

Response by Parents with a Disability (PWAD) to ALRC discussion paper: Equality, Capacity and Disability in Commonwealth laws.

PWAD is an organisation for and by parents with a disability operating with the organisational support of Independent Disability Services (IDS). IDS and PWAD believe that whatever the disability, people have the right to support to help them fulfill their role as a parent. Most parents do not parent alone, they rely on family and friends to create a healthy, stimulating and nurturing environment for their child.

As a group of parents with disabilities, PWAD are stakeholders with a deep concern about the operation of the family law system. We are making comment on Chapter 11 of the discussion paper.

The discussion paper quotes the Chief Justice of the Family Court saying that “if it is being suggested that the Act discriminates against parents with an intellectual disability or that the presence of an intellectual disability is of itself a disqualifying factor in an application in which a parent is seeking to spend substantial time with their child, I believe those views are misconceived”. In her submission the Chief Justice also says “In any case where parenting orders are being sought ... the best interests of the child is the paramount consideration ... the focus is unequivocally on the child’s interests and who is best positioned to meet the child’s needs.”

The discussion paper also states that how the judges apply the primary and secondary considerations of s60cc in deciding the best interests of the child is outside the terms of reference of the ALRC

We do not have the legal knowledge to argue with the Chief Justice or the ALRC but we would like to make these comments so that they are on the public record.

1. The Act does not say anything about disability and the Court can consider any fact or circumstance that it thinks is relevant in deciding the best interests of a child. This allows the Court to discriminate against a parent with a disability in deciding what is in the best interests of their child.
2. Our experience is that if a parent has a disability, assumptions are made by the Court that we have less parental capacity than someone without a disability, whether that is the other parent or another family member. **However, Courts do not order assessments of our parental capacity,** only of our disability and make decisions based on their assumptions.
3. The Act allows other people, usually other family members, to apply to have children live with them, rather than their parents. We believe that this particularly happens to parents with a disability.

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The Convention on the Rights of Persons with a Disability and the Convention on the Rights of the Child both state that children and parents should not be separated against their will except when this is necessary in the best interests of the child.

We do not think that having a disability that limits some of the things that we can do as parents is enough to decide that it is necessary, and **in** the best interests of our children to have them taken away from us and go to live with another family member who does not have limitations.

If we require extra help and assistance to look after our children because of our disability, this is held against us in deciding what is in the best interests of our children because we are told that we cannot independently meet the needs of our children.

The Chief Justice says that there are no barriers to appealing a decision if circumstances change. However, the CRPD and the CRC both say that all decisions about parenting should be subject to judicial appeal. In reality, it is almost impossible to get funding for an appeal in parenting cases, whether or not circumstances have changed and so we do not have equal access to justice.

PWAD believes that the relationships between parents and their children is vital and should override other issues, except where a parent is found to be abusing or neglecting their children. We therefore think that separating children from their primary carer, usually their mother, should be a last resort and that parents with a disability should not be separated from their children because they are in a lesser position to independently meet the needs of their children without the help of others.

In the following case study the father with a disability believes he has not received fair justice from the family court

Tom **(not his real name)** is a parent with a disability. He was the primary carer of his daughter until an application was made by his **ex**-wife in the family court for full residence of their child.

Tom has told PWAD that his **ex**-wife had been making accusations regarding the care of his child. The case was heard in the family court where a decision was made to remove primary care from Tom. **He now has** only fortnightly weekend visitation with his child. He believes he has not received justice from the court and the decision **against him** was harsher because of his disability.

As a result of this court outcome, Tom has suffered a loss of confidence and self worth now that he is no longer a primary carer for his child. He has lost his parenting support payments that has added further hardship and now must solely rely on his DSP **limiting his** access visits with his child. These hardships have permanently and negatively affected the relationship he has with his daughter. This is hardly surprising when he is only able to spend an

extremely limited amount of time with his child. He believes that the decision of the family court unfairly judged his ability to be a parent due to his disability.

PWAD acknowledges as mentioned in the discussion paper that the enquiry is focused on federal frameworks, however, questions arise that decisions made at the family court may be affected by decisions that have been previously made in the state based child protection system. This link to the family court can be seen in the following case study.

A soul parent with a disability has presented her case to PWAD at our meetings. This mother of two young children has her youngest child living with her full time and her eldest child has been removed (in our view) unjustly by child protection to full time kinship care with her grandparents. The mother has been diagnosed with Aspergers syndrome. Rather than getting affective support to manage her disability, she was found unfit to parent. She believes the kinship care that has been put into place by child protection is unsuitable and she believes her child is at risk of suffering child abuse.

Since this order has been in place, she has had extremely limited access to her child. It is extremely difficult for her to visit as the child is in a suburb on the opposite side of the city. If she is to visit she must travel for many hours to an outer suburb on public transport. Due to the separation of the family the bond has been broken between them and there has been no support to either the children or mother to address this situation.

The mother has reported to the group that her parents are now seeking full residence of the child through the family court. She believes that she will not get her daughter back. She does not even have access to legal support to assist her in the family court, and has been disadvantage by the fact she has not been able to have regular contact with her child. Once again, in our opinion this is a sad error of justice that the family court will make a decision with the case at hand, when the factors that have dictated the circumstances are unjust to begin with.

If the family court decides to give permanent status to the mother's parents, the outcomes will be as follows:

- The family court will be making a decision over an already unfair situation created by the child protection system.
- The bond between mother and her child will be permanently broken
- The child will be permanently affected by not having access to, or ever able to live with her natural parent
- The two children will be permanently separated.

PWAD believes that unless the Act is changed to protect parents with a disability in family court matters, both parents and children from families where the parent has a disability will continue to be discriminated against and will not have equal access to justice.

The Terms of Reference identify parenthood and family law as an area for consideration in the Inquiry. PWAD recommends that this matter if not dealt

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with by the wider scope of the ALRC enquiry requires a further investigation to establish the extent of unjust discriminatory outcomes where there is removal of children from parents with disability via the family court.

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