



Office of the Public Advocate

Submission to the Australian Law Reform Commission Review of the Family Law System

May 2018

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Summary of Recommendations

Recommendation 1

The rights reflected in the United Nations' *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*, and the culture these Conventions seek to foster, should be translated into the *Family Law Act 1975* (Cth).

Recommendation 2

The *Family Law Act 1975* (Cth) should affirm that disability is not, per se, a barrier to parenting and that the presence of disability of one or both parents, in and of itself, cannot be relied upon to determine the best interests of the child.

Recommendation 3

The Federal Circuit Court and the Family Court should develop clinics like that of the Victorian Children's Court Clinic.

Recommendation 4

The *Family Law Act 1975* (Cth) should contain guidance in relation to the assessment of capacity.

Recommendation 5

The *Family Law Act 1975* (Cth) should provide that, in determining what is in the child's best interests, the Court must consider Article 23(4) of the *Convention on the Rights of Persons with Disabilities*.

Recommendation 6

OPA recommends the Federal Circuit Court and the Family Court should:

- develop guidelines concerning Court practices where a person is vulnerable or has a disability.
- utilise intermediaries for people with disabilities in Court proceedings, including the use of ground rules hearings.

Recommendation 7

Victoria Legal Aid and comparable interstate bodies should provide grants of aid to parties with disabilities to either in-house lawyers with training in disability or to private lawyers who undergo training and education in representing people with disabilities in parenting matters.

Recommendation 8

The *Family Law Act 1975* (Cth) should establish the role of a supportive litigation guardian.

Recommendation 9

A code of conduct concerning litigation guardians should be drafted under the *Family Law Act 1975* (Cth) and should include principles concerning the role requiring litigation guardians to give effect to the rights, will and preferences of the person except where to do so would be contrary to law.

Recommendation 10

All litigation guardians should be provided by the relevant court at the time of their appointment, with copies of the legislation, guidelines and rules that apply to their role. Litigation guardians should also be provided with an avenue of specialist advice on the conduct of their role that is independent of the solicitor and barrister in the case.

Recommendation 11

All litigation guardians, acting in good faith and within the role, should be provided with immunity from orders for costs.

Recommendation 12

There should be consideration of the circumstances where a litigation guardian could receive public funding. A person who has had a litigation guardian appointed should not be required to pay the costs of the litigation guardian in addition to the costs of their legal representation.

Recommendation 13

The Federal Government should consider the development of a Litigation Guardian Scheme that could be modelled on the NSW Guardian ad Litem scheme.

Recommendation 14

Additionally, in relation to the existing system, OPA considers the following issues need to be addressed:

- i. There are different titles for the role of litigation guardian, depending on whether the Court follows the *Family Law Rules 2004*, where there are 'case guardians' or the *Federal Circuit Court Rules 2001* which refer to a 'litigation guardian'. A common title should be used for all appointments, irrespective of whether the case is conducted in the Family Court or the Federal Circuit Court. OPA prefers the term 'litigation guardian' as it is in common usage and is somewhat informative of the purpose of the role.
- ii. The Federal Circuit Court, where most family law cases are now heard, can decide which Rules it will adopt, according to its convenience. The *Federal Circuit Court Rules (Cth)* (1.05(2)) state that where the rules of the Court are insufficient or inappropriate, the Court may apply the Federal Court Rules or the Family Court rules "in whole or part, or modified or dispensed with, as necessary". Orders appointing a case or litigation guardian do not, in OPA's experience, specify which Rules will apply. There should be one set of Rules that apply to all Family Law cases, irrespective of whether the case is conducted in the Family Court or the Federal Circuit Court.
- iii. Both sets of Rules currently in place are inadequate to guide the parties and the Court in the conduct of a case involving a litigation guardian, referring only to a guardian being able to do anything allowed under the rules and not allowed to do anything not allowed under the rules. As noted above, a code of conduct, whether created through Rules or a Court practice note, is the minimum required.
- iv. The proposed code of conduct should clarify the role of a litigation guardian as an active one. A litigation guardian should be permitted and expected to arrange assessments and supports for the parent's case and provide reports to the Court from witnesses in support of the parent without any adverse inferences being drawn from the parent not organising these reports themselves.
- v. The *Family Court Rule* 6.13(1(d)) contains a provision that a case guardian, who is seeking a consent order, must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party's best interests. It is a not infrequent experience of OPA that neither the legal professionals, nor the Court, is aware of, or is applying, this rule, which provides an important protection to a person with disabilities. This provision must be included in any new set of Rules.
- vi. When approving the settlement of orders by a litigation guardian, the Court should be required to review the orders having regard to the provisions of the *Convention on the Rights of the Child* Article 9(1) and the *Convention on the Rights of Persons with Disabilities* Article 23(4). There should also be consideration how the party represented by the litigation guardian could appear at the hearing and indicate to the Court their views regarding the consent orders.
- vii. The proposed code of conduct should clarify the relationship between the person with a disability, the litigation guardian and the legal representative.

About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is an independent statutory office of government that works to safeguard the rights, interests and dignity of people with disabilities.

