



Office of the  
Public Advocate



**Rebuilding the village:**  
Supporting families where  
a parent has a disability

**Report 2: Child Protection**  
2015

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# Table of Contents

<b>Executive Summary</b>	<b>4</b>
<b>Introduction</b>	<b>6</b>
<b>Recommendations</b>	<b>9</b>
<b>1. Australia in the International Child Protection Context</b>	<b>11</b>
1.1 Parents with disabilities – the invisibility of disability	11
1.2 Pre-birth notifications	12
1.3 Child protection systems	15
1.4 The child protection landscape in Victoria since 2000 and the impact on parents with disabilities	16
1.5 Child protection in Victoria: risk assessment and best interests	18
<b>2. Particular Matters Relating to the Child Protection System Affecting Parents with Disabilities and their Children</b>	<b>26</b>
2.1 Separation of families and children’s best interests	26
2.2 Fear, trauma and grief	28
2.3 Case practice – too much assessment, not enough support	29
2.4 Administrative review of case plan decisions through VCAT	32
2.5 Guardianship and parental responsibility	34
2.6 Family violence	35
2.7 Contact and access between families and children	37
2.8 Power imbalance, stigmatisation and the need for advocacy	38
2.9 Litigation guardianship	41
2.10 Children’s Court processes	43
<b>3. Conclusion</b>	<b>46</b>
<b>Appendix</b>	<b>47</b>
<b>References</b>	<b>50</b>

## Executive summary

In Australia, and internationally, the family is recognised as the best environment for raising children wherever possible. Governments provide a range of universal and specialist services to support families. However, where a parent has a disability, particularly cognitive disability or mental illness, children are removed from their family at a rate many times greater than where parents do not have a disability.

In Victoria, the *Charter of Human Rights and Responsibilities* (the Charter) protects the rights and interests of families and children as the fundamental unit of society. Australia is a signatory to the United Nations *Convention on the Rights of the Child* (CRC) and the *Convention on the Rights of Persons with Disabilities* (CRPD). The CRPD and the CRC provide that children should not be separated from their parents against their will unless this is in the best interests of the child as determined by a Court and subject to judicial review. Under these conventions, abuse or neglect by the parents is a justification but the disability of a parent is not. The State is also committed under the CRPD to providing the supports necessary for parents with disability to meet their parenting responsibilities. The responsibility for raising children is to be shared by the whole community.

The Public Advocate considers that the rights and interests of children and parents with disabilities that are enshrined in domestic legislation and international conventions are at risk if our child protection system creates a dichotomy between the rights of children and the rights of parents. Greater protection, support and understanding of families where a parent has a disability are needed so that these families can stay together where possible. There is considerable knowledge available about how to work successfully with parents who have cognitive disabilities in order to reunify families or enable families to stay together. The Public Advocate strongly supports the adoption of these approaches across Victoria so that fewer children will need to be removed from their parents' care.

A perceived dichotomy between the interests of children and their parents has most likely been built on erroneous assumptions about inherent parental incapacity, the lack of appropriate family supports, predictions of the likelihood of future harm to children in a risk-averse society and the priority given within the system to stability for children, thought to be found in permanent care.

Victoria has been leading the way in Australia in providing a range of family support services through the Child FIRST service system. However, when a family moves into the child protection system, many of these services are not available and the focus of the casework moves to investigation and assessment rather than support, even when the goal of a protective court order is the reunification of the family.

There is, inevitably, a great power imbalance in the child protection system between parents and the Department of Health and Human Services (DHHS) at every stage of the process. Parents often come from a background of social disadvantage and are encountering the system at a time when they are emotionally very vulnerable. They lack the knowledge of how to understand and navigate the system and there is little or no advocacy available to assist them beyond the courtroom doors. Recent amendments to the *Children Youth and Families Act 2005* (CYFA) have diminished the authority and level of oversight of the Children's Court in child protection cases and increased the power of DHHS.

When children are in out-of-home care, their access with their siblings and parents is usually inadequate to maintain attachment and bonding and to foster successful reunification. Women with disabilities are more likely to be the victims of domestic violence and are frequently perceived by child protection as likely to attract men who prey upon them and to be unable to keep their children safe. When this happens, parents are, in effect, being held personally responsible for the systemic social evil of domestic violence in our community.

The Public Advocate has been concerned that the guardianship rights and responsibilities of parents when their child is under a Custody to the Secretary Order (CTSO) were not being respected and that the DHHS processes for a parent providing informed medical consent did not meet the established legal standards. The Public Advocate is alarmed that, rather than addressing this issue, amendments to the legislation have now removed guardianship authority from parents when their children are in out-of-home care under a protective order.

The Public Advocate also considers that insufficient attention may be given to the importance of family love and family and community connection in deciding whether it is in a child's best interests to be removed from their family and too little consideration given to the on-going trauma, fear and grief for both parents and children when families are separated.

The Public Advocate supports the role of the Children's Court (the Court) in providing independent judicial scrutiny of child protection processes in accordance with the CRC and CRPD. This scrutiny is necessary given the extreme seriousness of the decisions that are being made. There are, however, areas where the operation of the Court raises questions about equality of access to justice for families, in particular consent orders, litigation guardianship and the DHHS disposition reports on which the Court relies to decide whether a child is in need of protection. In addition, recent amendments drastically diminish the role of the Court in determining the best interests of children.

## Introduction

This is the second report of the Victorian Public Advocate concerning families where the parent has a disability. The first report, titled: “Whatever happened to the Village? The removal of children from parents with a disability” explored issues relating to the Australian family law system.<sup>1</sup>

The Public Advocate shares the vision of the Victorian government of a community where children are kept safe from harm and have every opportunity to succeed in life. The purpose of this report is to contribute to the achievement of the shared vision by specifically considering issues relating to parents with a disability within the child protection system. Australia has made significant progress in the legal and social acceptance of people with a disability into many areas of community life and more people with disabilities are now having children and founding families than in earlier years. The community as a whole, together with parents with disabilities, wants a child protection system that ensures that children have a good childhood, that protects children by supporting families and treats all involved with respect and compassion.

When children must be removed from their families against their will, responsibility cannot be placed solely on the parents. Everyone must take responsibility, particularly if the State could have provided support and protection but did not provide adequate support and protection.

The Public Advocate supports the strategy of the DHHS of acting to prevent abuse and neglect of all children and of providing the supports needed for vulnerable children and families. The Public Advocate also supports the rights to people with a disability to lead full independent lives in the community to the greatest extent possible and the rights of all children to be raised by their natural parents wherever possible, whether or not they or their parents have a disability.<sup>2</sup> 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.

The best interests and rights of children and families are not mutually exclusive, either in legislation or practice. It is a mistake to view child protection from a perspective of “children’s rights versus parents’ rights”. In 2012, Kevin Cocks, then Queensland’s anti-discrimination commissioner, observed that legal systems that seek the best interests of Australia’s children need to enable rather than disable families.<sup>3</sup>

Victoria’s Charter, in Section 17, entitles families, as the fundamental unit of society, to protection by society and the State. It also gives children, without discrimination, the right to protection that is in their best interests, and needed by reason of being a child. This section protects all the rights and interests of the child and family.<sup>4</sup>

Australia has also signed and ratified the CRC and the CRPD, both of which acknowledge the centrality of the family and commit to providing supports and assistance to enable families to remain intact.

The Public Advocate is conscious of the extreme seriousness of removing a child from the care of their parent or parents against the parents’ will. It profoundly affects the lives of the entire

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<sup>1</sup> The report is available on the Office of the Public Advocate website.

<http://www.publicadvocate.vic.gov.au/research/255/>

<sup>2</sup> Office of the Public Advocate: *Position statement on the removal of children from their parents with a disability*, 2012, available at <http://www.publicadvocate.vic.gov.au/research/302/>

<sup>3</sup> Cocks, K: *Human rights of parents with intellectual disability*, 19 November 2012, available at <http://www.adcq.qld.gov.au/about-us/the-commissioner/speeches>

<sup>4</sup> Victorian Equal Opportunity and Human Rights Commission: *Desperate measures: The relinquishment of children with disability into state care in Victoria*. 2012: 89-91.

family, including the child who is removed, as children in out-of-home care have significantly worse life trajectories overall than children who live at home.<sup>5</sup> Therefore it cannot be concluded that their best interests have necessarily been served by moving into out-of-home care.

For more than ten years, the Public Advocate in Victoria has been highlighting concerns about the disproportionate removal of children from the care of their parents where one or both parents have a disability, in particular a cognitive disability or mental illness. The Public Advocate does not argue that children should remain with parents with disabilities in circumstances that place them at an unacceptable risk of harm but rather that, where services and supports are needed for families, that they are provided and evaluated before their children are removed from their care.<sup>6</sup>

For the purposes of this paper, the definition of disability under the *Guardianship and Administration Act 1986* is adopted where disability is defined as “intellectual impairment, mental disorder, brain injury, physical disability or dementia”. Information about the disability of parents whose children are in the child protection system is not recorded by DHHS. Those working in the field suggest that the children of parents with intellectual disability or a mental disorder are those most likely to have their children removed from their care. Parents with other disabilities are more likely than parents without disabilities to have their children removed but less likely than parents with cognitive disabilities and mental illness.

With regard to intellectual disability, there is considerable research evidence that parents with this disability are generally able to successfully parent their children if they are provided with the education and support necessary in the ways that have been demonstrated by research to be effective.<sup>7</sup> For parents with a mental illness, different supports may be necessary. It is therefore important to have detailed statistical information about the involvement of parents with a disability in the child protection system and to understand the basis on which the disability of that parent has been identified as a risk factor for the abuse or neglect of their children.

Given the research evidence, the reality of a disproportionate number of children being removed where their parents have a disability suggests that children may be removed in the mistaken belief that a diagnosis of disability, particularly cognitive disability or mental disorder, constitutes a static and irremediable barrier to effective parenting and that the removal of the child is essential to keep the child safe. However, a lack of support and education services that are skilled in working with families with parental disability is also a factor, together with embedded negative attitudes within the community towards parents with a disability.

If assumptions are made about the impact of disability on parenting capacity and there is a lack of effective support and assistance provided to parents with disabilities, the inevitable result is the unnecessary removal of children from parents with a disability with serious consequences for the best interests and human rights of children, parents and society as a whole.

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<sup>5</sup> Cashmore J and Paxman M, Predicting outcomes for young people after leaving care: The importance of “felt” security. *Child and Family Social Work: Special Issue on Leaving Care*. 2006, 11, 232-241.

<sup>6</sup> These steps are required under the CYFA but will no longer be required under recent amendments.

<sup>7</sup> Booth T and Booth W, Parenting with learning difficulties: lessons for practitioners. *British Journal of Social Work*, 1993, 23, 459–480.

Feldman M A, Parenting education for parents with intellectual disabilities: a review of the literature. *Research in Developmental Disabilities*, 1994, 15, 299–332.

Booth T, Parents with learning difficulties, child protection, and the courts. *Representing Children*, 2000, 13(3), 175–188.

Llewellyn G McConnell D Honey A Mayes R and Russo D, Promoting health and home safety for children of parents with intellectual disability: A randomised controlled trial, *Research in Developmental Disabilities*, 2003, Vol, 24(6), 405-431

## **Purpose and methodology**

OPA has a long-standing commitment to promoting the rights and interests of families where a parent has a disability. The purpose of the report is to explore the over-representation of families where a parent has a disability in Victoria's child protection system from the perspective of families and to make recommendations that will begin to remedy this situation. The report examines issues raised in earlier reports about child protection in the light of developments over the past ten years. It draws on publicly available material and information gained by OPA in the performance of its statutory duties. This includes information gained through casework.

OPA gratefully acknowledges the contribution to this report of parents with disabilities and of organisations working with families involved in the child protection system. Their insights and experiences have greatly enriched this report. The Bendigo Health-Justice Partnership, Loddon Campaspe Community Legal Centre and Bendigo Community Health Services have provided several case studies drawn from the Centre's experience of representing parents with a disability in the Children's Court and the report includes observations and insights from the experience of their legal staff.



## Recommendations

### Accurate Data

**Recommendation 1:** The Victorian Department of Health and Human Services (DHHS) should collect and disseminate statistics on the number of parents with disability whose children are removed, either permanently or temporarily, as a result of intervention by Victoria's child protection system.

**Recommendation 2:** DHHS should conduct a comprehensive review of pre-birth notifications to establish basic demographic details about mothers, including the presence of any disability and the reasons given for the making of notifications. This information, in de-identified form, should be released to the public.

### Legislative and policy reform

**Recommendation 3:** The *Children, Youth and Families Act 2005* (CYFA) should be amended to include a provision stating that disability, *per se*, is not a barrier to effective parenting.

**Recommendation 4:** The "Victoria's Vulnerable Children – our shared responsibility strategy 2013-2022" should be revised to include strategies to reduce the over-representation of families in the child protection system where a parent has a disability.

**Recommendation 5:** The guidelines developed by the Parenting Research Centre for assessing and working with parents with disability should be adopted by DHHS, and community services should be contracted to work in accordance with these guidelines.

#### **Recommendation 6:**

- (a) The sections of the Act relating to "parental responsibility" should be repealed.
- (b) Pending the repeal of these provisions, DHHS should work with OPA to develop policy and guidelines on the rights and responsibilities of child protection workers, parents, medical and education professionals under Children's Court protection orders.

**Recommendation 7:** Funding should be provided either to Victoria Legal Aid, or to a state-wide advocacy organisation, to enable specialist independent advocacy and assistance to be provided to parents with disability whose children are involved in the child protection system.

**Recommendation 8:** The Victorian Government should adopt Recommendation 37 of the Victorian Parliament Law Reform Committee's report following its "Inquiry into access to and interaction with the justice system by people with intellectual disability and their families and carers". In the context of child protection, this would have particular relevance to matters before the Children's Court. Recommendation 37 states:

That the Victorian Government review current arrangements for the appointment of litigation guardians. The review could seek to:

- ensure consistent processes are employed by the courts to appoint litigation guardians;
- ensure that a mechanism exists to enable a person with a disability to obtain the services of a suitably qualified litigation guardian; and
- ensure that organisations currently acting, or required by the courts to act as litigation guardians are able to draw upon funds to meet adverse costs orders should such orders be imposed by the courts.

## **Children's Court**

**Recommendation 9:** Respondent parents in the Children's Court should have the opportunity to file an affidavit in response to any disposition report provided to the Court by DHHS.

