Australian Law Reform Commission

Discussion Paper: Review of the Family Law System

November 2018

# About PWDA

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

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

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

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



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# Introduction

PWDA welcomes the opportunity to respond to the Australian Law Reform Commission’s (ALRC) Review of the Family Law System Discussion Paper (Discussion Paper). PWDA has extensive expertise in the area of all forms of violence, including domestic and family violence and forced medical interventions, against children and young people and adults with disability. Our response to this Discussion Paper draws upon this long history of representation and advocacy.   
  
Our submission focuses primarily on the matters raised in our response to Issues Paper 24, and how they are addressed in this Discussion Paper. We reinforce a number of key issues including those relating to accessible information, discrimination against parents with disability, the forced treatment of children with disability and those with intersex variations, and legal capacity and supported decision making.

Finally, PWDA endorses the recommendations made in Women’s Legal Services Australia’s (WLSA) submission to this review. We also endorse WLSA’s Safety First in family law document,[[1]](#footnote-1) which outlines five steps towards a safer family law system. Furthermore, we endorse the Intersex Human Rights Australia (IHRA) and Australian Women Against Violence Alliance submissions to this review.

# Proposals and questions

## 2. Education, awareness and information

**National education and awareness campaign**

**Proposal 2–1**

The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system. This should include information about:

· the benefits of seeking information, advice and support when contemplating or experiencing separation;

· the duties and responsibilities of parents and the importance of taking a child-centred approach to post-separation parenting that prioritises children’s safety and best interests;

· the existence and location of the proposed Families Hubs (Proposals 4–1 to 4–4) as a place where people experiencing separation can access advice and support services;

· the availability of the proposed family law system information package (Proposals 2–5 to 2–8) that provides practical information to assist people, including children and young people, to understand and navigate the family law system, including how to access the package; and

· the availability of alternative dispute resolution processes to assist and empower people experiencing separation to reach agreement about arrangements for their children and property outside of court proceedings.

**Proposal 2–2**

The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

**Proposal 2–3**

The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.

**Family law system information package**

**Proposal 2–5**

The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:

· advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and

· review the information package on a regular basis to ensure that it remains up-to-date.

**Proposal 2–6**

The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

· the legal framework for resolving parenting and property matters;

· the range of legal and support services available to help separating families and their children and how to access these services; and

· the different forums and processes for resolving disputes.

**Proposal 2–7**

The family law system information package should be accessible in a range of languages and formats, including:

· electronically via a central website;

· as printed material available at key entry points to the family law system and universal services; and

· through interactive means, including a national telephone helpline and a national web-chat service.

1. PWDA supports these proposals and welcomes all serious efforts to facilitate accessibility of the family law system in line with article 13, Access to justice of the Convention on the Rights of Persons with Disabilities (CRPD).
2. In particular, “consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations” and user-testing is a critical component of the process of facilitating accessibility. As the national cross-disability peak, PWDA looks forward to the opportunity to participate in the consultations. For information to be most effective, we recommend a genuine co-design process with representative groups.
3. Consultations must prioritise involvement of children and young people with disability, and women with disability.
4. While the accessibility of a national education and awareness campaign as well as an information package is very welcome, this is only part of the work of making all family law information accessible and available in multiple formats including Easy Read, Auslan and plain English.
5. As PWDA stated in our response to the Issues Paper:

In order to improve access for people with disability, information about family law, family law services and domestic and family violence services must be freely available in a range of accessible formats (both digital and non-digital), including large print, plain English, Easy English, Auslan videos, audio recordings and Braille. Information about the processes, what to expect when engaging with the family law system, and how the family law system interacts with other services and systems must also be provided in a range of formats. In addition, making information available in a range of accessible formats will likely improve access for people with low literacy levels and people from non-English speaking backgrounds.