OPA provides a number of services to work towards these safeguards, including the provision of advocacy, investigation and guardianship services to people with disability or mental illness. Advocacy is fundamental to OPA's work, and this submission draws upon OPA's experience of parents and families where disability is present for people who come into contact with the Family Law and child protection systems.

OPA has a long-standing commitment to promoting the rights and interests of families where a parent has a disability as these families are over-represented in the child protection system. Over many years, OPA has worked with a range of community organisations, disability providers and government agencies to improve the service system response to families where a parent has a disability.

Australia has made significant progress in the legal and social acceptance of people with disabilities into many areas of community life, and more people with disabilities are now having children and creating families than in previous years. The Public Advocate supports the rights of people with disabilities to lead full independent lives in the community to the greatest extent possible and the rights of children to be raised by their natural parents wherever possible, whether or not they or their parents have a disability. To these ends, the Public Advocate supports the rights of parents with a disability to live with and raise their children and to receive encouragement and assistance from the community to parent successfully.

OPA thanks the Commission for the opportunity to make this submission. This submission will address selected questions from the consultation paper where OPA considers that it has information or perspectives that will be of assistance to the review. This includes the case study contained in Appendix 1 to this submission which describes how a litigation guardian experienced the family law system.

Response to Questions

Question 7: How can the accessibility of the family law system be improved for people with a disability?

OPA's response to this question focuses on two areas. First the barriers within the system to people with disabilities who are parties to parenting and property matters. Second, the issues surrounding the appointment and operation of a litigation or case guardian for adults with disabilities involved in parenting or property disputes in the Family Court or the Federal Circuit Court.

OPA has experience in a number of Family Law matters in relation to parents who have disabilities. In a number of these the court has appointed OPA litigation guardian. One particular matter highlighted serious deficiencies in the way Family Law operates unfairly to people with disabilities. A de-identified summary of that matter is set out in appendix to this submission.

Barriers within the system to people with disabilities who are parties to parenting and property matters

A negative perception of disabilities permeates the Family Law system and affects the way people with disabilities are thereby treated. The United Nations has sought to challenge such perceptions.

In the context of this submission, two United Nations' conventions signed by Australia are relevant:

- The *Convention on the Rights of the Child* (CRC), and
- The *Convention on the Rights of Persons with Disabilities* (CRPD).

Article 23 (4) of the CRPD states that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. 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.

Article 7 (1) of the CRC states:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 9(1) states:

States Parties shall ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of a child by the parents or one where the parents are living separately and a decision must be made as to the child's place of residence.

Some of the processes and practices within the family law system towards parents with disabilities do not operate consistently with the rights of people with disabilities under these Conventions.

Recommendation 1

The rights reflected in the United Nations' *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*, and the culture these Conventions seek to foster, should be translated into the *Family Law Act 1975* (Cth).

Disability of the parent as a factor in deciding the best interests of the child

Within the family law system, disability is frequently presented as a deficit in a parent who is seeking parental responsibility and residence in relation to their child. For example, because a parent has an intellectual disability they would be unable to care for their child. This is contrary to Australia's commitment under CRPD Article 23(4) that "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".

In a case study in the appendix, the parent with an intellectual disability was able to care for their child but was competing with her grandparents to be the primary carer. The Independent Children's Lawyer advised that disability would be treated by the Court like any other characteristic or defect of the person that affects their parenting capacity. He stated that it would be comparable to someone with a drinking problem and that the Court would consider whether the person was able to "step up" and overcome the effects of that characteristic or behaviour on their parenting.

Disability is not a defect that is overcome. It is a characteristic of a person that may or may not affect how well that person is able to negotiate the world and, relevantly, parenthood. A person with disability may need supports to help them negotiate the role of parent. There may be some who, despite all effort and support, remain unable to negotiate that role. Disability does not, prima facie, mean a person is unable to parent their child.

The analogy drawn between having a drinking problem and having a disability exemplifies the negative view of disability permeating the thinking of people in the Family Law system about disability. Having a disability is not the same as having a drinking problem. Australia does not have legislation that protects people with a drinking problem against discrimination, nor are there international conventions on the rights of persons with drinking problems.

Recommendation 2

The *Family Law Act 1975* (Cth) should affirm that disability is not, per se, a barrier to parenting and that the presence of disability of one or both parents, in and of itself, cannot be relied upon to determine the best interests of the child.

Disability assessments

OPA is concerned that too often in Family Law proceedings inferences are drawn from disability and capacity assessments where it is improper to do so.

The Court may seek or be provided with assessments of a parent in relation to:

- whether the parent has a cognitive disability, a physical or sensory disability or a mental illness
- whether that disability affects their ability to participate effectively in family law proceedings, understand the process and provide instructions to their legal representative
- whether, and to what extent, their disability affects their capacity to parent their child, and
- whether the parent will require assistance to parent their child until the child reaches adulthood.