**Recommendation 10:** The Children's Court should develop a practice guideline aimed at ensuring that parents with disability understand the implications of any proposed consent order. Children's Court orders for the removal of children from their parents, including orders made by consent, should be subject to judicial review.

# 1. Australia in the international child protection context

## 1.1 Parents with disabilities – the invisibility of disability

It is not possible to obtain accurate statistics on the number of people with disabilities who are parents. Generalised estimates have suggested that parents with an intellectual or cognitive disability make up 1% to 2% of the parenting population in countries such as Australia,<sup>8</sup> Canada, the United States and the UK. However, a recent Australian report estimates the percentage of parents with an intellectual disability living in private dwellings with children usually living with them at 0.41% of all parents.<sup>9</sup> These figures are based on the Australian Survey of Disability, Ageing and Carers (SDAC) 2009. This survey data does not identify parents with intellectual disabilities whose children, or some of their children, are not living with them.<sup>10</sup> If the generalised estimates that parents with an intellectual disability make up 1% to 2% of the parenting population are accurate, the conclusion can be drawn that between 50% and 75% of parents with intellectual disability do not have their children living with them. Such a conclusion would be consistent with the broad consensus in international research that children are removed when a parent has learning difficulties (intellectual disability) in 40% to 60% of cases.<sup>11</sup> The 2012 American report by the National Council on Disability, “Rocking the Cradle”, estimates that between 40% and 80% of the children of parents with intellectual or psychiatric disability are removed from their parent’s care.<sup>12</sup> Children of adults with intellectual disability in English-speaking countries are known to be at a high risk of being removed from their parents at birth or in their early childhood years.<sup>13</sup>

It is not possible to obtain reliable statistics about the number of parents with disabilities who are reported to the child protection authorities or subsequently have their children removed from their care and whether children are removed from parents with disabilities in greater numbers of reported cases than where parents do not have a disability. A study from Canada found that more than one in ten child maltreatment investigations opened in Canada in 2003 involved children of parents with cognitive impairment.<sup>14</sup> Studies in Victoria and New South Wales have found similar proportions but both are based on limited data.<sup>15</sup>

Just as there are no reliable statistics on the number of parents with cognitive disabilities involved in the child protection system in Victoria, there are no reliable statistics on parents with mental illness or with other disabilities such as physical and sensory disability. Indications are that parents who have experienced mental illness are also at high risk of having their children removed from their care and that parents with all types of disabilities are over-represented in the child protection system.

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<sup>8</sup> Australian Institute of Family Studies: *Parental intellectual disability and child protection: Key Issues*. NCPIC Issues No 31, 2009: 2.

<sup>9</sup> *Estimated prevalence and living circumstances of parents with intellectual disability in Australia from selected national surveys: Technical report 1*. Healthy Start Australian Supported Parenting Consortium. 2014: 10.

<sup>10</sup> The survey suggests that only 8% of people with intellectual disability are parents, compared to 21.2% of people with other disabilities and 30% of people without disabilities.

<sup>11</sup> Victorian Parenting Centre, *Understanding and supporting parents with learning difficulties* 2003:4. Booth T and Booth W, *Supported parenting for people with learning difficulties: lessons from Wisconsin. Representing Children*, 1996, 9(2), 99–107.

<sup>12</sup> National Council on Disability: *Rocking the Cradle: ensuring the rights of parents with a disability and their children*. Washington DC. 2012. Chapter 5. Available at <http://www.ncd.gov/publications/2012/Sep272012/Ch5/>

<sup>13</sup> Llewellyn G, Parents with Intellectual Disability and their Children: Advances in Policy and Practice *Journal of Policy and Practice in Intellectual Disabilities*. Vol 10 (2) 82-85.

<sup>14</sup> McConnell D, Feldman M, Aunos M, Prasad N: *Child Welfare process and outcomes: Caregiver Cognitive Impairment*. University of Alberta 2011: 2.

<sup>15</sup> McConnell D, Llewellyn G, Ferronato, *Parents with a disability and the NSW Children’s Court*. Lidcombe, NSW University of Sydney, Family Support and Services Project, 2000. Swain, Goodfellow, Lee, Cameron and Bennett, *Pride and Prejudice: a snapshot of parents with disabilities’ experience of the child protection system in Victoria*. 2002.

It has been established that intellectual disability does not cause parental inadequacy and that a global lack of competency cannot be assumed on the basis of IQ level.<sup>16</sup> Investigations into the reasons for the overrepresentation of parents with cognitive disabilities in child protection systems suggest that there are three likely factors: the role of the families' living conditions and circumstances, the role of prejudicial beliefs, perceptions and expectations and the role of the significant gaps in support services.<sup>17</sup> Many parents with disability live with the fear that contact with welfare and disability services will result in the removal of their children, making it less likely that they will seek help to successfully parent their children.<sup>18</sup>

Despite the quite startling figures that are available, the disproportionate rate of parents with disabilities' involvement with the child protection system appears to have received little attention from the mainstream child welfare area. As an example, the Child Aware Approaches conferences are a key initiative within the Australian Government's *National Framework for Protecting Australia's Children 2009-2020*. These annual conferences are the major forum for government, non-government and researchers in the child and family welfare area. In the conference programs of 2013 and 2014, there were no presentations directly dealing with the issues facing parents with disabilities and their children, other than papers about parents with mental illness. In contrast, there were many presentations focusing on indigenous families, a population where the involvement of families with the child protection system is also disproportionate.<sup>19</sup>

The lack of reliable data on the number of parents with disability involved in the child protection system at each stage of the process seriously impairs the ability of the community and the child protection system to respond to the rights and needs of children from families where a parent has a disability. To shape child protection policy and practice on the basis of assumptions about parental disability without strong statistical data, analysis and research to test the validity of the assumption is not acceptable and is contrary to the rights of children. It also calls into question whether there is the political or societal will to examine the present situation to see whether the current approaches are achieving the best possible outcomes for vulnerable children and families.

Article 31 of the CRPD requires governments to take responsibility for collecting, disaggregating and disseminating statistics to guide the development of policy and programs for people with disabilities that respect their rights and interests.

**Recommendation 1:** The Victorian Department of Health and Human Services (DHHS) should collect and disseminate statistics on the number of parents with disability whose children are removed, either permanently or temporarily, as a result of intervention by Victoria's child protection system.

## 1.2 Pre-birth notifications

The CYFA introduced pre-birth notifications and referrals. A person with concern for an unborn child can notify child protection or Child FIRST of their concerns for the future well-being of the

<sup>16</sup> Booth T, Booth W, *Parenting with learning difficulties: lessons for practitioners*. 1993.

Feldman M A, *Parenting education for parents with intellectual disabilities: a review of the literature*. 1994.

Booth T, *Parents with learning difficulties, child protection, and the courts*. 2000.

Llewellyn G, McConnell D, Honey A, Mayes R, Russo D, *Promoting health and home safety for children of parents with intellectual disability: A randomised controlled trial*. 2003,

<sup>17</sup> Victorian Parenting Centre: *Understanding and supporting parents with learning difficulties: 4*.

<sup>18</sup> McConnell, D, Llewellyn, G, Bye, *Providing services for parents with intellectual disability: parent needs and services constraints*. *Journal of Intellectual and Developmental Disability*, 22(1), 1997. 5-17.

<sup>19</sup> It is acknowledged that there is some overlap between these populations.

child.<sup>20</sup> The Act does not allow for court orders to be made in relation to unborn children but DHHS can become involved whilst a woman is pregnant on a voluntary basis. Since pre-birth notifications were introduced, the numbers have steadily risen each year according to the latest available figures to over 700 per year in 2010.<sup>21</sup>

Whilst mandatory reporting does not apply to pre-birth notifications, DHHS has published formal advice in the Child Protection Practice Manual on the practice requirements and guidance for reports regarding unborn children.<sup>22</sup> The advice states that an unborn child report to Child Protection is particularly appropriate in circumstances that include where another child has been removed from the care of either parent or where the mother has an intellectual disability or mental illness that is likely to affect their capability to care for the child or impact on the child's safety, stability and development.<sup>23</sup> The Public Advocate is aware that within the community service field, there is a clear perception that in these situations, it is expected that the pregnant woman will be reported to DHHS. The perception of parents with a disability is that, if one child has been removed from their care, the next and subsequent children will be removed almost automatically.

The advice states that the intent of the legislative provisions on unborn children is "to prevent further harm and reduce the likelihood of child protection intervention after the child's birth by working earlier and in partnership with the mother and appropriate support services to address the needs or risk factors".<sup>24</sup> The stated guiding practice principle is one of supportive intervention, rather than interference with the rights of the pregnant woman.

The Cummins report notes that DHHS has not conducted an evaluation of pre-birth notifications and was not able to provide the inquiry with any information on the outcomes for children where pre-birth notifications have been made.<sup>25</sup> With high numbers of pre-birth notifications in Victoria, it is essential to know the circumstances and characteristics of the women concerned, the assistance and support that has been provided to them, the nature of case conferences that have been held, the number of babies that go home with their mother from hospital, the length of time the babies remain with the mother before removal if removal occurs and the orders, if any, that are made after the birth of the child. This information is needed to establish whether the stated intention and principles of this section of the Act are being fulfilled as well as whether the provisions of the CRC and CRPD are being followed.

This issue was highlighted in a paper given by Dr Stephanie Taplin at the Institute of Family Studies Conference in Melbourne in July 2014. She stated that 446 babies under one year of age were removed in the previous year, four times the number that were removed ten years ago. She questioned whether families were getting the support that they need after being reported and having their child removed. She also suggested that the growing focus on reporting was having the unintended consequence of keeping women away from health and other services because of concerns their child might be taken away.<sup>26</sup>

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<sup>20</sup> CYFA Section 29.

<sup>21</sup> Protecting Victoria's Vulnerable Children Inquiry, Cummins, P. D., Scott, D., & Scales, B. (2012). *Report of the Protecting Victoria's Vulnerable Children Inquiry*. Melbourne: Victorian Government Printer. Chapter 8:149

<sup>22</sup> Department of Health and Human Services, *Reports regarding unborn children*. Advice no.1144, 23 April 2013. Child Protection Practice Manual, Victoria.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Protecting Victoria's Vulnerable Children Report. 8:149.

<sup>26</sup> Taplin S, McArthur M, Richmond G: *Pre-natal reporting of "at risk" mothers*. Paper given at Australian Institute of Family Studies conference, Melbourne 2014.

"446 babies rescued" Herald Sun, 1 August 2014.

The Cradle to Kinder program was first established in Victoria in 2012.<sup>27</sup> Six locations and service providers were established from April 2012 and another four programs commenced in 2014. Cradle to Kinder is described as “an intensive ante and postnatal support service for Victorian families”. The target group is young pregnant women under 25 years where a report to child protection has been received for their unborn child or where there are indicators of concern about the well-being of the child but the young woman is not yet involved with the child protection system. Priority is given to women who have been in out-of-home care, Aboriginal women and women who have a learning difficulty. The referral to the Cradle to Kinder program comes through Child FIRST and the program offers an important whole-of-family response to the young mothers who meet the eligibility criteria. It is most unfortunate that parents who are already involved in the Child Protection system or where DHHS has decided to apply for protection orders after a child is born, are not eligible for the program.

#### Janine and Peter

Janine and Peter were a married couple in their twenties. They both have cognitive disabilities and Janine has some physical disabilities that limit her mobility. Although she has an intellectual disability, Janine is considered to be at the upper end of the range. Their first involvement with child protection came when they received a visit from a child protection worker who told them that child protection had received a pre-birth notification and that they were worried about whether they would be able to look after their baby. Janine says that, after she had been informed of the notification, child protection did not get involved again until after their daughter had been born. She says that she was not offered any support, assistance or education about how to care for a baby by DHHS.

When she and Peter found out that she was pregnant, they decided to have all the tests available to see if the baby had genetic disabilities. At first Peter was tested and then the foetus was tested for his disabilities. Janine thinks that she was about 16 weeks pregnant by the time these tests were done. At that stage she did not know what her disability was, so they could not test for that. Janine says that the doctor put a needle into her stomach. She had been told that it sometimes causes a miscarriage. She thought, “How much pressure are you allowed to put a pregnant woman under?” They found out that their baby did not have her husband’s disability. Although she was glad about that, she says that she felt dreadful because she then thought that if their baby did have disabilities, it would be because of her.

Following the birth of their daughter, DHHS became involved again. They were all living with the grandmother and DHHS sent them both for neuropsychological testing. They told Janine and Peter that the results were borderline and then sent them to a Centre for two days. Again, there was no conclusive view about their ability to safely care for their baby. However, ongoing education and assistance to enable them to live independently with their daughter was not provided and eventually, after further assessment, their daughter was placed in permanent kinship care with her grandmother.<sup>28</sup>

**Recommendation 2:** DHHS should conduct a comprehensive review of pre-birth notifications to establish basic demographic details about mothers, including the presence of any disability and the reasons given for the making of notifications. This information, in de-identified form, should be released to the public.

<sup>27</sup> Information on the Cradle to Kinder program is available on the DHHS website. [www.DHHS.vic.gov.au](http://www.DHHS.vic.gov.au)

<sup>28</sup> OPA Advocacy case study.

### 1.3 Child protection systems

All developed countries have systems for dealing with alleged child abuse and maltreatment. Variations in national systems have traditionally been considered according to the extent to which their child abuse reporting systems are characterised either by a child protection orientation or a family service orientation. The approach adopted by a country is closely related to the overall social welfare philosophy of the country and reflects the cultural, historical and philosophical context of the society.<sup>29</sup>

In a recent study comparing the child protection systems of ten countries, a number of chapters refer to the growing significance since the 1990s of neo-liberal ideas, the influence of globalisation and the increased awareness of uncertainty and insecurity in a “risk-averse” society.<sup>30</sup> Common themes, identified as emerging internationally in the child protection area, include:

- the challenges of operating in the public spotlight with intense media coverage of so-called “atrocious tales”,
- the emergence of neglect as the predominant child maltreatment category,
- foster care or kinship care as the placement of preference for children who cannot live with their family,
- the growth in formal procedures and evidence-based initiatives, together with associated tools and technologies to make front-line workers more formally accountable, and
- the overrepresentation of racial and ethnic minorities in child protection populations.<sup>31</sup>

The study suggests that, in response to these themes, a third orientation, a child-focus orientation, has emerged since the mid-1990s.<sup>32</sup> This orientation is influenced by ideas of the social investment state and by the idea that children are independent beings, not just future adults or the property of their parents.<sup>33</sup> The child-focused orientation posits a conflict between children’s rights and parent’s rights and emphasises parents’ obligations as caregivers.