When considering the use of technology as a form of information and/or navigation, it is worth acknowledging that not everyone is proficient in the use of technology, or necessarily has access to it. This barrier is yet another which must be overcome to ensure equity of access not only for women with disability, but also for some Aboriginal and Torres Strait Islander women, older women and women with low literacy, for instance.[[2]](#footnote-2)

## 3. Simpler and Clearer Legislation

**Simplifying decision making about parenting arrangements**

**Proposal 3–3**

The principle (currently set out in s 60CA of the *Family Law Act 1975* (Cth)) that the child’s best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to ‘safety and best interests’.

**Proposal 3–4**

The objects and principles underlying pt VII of the *Family Law Act 1975* (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:

· arrangements for children should be designed to advance the child’s safety and best interests;

· arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;

· children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;

· decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and

· decisions about the care of an Aboriginal or Torres Strait Islander child should support the child’s right to maintain and develop the child’s cultural identity, including the right to:

(a) maintain a connection with family, community, culture and country; and

(b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age and developmental level and the child’s views, and to develop a positive appreciation of that culture.

**Proposal 3–5**

The guidance in the *Family Law Act 1975* (Cth) for determining the arrangements that best promote the child’s safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:

· any relevant views expressed by the child;

· whether particular arrangements are safe for the child and the child’s carers, including safety from family violence or abuse;

· the developmental, psychological and emotional needs of the child;

· the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;

· the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and

· anything else that is relevant to the particular circumstances of the child.

**Proposal 3–6**

The *Family Law Act 1975* (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child’s connection to their family, community, culture and country must be considered.

**Proposal 3–7**

The decision making framework for parenting arrangements in pt VII of the *Family Law Act 1975* (Cth) should be further clarified by:

· replacing the term ‘parental responsibility’ with a more easily understood term, such as ‘decision making responsibility’; and

· making it clear that in determining what arrangements best promote the child’s safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.

1. PWDA strongly supports Proposal 3-4 to amend the objects and principles of the *Family Law Act 1975* (Cth) (the Act*)* to include the following:

decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

1. Despite the proposal for the objects of the Act (Section 60B) to give effect to the Convention on the Rights of the Child (CRC), PWDA raises concerns about the interpretation of ‘best interests’ by the family law court, which is a welfare jurisdiction. Proposal 3-3 to change ‘best interests’ to refer to ‘safety and best interests’ will only provide protection of children’s rights if it is interpreted in accordance with General Comment No. 14 of the CRC, paragraphs 4-7, which states:

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child… It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the “child's best interests” and no right could be compromised by a negative interpretation of the child's best interests.[[3]](#footnote-3)

The fundamental principle is that interpretation of best interests must be in line with the all human rights under the CRC.

Further guidance on ‘best interests’ for children with disability is set out in the General Comment no. 1 from the CRPD, at paragraph 36.[[4]](#footnote-4) This means that the CRPD also recognises ‘best interests’ as the primary consideration and that in the context of the developing capacities of children and young people with disability that their will and preference must also be recognised.

To comply with article 12, States parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children.[[5]](#footnote-5)

Again, best interests must be interpreted as the protection of all human rights, and not simply the views of the decision maker, as stated in General Comment No. 14.[[6]](#footnote-6)

1. PWDA is supportive of Proposal 3-5 to simplify guidance on children’s safety and best interests, and to emphasise the importance of considering the views of the child. We have concerns, however, that consideration of “the capacity of each proposed carer” will negatively impact parents with disability. It is well known that parents with disability are often considered not to capable of parenting. This is particularly the case for parents with intellectual disability and psychosocial disability. This is despite the fact that there is no evidence of poor parenting by people with intellectual disability.[[7]](#footnote-7) Despite this, we are overrepresented in the child protection system and are at greater risk of having our children removed.[[8]](#footnote-8)
2. In our experience parents with disability seeking custody, are often disadvantaged in the court system, whilst perpetrators of violence are often favoured, purely on the basis of the other parent’s disability or impairment. If we are in the child protection system, disability may be used against us; the Office of the Public Advocate has shown that non-disabled parents use disability to apply to limit contact or living arrangements between children and disabled parents.
3. The issue here is that parents with disability must have all the supports they need to parent effectively on an equal basis with other parents. Supports must be available to assist those carers who need them to provide for the needs of the child. We refer the Committee to our response to Proposal 9-6, which notes that those people with disability who do not have access to the NDIS must also have access to parenting supports, in order for the Act to comply with the CRPD and the CRC.