In relation to assessment of cognitive disability, the Family Court frequently relies on a report from a psychologist based on the Weschler Adult Intelligence Scale (known as IQ testing). On the basis of the person's results from that testing and from the associated interview process, conclusions are drawn by the psychologist and determinations made by the Court about their legal capacity and their parenting capacity.

Such an approach reflects an out-dated approach to capacity assessment. It is now accepted that capacity is domain-specific and that conclusions cannot be drawn from generalised IQ testing about the capacity of a person to manage the various aspects of their lives. It reflects an assumption that disability is global, static and irremediable, none of which is supported by research evidence.

Victoria's *Medical Treatment Planning and Decisions Act 2016* sets out guidelines when assessing if a person has decision making capacity in relation to medical treatment. Section 5(4–5) provides:

- (4) In determining whether or not a person has decision making capacity, regard must be had to the following—
- (a) a person may have decision-making capacity to make some decisions and not others;
 - (b) if a person does not have decision-making capacity for a particular decision, it may be temporary and not permanent;
 - (c) it should not be assumed that a person does not have decision-making capacity to make a decision—
 - (i) on the basis of the person's appearance; or
 - (ii) because the person makes a decision that is, in the opinion of others, unwise;
 - (d) a person has decision-making capacity to make a decision if it is possible for the person to make a decision with practicable and appropriate support.

Examples

Practicable and appropriate support includes the following—

- (a) using information or formats tailored to the particular needs of a person;
- (b) communicating or assisting a person to communicate the person's decision;
- (c) giving a person additional time discussing the matter with the person; and
- (d) using technology that alleviates the effects of a person's disability.

(5) A person who is assessing whether a person has decision-making capacity must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision-making capacity can be most accurately assessed.

If such a provision were applied to parenting capacity, a person with a cognitive disability needs to be assessed over time in the parent's and child's environment. Compare an approach under section 5 and that of assessing parental capacity through the Family Report writer process. The latter is unfair to a parent with a disability as it is a snapshot in time in an unfamiliar and stressful environment.

OPA would like to draw the attention of the ALRC to the Children's Court Clinic in Victoria as a model of good practice. This is a highly regarded Clinic, independent of the service sector that provides specialised reports to the Children's Court on referral from the Court. It is staffed by psychologists who are leaders in their field.

Recommendation 3

The Federal Circuit Court and the Family Court should develop clinics like that of the Victorian Children's Court Clinic.

Recommendation 4

The *Family Law Act 1975* (Cth) should contain guidance in relation to the assessment of capacity.

The emphasis on “independent parenting”

Most parents do not parent alone. They rely on their family, friends, wider networks and various community and government supports to create a healthy, stimulating and nurturing environment for their child. When a parent with a disability requires support, an inference is drawn that the person is unfit to be a parent.

Under Article 23(2) of the CRPD:

States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

The National Disability Insurance Scheme (NDIS), Australia's system for supporting people with disabilities, should provide assistance with parenting responsibilities. The general principles of the *National Disability Insurance Scheme Act 2013* (Cth) provides that “people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development”¹. Other principles support this –

- People are to receive the care and support they need over their lifetime (s 4(3))
- People should be supported to receive reasonable and necessary supports, including early intervention supports (s 4(5))
- Reasonable and necessary supports should support people to pursue their goals and maximise their independence, support them to be included in the community as fully

¹ *National Disability Insurance Scheme Act 2013* (Cth) s 4(1).

participating citizens and enable them to undertake activities that enable them to participate in the community (s 4(11)).

It is OPA's experience that parents with disabilities who want to parent their children may need support to make that happen. But in acknowledging the need for support, an inference should not be drawn that the person is thus unable to parent.

The Family Law Act is concerned with individuals, normally the mother and father. Section 60CC considerations for determining the best interests of the child refer to the capacity of each parent (or others such as extended family) to meet the needs of the child. Psychological reports and family reports refer to the capacity to parent individually, and frequently see reliance on others or on community services for support as a deficit.

JH and RH [2005] FMCAfam 584 (4.2.1) is an interesting case because each parent was receiving support from a grandparent to care for the child. Federal Magistrate Ryan concluded that:

“the father and his mother were between them better able to provide consistently appropriately skilled care than the mother and her family. If something happened to the maternal grandmother, the mother would have to seek out other supports to care for her child whereas if something happened to the paternal grandmother, the father would be able to meet the child's needs without relying on others. Orders were made for the child to live with his father”.

But where only one of the competing parents has a disability, the need of that person for support is detrimental to their success in litigation.

An emphasis on independent parental capacity, as it plays out in disputes between parents is out-of-step with the reality of modern parenting and particularly discriminatory to parents with disabilities who have the right to parenting supports on a voluntary basis through the NDIS and under the CRPD.

Applications by people other than parents for parental responsibility and residence

The Family Law Act allows for parental responsibility and residence to be given to a person who can establish that he or she has a parenting relationship with the child. Many parents with disabilities receive assistance from their families to raise their children. If relationships within families change or break down, family members can make application to the Court on the basis of those previous relationships. The Act gives no preference to a natural parent over another family member or more remote connection.²

Parents with disabilities are arguably more likely than other parents to lose the care of their children in these circumstances. Disturbingly, this may happen even where there are no protective concerns and no evidence of abuse and neglect. This is contrary to the CRC article 7(1), which states that a child has, as far as possible the right to know and be cared for by his or her parents.