In the child-focused orientation, the child is seen as an individual with an independent relationship with the state. A possible consequence of treating the child as a separate entity from the family is that the State promotes policies that lead to “de-familialisation” by reducing families’ and parents’ responsibilities in raising their children.<sup>34</sup>

There is no mention in this study of parents with disabilities but it is reasonable to conclude that both the child-focused orientation and the child protection orientation make it more likely that children will be removed from parents with a disability than from parents without a disability.

Due to its federal system of government and constitutional arrangements that give primary responsibility for child protection to the states and territories, Australia cannot be said to have a consistent, overarching child protection system. There is a National Framework, endorsed by governments, within which the state child protection systems operate.<sup>35</sup> That said, all Australian states historically adopted more of a child protection orientation rather than a family focused

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<sup>29</sup> Gilbert N, Parton N, Skivenes M: *Child Protection systems, International Trends and Orientations*. Oxford University Press, 2011:3.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Gilbert N, Parton N, Skivenes M: p11

<sup>34</sup> Gilbert N, Parton N, Skivenes M:p252

<sup>35</sup> The National Framework for Protecting Australia’s Children 2009-2020 is a collaboration between National State and Territory Governments and represents a coordinated response to child protection endorsed by the Council of Australian Governments in 2009.



orientation to issues of child maltreatment. Since the turn of the century, the orientation has shifted in a number of Australian states towards an explicit child focus. Victorian legislation, policy and practice have adopted many features of the child focus approach whilst also retaining aspects of the child protection focus. DHHS Victoria describes its practice as “child centred, family focused”. The Carmody report into Queensland Child Protection proposes an explicit family focused orientation that suggests a radical departure from current practice.

#### **1.4 The child protection landscape in Victoria since 2000 and the impact on parents with disabilities**

There has been significant activity at State, Federal and international level that has impacted on Victorian parents with disabilities in the child protection system. A fuller account of some major developments can be found in the Appendix.

OPA, in conjunction with the Victorian Parenting Centre (now the Parenting Research Centre), held a major forum in July 2003 that resulted in a plan to improve the service system response to families where a parent has a disability. The plan included the development of empirically validated supports, clear practices for service cooperation and a legislative framework and legal system that supports the family and ensures protection for children at risk. In 2004, OPA highlighted concerns about the planned CYFA, citing the negative impact that aspects of the Act would have on families where the parent has a disability and calling for more constructive and positive approaches to families.

Victoria adopted a Charter in 2006 that provides protection to families and children and protects their human rights. At an international level the CRPD has been signed and ratified by Australia. The CRPD commits States to ensuring that children are not separated from their parents on the basis of a disability of either the child or one or both of the parents. It also commits States to taking measures to eliminate discrimination against persons with disabilities in matters relating to parenthood and to giving persons with disabilities assistance in the performance of their child-rearing responsibilities. The CRC gives children the right to know and be raised by their parents as far as possible. Both conventions state the children should not be separated from their parents against their will except when this is necessary in the best interests of the child and the decision is subject to judicial review. The disability of the child or parent is not a reason for separation.

The Victorian government in 2011 set up a judicial inquiry into child protection, led by Justice Phillip Cummins. The report of the inquiry “Protecting Victoria’s Vulnerable Children” framed the protection of children in terms of vulnerability and risk factors for child neglect and abuse. It identified six risk factors for neglect and abuse by parents:

- History of family violence
- Alcohol and other substance misuse
- Mental health problems
- Intellectual disability
- Parental history of abuse and neglect
- Situational stress.

In relation to parental intellectual disability, the report states that intellectual disability is a significant factor affecting the prevalence of child abuse and neglect and identifies this as a matter that should be further considered.<sup>36</sup>

The Cummins Report will shape Victoria’s child protection system into the future. The Public Advocate makes the following observations:

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<sup>36</sup> Protecting Victoria's Vulnerable Children Inquiry, Cummins, P. D., Scott, D., & Scales, B. (2012). *Report of the Protecting Victoria's Vulnerable Children Inquiry*. Melbourne: Victorian Government Printer. Chapter 9:225



- It is a very small step from identifying risk factors to those risk factors becoming the actual practice criteria for the removal of children from their parents. This is particularly so in the context of Child Protection making decisions about the likelihood of future harm to children.
- Of the six identified risk factors only one, alcohol and substance abuse, is arguably within the control of the parent.
- There is no distinction drawn between a diagnosis of disability and the capacity to parent or of the reputable research that supports the ability of people with disabilities to be effective and capable parents.<sup>37</sup>
- The CRC is cited only in relation to protective rights. There is no mention of the identity rights or the right to family contained in Article 7 and 9. There is no mention in the report of the CRPD in relation to parenting or any relevance of the CRPD to the inquiry.
- There were very few submissions to the Inquiry from groups or individuals representing parents, with or without a disability, and the panel does not appear to have sought to consult with groups representing families.

The report recommended a series of steps to expedite the permanent placement of children removed from the care of their families that the Public Advocate is concerned will severely disadvantage parents with a disability.

In response to the Cummins Report, the Government's implementation strategy titled "Victoria's Vulnerable Children – Our Shared Responsibility Strategy 2013-2022" was released in May 2013. A Baseline performance data report was subsequently published in December 2013. Most regrettably, neither the Strategy or the Performance data report pay attention to parents with disabilities or incorporate the government's commitment to work in close collaboration with the disability community and service providers to "inform appropriate responses to the needs of children and young people from these higher risk groups".<sup>38</sup> No baseline data was provided on the number of parents with disabilities in the community or involved in the child protection system. These omissions must be remedied as a matter of urgency and the commitment to work in collaboration must be honoured.

Amendments to the Act in relation to permanent care and the role of the Children's Court were passed by the Victorian parliament in September 2014. Overall, the amendments increase the parameters of DHHS decision-making power, decrease the time before children are moved into permanent care, lower the level of authority of the Children's court, repeal the obligation on DHHS to provide services to parents and children, take away the guardianship rights of parents and reduce the inherent jurisdiction of the Court to review DHHS decision-making.

In announcing the changes in relation to permanent care, the Minister said "our first priority is to keep a child with a parent, but when parents cannot address the areas of concern, such as dealing with their drug addiction or providing a safe environment, removing the children is the only option".<sup>39</sup> The changes are described as giving the parents twelve months to resolve the issues of concern, with an extension of a further twelve months possible if the parents are demonstrating good progress.

The changes in relation to permanent care clearly place the responsibility for addressing problems onto the individual parents and, at the same time repeal the obligations on DHHS to

<sup>37</sup> See, for example McConnell D, Llewellyn G, Mayes R, Russo D, Honey A. 2003. "Developmental profiles of children born to mothers with intellectual disability". *Journal of Intellectual and Developmental Disability* 28(2): 122-134.

<sup>38</sup> *Victoria's Vulnerable Children – Our Shared Responsibility Strategy 2013-2022* ; p6.

<sup>39</sup> Premier of Victoria media release: *New legislation a game-changer for kids in care*. 5 August 2014, available at <http://www.premier.vic.gov.au/media-centre/media-releases/10614-new-legislation-a-game-changer-for-kids-in-care.html>.

provide services to parents and families. They call into question the rhetoric of child protection being a shared responsibility.

Concerns about the 2014 legislative changes are comprehensively set out in a submission by the Law Institute of Victoria, dated 20 August 2014.<sup>40</sup> The Public Advocate strongly supports the submission and has deep concerns about the impact of the legislation on families where a parent has a disability. The Public Advocate urges the current Victorian Labor government to reconsider the 2014 amendments to the Act as she does not consider that they are in the best interests of Victoria's families.

In summary, the concerns raised by the Public Advocate since the year 2000 about child protection legislation and practice where the parent or parents have a disability, have unfortunately been borne out in the years since. The child protection system continues to harden against families where disability is present. The numbers of children removed from their parents' care continues to increase and whilst the number of cases involving parents with disability is not known (see Recommendation 1), it is highly likely that number is increasing at a faster rate than the overall rate. This is happening despite the Victorian Charter and the CRPD.

**Recommendation 3:** The *Children, Youth and Families Act 2005* (CYFA) should be amended to include a provision stating that disability, *per se*, is not a barrier to effective parenting.

**Recommendation 4:** The "Victoria's Vulnerable Children – our shared responsibility strategy 2013-2022" should be revised to include strategies to reduce the over-representation of families in the child protection system where a parent has a disability.

## 1.5 Child protection in Victoria: risk assessment and best interests

### Risk

Under the CYFA, a child must not be removed from the care of his or her parents unless there is an unacceptable risk of harm. The best interests of the child are largely determined by assessing the level of risk that the child is subject to and using this information to predict the likelihood of whether the child will be harmed in the future if they remain in that situation. A risk assessment framework identifies the negative features in the child's situation and then seeks out positives and strategies to alleviate or minimise the negatives. Society overall has become increasingly risk-averse since the 1980s and risk assessment frameworks have been developed to systematise and manage risk and to identify the acceptable "risk appetite" for organisations and government.

There has been a counter discourse in the human services field based on concepts of dignity of risk and freedom of thought and action but such counter paradigms do not gain much traction in discussions about child protection. It is unfortunate, however, that there are no well-developed alternative paradigms to the risk paradigm available in child protection because there are some inherent dangers in focusing so strongly on a risk assessment process in child protection decision-making.

Some of the dangers inherent in the risk paradigm emerge when we consider the groups and characteristics that are identified. Research in Australia indicates that when children are removed from home, it is the mother who is identified as failing and mothers who continue to be held responsible for the majority of problems in families after child protection authorities have

<sup>40</sup> Law Institute of Victoria: *Submission, Children Youth and Families (Permanent Care and other matters) Amendment Bill 2014*. [www.liv.asn.au](http://www.liv.asn.au)

become involved.<sup>41</sup> The research indicates that families most likely to come to the attention of child protection authorities are Aboriginal and Torres Strait Islander (ATSI) families, those living with domestic and family violence, where the parent has a mental illness, where the parent or child has a disability, single and young parents and parents who abuse alcohol or drugs.

In considering the basis on which the disability or mental illness of a parent has been identified as a risk to a child's safety and development in the child protection system, it appears to be based on doubtful perceptions that:

- Parents with disabilities are likely to neglect their children. There is evidence that suggests more children are taken from their parents on the basis of neglect or risk of neglect or emotional abuse than on the basis of physical abuse.<sup>42</sup>
- Parents with a disability will be unable to meet the developmental needs of their child.
- Parents with a disability are unable to learn parenting skills.

When particular parental characteristics are identified as risk factors, the attention of child protection authorities is directed towards members of those groups. This means that assumptions are effectively being made that parents with those characteristics will be those most likely to harm their children. It is a very small step from identifying particular characteristics as risk factors to those characteristics becoming the actual practice criteria for the removal of children from their parents. The dynamic is created whereby the parents must prove otherwise if they wish to retain the care of their children.

In child protection practice, the issue is not only about what has happened in the past but about using the past to predict what is likely to happen in the future. Not only is this very uncertain, but within this framework immediate risks take precedence over longer-term risks. DHHS is in the situation of assessing a known situation, the current family environment, against an essentially unknown alternative (kinship foster or permanent care), the circumstances and impact of which are longer term and not predictable when decisions are being made.<sup>43</sup> The reality is that children suffer harm in foster, kinship and residential care as well as when they remain with their parents without effective assistance being provided to the family.

Risks to the government and its agencies of action or inaction are also part of any risk paradigm in child protection. There is pressure from the community to find solutions and to take action in response to a past or current situation that will minimise the risk to children in the future.

Risk analysis should not stop at considering the risks to a child of remaining in his or her current situation. The risks of out-of-home care may be longer term, less concrete and less quantifiable but must also be considered if decisions are to be made in the best interests of children. The evidence available suggests that these risks include:

- Risks to the development of a child by removing them from the love of their parents and siblings without being able to ensure that this love will be provided by another parent figure.
- Risk to the development of a child's identity, their loss of family history and their sense of belonging in the world.
- Risks associated with multiple placements and upheavals in a child's life, with the average number of out-of-home placements being eight during a child's life.
- The risk of children in care having significantly worse educational, health and social outcomes than children who remain at home.

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<sup>41</sup> Hamilton S and Braithwaite V: *Complex Lives, Complex Needs, Complex Service Systems: Community worker perspectives on the needs of families involved with ACT Care and Protection Services*, Occasional Paper No 21, Regulatory Institutions Network, ANU Canberra, 2014: pp6-8.

<sup>42</sup> Australian Institute of Health and Welfare: *National Framework for protecting Australia's children 2009-2020*, 2009.

<sup>43</sup> The DHHS practice manual does not specifically acknowledge that there are risks involved in removing children from their families.

- The risk of children leaving care at 18 years, without the support, however imperfect, of a family.
- The inability of the State to ensure that children will be better off in care than if they had remained with their family with supports provided to them.

Associate Professor Philip Mendes, from Monash University, has written:

Child protection systems are based on the assumption that if we give our government the power to coercively intervene in families where alleged significant abuse or neglect has occurred, then our government as a corporate parent has the moral and legal obligation to devote sufficient resources to ensure that the outcomes for those children are far better than if they had remained with their family of origin.<sup>44</sup>

The information that we have about the life trajectory of children in out-of-home care shows that the State cannot demonstrate that these resources are being provided to children in out-of-home care in Victoria today. The State cannot consistently demonstrate that it will be a “better parent” to the children removed from the care of their parents.

### Best interests

The removal of a child from the care of his or her parents and family is probably the most intrusive action that the State can take into the life of a family and profoundly affects the lives of all the members of that family as children are taken away not only from their parents but from siblings, extended families and local communities.<sup>45</sup> In debates about child protection, the voices of families are rarely heard and there is only anecdotal evidence about the life outcomes for others in the family.

The implications and consequences of separating families are serious and far-reaching. Aleardo Zanghellini argues that parents have a fundamental interest in raising their children that goes beyond arguments about the rights of parents and the best interests of children and extends to fundamental duties owed by the society to respect the relationships between children and parents.<sup>46</sup> Margaret Somerville argues for a basic presumption in favour of “the natural” and that society needs to rediscover respect for the natural. This perspective places the burden of proof on those proposing to move away from the natural, in this context the removal of children from their families.<sup>47</sup>

There are many cases where children must be removed from their parents because of abuse or the inability of the parents to understand or meet their needs despite all the supports that are provided. However, the arguments of both writers support the view that children should not be taken away from their parents (most particularly from their mother) or from each other unless there is an overwhelming need to do so and a real risk to the child. This reflects article 7(1) and 9(1) of the CRC and article 23(4) of the CRPD.

