



Office of the Public Advocate

Submission to the Australian Law Reform Commission Review of the family law system

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Abbreviations

ALRC	Australian Law Reform Commission
the Act	Family Law Act 1975 (Cth)
CRC	United Nations Convention on the Rights of the Child
FASS	Family Advocacy and Support Service
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate (Vic)
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

Recommendations

Recommendation one

The *Family Law Act 1975* (Cth) Act should be amended so that interpretation governing parenting arrangements is consistent with the human rights principles set out in the United Nations *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*. This guidance should also specifically restate the principle that it is never acceptable for a child to be separated from parents on the basis of a disability of either the child or one or both of the parents.

Recommendation two

The guidance in the *Family Law Act 1975* (Cth) for determining the arrangements that best promote the child's safety and best interests should be strengthened so that it is non-discriminatory for parents with disability by including additional text to the clause: The capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child, *including their willingness and capacity to receive parenting support where this would benefit the child*.

Recommendation three

Access to disability-competent support workers and Auslan interpreters should be provided at Families Hubs as part of the range of relevant services.

Recommendation four

Family Advocacy and Support Services should be expanded to provide case management where a client has complex needs and case management is not available elsewhere.

Recommendation five

Disability advocacy and self-advocacy organisations should contribute to the development of effective practice guidelines for the delivery of legally assisted dispute resolution. The guidelines for effective practice should specifically refer to disability as an issue that can raise questions of risk. A key purpose of the guidance should be effective practice in screening, assessing and responding to risk, which is evidence based and non-discriminatory.

Recommendation six

Consideration should be given to adding the concept of impairment-related abuse to the issues and behaviours referred to in the definition of family violence in the *Family Law Act 1975* (Cth).

Recommendation seven

The Federal Government should commission research to fully explore the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of people with disability, alongside research projects for the other disadvantaged communities that have been identified.

Recommendation eight

The *Family Law Act 1975* (Cth) should provide protections against costs orders for supporters acting responsibly within the supported decision-making framework and for litigation representatives.

Recommendation nine

The term 'intersex medical intervention' should be used when a medical technology is used to intentionally alter an individual's physical or biological features so these more closely align with the physical characteristics of a particular gender.

Recommendation ten

Existing state and territory guardianship and tribunals should be given concurrent jurisdiction with the Family Court to determine authorisation for sterilisation procedures of a child (irrespective of disability) or intersex medical interventions.

Recommendation eleven

The Federal, State and Territory Governments must ensure individuals with disability and their families have good access to independent advocacy, including legal advocacy, through a significant expansion in long-term funding for this purpose. This advocacy support must focus on addressing the personal and social wellbeing of the person with disability.

Recommendation twelve

Legislation should make procuring or abetting the coercive sterilisation of people with disability without judicial authority a criminal offence, including serious penalties for conviction, as part of a range of safeguards to ensure that the human rights of children are protected.

Recommendation thirteen

The family law system should support the provision of effective educational resources to medical practitioners, teachers, guardians, carers and people with disability and their families around the legal requirements that must be met before sterilisation procedures can occur.

Recommendation fourteen

The core competency for the family law system workforce of 'disability awareness' should be changed to 'understanding of human rights based approaches to supporting people with disability and the possible impact of disability on parenting'.

Recommendation fifteen

The second dot point of proposal 10-13 should be strengthened to: 'make recommendations, based on research and evidence, about how that person's disability may, or may not, affect their parenting'.

Recommendation sixteen

The cultural safety framework should be strengthened through the participation of disability advocates and self advocacy organisations during its development and review.