Recommendation 5

The *Family Law Act 1975 (Cth)* should provide that, in determining what is in the child's best interests, the Court must consider Article 23(4) of the *Convention on the Rights of Persons with Disabilities*.

² For example in *WKM&LD [2002] FMCAfam 391* the child's grandparents were the alternative to her mother.

Violence

The discussion paper identifies that women and girls with disabilities are twice as likely as women and girls without disabilities to experience violence during their lives. This applies to intimate partner violence as well as stranger violence and the safety needs of women in the family court processes need to be taken very seriously.

The definition of child abuse has been extended to include the witnessing of violence. As women who have disabilities are more likely to experience family violence, their children are more likely to witness violence and are thereby suffer abuse. Accordingly, women with disabilities are susceptible to judgments that they are unable to keep their children safe from violence or the witnessing violence and that their children are likely to be at risk from future partners.

There is more evidence of these views being manifest in the child protection area than in family law.

Such views would be a serious barrier to justice in the family law system for women who have experienced violence. OPA understands that the Family Court is giving greater attention to protecting children against violence in the decisions made about parental responsibility, residence and access and supports these changes. However, there is a need to guard against judging individual women with disabilities as less likely to keep their children safe on the basis that women with disabilities as a group are more likely to be the victims of violence. It is necessary that judgments on such matters are not made on the basis of whether a parent has a disability but on the actual facts and circumstances of the case.

Barriers to participating in Court proceedings

OPA is on record as stating that decisions about children's futures should not be based on the ability of a parent to stand up to arduous and stressful court processes.³

All parents in the family law system find the situation highly stressful. The stresses experienced by parents with disabilities are greater, in part because of the negative assumptions within the community about people with disabilities. Parents with disabilities are held to a higher standard than other parents and come under a higher level of scrutiny than parents without disabilities.⁴

Particular areas of concern are cross-examination practices by an opposing barrister, advice/pressure from some solicitors and barristers to consent to orders that are disadvantageous to the parent, the difficulty for a person with a disability of negotiating the extended processes and environment of the Court, the difficulty of obtaining consistent support throughout the process and the need not to respond to derogatory statements made about them during the Court processes.

Recommendation 6

OPA recommends the Federal Circuit Court and the Family Court should:

- **develop guidelines concerning Court practices where a person is vulnerable or has a disability**
- **utilise intermediaries for people with disabilities in Court proceedings, including the use of ground rules hearings.**

Recommendation 7

Victoria Legal Aid and comparable interstate bodies should provide grants of aid to parties with disabilities to either in-house lawyers with training in disability or to private lawyers who undergo training and education in representing people with disabilities in parenting matters.

³ Office of the Public Advocate: *Whatever happened to the Village: the removal of children from parents with a disability Family Law – the hidden issues* (2013) 17. Available at <www.publicadvocate.vic.gov.au>.

⁴ Women with Disabilities Australia: *Parenting Issues for Women with Disabilities in Australia* (May 2009) 20.

Issues surrounding the appointment and operation of a litigation or case guardian for adults with disabilities involved in parenting or property disputes in the Family Court or the Federal Circuit Court

In a Family Law proceeding, a person with a disability may have a litigation or case guardian appointed whose role is to act in the place of the person with a disability and take responsibility for the conduct of the proceedings.

The CRPD requires that we reconsider our approach to substitute decision making for people with disabilities.

Article 12 concerns the equal recognition of persons with disabilities before the law. It -

- a. affirms that persons with disabilities have the right to recognition as persons before the law;
- b. requires that States Parties recognise that persons with disabilities enjoy legal capacity on an equal basis with others; and
- c. requires that States Parties shall take appropriate measures to provide access to persons with disabilities to the support they may require when exercising legal capacity.

The appointment of a litigation guardian may be a measure that enables a person to be recognised as a person before the law, it may be a way to enable that person to enjoy legal capacity and the litigation guardian may be a form of support for a person to exercise legal capacity. But this framing of litigation guardianship in terms of the CRPD is not how we have traditionally conceived the litigation guardian's role.

In 2014 the United Nations issued its General Comment No. 1 on Article 12. It notes that there are two strands to legal capacity—legal standing and legal agency. It argued that all people have legal capacity simply by virtue of being human. Neither strand can be taken away.

It is common in our Australian law that a person is considered not to have legal capacity (agency) because she or he does not have sufficient mental capacity.⁵ The General Comment is critical of the concept of mental capacity, how it is assessed, and its linking with legal capacity. Rather people should be supported to exercise their legal capacity and this should never amount to substitute decision making.⁶

Litigation guardianship is a form of substitute decision making which raises the concern that it is proscribed by the CRPD. When Australia signed the CRPD it declared "... its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards".