<sup>44</sup> Philip Mendes, “Letter to the Editor”, *The Age*, 17 March 2014.

<sup>45</sup> One American academic has referred to the termination of parental rights as the “death penalty of civil cases”. Stephanie N. Gwillim, “The Death Penalty of Civil Cases: The Need for Individualized Assessment and Judicial Education When Terminating Parental Rights of Mentally Ill Individuals,” *St. Louis University Public Law Review* 29 2009: 344 quoted in NCD; *Rocking the Cradle: Ensuring the Rights of Parents with a disability and their children*.

<sup>46</sup> Zanghellini A, “Who Is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (Cth): A Jurisprudential Feminist Analysis” in *Monash University Law Review* Vol 35(1) 2009: 150

<sup>47</sup> Somerville M, *The Ethical Imagination: journeys of the human spirit*. MUP, Melbourne, 2006: 107

## Tamara

Tamara is in her mid-20s and has a three and a half year old daughter, Natasha. Tamara has a mild intellectual disability, is Aboriginal and was herself raised in foster care. Tamara suffered from post-natal depression after the birth of Natasha and also struggled as a first-time parent with no family support.

Natasha was relinquished by Tamara when she was seven months old. At this time, there was a supervision order in place. Tamara and Natasha's circumstances are complicated by the fact that Natasha suffers from a chronic physical health condition that can require regular hospital admissions. Natasha was placed with a foster carer and after a short time a Guardianship to the Secretary Order (GTSO) was made in the belief that Tamara was unable to make guardianship decisions. The only reports completed were assessments done at a time when Tamara was suffering with post-natal depression and post-traumatic stress disorder.

At the time the Health-Justice partnership became involved with Tamara, DHHS was seeking an extension of the GTSO for a period of two years, with a view to placing Natasha in permanent care. Case planning at this stage was for non-reunification, with a view to reducing Tamara's contact to four times a year.

When Health-Justice saw Tamara, she impressed as someone who had made significant improvements in her own life since the GTSO was made and was really making an effort to be child focused in her decisions. It was also evident in the material provided by DHHS that there were no current reports about Tamara's ability to parent or any recent assessment of her capacity.

It was, however, clear and accepted by DHHS that Natasha has a very positive relationship with her mother and that their attachment and bond is strong. This is a result of Tamara's own commitment to her daughter and the exceptional nature of Natasha's carers, who have encouraged and nurtured Tamara's relationship with Natasha. A Children's Court Clinic assessment was completed with the Clinician making very favourable comments about Tamara and Natasha's bond with one another.

When the Health-Justice partnership initially became involved, the Department was of the view that Natasha's father was unable to be found. They were, however, instructed by Tamara that she had in fact repeatedly supplied the father's name to the Department, but the information had not been followed up. The father was eventually found, completed a confirmatory DNA test and became actively involved in responding to the application.

Ultimately this matter resolved with the Department withdrawing their application, with Natasha being relocated to live with her father and his family with a parenting plan in place for Tamara to share parental responsibility and to have regular contact with her daughter.

Child protection practitioners generally acknowledge that most parents love their children but argue that love is not enough to prevent their children being harmed and to provide for their needs. OPA has experienced child protection staff dismissing concerns about parent/child love as mere sentimentality. Although love, by itself, is not sufficient to provide for all a child's needs, it is nonetheless necessary for a child's healthy development, nurture and identity and cannot be reliably provided in out-of-home care even when the care is stable and capable. It is particular to the parent and child concerned. The love of a parent with a disability for their children is no less important to that child than the love of a parent without a disability for their child. As the Jewish Rabbi, Jonathan Sacks, has observed: "The essential irreplaceability of persons is what gives love its vulnerability, its openness to loss and grief, its fragility and

pathos”.<sup>48</sup> The Australian philosopher, Professor Raimond Gaita writes of the “unfathomable preciousness” of people and the importance of love between parents and children:

As a child I was conscious of the disdain many people showed to my mother. ... The concern (that she did not care for me properly) is I think sincere but it is pernicious because it suggests that my mother was such a bad mother that she was not deserving of my father’s love and kindness or even the love of her son. Such concern is no kindness to a child on behalf of whom it is expressed because it can never be a kindness to a child to undermine its love for its parents by suggesting its parents are not deserving of its love.<sup>49</sup>

In addition, if a child grows up in a community where they are known and included, the thick web of relationships and sense of identity they develop over childhood and carry into adulthood can compensate for many shortcomings in their immediate family situation.<sup>50</sup> Considerations of parental love and its importance are not easily quantifiable and therefore cannot be readily incorporated into a risk assessment framework.

The following case note from OPA files shows what can be achieved when all concerned are prepared to work together and focus on the interests of the child within their family.

#### OPA note on Child Protection case where mother had a mental illness

In 2013, OPA became involved in a child protection case concerning a mother with a mental illness. Protective concerns were raised during the mother’s admission to hospital for the birth of her child. She presented with longstanding delusions about her own birth family and her older children who had been permanently removed from her care. She did not accept DNA results confirming the identity of the child’s father, and had delusional anxieties about the father.

The mother-baby dyad received significant support from treating medical and allied health practitioners from birth. A feature of the situation was the mother’s recognition that working with support services was the best way to protect her relationship with her child. This insight combined with the mother’s determination and pre-existing life skills provided a solid basis for OPA to advocate in support of the mother’s wish to have her child living with her. An OPA employee was appointed as litigation guardian and attended a number of case meetings and court dates with the mother. Another OPA employee was briefly involved in practical advocacy around service provision. After an extended period in residential care together, the mother was allowed by the Court to take her child home to private rental accommodation, with regular and frequent contact with support services. The father, who also has a mental illness, also has regular contact with the child.

Once the order was made allowing mother and baby to live at home together, OPA had no further direct involvement until the next case review meeting around eight months later. Shortly before that meeting, Child Protection indicated that they were considering terminating their involvement on the basis of their own observations and reports from service providers that mother and baby were doing very well. By the date of the meeting, Child Protection had concluded that there should be a final period of consolidation before their involvement ceased. The mother again expressed her willingness to work with services in the interests of her child, and the litigation guardian consented in principle to an extension of the existing order. The child was present at the case review meeting and appeared to be happy, attached to the mother, outgoing, well cared for and healthy.

<sup>48</sup> Sacks J, *The dignity of difference: how to avoid the clash of civilisations* Continuum, London, 2002. p56

<sup>49</sup> Gaita R, *For the love of our children and for the love of the world: Reflections on Rights, Needs and Hope*. Inaugural Rights of the Child lecture, September 2009, Canberra, quoted in Ivec M: *A necessary engagement: an international review of parent and family engagement in child protection*. Social Action and Research Centre, Anglicare Tasmania. 2013

<sup>50</sup> *ibid.*

This case shows that with the appropriate supports, a child and parent who might at first sight seem likely to be separated can be supported to remain together. Sometimes this will take more advocacy than busy legal aid lawyers can provide. The benefits of such support go not only to individual parents and children but also to the wider community, including taxpayers (as it will usually be less costly to keep families together where possible). The love within families and the importance for the future well-being of children of ensuring that every effort is made to protect and preserve family relationships should be recognised free of discrimination based on mental illness or any other disability. Where a child becomes involved with Child Protection, what ultimately matters is whether adequate parenting can be provided. If a parent with a disability needs support to provide that parenting, the focus should not be on their disability per se, but on the supports they need and how those supports can be appropriately and efficiently provided. That was the focus of those involved in the case described above, and the results so far are highly encouraging.

Before making protective orders that remove the child from the care of the parent or parents, the Children's Court must be satisfied that the child has suffered harm whilst in the care of the parent (or other person providing care) and/or the child is at an unacceptable risk of future harm. The Court is also required to establish that all reasonable steps have been taken by the Secretary of DHHS to enable the child to be placed with the parents before a child is placed on an order that removes their custody from their parent.<sup>51</sup> However, Children's Court research materials on child protection have noted that this requirement is rarely raised in child protection matters and there seems to be no mechanism to see that this section of the Act is implemented.<sup>52</sup> Importantly, the 2014 amendments to the Act remove the obligation from DHHS of providing services to enable the child to remain with his or her parent or parents.

#### Angelique

Angelique is the mother of a 16-month-old daughter, Carly. Angelique has a mild intellectual disability. Following a report to child protection when Carly was two months old about her basic needs not being adequately met, a supervision order was made, with Angelique's husband (Carly's father) to be her primary carer. The protective concerns for Carly included exposure to parental substance abuse, family violence and concerns about her general well-being. When Angelique's husband died six months later, an order was made whereby Carly and Angelique were to reside with Carly's paternal grandparents. This arrangement quickly reached crisis point and broke down due to conflict.

A further order was made for Carly to reside with her paternal grandparents. Angelique was thus separated from her 9-month old daughter, with very tenuous accommodation herself, soon after the death of her husband. For some weeks, no arrangements were made for her to see her daughter and she received little support, either emotionally or practically. In the opinion of OPA, child protection showed no awareness that, as a person with a disability in this tragic situation, Angelique was likely to need extra support and that this support could be available through Disability Services.

For about eight weeks, child protection pursued the possibility of kinship care for Carly with Angelique's father, in another state, before deciding that this was the best option for Carly and that Angelique could also move to live with her father if she wished to retain contact with her daughter. OPA is not aware of any serious consideration or analysis being given to whether Angelique and her daughter could be supported to remain together, even if only until final decisions were made in Court about Carly.

In this complex area, it is difficult for the community and child protection professionals not to succumb to the closed-loop thinking inherent in any paradigm, with the increase in the number

<sup>51</sup> Power P, *Child protection*. Children Court research materials. 5:37

<sup>52</sup> *ibid*.

of parents with a disability whose children are in the child protection system too often taken as evidence that they have failed as parents.

Research in the psychology pertaining to child protection practice suggests that once an opinion is formed and a position adopted, theories and beliefs tend to persist despite an array of evidence that should challenge, invalidate or reverse the position. Eileen Munro suggests that child protection decision-making may be particularly susceptible to forms of bias and resistant to changes of judgment:

We selectively remember information that endorses our beliefs. We look for evidence to confirm not disprove our views. We adopt different critical standards for evidence depending on whether it confirms or challenges our beliefs: supportive information tends to be taken at face value while potentially disconfirmatory evidence is subjected to highly sceptical scrutiny. As a consequence of all these biases, there is the tendency to perceive more support for those beliefs than actually exists in the evidence at hand.<sup>53</sup>

### The Wallingford family

This case study demonstrates many issues raised throughout this report, not only the impact of a risk-averse system on a family under pressure. Mr. and Mrs Wallingford have four children, ranging from 16 to 8. Mrs Wallingford has a psychiatric illness and for many years has been receiving treatment, including multiple admissions to psychiatric hospital. She is currently living in a Community Care Unit, and sees her children, both at the unit and on visits home.

Because of his wife's illness, Mr Wallingford has taken the major role in raising the children. The three older children are doing well. The youngest child has been going through a bad patch at school. He has been bullied, at least partly because of his mother's situation, and over the past term he has been strongly and consistently refusing to go to school. Mr. Wallingford has been working with the school and with counsellors to address the issues and made the decision to take his son out of school for a period and provide home schooling, with the intention of him returning to school when the problems are resolved.

DHHS became involved and strongly challenged the father over his approach. DHHS wanted to manage the problem of "school refusal", organise a range of assessments, direct the therapeutic work with the child and decide about the level of contact between the mother and child. The Public Advocate was appointed as litigation guardian for the mother in the case. The mother had, in the past, made accusations about the father but advised the litigation guardian that she had made these allegations when she was very unwell and that her husband was a good father and husband and had never hurt the children. The children had confirmed this.

DHHS had applied for a Supervision order and a contested hearing was held. Counsel for the father argued that he was meeting the needs of the child and that the intervention of the state was not necessary and was, in fact, harmful to all of them. Ultimately, a supervision order was made by consent. The magistrate made it clear that a central focus was to be the return of the child to mainstream schooling as soon as possible. DHHS agreed that it would not oppose the therapeutic program, the home schooling or the contact between the mother and child as decided by the father. The father agreed to tell DHHS about the visits, and to provide DHHS with medical and educational progress reports.<sup>54</sup> The magistrate said that the involvement of DHHS should centre on providing practical support services to the family rather than on assessments. Unfortunately, answers to questions by the Court revealed that relatively few support services were available, compared to assessment services available.

<sup>53</sup> Munro E, *Avoidable and unavoidable mistakes in child protection work* London: LSE Research Articles Online. 1996. Page 6-7. Available at <http://eprints.lse.ac.uk/archive/00000348/>

<sup>54</sup> Case study from OPA files.



One response of the Victorian child protection system to alleged child abuse and neglect has been to move more decisively to out-of-home placement with the aim of preventing cumulative harm.<sup>55</sup> Once in out-of-home placement, the pressure is for stability and certainty in the child's care arrangements. Despite considerable evidence to the contrary, it is often assumed that stability and certainty will be found in foster care or permanent care if the government pays sufficient attention to improving the quality of the out-of-home care system.

In March 2014, the government released a five-year plan for out-of-home care in Victoria. While the Public Advocate strongly supports plans to improve the quality of care for children who cannot safely live with their families, she considers that the best interests of children will only be protected and promoted if the child protection system pays equal attention to strengthening the supports that will enable children to remain with their families wherever possible.

The increased focus on stability and permanency in Victorian child protection is part of the implementation of the Cummins report recommendations. The Stability Planning and Permanent Care project that commenced in November 2012 reviewed every child under ten years in out of home care who was subject to a permanent care plan or had been out of home for more than 12 months and did not have a stability plan with the purpose of expediting permanent care placement.<sup>56</sup> The project identified, as legislative barriers to permanent care, "the need to simplify court orders so that they align better with case plan directions", "the appropriateness of the Children's Court placing parental access conditions on permanent care orders (and) the need to reduce the number of Court hearings and complexity of court processes".<sup>57</sup> These perceived barriers seem to suggest that court orders should be subsidiary to DHHS case plans. If so, DHHS would effectively become the judge as well as prosecutor of the case. This would be directly contrary to article 9 of the CRC.

Despite the opportunities such a project would have provided to review these children's situation to see whether they could safely return home with some additional or more specialised supports, that was not part of the terms of reference of the project.<sup>58</sup> This is counter to the intention of article 7 of the CRC that would suggest resources should also be directed towards supporting reunification of families.

