in relation to family law and violence, a nationally consistent early risk assessment framework must be embedded within the family law system.[[49]](#footnote-49) This framework must be inclusive of the unique experiences of violence for people with disability and other communities, must occur earlier, and must be repeated throughout the family law proceedings to ensure ongoing safety. The use of this framework must also be supported by appropriate training for family law professionals, including family law services, violence services, family dispute resolution practitioners and family report writers.[[50]](#footnote-50) Such training must include information about the different forms of violence experienced by people with disability, and the numerous barriers we experience to disclosing such violence.
6. Furthermore, PWDA supports the recommendations found in Step 1 of the WLSA Safety First Plan.[[51]](#footnote-51) In general, the people with disability we spoke to felt there was a lack of collaboration and integration in the family law system. This was felt most keenly in relation to family law cases involving violence, and those involving child protection concerns.[[52]](#footnote-52) Previous recommendations have been made regarding greater integration between the family law system and the disability sector,[[53]](#footnote-53) and these must be heeded to provide better outcomes for both parents and children with disability, particularly those who have been subjected to violence.
7. Greater integration could be facilitated by embedding staff from disability advocacy and representative organisations[[54]](#footnote-54) and from specialist domestic and family violence services into the family law system.[[55]](#footnote-55) These workers could bring their expertise to risk assessment processes, to ensure women with disability who have experienced violence are identified and offered appropriate supports. Furthermore, co-locating these services would provide easier and earlier access to independent advocates and specialist domestic and family violence workers, would enhance connections and collaboration between family law, violence and disability sectors,[[56]](#footnote-56) and would likely lead to improved outcomes for women with disability who have experienced violence.
8. Finally, PWDA agrees with recommendation 19 of the Family Law Council’s Family Report that research should be commissioned into what family law systems abuse occurs and how it can be prevented.[[57]](#footnote-57) We recommend that such research look into the ways in which the child or parent’s disability may contribute to the misuse of family law systems and processes.

## Protecting the integrity of the person

1. Forced sterilisation of people with disability, particularly women and girls with disability and people with intersex variations, is an ongoing practice in Australia.[[58]](#footnote-58) Article 23.1(c) of the CRPD articulates that children and adults with disability have the right to retain their fertility on an equal basis with others.
2. Forced sterilisation and forced medical interventions without medical necessity or serious threat to life, have been found to violate the right to bodily integrity and the right to be free from torture and ill-treatment. Since 2005, UN human rights treaty bodies, the Human Rights Council, UN special procedures and international medical bodies have made recommendations to Australia to enact national legislation to prohibit forced sterilisation,[[59]](#footnote-59) and the most recent review of Australia by the Human Rights Committee also recommended an end to forced sterilisation and forced medical interventions of intersex infants and children.[[60]](#footnote-60)
3. Comprehensive analysis and recommendations regarding the issue of intersex infants and children being subjected to irreversible medical interventions has been provided in the submission to this ALRC review by Intersex Human Rights Australia. We fully endorse this submission.
4. Despite numerous UN recommendations for the prohibition of forced sterilisation against people with disability, Australia continues to focus on better regulation of forced sterilisation through law and administered by court and tribunal processes. This view can be attributed to Australia’s understanding of Article 12 of the CPRD, *Equal recognition before the law*, that substitute decision making, such as through courts and tribunals, is permissible for people with disability who are deemed unable to provide consent. This view means that current court authorised sterilisation of children and adults with disability based on the best interests principle is considered compliant with human rights.
5. As outlined by the Committee on the Rights of Persons with Disabilities, non-compliance with Article 12 leads to violations of many other human rights provided in the CRPD including the right to respect for one’s physical and mental integrity: “Without recognition of the person as a person before the law, the ability to assert, exercise and enforce those rights, and many other rights provided for in the Convention, is significantly compromised.”[[61]](#footnote-61)
6. An analysis of Australian Court and Tribunal applications and authorisations for sterilisation of women and girls with disability clearly demonstrates that these applications and authorisations have little to do with medical necessity, serious threats to life, or the ‘best interests’ of the women and girls with disability and more to do with discriminatory attitudes and assumptions and the interests of others.[[62]](#footnote-62)
7. In relation to Article 17 of the CRPD, *Protecting the integrity of the person*, the Committee “recommends that States parties ensure that decisions relating to a person’s physical or mental integrity can only be taken with the free and informed consent of the person concerned.”[[63]](#footnote-63)
8. Enshrining human rights for people with disability within family law legislation and the family law system would not only require recognition of legal capacity (as outlined in paragraphs 38-47 above) but also require the prohibition of forced sterilisation of children with disability and adults with disability in the absence of their prior, fully informed and free consent.[[64]](#footnote-64)