Article 12(4) of the CRPD requires States Parties to effect safeguards to prevent abuse in relation to measures that may affect a person's legal capacity. Safeguards shall ensure measures -

- a. respect for the rights, will and preferences of the person
- b. are free from conflicts of interest and undue influence

⁵ For example, the appointment of a guardian or administrator under the *Guardianship and Administration Act 1986* (Vic) is on the basis that a person is unable, by reason of their disability, to make reasonable judgements. See also the *Mental Health Act 2014* (Vic), the *Powers of Attorney Act 2014* (Vic) and the *Voluntary Assisted Dying Act 2017* (Vic) for tests of mental capacity and how these impact on a person's right to legal agency.

⁶ United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [16–17].

- c. are proportionate and tailored to the person's circumstances
- d. apply for the shortest time possible
- e. are reviewed by a competent, independent and impartial authority or judicial body.

The challenge is to bring Australia's traditional approach to litigation guardianship in line with the CRPD as understood by Australia.

This review is an opportunity for the development of a supportive litigation guardian whose role is not to make decisions for the person with disabilities, but to support that person to make their own decisions. There are models that could be drawn upon, such as the role of a supportive guardian in the *Guardianship and Administration Bill* before the Victorian Parliament, the supportive attorney role in Victoria's *Powers of Attorney Act 2014*, and the support person in Victoria's *Medical Treatment Planning and Decisions Act 2016*.

Recommendation 8

The *Family Law Act 1975 (Cth)* should establish the role of a supportive litigation guardian.

However, supported decision making will not always be possible and a substitute decision maker may be required if the person is to be properly heard before the Court. Where the role is necessary, the litigation guardian should be guided by standards and other support to perform their role consistently with Australia's understanding of Article 12.

This affords an opportunity to reflect on existing practices regarding litigation guardianship and to codify what is needed. For example

- a. there is no code of behaviour in Family law about how a litigation guardian should engage with the person he or she represents;
- b. there is no guidance as to what it means to act in the person's best interests as is required by the common law;
- c. there is no information provided to litigation guardians about the standards they are required to meet in performing their role.

Recommendation 9

A code of conduct concerning litigation guardians should be drafted under the *Family Law Act 1975 (Cth)* and should include principles concerning the role requiring litigation guardians to give effect to the rights, will and preferences of the person except where to do so would be contrary to law.

The NSW Code of Conduct for Guardians ad Litem is an excellent place to start but this code does not fully reflect the CRPD.⁷ It should also be clear that the role of a litigation guardian is to act as far as possible in the same way the person would act but bringing to their role the capacity to understand, remember, weigh up and evaluate information and to communicate their position and decisions. This would require the litigation guardian to meet with the person they represent regularly and to keep them informed of the progress of the litigation.

The litigation guardian is not simply an impartial assessor of the evidence on behalf of the Court.

Recommendation 10

All litigation guardians should be provided by the relevant court at the time of their appointment, with copies of the legislation, guidelines and rules that apply to their role. Litigation guardians should also be provided with an avenue of specialist advice on the conduct of their role that is independent of the solicitor and barrister in the case.

⁷ The NSW Guardian ad Litem scheme has a Professional Advisory Committee.

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All litigation guardians, acting in good faith and within the role, should be provided with immunity from orders for costs.

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There should be consideration of the circumstances where a litigation guardian could receive public funding. A person who has had a litigation guardian appointed should not be required to pay the costs of the litigation guardian in addition to the costs of their legal representation.

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The Federal Government should consider the development of a Litigation Guardian Scheme that could be modelled on the NSW Guardian ad Litem scheme.

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Additionally, in relation to the existing system, OPA considers the following issues need to be addressed:

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- ii. The Federal Circuit Court, where most family law cases are now heard, can decide which Rules it will adopt, according to its convenience. The *Federal Circuit Court Rules* (Cth) (1.05(2)) state that where the rules of the Court are insufficient or inappropriate, the Court may apply the Federal Court Rules or the Family Court rules “in whole or part, or modified or dispensed with, as necessary”. Orders appointing a case or litigation guardian do not, in OPA’s experience, specify which Rules will apply. There should be one set of Rules that apply to all Family Law cases, irrespective of whether the case is conducted in the Family Court or the Federal Circuit Court.**
- iii. Both sets of Rules currently in place are inadequate to guide the parties and the Court in the conduct of a case involving a litigation guardian, referring only to a guardian being able to do anything allowed under the rules and not allowed to do anything not allowed under the rules. As noted above, a code of conduct, whether created through Rules or a Court practice note, is the minimum required.**
- iv. The proposed code of conduct should clarify the role of a litigation guardian as an active one. A litigation guardian should be permitted and expected to arrange assessments and supports for the parent’s case and provide reports to the Court from witnesses in support of the parent without any adverse inferences being drawn from the parent not organising these reports themselves.**
- v. The *Family Court Rule* 6.13(1(d)) contains a provision that a case guardian, who is seeking a consent order, must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party’s best interests. It is a not infrequent experience of OPA that neither the legal professionals, nor the Court, is aware of, or is applying, this rule, which provides an important protection to a person with disabilities. This provision must be included in any new set of Rules.**

- vi. **When approving the settlement of orders by a litigation guardian, the Court should be required to review the orders having regard to the provisions of the *Convention on the Rights of the Child* Article 9(1) and the *Convention on the Rights of Persons with Disabilities* Article 23(4). There should also be consideration how the party represented by the litigation guardian could appear at the hearing and indicate to the Court their views regarding the consent orders.**
- vii. **The proposed code of conduct should clarify the relationship between the person with a disability, the litigation guardian and the legal representative.**

Conclusion

The Family Law system currently reflects a negative view of people with disabilities. The new law and systems must address this so that people with disabilities are not disadvantaged or discriminated against because of their disabilities.