Consequently, the Public Advocate is concerned about the implications of many of the amendments to the Act incorporated in the Children Youth and Families (Permanent Care and other matters) Act that passed the Victorian Parliament in September 2014. Under these changes, DHHS will no longer be required to provide services to enable children to remain or return to their parents and, except in exceptional circumstances, permanent care orders will be sought after child has been out of home for a period of 12 months. In stark contrast, the central plank of the recommendations of the Carmody inquiry into child protection in Queensland that were accepted by the Queensland government in December 2013 was to keep families together. The Queensland Commission reports states:

There is little point in tearing a family apart just to try to put it back together again later. To children, a loved parent is much more than the worst thing the parent has ever done them: most children are better off being cared for haphazardly by a loved parent than in someone else's family or a state-run facility.<sup>59</sup>

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<sup>55</sup> The concept of cumulative harm was introduced in the CYFA in recognition that children can be harmed by an accumulation of experiences, not only by separate incidents of abuse or neglect.

<sup>56</sup> Department of Health and Human Services *Out of Home Care: a five year plan*, March 2014, p41.

<sup>57</sup> *ibid.*

<sup>58</sup> It is not known whether the final report of the Stability Planning and Permanent Care project provided details of the disability and other social disadvantage characteristics of these children.

<sup>59</sup> Camody T, *Taking Responsibility: a roadmap for Queensland Child Protection*: xiii.



The Commission is convinced that wherever possible it is better for the child to stay safely at home — better for the child, better for the family and better for society as a whole.<sup>60</sup>

The Queensland inquiry recommended that all children on long-term guardianship orders to the chief executive officer should be reviewed to determine whether the order is still in the best interests of the child.<sup>61</sup> Only after that has been done will Queensland child protection move to permanent care or adoption. Such an approach is far more consistent with the CRC and the CRPD and, in the opinion of the Public Advocate, shows greater concern for the best interests of the children involved and their families.

### The Smith family

The human and financial costs of refusing to review the circumstances of children in out-of-home care with an open mind can be demonstrated in a recent Victorian case. Two 12-month old children were removed from their mother and placed in foster care primarily on the basis of a report alleging non-accidental injuries of one of the children. The investigation phase took eight months, rather than the standard of three months, and the mother then consented to a series of Custody to the Secretary Orders on the basis of a reunification plan. After three years in foster care, DHHS changed the case plan to non-reunification and permanent care. At that stage, the mother decided to contest the application.

Almost twelve months after the permanent care case plan was approved by DHHS, and after eight days of contested hearing, DHHS and the mother consented to a Supervised Custody Order whereby the children returned to wider family for a period before returning home. By the time they returned home, the children were five years old and had been in seven placements. They had seen their parents and siblings for no more than two hours a week and sometimes did not see their siblings for extended periods of time. The court case revealed serious deficiencies in the DHHS investigation and casework practice.<sup>62</sup>

## 2. Particular matters relating to the child protection system affecting parents with disabilities and their children

### 2.1 Separation of families and children's best interests

Both the CRC and the CRPD state that children should not be separated from their parents unless competent authorities, subject to judicial review, determine that this is necessary in the best interests of the child.<sup>63</sup> Separation may be necessary where abuse or neglect of the child by the parents is present<sup>64</sup> but must never be based on the disability of the parent.<sup>65</sup>

Except in defining the overarching responsibilities of the Secretary of DHHS and in relation to sexual abuse, the CYFA 2005 moved from the language of abuse and neglect that was present in the previous legislation and is the language of the CRC, to the language of harm, including cumulative harm and the risk of future harm, in establishing whether a child is in need of protection. The emphasis is on the harm that occurred and on the likelihood of it happening again rather than who caused the harm or what circumstances contributed to the harm. So, a child may be found to be in need of protection under the Act without the parents, themselves, having abused or neglected the child. This widens the protective role of the legislation towards

<sup>60</sup> *ibid.* xvii.

<sup>61</sup> *ibid.* xxxviii

<sup>62</sup> Case study provided by the writer who was the advocate in the case.

<sup>63</sup> CRC Article 9(1), CRPD Article 23(4)

<sup>64</sup> CRC Article 9(1)

<sup>65</sup> CRPD Article 23(4)

children and moves beyond the best interests standard of the CRC that speaks of abuse and neglect of the child *by the parent* as the justification for separating families (emphasis added).

With the prediction of harm becoming a central element of the legislation and child protection processes, parents with disabilities are particularly vulnerable to judgments based on untested assumptions that their children will be harmed in the future. The experience of parents and of OPA is that child protection authorities frequently argue that if a protective order is made, it has been proved in Court that *the parent* abused or neglected the child.

The maintenance and development of family relationships is not given high priority when children are in out-of-home care. Access of one or two hours each week or fortnight is most commonly provided, even when the intention is reunification. When a child moves into permanent care, this is reduced to three or four times a year on average. The 2014 amendments to the Act have reduced the maximum amount of contact with family that the Court can include as a condition of a Permanent Care order to four times a year.<sup>66</sup>

Of equal concern is the widespread occurrence of siblings being separated from each other. Children's court solicitors recently described the rate of sibling separation as being at epidemic levels in Victoria with one survey of children in 116 foster homes finding that 84% of children were separated from some of their siblings and 42% were separated from all their siblings.<sup>67</sup> The consequences for children separated from their siblings can be traumatic, causing entrenched sadness and despair, a situation comparable to the Stolen Generation and the Forgotten Australians.<sup>68</sup> As one professional stated:

I don't want to be part of the huge apology about these things later on, when we know (the damage) now.<sup>69</sup>

The 2015 report by the Create Foundation, *Sibling Placement and Contact in out-of-home care*,<sup>70</sup> highlights research that overwhelmingly demonstrates that the family's greatest strength is the enduring support that it provides to its members and that family well-being is one of the strongest and most consistent indicators of child well-being and resilience. Of the number of children in care studied in the report, 29% lived with all their siblings, 35.4% lived with some of their siblings and 35.6% did not live with any of their siblings.<sup>71</sup> By definition, none of the children in out-of-home care are living with their parents.

Department of Health and Human Services and B siblings; H siblings. Children Court Victoria Family Division 2009.

In this case, DHHS sought a ruling that the Children's Court did not have the authority to make an order that siblings be placed together when a Custody to the Secretary Order is in place. Counsel for DHHS argued that the Court does not have that authority because it is for the Secretary alone to decide where the children should be placed. Counsel for the children argued that the Court could make such an order, as it would not direct where the children should be placed but that they should be placed together. As such it would be akin to other permissible conditions in an order such as access or schooling or acceptance of services. Judge Grant ruled that, whilst the Secretary does not have unfettered power in relation to placement decisions and must act in the best interests of the child, including considering the desirability of siblings being placed together in out of home care, the Court does not have the power to make an order that siblings on a CTSO be placed together.

<sup>66</sup> LIV submission: *Children Youth and Families (Permanent care and other matters) Bill 2014*. p12.

<sup>67</sup> "Sibling separation in foster care at "epidemic" levels". *The Age*. 21 February 2014.

<sup>68</sup> "Alarm sounded over separating siblings in foster care". *Herald Sun*. 10 October 2013.

<sup>69</sup> *ibid*.

<sup>70</sup> McDowell J, *Sibling placement and contact in out-of-home care*, CREATE Foundation, Sydney, 2015

<sup>71</sup> McDowell J, *Sibling placement and contact in out-of-home care* p32.

Whilst the Children’s Court can make orders about access between parents (or another person) and children that must be adhered to by DHHS, the Court rarely makes orders about access between siblings. It is common for parents to travel considerable distances to see different children in different locations with different supervisors. If orders about access are not adhered to by DHHS, it is difficult for the parent to have any realistic avenue of redress.

OPA acknowledges the many obstacles that prevent siblings being placed together in out-of-home care. In a system where 70% of children are not together with all their siblings, the solution must include strenuous efforts to support the family and prevent children from being removed from their families in the first place.

### Sally

Sally is 25 years of age and the mother of Lucy, now aged six. Sally has a mild intellectual disability and epilepsy. She had a relationship at 19 with Lucy’s father and for 18 months after the birth they all lived with the paternal grandparents. Sally says that she was “thrown out” of the home when Lucy was 2 years old. She lived with various family members but has always maintained contact with Lucy.

Following DHHS involvement, Lucy was placed permanently with her paternal grandparents with access orders made in 2013 for Sally and Lucy to maintain their relationship. DHHS then closed the case. The paternal grandparents are not complying with the access orders and the mother and daughter are not seeing each other. Lucy loves her mother and wants to see her.

Sally is now in stable, independent housing. The Public Advocate is assisting Sally to take the matter back to court but DHHS has declined to provide any assistance.<sup>72</sup>

## 2.2 Fear, trauma and grief

There is reputable professional opinion to support the view that parents with a disability are scrutinised more intensely and are held to a higher standard of parenting than parents without a disability.<sup>73</sup> Although parents with a disability are officially encouraged to seek help and assistance to raise their children, they frequently say that they live with the fear that requests for help will result in their children being removed from their care. This fear is further intensified by mandatory reporting requirements and negative community attitudes towards parents with disabilities. Many services to parents with a disability are only available on the basis that the child is at risk or the family is in crisis and the parent must agree that her child is at risk or that she is in a crisis situation before she is eligible to receive the service. Parents and workers have expressed it in this way:

If you do ask for help from an organisation that provides crisis assistance, they can ask you all sorts of intrusive questions and even look in your cupboards to see what food is there and whether you qualify. I think that we have kept our children by flying below the radar and only asking for help when we absolutely had to.

I am a support worker for people with disabilities and I am shocked at how quickly and casually some workers from other services make negative judgments about their parenting and suggest their children should be in foster care for trivial reasons. I was a ward of the state myself and I know what it was like.<sup>74</sup>

<sup>72</sup> Case study from OPA files.

<sup>73</sup> Llewellyn G. speaking on “Insight” SBS “What’s best for the child” 23 April 2013, available at <http://www.sbs.com.au/insight/episode/transcript/534/What-s-Best-For-The-Child>

<sup>74</sup> These comments were made at a public meeting of an organisation for parents with a disability. March 2014.

Much child protection literature and practice focuses on trauma to children. Children who demonstrate signs of trauma in placement are generally judged to have been traumatised by abuse and neglect in the family home. There is occasional reference in the literature to the trauma of removing children from their home and placing them with strangers with little contact with their parents and, possibly, little contact with siblings.<sup>75</sup> However, in practice, children in child protection are assumed, through the existence of the order, to have suffered trauma at the hands of their family prior to their removal from home. Children whose carers report signs of trauma after contact with their parents and siblings are assumed to be responding to memories of abuse previously inflicted on them by their parents, rather than the distress of repeated separation from their parents being considered as an explanation. The distress of multiple placements that are a feature of most children's foster care experience is frequently minimised or used as justification to move more rapidly to permanent care.

Although there is some acknowledgment of the grief that children experience through their involvement with the child protection service, there is little evidence that the child's grief is given much weight in decisions about placing a child in out-of-home care, either temporarily or permanently. The grief of parents is rarely acknowledged or considered in decision-making with the grief in families appearing to be regarded as an unfortunate but inevitable side-effect of keeping children safe. In Australia, one study in Queensland has paid some attention to parental grief and argues that the grief of parents is important in, and of, itself.<sup>76</sup> The report of Anglicare Tasmania "Parents in the child protection system" found that parents struggled "to understand and deal with what was happening to them within a legalistic and adversarial system geared to focussing on the well-being of children rather than of families".<sup>77</sup>

An instrumentalist attitude towards parents is contrary to the Universal Declaration of Human Rights<sup>78</sup> and to the CRPD. It demonstrates a lack of respect for the equal importance, humanity and dignity of everyone involved in these sad situations.

### 2.3 Case practice – too much assessment, not enough support

DOHS v Mr D & Ms W: [2009] V ChC 1

In this case, Magistrate Power was highly critical of many aspects of DHHS case practice. In a long decision (109 pages) the Magistrate was particularly critical of the attitude of DHHS to the father. In a section of the judgment headed "DOHS' disgraceful ignoring of the father", Magistrate Power said that it was impossible to see how it could be in the best interests of the children for them not to have any contact for 3½ to 4 months with a father about whom the Department held no protective concerns. He was also critical of the Department's practice of applying for a Custody to the Secretary order when their father was able and willing to care for them and for failing to invite him to the Best Interests Case Planning meeting. He remarked that that the case worker and her supervisor acted as if they were totally unaware of sections 8 and 10 of the CYFA.

<sup>75</sup> UPenn Collaborative on Community Integration: *Removal from the Home: Resulting Trauma*. Available at: [http://tucollaborative.org/pdfs/Toolkits\\_Monographs\\_Guidebooks/parenting/Factsheet\\_4\\_Resulting\\_Trauma.pdf](http://tucollaborative.org/pdfs/Toolkits_Monographs_Guidebooks/parenting/Factsheet_4_Resulting_Trauma.pdf)

<sup>76</sup> Douglas H, Walsh T, Blore K, *Mothers and the Child protection system*. University of Queensland 2009, available at <http://www.law.uq.edu.au/documents/research/projects/child-protection-report.pdf>. Burgheim, Theresa, *The Grief of Birth Parents whose children have been removed: implications for practice in out-of-home care*. ACWA Conference 2002.

<sup>77</sup> Teresa Hinton, *Parents in the Child Protection system*. p132.

<sup>78</sup> The Universal Declaration of Human Rights, Article 1, states that all human beings are born free and equal in dignity and rights.

From the time that Child Protection receives a report about a child, the processes of the department are heavily focused on the investigation of that report. If DHHS substantiates the report and makes application for a protective order, the forensic-style investigation process continues in order to obtain evidence to support an application to the court for a protective order.

Prior to the 2014 amendments, before the court could make a protective order that removes a child from the custody of his or her parent, under s276 (2)(b) of the Act it must be satisfied, by a statement contained in a disposition report in accordance with s558(c) that all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in the custody of his or her parent. Section 276(1)(b) was repealed and replaced with “it is satisfied that the child cannot be sufficiently protected without a protection order”.

The disposition report proforma currently used by DHHS contains a heading “Steps taken to enable the child to return home”. In the disposition reports seen by the Public Advocate, this section generally contains reports of the assessments undertaken, but little, if anything about supports provided to the parent. See also the Wallingford family case study on page 24 of this report, where the magistrate made clear that the focus of DHHS involvement should be on practical support rather than protection but it became apparent that little support was actually available to the family. With the removal from DHHS of the legislative obligation to provide services to assist the family, the way will be cleared for children to move more rapidly into permanent care and the lack of support services will not be addressed.