## 4. Getting Advice and Support

**Families Hubs**

**Proposal 4–1**

The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:

· identify the person’s safety, support and advice needs and those of their children;

· assist clients to develop plans to address their safety, support and advice needs and those of their children;

· connect clients with relevant services; and · coordinate the client’s engagement with multiple services.

**Proposal 4–2**

The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.

**Proposal 4–3**

Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:

· specialist family violence services;

· legal assistance services (such as community legal centres);

· family dispute resolution services;

· therapeutic services (such as family counselling and specialised services for children); · financial counselling services;

· housing assistance services;

· health services (such as mental health services and alcohol and other drug services);

· gambling help services;

· children’s contact services; and

· parenting support programs or parenting education services (including a program for fathers).

**Proposal 4–4**

Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.

1. PWDA cautiously supports the proposal for Families Hubs, particularly Proposal 4-4 regarding community co-design, and also refers again to our recommendation of access auditing for all family law facilities and information, outlined in response to the Issues Paper.[[9]](#footnote-9)

## 5. Dispute Resolution

**Supporting the development of FDR**

**Proposal 5–9**

The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:

· examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;

· the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and

· amendments to existing funding agreements and practice agreements to support this work.

**A framework for legally assisted dispute resolution**

**Proposal 5–10**

The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters. These Guidelines should include:

· guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;

· effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;

· the respective roles and responsibilities of the professionals involved;

· the application of child-inclusive practice;

· the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;

· the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;

· the application of approaches to support effective participation for LGBTIQ families;

· the application of approaches that support effective participation for families where parents or children have disability;

· practices relating to referral to other services, including health services, specialist family violence services and men’s behaviour change programs;

· practices relating to referrals from and to the family courts; and

· information sharing and collaboration with other services involved with the family.

**Proposal 5–11**

These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

1. PWDA supports Proposals 5-9 to 5-11, in particular the inclusion of disability organisations in the development of family dispute resolution models and practice guidelines. We recommend that to facilitate the involvement of disabled people’s organisations, accessibility of the development process be considered, and that the organisations are consulted regarding the processes and supports needed by parents and children with disability to facilitate their participation.

## 6. Reshaping the Adjudication Landscape

**A safe and accessible court environment**

**Proposal 6–12**

The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:

· waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;

· safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;

· private interview rooms;

· multiple entrances and exits;

· child-friendly spaces and waiting rooms;

· security staffing and equipment;

· multi-lingual and multi-format signage;

remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and

· facilities accessible for people with disability.

1. PWDA supports the proposal to ensure family court premises are accessible for people with disability. PWDA has expertise in auditing services for accessibility in the context of domestic and family violence.[[10]](#footnote-10) Creating accessible facilities, or retrofitting existing buildings and offices, requires thorough auditing, planning and management. For this to be an effective and accountable process, which results in facilities that are accessible to all people with disability, an auditing process is required.
2. PWDA therefore reiterates our recommendation from the response to the Issues Paper:

all court and service entrances and exits must, where possible, be wheelchair accessible. Having separate entrances and exits for those who have perpetrated violence and those who have experienced violence was generally seen as positive by those we spoke to, yet being able to ensure this in practice was treated with scepticism, as not all courts are fully accessible. PWDA therefore recommends that all courts perform an audit of their facilities and create and implement a disability inclusion action plan (where a current plan is not already in existence).[[11]](#footnote-11)

## 8. Reducing Harm

**Definitions of family violence and abuse**

**Proposal 8–1**

The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to:

· clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8–3)) including emotional and psychological abuse and technology facilitated abuse; and

· include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.

Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

**Further research into the definition of family violence**

**Proposal 8–2**

The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of:

· Aboriginal and Torres Strait Islander people;

· people from culturally and linguistically diverse backgrounds; and

· LGBTIQ people.