About the Office of the Public Advocate

The Victorian 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, like OPA's submission to the Issues Paper, 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 is pleased to see many of the recommendations and comments contained in the submission to the Issues Paper reflected in the proposals contained in the *Review of the Family Law Discussion Paper*. OPA points particularly to proposals reflecting the following recommendations contained in OPA's submission to the Issues Paper:

- the Family Law Act should be amended to align with the UNCRPD (to include a supported decision making framework and the national decision making principles and guidelines, as previously recommended by the Australian Law Reform Commission),
- provision of information and guidance to people who require decision making support in family law matters, and their supporters
- the Family Law Act should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative
- Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

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. OPA has also written two relevant reports which are available on OPA's website.¹

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 Australian Law Reform Commission for the opportunity to make this submission. This submission will respond to select proposals and makes sixteen recommendations to improve the operation of the family law system so that it better protects and promotes the rights of people with disability.

¹ 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). Available at <www.publicadvocate.vic.gov.au>. This report explored issues relating to the Australian family law system concerning families where the parent has a disability.

Comments and recommendations

Proposals 3.1 – 3-3 Clearer legislation

OPA supports the intention of simpler and clearer legislation to promote readability and usability and welcomes the intention to produce forms in Easy English.

OPA also supports the proposal for amending the ‘best interest’ principle to prioritise the safety of children, particularly in the context of family violence. OPA is, however, concerned about the impact of the principle upon parents with disability.

People with disability continue to be discriminated against on the basis of erroneous assumptions that parents with disability pose a risk to their children and cannot keep their children safe.²

Proposal 3-4 Human rights

OPA strongly supports the intention contained within the fourth dot point concerning children’s human rights, as set out in the CRC and the CRPD. Due to continuing discrimination on the basis of erroneous assumptions, the guidance also needs to restate the principle that it is never acceptable for a child to be separated from parents on the basis of a disability of either the child or one or both of the parents.

Recommendation one

The *Family Law Act 1975* (Cth) should be amended so that interpretation governing parenting arrangements is consistent with the human rights principles set out in the *United Nations Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*. This guidance should also specifically restate the principle that it is never acceptable for a child to be separated from parents on the basis of a disability of either the child or one or both of the parents.

Proposal 3-5 Carer capacity

OPA supports simplification of the guidance for determining the arrangements that best promote the child’s safety and best interests. OPA is concerned that the current suggestion at dot point four in relation to assessing capacity of proposed carers may give rise to discrimination against parents with disability. The current wording carries the implication that a proposed carer should be assessed on their capacity to parent independently. This issue can be addressed by expanding the guidance with an added reference to parent’s willingness and capacity to engage assistance that will benefit their child.

Recommendation two

The guidance in the *Family Law Act 1975* (Cth) for determining the arrangements that best promote the child’s safety and best interests should be strengthened so that it is non-discriminatory for parents with disability by including additional text to the clause: **The capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child, including their willingness and capacity to receive parenting support where this would benefit the child.**

² OPA has written two relevant reports on this and related matters: Office of the Public Advocate: *Whatever happened to the Village: the removal of children from parents with a disability, Report 1: Family Law – the hidden issues* (2013); Office of the Public Advocate: *Rebuilding the Village: Supporting families where a parent has a disability, Report 2: Child Protection* (2015). Available at <www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/social-inclusion/parents-with-disability>.

Proposal 4-3 Advice and support

The Public Advocate supports the establishment of Families Hubs to support and advance the safety and wellbeing of separating families and children. The range of supports offered at the Families Hubs needs to be expanded to include disability-competent support workers and Auslan interpreters that are funded through the operation of the Family Hubs itself. The Families Hubs are a mainstream service that will need to offer reasonable and necessary adjustments to provide fully accessible supports to people with disability. These accessibility supports will need to be provided outside NDIS funded supports, which only a proportion of people with disability will be accessing.

Recommendation three

Access to disability-competent support workers and Auslan interpreters should be provided at Families Hubs as part of the range of relevant services.

Proposal 4-6 Case management

OPA strongly supports this proposal that FASS services should be expanded to provide case management where a client has complex needs and case management is not available elsewhere. Case management is currently not a support type provided under the NDIS. The provision of case-management support will further enable the participation of people with disability in the family law system.

Recommendation four

Family Advocacy and Support Services should be expanded to provide case management where a client has complex needs and case management is not available elsewhere.