Once a protective order is made, more investigations may be undertaken to guide the case planning process and setting of goals. With limited resources, it appears that the greater proportion of resources that are available goes into investigation rather than into providing the family with the supports that may enable the children to live safely with their family. This is particularly the case when the children have already been removed from home and are in foster care.

The counselling that is set down for the parents may also be forensic, rather than therapeutic in nature, evidenced by the wording of referrals and the requirement that the psychologist report to DHHS so that DHHS can determine whether the goal to which the counselling was directed has been achieved. As an example, one case plan seen by OPA set a goal “to assess the viability of reunification, with the mother to engage in counselling to focus on her past circumstances and identify the factors that led her to be in those circumstances so as to assist her to make links with her diminished parenting capacity”.

DHHS controls the information that is provided to professionals and service providers. The parent does not receive a copy of the DHHS referral to the counsellor or any other professional and does not have the opportunity to respond to the information in the referral, giving his or her perspective. This is, arguably, a denial of natural justice and again demonstrates the power imbalance between DHHS and families. OPA’s experience is that advocates and even litigation guardians also have great difficulty in obtaining such information.

Many generic services are not available to families that do not have children in their care for more than a certain number of hours per week.<sup>79</sup> Some generic services report that they do not have the capacity to work with families where the parent has a disability or they do not have the knowledge to work effectively with them. DHHS Disability Services does not regard parenting support as a high priority for their services and often will not accept referrals for support with parenting responsibilities. The eligibility criteria to be a registered DHHS Disability client are strict and many parents with mild disabilities who have lived independently for years do not qualify. Such parents may be labelled as generally “low functioning”, not disabled enough to

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<sup>79</sup> One example is the Positive Parenting Program that requires that parents have unsupervised access to their children for at least eight hours a week.

receive support services but in need of those supports to assist them in their parenting. Another major concern is the lack of liaison and collaborative work between child protection and DHHS Disability Services.

#### Angelique (continued)

Whilst the family was together they were supported, through child protection involvement, by a family support organisation. However, when Carly's father died, that agency was less equipped to support Angelique because their awareness and expertise in disability issues was lower and their primary relationship was with child protection rather than disability services. Angelique subsequently had a DHHS Disability Services case manager appointed who in turn lodged an application for guardianship. OPA was then appointed to be Angelique's guardian by VCAT, based on the need for accommodation decisions for Angelique and concerns of potential abuse of Angelique by her deceased partner's family. OPA was unable to engage with child protection in any meaningful sense in the short time frame involved and the child protection issues were mediated through her solicitor and the Court system. In some senses the matter seemed pre-determined as there were strong indications that child protection were only considering a placement with the maternal grandfather and this confined the scope and impact of guardianship decision making to a quite limited locus.

In addition, the family support organisation involved did not pass on to OPA full information about Angelique's circumstances and her very difficult and unsafe situation following her husband's death. This compromised the ability of OPA to provide effective support for Angelique.

Child protection did not at any time liaise or share information with Disability Services or the guardian and the Disability Services case manager did not even know that Angelique had a solicitor in relation to decisions to be made in the Children's Court about Carly's care. Child protection withheld information and reports about the court case from Disability Services, even though they were in the same office. OPA obtained a copy of the Court report and provided this to Angelique and to Disability Services, over the strong opposition of child protection. A subsequent discussion between OPA and the DHHS regional manager has resulted in agreement that Angelique's case manager should have a copy of the child protection report. OPA hopes that this will, in future, happen in all cases where both Disability Services and Child Protection are involved.

Services such as the Parental Assessment and Skills Development (PASDS) that work with families in child protection, first assess parental capacity by observation and then recommend areas of skill development. Each stage of the process must be authorised by DHHS. A full assessment can only be completed if the family is assessed together, over a period of time in the family home. If DHHS is not prepared to allow the children to be assessed in the home, the full assessment cannot be completed. Whilst the assessment phase is underway, little guidance is given to the parents about how to improve their parenting skills.

The Parenting Research Centre advises that there are no adequate tools or resources in place in Victoria to properly assess the functional parenting of parents with disabilities. Their research shows that parents with disabilities need to receive education first before their parenting skills and parenting capacity can be fairly assessed. The assessment then needs to be done in the home with the purpose of designing a support intervention that will be effective for that parent.<sup>80</sup> In 2003, the Victorian Parenting Centre published "Understanding and supporting parents with learning difficulties", a guide to best practice in this area. The guide is based on evidence showing that parents who are supported and educated in these ways are generally capable of being good parents and meeting the needs of their children. The Centre suggests that services

<sup>80</sup> Robyn Mildon, Personal communication. 20 February 2014.

that are funded to work with parents with disabilities should be outcome focused and contracted to use the evidence-based research and identified best practice that is available.<sup>81</sup>

Anne (continued)

At the time OPA became involved, Anne was not receiving an Independent Support Package. OPA's first application to DHHS Disability Services for a package to support Anne during access visits was rejected because she was not considered to be "at risk". The Public Advocate wrote to the Regional Director and requested that she review the decision. The decision was reviewed and subsequently the support package has been approved. Without the Public Advocate's intervention, Anne would not be receiving this service, as it would be considered low priority in relation to other cases.

The Public Advocate also concurs with the Parenting Research Centre's view that there is an urgent need for a cultural change in the approach of the community and of some child protection staff towards parents with disabilities. The Parenting Research Centre considers that this could be partly addressed by a comprehensive public health initiative to change community attitudes towards parents with disabilities.<sup>82</sup>

**Recommendation 5:** The guidelines developed by the Parenting Research Centre for assessing and working with parents with disability should be adopted by DHHS, and community services should be contracted to work in accordance with these guidelines.

## 2.4 Administrative review of case plan decisions through VCAT

After a protective order is made by the Children's Court, parents are dependent on Child Protection to develop and implement a best interests case plan that moves towards the stated goal.

If a parent disagrees with their child's case plan, or there is a change in case plan, there is an administrative review process available that involves a two-step internal review that can then be appealed to the Victorian Civil and Administrative Tribunal (VCAT) if the parent or other party is still dissatisfied. Under section 331 of the CYFA, all other avenues of review must be exhausted before the matter can be taken to VCAT. This review process via DHHS and VCAT takes many months (and can take years). There is no time limit on the internal review and OPA has seen review processes that involve months of further assessments before a decision is made.<sup>83</sup> Parents are not entitled to funding from Victoria Legal Aid for representation at any stage of this process and DHHS discourages the support of an advocate. DHHS, on the other hand, regularly has legal representation when matters go before VCAT, accentuating the power imbalance referred to in section 2.8 of this report. It is not surprising that very few cases reach VCAT. Unfortunately, OPA was not able to establish the number of applications for review of a case plan decision that have gone to VCAT over the past five years.

Under section 333 of the Act, VCAT may review a decision contained in a case plan but does not review the case planning process, thereby removing the decision from any consideration of the context in which it was made or of whether DHHS has behaved fairly and reasonably in its

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> In one case, a father's application for review took over a year before reaching VCAT as DHHS sought out additional assessments that, in the opinion of the solicitor involved, appeared to advance discrete aspects of their case narrative and did nothing to support the father. When the case did reach the Tribunal, the solicitor observed that the Tribunal member was quite critical and discouraging of the father's application, making comments that it was just stalling the process. The application was ultimately withdrawn as a negotiated outcome was reached in the Children's Court. Personal correspondence, Nickie King. March 2015.



case planning and conduct of the case. In *NO v Department of Health and Human Services (General)* [2006] VCAT 1856, Senior Member Davis was requested by counsel for NO to review not just the case plan but also the case planning process as counsel submitted that it had been unfair to the applicant. Senior Member Davis stated that under the legislation he was not able to review the case planning process.<sup>84</sup>

#### AT v Department of Health and Human Services (Review and Regulation) [2014] VCAT 301

AT and BT are the parents of five children, four of whom who were removed from their parents in August 2009. The youngest child was already in the care of extended family. Four and a half years later they were in three different placements. The father has a learning disability with an assessed IQ of 71 and the mother has an assessed IQ of 81. DHHS first made a case plan decision that the children should not be reunified with their parents in April 2011. From that time the decision had been going through the review process with the final VCAT decision made on 21 March 2014 being that the case plan for the five children should not include reunification with their parents.

The parents did not argue that their children's removal from their care in 2009 was unwarranted but they disagreed with DHHS that their house remained unsuitable for children at the time of the hearing. They argued that they had successfully done everything DHHS had asked them to do and in addition the mother had taken courses in childcare, food handling and first aid to assist them to safely resume the care of their children. The father had seen a grief counsellor for over a year and had completed an alcohol counselling program. The parents received good reports from assessors of the way they interacted with and met the needs of their children during access visits and they reliably attended access visits. DHHS had not arranged any parenting courses or supports for the parents, with the Team Leader stating that courses were difficult to coordinate in rural areas and that family supports were based around parents having their children living with them.

In OPA's opinion, the decision reveals deeply troubling aspects of the administrative review legislation and procedures for case plan decisions review through DHHS and VCAT.

Throughout the hearing, the parents were not legally represented while DHHS was represented at VCAT by a barrister. The DHHS witnesses were, according to the wording of the decision, cross-examined.<sup>85</sup> The parents live in a small rural town in reduced financial circumstances while the case was heard in Melbourne in two sittings over four days. DHHS did not produce the case plan as requested by the Member<sup>86</sup> or twelve of the twenty reports on which the Team Leader had relied to make her decision of non-reunification. The Member's decision stated her opinion that while the parents' intellectual functioning could not be the determinant of reunification it could be a factor in assessing their parental capacity.<sup>87</sup> The entire process took from April 2011 to February 2014 at which time DHHS could argue that the children had become more settled in their foster placements. The Member stated: "Ultimately I must consider the children's best interests at the current time, not what should or might have happened differently up to this time, even if things could have been done differently".<sup>88</sup>

<sup>84</sup> This case was heard under s122 of the *Children and Young Persons Act* 1989. The wording of s333 the 2005 Act is the same as the 1989 Act.

<sup>85</sup> It is not clear whether the questions asked by the parents of the expert witnesses are being described as cross-examination.

<sup>86</sup> See paragraph 16 of the decision. The Member asked for the case plan and was told that it was not up-to-date.

<sup>87</sup> Paragraph 70. The decision appears to suggest that no professional assessments of parental capacity were made with the assessors observing children and parents together.

<sup>88</sup> Paragraph 91.

From the perspective of the Public Advocate, the administrative review process by DHHS and VCAT of case plan decisions is not providing an accessible, timely or adequate path to justice for parents. Such a system entrenches the status quo and thus becomes discriminatory in its application. While these extended review processes are underway, babies and young children are spending a large percentage of their young lives out of home and many parents, placed under too great pressure, give up hope.

The bifurcated review system through DHHS/VCAT and the Children's Court creates further confusion in an already confusing system. It means that the Children's Court is curtailed in its oversight of DHHS case planning decisions about where and with whom children live, their education, health and other important matters. The review system through VCAT that limits review to whether an actual decision is in the best interests of the child at the time the case is determined means that any deficiencies in the way that DHHS is implementing a case plan are not and cannot be subjected to external review.

In the view of the Victorian Bar Council the separation between the Children's Court jurisdiction and that of the Victorian Civil and Administrative Tribunal makes accessing the current child protection legal framework very difficult for the vast majority of families.<sup>89</sup> A single unified system, such as that in Queensland, where the Court is required to approve and review the progress of the case plan, would provide, in the opinion of one experienced lawyer, a more transparent, fairer and more accountable process.<sup>90</sup>

## 2.5 Guardianship and parental responsibility

Prior to the September 2014 amendments to the Act, a parent retained guardianship of their child when the child was under a protective order except when the order was a GTSO or a permanent care order. This meant that, whilst the day-to-day care decisions were made by DHHS and carers, significant and long-term decisions about matters such as health, medical procedures, education and religion remained with their parents.

Under the amended legislation, the terms "care" and "guardianship" have been replaced with the term "parental responsibility", encompassing both care and guardianship. Under all protective orders where a child is not living at home with their family, with the exception of Interim Accommodation Orders, parental responsibility is now given to the Secretary of DHHS or to a permanent carer. The only limitation on this authority is that, under Family Reunification orders, DHHS must not make long-term decisions with which the parent disagrees.

The Public Advocate is strongly opposed to these changes. They will have the effect of further cutting parents out of the lives of their children. They will make it even more difficult for parents to demonstrate that they are capable of resuming the care of their children. The changes are unnecessary because there were already adequate provisions in place for situations where parents were unwilling or unable to make appropriate decisions for their children's well-being in care. They are also inconsistent with the Best Interests principles in Section 10(3)(a) of the Act that speaks of:

the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.

As the agency that provides community education on the operation of the *Medical Treatment Act 1988* (Victoria), OPA is deeply concerned that the Secretary or DHHS staff or carers (under

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<sup>89</sup> Victorian Bar Council: Submission of the Victorian Bar in response to the VLRC review of Victoria's child protection legislative arrangements 2010. 13.

<sup>90</sup> Nickie King, personal communication, January 2015.

delegation) do not have the capacity to fulfil the normal parental responsibilities of providing informed consent for medical procedures that meet legal standards. Failure to fulfil the legal requirements to obtain informed consent for a medical procedure can expose both the doctor, the Secretary and/or DHHS staff to an action for medical assault. There are clear legal standards for the provision of informed medical consent that are already not being consistently adhered to by DHHS and many doctors. It is common practice for a doctor to accept the consent of a carer for routine medical procedures. It has been common practice for a doctor to give a carer or a child protection practitioner a consent form for the parent to sign and leave it to the DHHS worker to explain the procedure to the parent. Unless DHHS is able to put into place rigorous processes to ensure that the Secretary's arduous parental responsibilities for the health of the children in her care are fulfilled, there will be serious consequences for the long-term health of children and, potentially, legal action taken on behalf of children or by the children themselves when they become adults.

In relation to education, it is common for parents to have little or no say in where their children attend school or kindergarten and for them to be denied permission to attend parent/teacher interviews or school and kindergarten events. The Public Advocate considers that all of these practices, whilst common, are gravely detrimental to children, in both the short and long term, cruel to parents and children and completely unnecessary to protect children in out-of-home care. This will become more important with the increasing diversity of Australian society.