## Freedom of expression and opinion, and access to information

1. There are many barriers to access to and engagement with the family law system for people with disability. In relation to accessing information about family law and family law related services, for instance, we have been informed that the family law website is cumbersome and difficult to navigate. In addition, a lot of the information is inaccessible, which impedes access to the family law system or related supports for many people with disability. Most information is available in PDF format, which is inaccessible for many people who are blind or have vision impairment. In addition, the fonts are often small, the language is bureaucratic, and there is limited information in plain English, let alone in Easy English.
2. In order to improve access for people with disability, information about family law, family law services and domestic and family violence services must be freely available in a range of accessible formats (both digital and non-digital), including large print, plain English, Easy English, Auslan videos, audio recordings and Braille. Information about the processes, what to expect when engaging with the family law system, and how the family law system interacts with other services and systems must also be provided in a range of formats. In addition, making information available in a range of accessible formats will likely improve access for people with low literacy levels and people from non-English speaking backgrounds.
3. When considering the use of technology as a form of information and/or navigation, it is worth acknowledging that not everyone is proficient in the use of technology, or necessarily has access to it. This barrier is yet another which must be overcome to ensure equity of access not only for women with disability, but also for some Aboriginal and Torres Strait Islander women, older women and women with low literacy, for instance.[[65]](#footnote-65)
4. In addition, access must also be provided to complaints forms and processes. Many people we have spoken to in relation to this review felt that they had limited opportunity to make complaints when engaging with the family law system. In particular, concerns were raised about making complaints about family consultants and external report writers, with people generally feeling that information and processes were not accessible nor transparent. There must be an effective complaints mechanism for external report writers and family consultants, and information about this complaints process must be available in a range of accessible formats.
5. Finally, in order to ensure access to information and to facilitate people with disability seek and share information, the appropriate staff within the family law system must be trained on the use of accessible forms of communication. This would entail, for instance, training on booking and interacting with Auslan interpreters, and training about different types of augmentative and alternative communication. This would help to ensure that people are afforded access to appropriate supports, and would likely prevent instances in which, for example, a woman with vision impairment was offered the use of a hearing loop, rather than access to an independent person to describe photos and drawings to her, which was the support she actually required.

## Respect for home and family

1. As already discussed in relation to the need to raise awareness of the rights of people with disability, the family law system must prevent discrimination against people with disability as parents. Indeed, ‘in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.’[[66]](#footnote-66) Currently, however, parents with disability lose custody of their children at disproportionate rates.[[67]](#footnote-67)
2. One parent with disability we spoke to in relation to this review told us of her experiences with the family law system. Her abusive ex-partner was allowed to make an affidavit that focused almost exclusively on her disability, which consequently led to a lot of scrutiny about her parenting capacity. Furthermore, the expert report writer assigned to her case focussed unnecessarily on her disability. This parent recounted that the expert report writer spent a disproportionate amount of time asking about her disability, to the detriment of other pertinent issues, such as her ex-partner’s violence and her parenting support needs.
3. Furthermore, a woman with vision impairment recounted to us her experience of disclosing to her solicitor about the domestic and family violence she had been subject to at the hands of her ex-partner. In response, her solicitor stated that while her ex-partner had perpetrated violence, she had disability, so the two effectively cancelled each other out. This, and countless other remarks, point to the fact that often a parent’s disability is seen to be a primary focus, rather than the perpetration of violence by the other party. Presumptions such as these continue to be made about the parenting capacity of people with disability.
4. This lack of trauma-informed disability awareness training for family consultants and others in the family law system can mean that expert reports are written and received without interrogating the underlying biases against people with disability. As we have explained elsewhere,[[68]](#footnote-68) this can result in parents with disability being cast in a less favourable light, and may mean that they lose custody of their children, in some instances to the perpetrator of violence. This can have huge implications for the safety of these children. It is therefore vital that family consultants, expert report writers, ICLs and family dispute resolution practitioners have some experience working with people with disability, people who have experienced trauma and people who have experienced violence.[[69]](#footnote-69)

**PWDA thanks the Australian Law Reform Commission for the opportunity to contribute to this Review, and we would welcome further consultation on any of the matters raised in this submission.**

For individual advocacy support contact the **Disability Rights Information Service (DRIS)**between 9:00 am and 5:00 pm (AEST) Monday to Friday on (02) 9370 3100 or Toll Free on  
**1800 422 015** or TTY Toll Free on **1800 422 016** or email [dris@pwd.org.au](mailto:dris@pwd.org.au)

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14. Ibid, p36. For example, women with disability may face additional costs on top of the typical costs of engaging with the family law system, as expert and private family reports prepared by a report writer with expertise in working with people with disability can be more expensive than those prepared by a report writer with no such expertise or experience. [↑](#footnote-ref-14)
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