1. While PWDA supports these proposals, we are concerned about the exclusion of people with disability from proposal 8-2. We strongly recommend that people with disability be included as group for whom “the strengths and limitations of the definition of family violence in the *Family Law Act 1975* (Cth)” should be researched.
2. As noted in our original submission:

Due to the intersection of gender and disability based discrimination, women with disability are approximately 40% more likely to experience domestic and family violence than women without disability. However, as services and surveys are not all accessible to women with disability, it is likely that this figure is higher. Furthermore, women with disability often experience violence for a longer period of time, which can result in more severe injuries for this group of women.[[12]](#footnote-12)

1. There are ways in which family violence is perpetrated against people with disability, particularly women with disability and their children, that are different, or in addition to, the general population. These types of violence include, but are not limited to:

* Withholding support to undertake daily activities if the perpetrator is also the person’s carer
* Withholding disability specific equipment or assistive technology, such as wheelchairs, scooters, communication devices, hearing aides or canes
* Withholding money intended to be used for disability supports
* Restraining the person using any of the above methods, or by overuse of medications such as anti-psychotic or anti-anxiety medications
* Threatening reporting to child protective services on the basis of the person’s disability
* Threatening withdrawal of care or placement in residential care
* Abuse of or threats to assistance animals.

This is not currently captured in the definition in the Act.

1. The addition, the experiences of domestic violence by women with disability, including those at the intersection of marginalised identities, are under researched and this must be rectified.
2. As PWDA stated in our original submission on the Issues Paper, we recommend:

That research be conducted into the experiences and needs of children and young people with disability in relation to domestic and family violence and the family law system.

That research be commissioned into family law systemic abuse and how it can be prevented, particularly for people with disability.[[13]](#footnote-13)

## 9. Additional Legislative Issues

**Supported decision making in the family law system**

**Proposal 9–1**

The *Family Law Act 1975* (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, Equality, Capacity and Disability in Commonwealth Laws:

· Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and

· Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a ‘supporter’.

**Proposal 9–2**

The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.

1. PWDA’s submission to the Issues Paper recommended “enshrining the National Decision-Making Principles recommended by the ALRC in relation to recognition of legal capacity for people with disability as required by the CRPD”.[[14]](#footnote-14) PWDA supports proposal 9-1 as it is a critical shift towards recognition of legal capacity of people with disability and a move from substitute decision making to supported decision making model, which is required under article 12 of the CRPD. We refer to our position outlined clearly in response to the issues paper, at paragraphs 46-47.[[15]](#footnote-15)
2. Implementation of this recommendation needs to ensure full compliance with the CRPD article 12, Equal recognition before the law. Guidance in this regard is outlined in *General Comment No. 1, Article 12: Equal recognition before the* *law* which outlines measures to ensure full implementation and compliance with article 12 of the CRPD.[[16]](#footnote-16)
3. This guidance described in Proposal 9.2 must be CRPD compliant.

**Litigation representatives in family law proceedings**

**Proposal 9–3**

The *Family Law Act 1975* (Cth) 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. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, Equality, Capacity and Disability in Commonwealth Laws.

**Proposal 9–4**

Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

**Proposal 9–5**

The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

1. PWDA supports proposal 9-3 in principle, although implementation must be compliant with the CRPD. Given the ALRC Report 124 recommendations were developed in 2014, and at the same time as the Committee on the Rights of Persons with Disabilities finalised its General Comment No. 1, then implementation of the recommendations in this proposal 9-3 needs to ensure compliance with article 12 of the CRPD as outlined in that General Comment.[[17]](#footnote-17)
2. In particular, PWDA notes that implementation of ALRC recommendation 7-3 and 7-4 need to comply with the comprehensive understanding of support and its many forms, and the significant efforts required to determine ‘will and preferences’ before litigation representatives are appointed.[[18]](#footnote-18) As noted in our submission to the Issues Paper:

it must be formally recognised within the family law system that all people may require different supports to make different decisions at different times throughout their lives. These decision-making supports will look different for each individual, but may, for instance, include Auslan interpreting, Easy Read information, or a support person or advocate.[[19]](#footnote-19)

