



FEDERAL CIRCUIT COURT OF AUSTRALIA

Federal Circuit Court of Australia
Commonwealth Law Courts
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21 July 2014

Professor Rosalind Croucher
President
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
By email: disability@alrc.gov.au

Dear Professor Croucher,

Equality, Capacity and Disability in Commonwealth Laws - Inquiry

Discussion Paper 81 (DP) raises issues of some relevance to the Federal Circuit Court (the Court). As the Court which deals with most federal civil trial work (both in family law and general federal law) not infrequently litigants appearing before the Court have some disability which impacts on their ability to fully participate and the Courts ability to make a just determination. I note that the access to justice issues raised in this Inquiry are, as identified in the DP, relatively narrow in scope, being confined to the laws and legal frameworks affecting people who may need decision-making support. Reference is made to the '*...tension between laws that are intended to operate in a 'protective' manner - including in order to ensure, for example, a fair trial - and increasing demands for equal participation, in legal processes, of people who may require decision - making support.*' It is these tensions which need to be articulated.

There are a number of personal and systemic issues which may affect the ability of people with disability to access justice. Although noted, the DP only briefly addresses the difficulties which courts confront when capacity is an issue during the course of proceedings. In particular, difficulties when no litigation guardian is available or issues confronting legal practitioners when they represent a client who may lack capacity or those instances where the person lacking capacity is unrepresented.

As noted in the DP, the current test for capacity at common law is able to take into account the level of legal representation. The level of capacity required being higher when a person is unrepresented because a '*litigant in person has to manage court proceedings in an unfamiliar and stressful situation*'.

While a person may not have the mental capacity to represent themselves they may have sufficient capacity to be able to give instructions to a lawyer to represent them (para 7.71). The suggested test proposed would be unmanageable with many more litigants falling within the proposed test. In the context of civil litigation, the powers obligations and liabilities of litigation guardians are more appropriately dealt with by the current rules and the common law. The proposed test does not give sufficient emphasis to the need for a person to understand the 'possible consequences' of the proceedings.

This can be of significance particularly when they are in breach of court orders. Orders are not necessarily 'once and for all' and may be varied where the court has evidence that a person, who due to mental illness, has been assessed as in need of a litigation guardian but at a late stage in the proceedings is found to have recovered sufficiently to be able to give instructions.

In the context of a Court where there is an emphasis on negotiation and the use of ADR, representatives of other parties may have difficulty in dealing with a person who is unable to understand the nature and possible consequences of the proceeding or any offer of compromise that might be made.

In the context of parenting matters, where the *best interests of the child* are the paramount consideration, it places a considerable burden on the litigation guardian should the wishes of the litigant be clearly contrary to the *best interests of the child*.

As noted, the purpose of federal civil litigation is to facilitate just resolution of disputes (paras 7.84, 7.85 and 7.86). Courts such as the FCC are not equipped to undertake the task being recommended. That is, to incorporate the participatory model proposed. Significant resources would need to be made available. Currently the participation of persons with impaired decision making ability is extremely difficult to facilitate in light of the problems identified in the DP (para 7.95). In particular, the Court is not infrequently unable to secure a litigation guardian as there is no one available to take on this role. These difficulties would be compounded if the court required litigation representatives to act in accordance with the National Decision-Making Principles and to consider '*the will preferences and rights of the person represented and to promote their personal, social and financial wellbeing and to consult with others*'.

It needs to be emphasised that the role of the courts is limited to the life of the specific litigation. Courts have an obligation to all parties and are obliged to deal with matters efficiently and proportionate to the matter in dispute. Courts cannot allow the wishes of litigants to take precedence where the case is without substance or costs are incurred unnecessarily. The guidelines proposed envisage a level of support that is unlikely to be available. Courts need to act in accordance with empowering legislation with specific objects. In some matters, the wishes of the person may be in direct conflict with those legislative objectives and it would not assist them or other parties to allow litigation to be conducted on that basis. It is disappointing that little weight is given to the significant access to justice impediments currently being encountered by persons with impaired decision making ability when seeking to proceed in the courts (para 7.87). These difficulties are compounded in the context of current limitations on the availability of legal aid with litigants who might otherwise have sufficient capacity to instruct a lawyer facing additional impediments. In this regard I refer you to the decision of *Throsby & Throsby* [2014] FCCA 138 a copy of which is attached.

In the context of family law proceedings I also draw your attention to the 2008 *Family Law Council advice on amendments to the Family Law Act 1975 regarding mental health issues in the family law system*. A copy is attached for your information.

In that advice, the Family Law Council noted that there are no express provisions in the Act giving the Courts jurisdiction to order a party to submit to a psychiatric or psychological assessment. Council pointed out that *without the power to compel a party to undergo a mental health status assessment, the court can face an insurmountable problem*. Council aptly identified the current unsatisfactory arrangements facing the courts when a litigation guardian is considered appropriate, including:

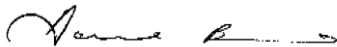
- legal practitioners often being reluctant to act because of perceived exposure to liability and the uncertain funding of the litigation - issues in respect of immunity
- difficulties with any arrangements with state guardian/ trustees to facilitate appointments.

Council went on to recommend that:

- (a) Litigation guardians be appointed by an independent body in the same way that ICLs are appointed by the Legal Aid bodies from a panel of specialists. If Legal Aid bodies cannot assist then CLCs might agree to nominate a panel of litigation guardians whom the Centres can then support.*
- (b) The Legal Aid bodies be approached with a suggestion that funding of litigation guardians in property cases be reimbursed out of the assets of the parties in a pre-determined formula manner or by an apportionment to be determined at trial or by agreement between the parties. In children's cases such funding could be provided by Legal Aid bodies who would have a right to seek contribution from one or both parties. The Commonwealth would need to provide adequate funding.*

The adoption of these and other recommendations would go some way to address the significant access to justice impediments which limit the ability of such litigant to participate and the Court to make a just determination when capacity is an issue.

Yours sincerely



Adele Byrne
Principal Registrar
Federal Circuit Court

Encl

Throsby & Throsby [2014] FCCA 138

Family Law Council Advice regarding mental health issues in family law system (9 December 2008)