Proposal 5-10 Dispute resolution practice guidelines

OPA supports this proposal in general terms. Disability should be added to the issues that are commonly treated as raising questions of risk in the second dot point. This will acknowledge that the issue of risk arising from disability is likely to be a contested matter in certain cases. Clear practice guidance will enable legally assisted dispute resolution to undertake effective practice in screening, assessing and responding to risk which is evidence based and non-discriminatory.

Recommendation five

Disability advocacy and self-advocacy organisations should contribute to the development of effective practice guidelines for the delivery of legally assisted dispute resolution. The guidelines for effective practice should specifically refer to disability as an issue that can raise questions of risk. A key purpose of the guidance should be effective practice in screening, assessing and responding to risk, which is evidence based and non-discriminatory.

Proposals 7-1 – 7-13 Children in the Family Law system

OPA supports these proposals for child inclusive family law processes, while noting that all necessary mechanisms must help ensure that the voice of children with a disability are heard as clearly, loudly and safely as that of any other child.

Proposal 8-1 and Question 8-2, Definitions

OPA supports clarifying the issues or behaviours referred to in the definition of family violence and abuse.

OPA draws attention to the emerging concept of impairment-related abuse, which might usefully be added to the issues and behaviours that should be referred to in the definition. Adding this concept should be considered because people with disability are subjected to particular forms of harm that other members of the community would not normally experience. Examples include being denied access to adaptive equipment such as communication devices or mobility aids. Denying access to medication is another example of impairment-related violence and abuse. Identifying and naming this form of abuse helps draw attention to the coercive and controlling behaviour underlying the abuse. This recognition of the abuse in turn helps others to appreciate its pervasive effect upon the human rights of the person with disability.

Recommendation six

Consideration should be given to adding the concept of impairment-related abuse to the issues and behaviours referred to in the definition of family violence in the *Family Law Act 1975* (Cth).

Proposal 8-2 Further research

As the concept of impairment-related abuse is an emerging issue, it may be preferable to include exploration of this aspect of the broader issue of family violence in the remit of new commissioned research into the definition and the experience of people with disability. This new research project would be conducted with the knowledge that children with disability are at much higher risk of violence than their peers without disability. It would complement any other review that might be conducted in relation to the definition of family violence and the experiences of people from other disadvantaged communities, which all include people with disability amongst their members.

Recommendation seven

The Federal Government should commission research to fully explore the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of people with disability, alongside research projects for the other disadvantaged communities that have been identified.

Proposals 9-1 and 9-2 Supported decision-making

OPA supports the proposal for a supported decision making framework within the *Family Law Act 1975* (Cth) that is accompanied by the provision of resources and protections.

Proposals 9-3 – 9-5 Litigation representative

OPA supports these proposals. Additionally, there needs to be protection against costs orders for decision maker supporters acting responsibly within the supported decision-making framework and for litigation representatives.

Recommendation eight

The *Family Law Act 1975* (Cth) should provide protections against costs orders for supporters acting responsibly within the supported decision-making framework and for litigation representatives.

Question 9-1 In relation to the welfare jurisdiction

Since 2011, OPA has been calling for Commonwealth legislation on the sterilisation of minors, which enact Australia's legal obligations to promote and protect the rights of minors with disability.

The view that sterilisation is not a legal problem, and should be dealt with privately by the person with a disability and their family and doctors, is factually incorrect. Australia's common law heritage, including the social protection doctrine of *parens patriae*, and its obligations under international law, require state action on this issue to protect vulnerable people with disabilities from harm, including harm that is superficially beneficent and well-intended. The same principle applies in relation to intersex medical interventions.

OPA notes that the sterilisation of children in situations that are not life threatening can amount to a serious violation of the rights and dignity of a child with a disability. In 1992 the landmark High Court decision known as 'Marion' enshrined in Australian common law the principle that minors with disabilities have a right to bodily integrity.³

OPA considers that court or tribunal authorisation should be required for children, whether or not they have a disability, concerning sterilisation, intersex procedures, and the removal of tissue for the purposes of transplantation into another person. Medical procedures to save the life of a child can proceed without court authorisation.