People with disabilities may need support to help them parent. The need for this support should not be used against them in litigation.

There should be consideration of supportive litigation guardians to support people to make decisions about their litigation. Where a person, even with such support, is unable to manage their litigation, the Court should be able to appoint a person who is skilled, who understands their role, who understands how they are to involve the person with disabilities in decision making, and who has access to support.

Lawyers and other professionals need education and access to good resources to enable them to better represent parents with disabilities.

Appendix 1: Case Study

This case study illustrates how a litigation guardian experienced the family law system.

Background

BK has lived with her child for the length of the child's life. Five of those years BK and the child lived with the child's maternal great grandparents, and the most recent two years with BK and BK's mother. The great grandparents expressed the view that they carried out primary parental responsibilities for the child while BK and the child were living with them before an acrimonious situation led to BK and the child moving states to live with BK's mother for the past two years. During those two years, there is no evidence of abuse or neglect and there has been no involvement with child protection authorities.

The proceedings

The great grandparents applied for a consent order whereby the child lives with them in Victoria. BK was diagnosed with a borderline Intellectual Disability in connection to this case. A litigation guardian was engaged to act as litigation guardian for the mother, who was assessed as unable to handle complex legal proceedings. At the time the litigation guardian was appointed the section 11F process had been completed (including the Family Report). The proceeding was held over 5 days in Victoria.

On the day of his appointment, it was put to the litigation guardian that he consents to an order whereby the child would live with the great grandparents in Victoria. The litigation guardian assessed that he did not have sufficient information to make such a decision and that he would be working with BK and local services in NSW. Upon making a decision to take the matter to trial the litigation guardian requested that the solicitor seek funding from Victoria Legal Aid.

Funding was approved a few weeks prior to the trial but at the time the affidavits were prepared, the litigation guardian was advised that funding had not been sought for professional reports in support of BK's case. Following the three-day allocated hearing, which included the litigation guardian taking the stand and being cross-examined on his interpretation of the role of litigation guardian, the case was adjourned for a number of months for a further two days. On the second day consent orders were made and signed by the litigation guardian enabling the removal of the child from the home of BK and BK's mother to live with the child's great grandparents.

The outcome in relation to United Nations human rights conventions

The litigation guardian is of the view that the outcome of the case breaches the human rights of both BK and the child under the United Nations *Convention on the Rights of Persons with Disabilities* (article 23(4)) and the United Nations *Convention on the Rights of the Child* (articles 7(1) and 9(1)) (specific articles discussed further in text of submission). Three major aspects of the case contributed to the outcome.

1. The constraints on the role of a litigation guardian

While generally agreed that a litigation guardian 'stands in the shoes' of the person with disability in relation to the case, the litigation guardian perceived his role in this matter as objectively assessing the merits of the mother's case to parent the child according to the legal criteria it was likely to apply under the Family Law Act, such criteria being that it was in the best interests of the child. Legal advice received by the litigation guardian was that it was highly probable the Court would see BK's parenting was of lesser quality than the child would receive from the great grandparents.

The litigation guardian must make the decision that a reasonable person would make. This includes, importantly, not extending a case when there is not a reasonable prospect of winning and accepting a reasonable settlement proposal, based upon legal advice about the state of the evidence at the time the proposal is made. A litigation guardian who acts outside their role, does not make reasonable decisions, does not act on the advice of their solicitor or does not act in good faith may be personally liable for costs in the matter.

The ethical dilemma for the litigation guardian arose that, if he made decisions based on the legal merits of the case, he could not pursue the action that he considered in the best interests of BK and the child—those based on the professional opinions of paediatrician, psychologist and family support service working directly with BK and the child in NSW. This ethical dilemma was all the sharper because the litigation guardian was of the view that BK is a good, loving and competent parent.

Another concerning issue is the lack of clarity about the role and about acceptable professional practice within the litigation guardianship role. During the course of this case, including at trial, it was argued by the lawyers involved in this particular case that a litigation guardian:

- replaces the person in the action and therefore should run the case, provide the primary affidavit and give evidence
- cannot act as an advocate for the person
- cannot take an active role in seeking evidence, such as assessments and supports that will strengthen the case of the person with a disability
- cannot seek (or encourage the person with a disability to seek) support for the person that will better enable them to cope with the stresses of being part of the Court process, such as psychological and medical assistance
- cannot provide emotional support or assistance to the person with a disability during the Court process
- should not be taking the wishes of the person with a disability into account in their decision making.