#### **Recommendation 6: Guardianship**

- (a) The sections of the Act relating to "parental responsibility" should be repealed.
- (b) Pending the repeal of these provisions, DHHS should work with the Office of the Public Advocate to develop policy and guidelines on the rights and responsibilities of child protection workers, parents, medical and education professionals under Children's Court protection orders.

## **2.6 Family violence**

A history of family violence was identified as one of the six risk factors for abuse and neglect in the Cummins report. Understandings of the impact on children of witnessing family violence have developed over recent years and family violence is now understood as a form of emotional abuse of children that affects their development. The submission of Domestic Violence Victoria to the Cummins Inquiry identified the mismatch between the child-focussed, statutory and inherently involuntary system of child protection and the woman-centred, empowerment-focused and voluntary basis of domestic violence services. The submission quotes Marianne Hester in the UK as noting that child protection approaches can tend to see mothers as failing to protect their children, whilst often ignoring violent perpetrators.<sup>91</sup>

People with disabilities are disproportionately the victims of abuse and violence in our community and this includes domestic violence. To again quote the submission of Domestic Violence Victoria:

We also know that violence against women has particular impact on women from marginalised groups; understanding the intersections of family violence with Aboriginality, culturally and linguistically diverse backgrounds, disability, and other forms of social disadvantage is an essential skill. This speaks to the need for basic family violence competency for practitioners working with families experiencing family violence and abuse.

Understanding the dynamics of power, hierarchy and gender within families is critical for appropriate identification of violence and abuse, risk assessment and ongoing

<sup>91</sup> DV Vic Submission to the Protecting Victoria's Vulnerable Children Inquiry, p2.

<http://www.childprotectioninquiry.vic.gov.au/images/stories/submissions/domestic-violence-victoria.pdf>

management of that risk; it can also mitigate against a tendency towards ‘mother-blaming’.<sup>92</sup>

A mother with a disability is typically portrayed as passive, dependent and dominated by a male partner or “string of partners”.<sup>93</sup> Mothers may be thought of as victims but are rarely seen as blameless.<sup>94</sup> Indeed, women with disabilities are often blamed for the violence perpetrated against them and not believed when they claim that they have been raped or sexually assaulted. The majority of reports of sexual assaults against people with cognitive impairment do not successfully navigate through the justice system and do not conclude with the conviction of the perpetrator.<sup>95</sup> OPA first raised these issues in a report titled “Silent Victims” in 1998.<sup>96</sup>

In a 2013 Insight program on SBS television, the Child Protection Principal Practitioner in Victoria observed that mothers with disability are often preyed upon by abusive men, and are more likely to have a mental illness than other parents and that these, together with their disability, are high risk factors for their children.<sup>97</sup> Despite this, it is the experience of OPA that child protection frequently dismisses the mother’s concerns about coming into contact with an abusive father, and may even favour a man who has abused his partner over the woman in considering the parent with whom the children should be reunified or in considering kinship care arrangements. When a child is placed with the family of an abusive ex-partner in a kinship care arrangement, the father generally has far greater access to the child than the mother.

#### Angelique (continued)

One of the grounds for the initial application to the Court for a protective order was concern about domestic violence in the home. OPA was subsequently appointed Angelique’s guardian by VCAT, based on the need for accommodation decisions for Angelique and also concerns about potential abuse of Angelique by her deceased husband’s family. Despite these concerns, Angelique and Carly had lived with her husband’s family after her husband’s death and she left because of the conflict.

Four days before the court case, Angelique’s tenuous accommodation completely broke down and she ended up in a motel where only limited supports could be provided to her. Whilst staying at the motel, she reported that she had been sexually assaulted. She was taken to the Police station and interviewed. As far as OPA is aware, no further action is being taken by Police.

Child protection and disability services were both aware that Angelique has previously been a victim of domestic violence but the support person who took her to the Police Station told Police that she sometimes made things up. Within the child protection framework, a parent who is a victim of violence is frequently seen as a hazard to her child rather than someone who is crucially important to her child and needs understanding, compassion and support. There is no evidence that Angelique ever received this type of support in her experiences with the child protection system.

<sup>92</sup> Domestic Violence Victoria, submission to PVVC, p8, available at:

<http://www.childprotectioninquiry.vic.gov.au/images/stories/submissions/domestic-violence-victoria.pdf>

<sup>93</sup> Llewellyn G, Spencer M, *Parents with intellectual disability* ACHRA Presentation 19 March 2013, slide 9. See also McConnell D, Llewellyn G, Stereotypes, parents with intellectual disability and child protection *Journal of Social Welfare and Family Law* 24(3) 2002: 303-308.

<sup>94</sup> Ibid.

<sup>95</sup> Camilleri M, *Enabling Justice*. Paper presented to National Victims of Crime Conference 23-24 September, 2008: p3.

<sup>96</sup> Office of the Public Advocate *Silent Victims – a study of people with intellectual disabilities as victims of crime* 1988. <http://www.publicadvocate.vic.gov.au/research/255/>.

<sup>97</sup> Robyn Miller, speaking on “Insight” SBS What’s best for the child”. 23 April 2013. Transcript available at <http://www.sbs.com.au/insight/episode/transcript/534/What-s-Best-For-The-Child>

## 2.7 Contact and access between families and children

Protective orders made by the Children's Court may include conditions about contact between parents and children. The case plan must include provisions for any contact ordered by the Court. However, if access does not take place due to the lack of availability of a worker to supervise access or transport the children, there is often little or no recourse for parents to enforce these conditions and so the conditions may be of little value to families.<sup>98</sup>

When children are placed in out-of-home care, the amount of contact between parents and children is rarely more than two hours per week, even when the stated case goal is reunification. If a non-reunification plan is in place or if a child is moved into permanent care, the level of contact between families and children will be reduced to between four and six times a year. Also, siblings may be placed in separate placements at a considerable distance from their family and access is usually fully supervised by DHHS outside of the family home. This means that:

- Supervised access is conducted almost entirely during DHHS working hours and does not accommodate parents who work regular hours.
- Access is insufficient to maintain attachment and bonding between parent and child.
- Parents are frequently required to travel long distances, often by public transport.
- Children rarely see other members of their extended family, including siblings, grandparents etc.
- Children generally do not have the comfort of returning to their family home during access, amid familiar surroundings and their family environment, even when there are no safety concerns about the family environment.

The consequence can be that, over a period of time, DHHS may argue that the relationship and bond between the parent and their child is not strong and that therefore it is not a significant factor in deciding whether it is in the child's best interests to return to live with their parent.

Under the 2014 amendments, the Court can no longer attach conditions to a Care by Secretary Order. Thousands of children will be subject to such an order and the Court will be prohibited from determining the contact between children and their families.<sup>99</sup>

### Tony

Tony is the father of Billy, aged 3 years. Billy's mother and Tony both have an intellectual disability and separated when their son was one. Neither parent has any other children. Tony lives with his mother, Ellie, who herself suffers with a number of physical ailments associated with old age. Billy's mother lives in supported accommodation and has limited involvement with her son.

Billy was removed from his parents after an extended stay in hospital following his birth, due to pre-term delivery and other complications. He was placed with carers in the same regional Victorian centre where both parents (and Ellie) live.

Both parents participated in a neuropsychological assessment shortly after the removal of Billy from their care. They also completed three days of a Parenting Assessment and Skills Development Service (PASDS) assessment. A GTSO was made at an early stage of this matter with no further supports put in place to for the parents to learn the skills required to parent.

<sup>98</sup> Contact conditions often lack sufficient prescription and can be "as agreed between the parents, carers and DHHS". These conditions, when not agreed, can be difficult for parents to enforce, particularly parents with a disability who are at a disadvantage in their negotiations with DHHS. Observation by Nickie King, March 2015.

<sup>99</sup> Law Institute of Victoria. *Importance of Judicial Discretion: The diminished abilities of the Children's Court*. 2015.

During the period of the first GTSO, the parents were still together and were seeing Billy several times a week for half an hour under supervision. Ellie often attended these contacts with her grandson. In the later stages of the Order, the contact had been scaled back to once a month. (It is noteworthy that the court is unable to attach conditions of any sort to a GTSO, so the contact arrangements are wholly left to the case planning process).

The Health-Justice Partnership, a project between the Loddon Campaspe Community Legal Centre and Bendigo Community Health Services at Kangaroo Flat was referred Tony's matter at the stage where DHHS was seeking a two year extension of the GTSO, with a view to securing Billy a place with permanent carers. There was no VLA funding available for this matter as it was regarded that that the father's case did not have merit.

The key issue from Tony's perspective was that his contact (which was still occurring once a month and was always attended with Ellie) continue while Billy was placed on the permanent care register. The lawyer put these issues to the Children's Court magistrate and was granted an adjournment to attempt to obtain agreement in writing from DHHS for monthly contact to continue.

DHHS then reported to the court that they would be unable to find a permanent carer for Billy if contact was to continue each month. Despite the contact being positive overall, DHHS stated that it would be including no more than four contacts per year in its case plan. The magistrate who heard this matter was sympathetic to the father and allowed Ellie to address the court on how this decision would impact the family. Ultimately however the magistrate was only able to note his concerns about a reduction in the father and grandmother's time with Billy. He urged that this be considered when case planning.

The case planning decision in this matter confirmed that contact between Tony and Billy will occur only four times a year. Health-Justice Partnership has assisted Tony to instigate an internal review of the Department's decision with a view to then going to VCAT. While this occurs this family's relationship with their son and grandson is very limited and this fact will undoubtedly have a bearing on any decision at VCAT.

Anne (continued)

When OPA became involved with the case, Anne was attending seven access visits per month in three different DHHS regions. With her children all in different placements and with some children in school, even the visits to children within each region were not co-ordinated and the access between siblings over the years has been minimal. OPA requested an access schedule from DHHS but that was not received. Anne's travel to access is supported by her partner who was approved by one DHHS region to attend access with Anne but not approved by a more distant region to attend until OPA declined to consent to a guardianship order that DHHS region was seeking until this matter was sorted out. Anne is reliable in attending access, demonstrating her commitment to her children.

## **2.8 Power imbalance, stigmatisation and the need for advocacy**

There is great power imbalance between families and professionals in the child protection system. This power imbalance is inevitable but is not acknowledged within child protection policy and practice. The power imbalance cannot be removed but if it is acknowledged, as it should be, it can be alleviated to some extent.

Child protection practitioners regard the child as their client and in focusing on the child may appear to have little or no concern for the parents and families. At the centre of the Victorian system is the best interests planning process where goals are decided upon and strategies and

tasks set to achieve those goals. These planning meetings are routinely attended by many professionals and by the parent or parents. It is common for ten or more professionals and one or two family members to be present. Clearly, this situation places parents under great pressure and at considerable disadvantage in presenting their views and perspectives to articulate professionals who are not emotionally involved in or personally distressed by the situation.

There is mounting evidence that parents involved with child protection authorities are frequently stigmatised.<sup>100</sup> Parents experience stigma through the communication of disrespect or their perceived unworthiness as people because of particular characteristics such as having a disability or being a single parent.<sup>101</sup> A recent ACT study has revealed that those who work with parents and family members also experience “stigma by association” or “courtesy stigma” when attempting to support and advocate for parents involved with child protection.<sup>102</sup>

Children involved in the child protection system may also experience stigma, whether they remain with their parents, go into out-of-home care or return to their parents after a period of time in out-of-home care. Stigmatisation of children can be manifested in a variety of hurtful and damaging ways. Other parents may not allow their own children to play with them; they may be bullied at school or excluded from community groups and activities. Children associated with the child protection system may not be invited to parties and invitations to their own birthday parties may be declined. The informal supports and social networks so important for the welfare of children and families can be eroded by the involvement of child protection.

Although a parent is permitted to have a support person at meetings with DHHS, there is no structured advocacy program where parents can obtain advocacy support in their interaction with the child protection system. It is difficult for a parent with a disability to find an advocate to assist him or her and, at present, DHHS does not recognise that parents have a right to an advocate.

The experience of OPA is that DHHS can be very suspicious of advocates and use a range of stratagems to discourage their involvement. DHHS may also judge parents who have an advocate as unable to take responsibility for themselves and therefore unable to fulfil the requirements of parenting. However, without an advocate to assist parents to navigate through the child protection system, their chances of retaining or regaining the care of their children or maintaining reasonable access to them are greatly diminished. “Our forgotten families: issues and challenges faced by parents with disabilities in Victoria” is an excellent report that gives direct voice to parents with disabilities and highlights the great importance of, and need for, skilled, specialist advocates.<sup>103</sup>

#### Bella

Bella is in her early 30s. She has a mild intellectual disability and lives in rural Victoria. She separated from her partner due to his violence and drug use. There is a permanent Intervention Order against him in place. After giving birth to her daughter, Bella was sent to an assessment unit where it was established that she was suffering from post-natal depression. After a psychotic episode, she was transferred to a psychiatric unit for treatment and her baby was removed from her care.

Following a court case, the baby was returned to her care on condition that Bella lived near her brother and his partner. This did not work out and the little girl was again removed. Bella

<sup>100</sup> Hamilton and Braithwaite: *Complex Lives, Complex Needs, Complex Service Systems*. p19.

<sup>101</sup> Teresa Hinton, *Parents in the Child Protection system*. Social Action and Research Centre, Anglicare Tasmania 2013 p35

<sup>102</sup> Hamilton and Braithwaite *Complex Lives, Complex Needs, Complex Service Systems*. Section3.

<sup>103</sup> Kate Fitt, *Our forgotten families: issues and challenges faced by parents with disabilities in Victoria*. Project of Yooralla and Valid, 2009. 29-31.

received support from a social worker at a non-government agency who strongly advocated for mother and daughter to remain together but that social worker has since retired. Her daughter has now been out of her care for more than two years and Bella is under intense, sustained pressure from child protection to agree to permanent care for her daughter and a drastic reduction in access, currently at three times a week.

Child protection has told her that she cannot look after her daughter properly because she cannot read and write, a claim that is not true. Bella is adamant that she wants reunification with her daughter. Her current disability advocate has helped her to move her legal representation from a local solicitor to the Villamanta Legal Service. Bella, like many women in her situation requires an advocate and a lawyer with knowledge and experience in child protection processes if there is to be any chance of a fair process and just outcome.