1. Independent advocacy must be viewed as a legitimate and appropriate form of support, as outlined in our submission to the Issues Paper:

[I]ndependent advocates often provide informal decision-making support to people with disability. These advocates have relationships with people with disability and are able to understand and support their decisions – even those deemed to be ‘risky’ or not in ‘the best interests of the individual’.[[20]](#footnote-20) This is because unlike case or litigation guardians, independent advocates support individuals to express and exercise their will and preference, rather than merely making best interests based decisions on their behalf.[[21]](#footnote-21)

1. A litigation representative must perform their duties in line with paragraph 21 of General Comment No. 1, which outlines the following:

Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations…The “best interests” principle is not a safeguard which complies with article 12 in relation to adults.[[22]](#footnote-22)

1. Practice notes proposed in Proposal 9-4 should be compliant with the CRPD, and developed to reflect General Comment No. 1.
2. PWDA has concerns regarding Proposal 9-5 in relation to State and Territory statutory authorities acting as litigation representatives in family law proceedings, as there is no recognition that many State and Territory statutory authorities are based on traditional substitute decision-making functions and arrangements. In order for this proposal to be CRPD compliance, then the Australian Government must work with State and Territory Governments to ensure that the National Decision Making Principles and associated supported decision-making supports are established and implemented to ensure a nationally consistent approach by litigation representatives.

**The welfare jurisdiction**

**Question 9–1**

In relation to the welfare jurisdiction:

· Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?

· In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?

· What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?

1. In response to question 9-1, PWDA again calls for the ALRC to recommend complete prohibition of sterilisation of children with disability, and of genital modification and medical interventions of children with intersex variations, except where medically necessary or where there is a serious threat to life, and in line with Australia’s international human rights obligations.
2. Our position is clearly articulated in our submission to the Issues Paper for this review, and supported by numerous UN recommendations made to Australia over many years.[[23]](#footnote-23) In this review, the ALRC is proposing incorporating CRPD into the legislation along with CRC, and has also proposed incorporating National Decision Making Principles that contain key elements of compliance with article 12 of the CRPD. It would be illogical and undermining of these human rights if there was consideration of proposals that would enable authorisation of medically unnecessary sterilisation or medical interventions on children with disability and/ or intersex variations without free, prior and informed personal consent.
3. Forced sterilisation and forced medical interventions are serious violations of the human right to bodily integrity, the right to health, to be free from violence and to be free from torture and ill-treatment. These are not issues that can be reduced to parental considerations of ‘best interests’ of the child, or through modification of existing mechanisms and regulations for authorisation within the Family Court or guardianship tribunals. It is imperative that human rights protection of all children is underpinned by prohibition of these human rights violations.
4. In order to ensure compliance and oversight of the legal prohibition of forced sterilisation and medically unnecessary medical interventions, the ALRC should recommend the establishment of a human rights body that would include representation by human rights experts, peer-led intersex groups and disabled people’s organisations. A human rights body must provide this additional safeguarding and protection role, given the welfare jurisdictions of the Family Court and State and Territory tribunals have focused on authorisation and regulation rather than prohibition. Analysis of court and tribunal authorisations has demonstrated how human rights have not been accurately considered and protected in these jurisdictions.[[24]](#footnote-24)
5. PWDA also endorses the submissions to this Discussion Paper made by Intersex Human Rights Australia and Dr Linda Steele.

**Supporting people with disability to use the system**

**Proposal 9–6**

The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to:

· build parenting abilities;

· access early intervention parenting supports;

· carry out their parenting responsibilities;

· access family support services and alternative dispute resolution processes; and

· navigate the family law system.

**Proposal 9–7**

The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.