The litigation guardian submitted details of his interpretation of the role of a litigation guardian and the actions taken and planned to take to both the Commonwealth Attorney-General's Department and to Victoria Legal Aid. Neither agency raised any questions about the approach taken at that time. This approach included liaison with professionals working with BK in her local town in NSW and obtaining services and supports, on her behalf. The litigation guardian stated to the Federal Magistrate at the time of his appointment that he would be undertaking these activities and it was not suggested that this was outside the role of a litigation guardian.

The litigation guardian formed the view that the high level of confusion around the legitimate role of a litigation guardian seriously disadvantaged BK.

The person with a disability has, by virtue of the appointment of a litigation guardian, been found to be unable to manage their legal affairs. A person without a disability is capable of taking an active part in their case and doing whatever they consider necessary to strengthen their case. They are able to make decisions about their case as a whole person and in their own best interests. In consideration of the arguments put by the lawyers involved in this particular case, a litigation guardian is not permitted to act in such a fashion. According to them, the role requires that he act essentially as a dispassionate case reviewer for the Court rather than in any real sense acting on behalf of the person with a disability.

A litigation guardian should be able to do everything that any other person could do in relation to their case and the person with a disability should not be discriminated against because the action or initiative has been taken by the litigation guardian. In this case, reports and evidence that the litigation guardian obtained were heavily discounted because BK did not do the work to obtain those reports herself. Given that BK has been found to be unable to understand and manage legal matters, this becomes a form of double discrimination.

The result is that the person with a disability is not properly represented. There is a barrier, in the form of the litigation guardian, between the person with a disability, their legal representatives and the Court. Litigation guardianship is, in part, intended to provide protection to a person with a disability. Instead, on this occasion, it appeared to operate largely as a protection for the Courts against having to deal with a person with a disability. In effect, the role of a litigation guardian in cases about parents and their children, in making an assessment of the merits of the case, acts like a judge. In acting like a judge the person with disability misses their day in court (or has the Court process cut short by consent orders made on their behalf). Consequently, they feel powerless, angry and frustrated.

2. The section 60CC considerations whereby the best interests of the child are determined

Section 60CC sets out the way in which the Family Law Act determines the best interests of the child.

- i. There is no explicit protection for the rights of parents with a disability under the Act. The litigation guardian was advised by the Independent Children's Lawyer that disability would be treated like any other characteristic or "defect" of the person that affects parenting capacity. It would be comparable, in his opinion, to someone with a drinking problem and the Court would consider whether the person was able to "step up" and overcome the effects of that characteristic or behaviour on their parenting. Disability is not the same as having a drinking problem.
- ii. Section 60CC appears to envisage a dispute between two parents with an equal relation to the child about who can best provide for the needs of the child. However, in this case, the dispute was between the great grandparents and BK, because the great grandparents were able to establish that they had a parenting relationship with the child to age five. With that parenting relationship established, the litigation guardian was advised that there is no preference given under the Family Law Act to the closeness of the relationship of a mother over a couple three generations removed from the child.
- iii. Under the Act, the determination of best interests is made on the basis of who has the capacity to be the better parent not whether the actual parent is a good enough parent to the child. In Child Protection jurisdictions the standard is "good enough" parenting with the grounds for removing a child and placing her or him with other members of her or his family or in foster care being whether the child is being abused or neglected. In the Child Protection jurisdiction in Victoria, the litigation guardian was advised that the Great Grandparents would not be considered for kinship care due to their age.
- iv. In this case, despite reports and evidence that the mother comfortably meets the "good enough" parenting test, the litigation guardian was advised that these reports were only slightly better than useless and irrelevant. There had been no reports to Child Protection authorities for the two years the child has been in NSW. The child was well settled in school, well cared for, went to the doctor when necessary and BK followed meticulously the advice of the school, her doctor and other professionals working with the family. As any good parent does (especially a young single parent), she made parenting decisions in consultation with family, friends and professionals involved with her child. Yet it was argued that she could not be given parental responsibility because she lacked the capacity to independently evaluate information in relation to parenting matters (for further discussion see below).

Together these four aspects of the Family Law Act operated to profoundly discriminate against BK and against her child.

3. The processes and procedures of the Court system

The processes and procedures of the Court system as applied in this case have also worked against the interests of BK.