OPA supports the extension of the authority of State Guardianship Tribunals to authorise these procedures for children. In most States and Territories, these Tribunals are authorised to consent to such procedures for adults with cognitive disabilities. In Victoria, for example, under the *Guardianship and Administration Act 1986*, the Victorian Civil and Administrative Tribunal (VCAT) can authorise "special procedures" to be performed on adults with disabilities, which includes sterilisation. OPA has called for this authority to be extended so that VCAT is given concurrent jurisdiction with the Family Court of Australia to hear sterilisation applications regarding minors.⁴

OPA acknowledges that there is variation between the States and Territories and proposes that model legislation be developed by the Attorney-General in conjunction with the Australian Guardianship and Administration Council for adoption by the States and Territories.

Independent advocacy needs to be strengthened as part of a range of safeguards to ensure that the human rights of children are protected in these cases.

A comprehensive approach to safeguarding the human rights of children in these cases includes human-rights informed support through medical practitioners and community, health and NDIS-funded services. This will include access to information, counselling and peer support, which assists people with intellectual disability to better manage their sexual and reproductive health. This will also require the availability of effective educational resources for medical practitioners, teachers, guardians, carers and people with disability and their families around the requirements for sterilisation and its consequences.

Recommendation nine

The term 'intersex medical intervention' should be used when a medical technology is used to intentionally alter an individual's physical or biological features so these more closely align with the physical characteristics of a particular gender.

³ For more on this, see Office of the Public Advocate, *OPA Position Statement on the Sterilisation of Children, December 2011*; Office of the Public Advocate, *Submission to The Senate Standing Committee on Community Affairs References Committee, Inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia* (2013) 8, available at <www.publicadvocate.vic.gov.au>.

⁴ Ibid.

Recommendation ten

Existing state and territory guardianship tribunals should be given concurrent jurisdiction with the Family Court to determine authorisation for sterilisation procedures of a child (irrespective of disability) or intersex medical interventions.

Recommendation eleven

The Federal, State and Territory Governments must ensure individuals with disability and their families have good access to independent advocacy, including legal advocacy, through a significant expansion in long-term funding for this purpose. This advocacy support must focus on addressing the personal and social wellbeing of the person with disability.

Recommendation twelve

Legislation should make procuring or abetting the coercive sterilisation of people with disability without judicial authority a criminal offence, including serious penalties for conviction, as part of a range of safeguards to ensure that the human rights of children are protected.

Recommendation thirteen

The family law system should support the provision of effective educational resources to medical practitioners, teachers, guardians, carers and people with disability and their families around the legal requirements that must be met before sterilisation procedures can occur.

Proposal 10-3 Workforce

OPA supports the identification of core competencies for the family law system workforce and the inclusion of a human-rights based understanding of disability. This understanding of the impact of disability should be informed by evidence and the social model of disability via knowledge of the UNCRPD. For this reason, the general term 'disability awareness' at the seventh dot point should be tightened to focus on the required competency.

Recommendation fourteen

The core competency for the family law system workforce of 'disability awareness' should be changed to 'understanding of human rights based approaches to supporting people with disability and the possible impact of disability on parenting'.

Proposal 10-13 Reports on parenting ability

OPA supports the proposal that a report writer with requisite skills prepare a report to assist the court where concerns are raised about the parenting ability of a parent with disability. This can be strengthened by further specifying that the report maker must make their recommendations based on research and evidence.

Recommendation fifteen

The second dot point of proposal 10-13 should be strengthened to: 'make recommendations, based on research and evidence, about how that person's disability may, or may not, affect their parenting'.

Proposal 12-8 Cultural safety framework

OPA supports the development of a cultural safety framework, developed in consultation with relevant representative organisations. This approach should be strengthened by also including input from disability advocacy and self advocacy organisations.

Recommendation sixteen

The cultural safety framework should be strengthened through the participation of disability advocates and self advocacy organisations during its development and review.

Bibliography

Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018)

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