1. There are around 18.3 per cent or 4.3 million people in Australia with disability[[25]](#footnote-25), and at full scheme rollout, around 460 000 people will be participants in the NDIS. This equates to roughly 10 per cent of people with disability.
2. Many people who have disability, but are not participants in the NDIS, also require parenting support. It is essential that the family law system works with these parents and families to provide this support, as one way to address the overrepresentation of parents with disability in child protection matters. There are many issues with NDIS interface with other service systems,[[26]](#footnote-26) and it is essential that mainstream services that provide intensive family support include and support people with disability. PWDA recommends an interagency working group that includes people with disability to establish protocols and guidelines for strengthening and supporting parenting skills.
3. PWDA supports Proposal 9-7, and reiterates our previous recommendations:

That dedicated funding be made available to improve collaboration and integration between family law, violence and disability advocacy services. This can be achieved by providing funding to embed staff from disability advocacy and representative organisations and from specialist DFV services into the family law system.

That funding be made available to establish an independent children’s advocates program, to ensure all children, including children with disability, are listened to and supported throughout the family law system and relevant proceedings.

That independent advocacy be embedded within the family law system and funded through a separate access to justice independent advocacy program.

That additional funding be made available to community legal centres and Legal Aid Commissions to ensure appropriate, accessible and affordable legal support is available to people with disability interacting with the family law system.[[27]](#footnote-27)

## 10. A Skilled and Supported Workforce

**A workforce capability plan for the family law system**

**Proposal 10–1**

The Australian Government should work with relevant non-government organisations and key professional bodies to develop a workforce capability plan for the family law system.

**Proposal 10–2**

The workforce capability plan for the family law system should identify:

· the different professional groups working in the family law system;

· the core competencies that particular professional groups need; and

· the training and accreditation needed for different professional groups.

**Proposal 10–3**

The identification of core competencies for the family law

system workforce should include consideration of the need for family law

system professionals to have:

· an understanding of family violence;

· an understanding of child abuse, including child sexual abuse and neglect;

· an understanding of trauma-informed practice, including an

understanding of the impacts of trauma on adults and children;

· an ability to identify and respond to risk, including the risk of suicide;

· an understanding of the impact on children of exposure to ongoing conflict;

. Cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;

· disability awareness; and

· an understanding of the family violence and child protection systems and

their intersections with the family law system.

**Question 10–1**

Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

**Proposal 10–4**

The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training—including cross-disciplinary training—and accreditation of family law system professionals

1. PWDA supports Proposals 10-1 – 10-4 and reiterates that all staff in the family law system should participate in professional development on disability awareness and human rights. This training should commence from recruitment and should be regularly refreshed. It must also be designed, delivered and evaluated with people with disability and our representative organisations.
2. The training should include the following:

* Disability awareness and human rights
* Intersectional discrimination
* The nature and impacts of violence against people with disability, including the specific nature and impacts of violence on women and girls with disability, children and youth with disability, Aboriginal and Torres Strait Islander people with disability, people with disability from culturally and linguistically and non-English speaking backgrounds and people with disability from LGBTIQ communities
* Identifying and supporting people with disability who are experiencing violence
* The barriers to reporting violence experienced by people with disability
* The barriers to accessing justice experienced by people with disability
* Working with people with disability who have experienced violence or trauma
* Providing timely, culturally safe and appropriate supports to improve access to justice for people with disability within their different communities.[[28]](#footnote-28)

**Reports on parenting ability of people with disability**

**Proposal 10–13**

The *Family Law Act 1975* (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

· prepare a report for the court about the person’s parenting ability, including what supports could be provided to improve their parenting; and

· make recommendations about how that person’s disability may, or may not, affect their parenting.