- i. The case was held in Victoria whereas the BK and the child lived in NSW. Proposals to transfer the case to Canberra had been rejected before the litigation guardian became involved. Consequently, each step of the process involved the child, BK and BK's mother traveling to Melbourne to an unfamiliar environment for several days. This added greatly to the stress that they were already under and was a significant disadvantage to BK.
- ii. The Court-ordered assessment of BK by a psychologist was based on the Wechsler Adult Intelligence Scale third edition. This provides a measure of general intellectual functioning across the areas of cognitive functioning including language abilities, learning and problem solving. The test was conducted in Melbourne at the time that BK was in Melbourne for other Court related matters. This assessment diagnosed a borderline Intellectual disability (5th percentile). From that diagnosis, the psychologist concluded that BK did not have legal capacity for the court process. The psychologist also concluded that BK could not independently evaluate information to make parenting decisions. The report then contained a number of general statements about people with this level of disability, including that when questions are presented in a way that invites agreement a person with a disability is prone to agree. This form of questioning was used in cross-examination of BK.
- iii. The psychologist did not carry out a separate evaluation of BK's functional capacity in the area of parenting. Current best-practice disability capacity assessment separates a diagnosis of disability from the capacity to function in particular areas. That is, a diagnosis of a level of disability does not translate into a finding of global incapacity. Thus a person who cannot manage the complex legal matters associated with a Court case may be quite able to parent effectively.
- iv. Because of the "better parenting" standard, the litigation guardian was advised that reports from professionals working with BK (psychologist, family support service and paediatrician) may not be admissible because they did not compare the mother and the great-grandparents. Such reports would, at best, be only slightly better than useless and would therefore not be funded by Legal Aid. On geography grounds alone, it was impossible to obtain comparable reports. The Independent Children's Lawyer gave permission for the child to attend only one session of counselling with the psychologist and did not consent to an assessment of the attachment between mother and child, saying that it was accepted that the great-grandparents and the mother were all acknowledged to have a "strong emotional bond".
- v. The litigation guardian obtained, with the agreement of BK's solicitor, reports from the Family Support worker, the psychologist and the paediatrician working with the family in NSW. The litigation guardian believed that these reports were necessary for BK's case. These were initially submitted as attachments to BK's affidavit. There was evidence in the reports of these professionals in NSW that BK was, in "the real world" and in her current situation with the support of her mother, parenting effectively and capably (the psychologist stated clearly that BK does have functional parenting capacity). The paediatrician advised that he would only provide a report for a specific hearing if his previous invoice for a report (October 2011) was paid (it had remained unpaid) and payment for the requested report was paid in advance by the solicitor. Due to the pressure of time the litigation guardian personally paid for both reports from the paediatrician to ensure that he were available for BK's defence.

The psychologist did not submit an invoice for her report at that time. Because the request for the report came from the litigation guardian, albeit with the agreement of BK's legal representative, the litigation guardian undertook to pay for this report. An application to Victoria Legal Aid was rejected on the basis that payment for reports must be applied for in advance.

- vi. The solicitor advised the litigation guardian that the reports could not be placed on affidavit because there was no funding available for Court appearances for these professionals to be cross-examined. On the first day of the trial, after arguments from the opposing counsel about the presentation of the case, the judge gave permission for these reports to be placed on affidavit. The solicitor for BK applied to Legal Aid for funding of the professionals' appearances at Court by videolink. Funding was not received until mid-way through the first day of the second part of the trial. For various reasons, none of these witness for BK, whose reports testified to her parenting capacity, appeared before the Court for cross-examination. The Family Support Worker was unable to commit to attending Canberra Court for health reasons. The psychologist came to Canberra Court on the morning of the day to give evidence in accordance with agreements made with the solicitor. However, no arrangements had been made for videolink between the Courts. Accordingly she was sent away. When funding did come through to provide evidence the following day, the Family Support Worker advised could not cancel another day's appointment list at short notice in order to be available. The paediatrician was to give evidence and all was arranged but the litigation guardian was taken to hospital and the hearing stopped. The paediatrician's report was admitted to evidence uncontested. In summary, both the paediatrician and the psychologist had cancelled their appointments in order to give evidence on BK's behalf but were not called and, therefore, not paid.
- vii. The court relied on the Family Report that compared the parenting of the great-grandparents and the mother. This assessment was conducted in a situation of great stress. The Family Report writer was also present at the Child Inclusive Conference. She reported BK as being emotionally distraught and in tears most of the day, believing that her child would be removed from her that day and not return home with her. The Family Report was undertaken before the appointment of the litigation guardian. A person with a disability is generally unable to perform as well in an artificial assessment situation with which they are not familiar. The only fair way to make an assessment for a person with a disability is over a period of time in the situation in which they will actually be functioning.
- viii. BK was cross-examined for approximately four hours by the opposing barrister and the ICL barrister without any intervention from BK's barrister or the Federal Magistrate. The litigation guardian was advised that unless BK took the stand there was no case because the court had to hear from BK herself in order to form an opinion.
- ix. Overall, Legal Aid funded a solicitor prior to trial and a barrister for the trial. The applicants were represented by senior counsel, junior counsel and a solicitor at the trial. Given that the majority of people with disabilities are not employed or are on very low salaries, they are disproportionately disadvantaged in their ability to pay for legal representation and are disproportionately dependent on Legal Aid. There are issues around Victoria Legal Aid's funding of reports for a client's defence. It is the litigation guardian's view that it seemed that solicitors are not applying for funding for reports because they believe those applications will be rejected.
- x. None of the legal professionals involved in the case appeared to have knowledge of disability and the efforts of the litigation guardian to inform them about disability were unsuccessful.