1. PWDA has serious concerns about this approach. We emphasise that the parenting ability of people with disability, particularly more marginalised groups such as people with intellectual disability, is consistently called into question for no other reason than disability, and that this is a breach of Article 23 of the CRPD, which states that “[i]n 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.”[[29]](#footnote-29)
2. We reiterate that despite no evidence of poor parenting by people with disability, we are overrepresented in the child protection system and are at greater risk of having our children removed.[[30]](#footnote-30)
3. While the training proposed in Chapter 10 will assist in reducing discriminatory attitudes, on its own this cannot safeguard against a system and culture that have entrenched discrimination against people with disability. Therefore, independent advocacy must be embedded within the family law system.
4. As stated in response to Proposal 3-5, parenting supports must be available to assist those carers who need them to provide for their child and systems must report on and provide those supports, rather than assess capacity. We again refer the Committee to our response to Proposal 9-6, which notes that those people with disability who do not have access to the NDIS must also have access to parenting supports, in order for the Act to comply with the CRPD and the CRC.

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

1. 1 Women’s Legal Services Australia, 2016. *Safety First in family law: Five steps to creating a family law system that keeps women and children safe.* Available: <http://www.womenslegal.org.au/files/file/SAFETY%20FIRST%20POLICY%20PLATFORM.MAY%202016_FINAL.pdf> [↑](#footnote-ref-1)
2. See Commonwealth of Australia, Department of the Prime Minister and Cabinet. 2016. *COAG Advisory Panel on Reducing Violence against Women and their Children - Final* *Report*. Available: <http://www.coag.gov.au/sites/default/files/communique/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf> for more information, and PWDA, May 2018, *Australian Law Reform Commission Issues Paper: Review of the Family Law System* available at: <https://pwd.org.au/wp-content/uploads/2018/06/2018-Access-to-Justice-Family-Law-Issues-Paper-to-ALRC.docx> [↑](#footnote-ref-2)
3. UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).* 29 May 2013. CRC/C/GC/14. Available: <http://undocs.org/CRC/C/GC/14> [↑](#footnote-ref-3)
4. Committee on the Rights of Persons with Disabilities, *Article 12: Equal recognition before the law*, General Comment, UN Doc CRPD/C/GC/1, paragraphs 28-30. Available: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).* 29 May 2013. CRC/C/GC/14. Available: <http://undocs.org/CRC/C/GC/14> [↑](#footnote-ref-6)
7. Law Council of Australia, 2017 *The Justice Project. Consultation Paper ‘People with Disability*’; Law Council of Australia, 2017 *The Justice Project. Consultation Paper ‘People Who Experience Family Violence’* available: <https://www.lawcouncil.asn.au/justice-project/consultation-papers> [↑](#footnote-ref-7)
8. For more information, see: Victorian Office of the Public Advocate (OPA), 2012. *OPA Position Statement: The removal of children from their parent with a disability.* Available: <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/social-inclusion/parents-with-disability/328-opa-position-statement-the-removal-of-children-from-their-parent-with-a-disability/file> [↑](#footnote-ref-8)
9. PWDA, May 2018, *Australian Law Reform Commission Issues Paper: Review of the Family Law System* available at: <https://pwd.org.au/wp-content/uploads/2018/06/2018-Access-to-Justice-Family-Law-Issues-Paper-to-ALRC.docx> [↑](#footnote-ref-9)
10. PWDA, 2017, ‘Building Access Program’, available at: <https://pwd.org.au/our-work/campaigns/preventing-violence/building-access/> [↑](#footnote-ref-10)
11. PWDA, May 2018, *Australian Law Reform Commission Issues Paper: Review of the Family Law System* available at: <https://pwd.org.au/wp-content/uploads/2018/06/2018-Access-to-Justice-Family-Law-Issues-Paper-to-ALRC.docx> [↑](#footnote-ref-11)
12. PWDA, May 2018, *Australian Law Reform Commission Issues Paper: Review of the Family Law System*, paragraph 61,available at: <https://pwd.org.au/wp-content/uploads/2018/06/2018-Access-to-Justice-Family-Law-Issues-Paper-to-ALRC.docx> [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. PWDA, May 2018, *Australian Law Reform Commission Issues Paper: Review of the Family Law System* available at: <https://pwd.org.au/wp-content/uploads/2018/06/2018-Access-to-Justice-Family-Law-Issues-Paper-to-ALRC.docx> [↑](#footnote-ref-14)
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