Skilled advocacy can foster understanding and collaboration and build trust between child protection, families and community agencies. Rather than cementing an adversarial relationship between families and child protection, experience from Western Australia, where the Family Inclusion Network was funded to provide advocacy and support for parents to negotiate the child protection system, found that child protection workers viewed the service as “a valuable partner that helps resolve issues and re-establish engagement with DCP”, generating “a culture of respectful engagement” and “very much a partner, valuable in the development of policy and practice not just advocacy”.<sup>104</sup>

The importance of building trust and fostering fruitful engagement of families with child protection is recognised within DHHS. Providing advocacy for families is an important way of doing this in a situation of inherent power imbalance. It is of crucial importance to a good child protection system.<sup>105</sup> The advocacy program should be independent of DHHS and be available to all parents and families with children involved with child protection.

There is also a need to broaden out-of-court legal representation and advocacy.<sup>106</sup> Grants of legal aid for clients involved with DHHS are limited to court representation. However, many of the important decisions for clients and families are made out-of-court and occur in the case planning process that, in Victoria, is not directly subject to judicial scrutiny (see section 2.4 of this report). Decisions are also made in the early stages during the investigation and assessment phase before, or at the time of, the child’s removal from their parents.

The system would be significantly strengthened, made fairer and less adversarial if an early intervention grant of legal aid was introduced to assist clients at the pre-application or early post-order stage. Such a grant would allow clients who are identified as being at risk of further intervention to access case work and legal advice about their rights. Such grants are available in other States in negotiation with child protection.<sup>107</sup> In Victoria at present, legal advice is limited to that available through the VLA Advice line or a generalist Community Legal Centre.

#### Anne

Anne is the mother of eight children ranging in age from 19 years to 3 years. Child protection has been involved since the birth of her first child in 1994. All her children have been removed from her care and were placed in different foster or permanent care placements in four different DHHS regions. As her oldest child is 19, he is outside DHHS jurisdiction. Her second oldest will be 18 this year. Both have re-established contact with their mother and would like to re-

<sup>104</sup> Hamilton and Braithwaite: *Complex Lives, Complex Needs, Complex Service Systems*, p24.

<sup>105</sup> Elder Rights Advocacy, the Commonwealth advocacy program for those receiving aged care services, provides a good model.

<sup>106</sup> Nickie King, personal communication, March 16, 2015. OPA is grateful to Ms. King for bringing this issue to our attention.

<sup>107</sup> See Queensland Legal Aid Grants Policy Manual. [www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-policy-manual](http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-policy-manual).



establish relationships with their siblings. Anne has a mild intellectual disability and became a client of DHHS Disability Services in 1998. OPA first became involved with Anne in September 2011 when requested by the Children’s Court to become her litigation guardian in relation to 13 applications before the Court.

Due to the complexity of the case, OPA appointed an advocate for Anne after being appointed as her litigation guardian. She had struggled to negotiate the child protection system and maintain a relationship with her children for 17 years with no effective advocacy to assist and support her. The consequences of the lack of advocacy are reflected in numerous court applications by her and by DHHS, the lack of co-ordination between regions and the lack of services to support her.

The OPA advocate has not been able to support Anne’s wishes to have her children returned to her care because there is a lack of evidence to suggest that she would be able to care for them adequately. OPA advocacy has, however, achieved funding for Anne to have support during access with her children to make these times more positive and beneficial for the children and for Anne and so build healthy relationships within the family. Since this has begun, it has been reported to OPA that the improvements have been quite dramatic.

**Recommendation 7:** Funding should be provided either to Victoria Legal Aid, or to a state-wide advocacy organisation, to enable specialist independent advocacy and assistance to be provided to parents with disability whose children are involved in the child protection system.

## 2.9 Litigation guardianship

Some issues relating to litigation guardianship in family law have been explored in Report 1: Family Law – the hidden issues. These issues are part of a wider concern about whether people with a disability are treated fairly in the justice system and the courts. The Australian Law Reform Commission conducted an inquiry into equality, capacity and disability in Federal laws in 2014. The Victorian Law Reform Commission’s report on Guardianship in 2012 made recommendations in relation to litigation guardianship that are being considered by the Victorian government. The Law Reform Committee of the Parliament of Victoria also recently conducted an inquiry into access to justice and the interaction of the justice system by people with an intellectual disability and their families and carers.<sup>108</sup> The inquiry drew attention to potentially very severe consequences of a person with a disability that affects their decision-making capacity appearing before the court without a litigation guardian.<sup>109</sup> The Inquiry recommended:

That the Victorian Government review current arrangements for the appointment of litigation guardians. The review could seek to:

- Ensure consistent processes are employed by the courts to appoint litigation guardians;
- Ensure that a mechanism exists to enable a person with a disability to locate a suitably qualified litigation guardian; and
- Ensure that organisations currently acting, or required by the courts to act as litigation guardians are able to draw upon funds to meet adverse costs orders should such orders be imposed by the courts.<sup>110</sup>

<sup>108</sup> *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with Intellectual Disability and their Families and Carers*. 2013. Parliamentary Paper Number 216. Session 2010-2013.

<sup>109</sup> *Ibid.* 286-287.

<sup>110</sup> *Ibid.* xxxv. Recommendation 37.

The Children's Court made a submission to this inquiry in relation to parents with a disability.<sup>111</sup> The submission emphasised the importance of ensuring that the rights of parents with disabilities were protected in Children's Court proceedings, both in cases where the person with a disability retains capacity and in cases where they do not. The submission pointed out that it is very difficult in most cases for the Court to appoint a family member as litigation guardian as many families have multigenerational involvement with the Court that would make such an appointment inappropriate or family members have other roles in the case, such as carers or access supervisors that would disqualify them as litigation guardians.<sup>112</sup> The submission also highlights the difficulties for the Court of assessing the capacity of people with a disability who may need a litigation guardian.

OPA has been appointed as litigation guardian for parents in the Children's Court in relation to their children in child protection proceedings. The Office is not resourced to take on this role and would not currently be protected against an adverse order for costs. The role is arduous and burdensome and OPA is also concerned about the burden and potential liability of family members or friends who are asked to take on this responsibility.

The lack of clarity about the role also raises serious difficulties. OPA staff who have been litigation guardians have found a lack of understanding about disability amongst the legal professionals representing the parties, a widely held assumption that needing a litigation guardian means that a person cannot safely care for a child, and have even had difficulty in obtaining access to reports and documents.

OPA also notes that very few litigation guardians are appointed for parents with a disability in Children's Court proceedings. Given what is believed to be the relatively high level of disability amongst parents in Children's Court cases, this suggests that either these parents are considered to retain their legal capacity or litigation guardians are not being appointed when they are needed. People with disabilities are considered to be more susceptible to persuasion and pressure than people without disabilities and the Public Advocate questions whether parents are being pressured to consent to the orders sought by DHHS. Without access to advocates or to a litigation guardian, we cannot know whether this is happening.

Practice varies greatly and there is anecdotal evidence to suggest that a litigation guardian tends to be sought when the person does not agree to what the professionals are recommending. This should be investigated to ascertain whether the rights of parents in child protection cases are being properly respected.

Anne (continued)

When asked to take on the litigation guardianship role, OPA made it clear, in submissions to the Court and in discussion with DHHS Child protection and Disability Services, that litigation guardianship must promote Anne's best interests and be of positive benefit to her. It is not only to facilitate the operations of the Court and DHHS. Anne's case has presented OPA with an ethical dilemma as the litigation guardian has had to balance Anne's clear wishes to have her children returned to her care and her own best interests (as expressed in the Guardianship and Administration Act 1986, from which OPA draws its statutory authority) against what would be in the best interests of her children under the CYFA.

OPA initially sought to assess whether it was likely that any of Anne's children could be returned to her care. The litigation guardian did this by reviewing the case material, clarifying Anne's rights, engaging support services, seeking assessment of whether Anne had an underlying mental illness (which was not the case) and then determining what the litigation guardian believed would be in her best interests. OPA accepted that the interests of the children must

<sup>111</sup> Grant P, Zemljak J, *Submission to Parliament of Victoria Law Reform Committee, "Inquiry into access to and interaction with the justice system by people with intellectual disability, their parents and carers"*. November 2011.

<sup>112</sup> *Ibid.*

take priority and determined that Anne's interests would be best served by ensuring that she developed a meaningful and enduring relationship with her children.

The work of litigation guardianship was difficult and complex and could not have been effectively carried out by a family member, even if one had been available. If Anne had had a litigation guardian and an advocate appointed years ago, her rights would have been better protected in this sad situation, her interests and those of her children advanced and there would have been considerable cost savings to the State.

**Recommendation 8:** The Victorian Government should adopt Recommendation 37 of the Victorian Parliament Law Reform Committee's report following its "Inquiry into access to and interaction with the justice system by people with intellectual disability and their families and carers". In the context of child protection, this would have particular relevance to matters before the Children's Court. Recommendation 37 states:

That the Victorian Government review current arrangements for the appointment of litigation guardians. The review could seek to:

- ensure consistent processes are employed by the courts to appoint litigation guardians;
- ensure that a mechanism exists to enable a person with a disability to obtain the services of a suitably qualified litigation guardian; and
- ensure that organisations currently acting, or required by the courts to act as litigation guardians are able to draw upon funds to meet adverse costs orders should such orders be imposed by the courts.

## 2.10 Children's Court processes

The Public Advocate strongly supports the role of the Children's Court in providing independent judicial scrutiny of child protection processes and opposes any proposals to reduce the authority and decision-making powers of the Court. The Public Advocate also supports the role of the Children's Court Clinic in providing independent assessments for the court and does not consider that any proposal to disband the Children's Court Clinic and replace it with a panel of psychologists commissioned by the Health Department would provide the necessary degree of independence and separation from the child protection arm of government. The Children's Court is, however, significantly under-resourced and many of the problems indicated below are a direct result of inadequate funding.

The Public Advocate shares the concerns of the Law Institute of Victoria (LIV) that the 2014 changes to the Act will diminish the Children's Court of Victoria's ability to exercise its jurisdiction and review the decision-making of DHHS. Rather than re-stating these concerns, readers are referred to the LIV submission: Children Youth and Families (Permanent Care and other matters) Bill 2014, submitted to Hon Jenny Mikakos, 21 August 2014 and to the subsequent LIV document "Importance of Judicial Discretion: the diminished abilities of the Children's Court".<sup>113</sup>

In particular, the Public Advocate considers that the new Family Reunification orders will have a disproportionate and discriminatory impact on parents with a disability and their children. Under the Amending Act the court cannot make a Family Reunification Order if this would mean that the child would be out of home for 12 to 24 months in total. After that time, the Court will have no discretion to decide that reunification should occur. For parents with disabilities, if suitable supports and education are not available or if they need more time than other parents to

<sup>113</sup> [http://www.liv.asn.au/getattachment/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Family-Law/Submissions/Submission-Children--Youth-and-Families-Amendment-/20140820\\_Final\\_Submission-CYF-Amend-Perm-Care.pdf.aspx](http://www.liv.asn.au/getattachment/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Family-Law/Submissions/Submission-Children--Youth-and-Families-Amendment-/20140820_Final_Submission-CYF-Amend-Perm-Care.pdf.aspx).

demonstrate that they are able to care for their children, their children will nonetheless be permanently removed from their care without the Court being able to prevent that.

In relation to Court procedures, the Public Advocate considers that the ability of a parent to withstand the stress of court proceedings should not be the determinant of their child's future. Children's Court processes are frequently criticised as being overly adversarial, unnecessarily stressful and too rigid to meet the needs of families with disadvantage and disability. Clients often meet their lawyer and see the DHHS disposition report on the day of the hearing. They (both parents and their lawyers) are then required to absorb the contents of the disposition report and attached expert reports, provide instructions to their solicitor or barrister and consider any consent or settlement offers made by DHHS in a very short time-frame. This frequently takes place in a noisy court precinct environment and their lawyer may be dealing with several other cases on the same day. Child protection proceedings involve multiple court appearances, often over years, before legal processes are concluded. During this time, a parent will need to attend numerous appointments and court hearings, even if the matter does not go through to a contested final hearing. These appointments and the attendances at court involve the parent going into unfamiliar and alien situations and frequently involve considerable travel and disruption to everyday routines. The requirements are more onerous where one of the parents has a disability, be it cognitive, physical or psychiatric.

Notwithstanding the merits of their case, a parent with a disability may be strongly advised by his or her solicitor to consent to the orders DHHS is seeking if the solicitor considers that he or she will not be able to stand up to the pressures of the legal processes or the pressures of a contested hearing. This is contrary to Article 13 of the CRPD that "ensure(s) effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings".

Before each court appearance DHHS provides a disposition report or an addendum to a previous disposition report. These reports are placed on the Court record and provide the court with a history of the DHHS involvement and with the case rationale of DHHS from the time of the originating application. There is no process whereby the respondent parent provides an affidavit in response to the disposition report that can also be placed on the Court's file. The only way that the parent's perspective is directly provided to the Court is at a contested hearing. Only 1% to 1.5% of matters originating in the Children's Court proceed to final judgment in a contested hearing. Consequently, in the vast majority of cases, any challenge to the accuracy of the disposition report or the inclusion of additional relevant material in support of the parent does not occur. This is in contrast to the situation in Queensland where respondents as well as child protection swear affidavits.<sup>114</sup>

The Public Advocate is also concerned about the implications of consent orders in the Children's Court. A common scenario is for a parent to accept the advice of their lawyer to consent to a protective order on the basis of a reunification goal. By consenting to an order, the parent is taking responsibility for any harm that has occurred or agrees that the child is at risk of future harm in her or his care. Consent is not necessarily an admission of personal guilt. The protective concerns are said to be "proven by consent". If the parent does not agree to a consent order, a contested hearing will take many months to be heard and during that time it is likely that Child Protection will take little action towards reunification.

With the high proportion of cases settled by consent, the Public Advocate proposes that magistrates should take an active role in speaking with the parents, explaining the implications of a consent order and ensuring that the parent understands what they are agreeing to. In some circumstances, it is suggested that this should be done with only the parent and his or her legal representative present. It should also be made clear to all parties that consent to all the

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<sup>114</sup> Personal communication, Nickie King, January 2015.

conditions of an order at one time does not necessarily bind the parent to consenting to future orders with the same conditions.

The Public Advocate is also concerned that consent orders are not normally subject to appeal unless circumstances change. This would appear to be contrary to the CRPD that requires any decisions that separate a child from his or parents against their will to be subject to judicial review.<sup>115</sup>

#### Angelique (continued)

Following the assault, Angelique was quickly relocated to live with her father and stepmother before the Court case and without her daughter. OPA was not involved in this decision and it was taken without the formal consent of the guardian that is legally required when a person has a guardian.

Importantly, in OPA's view, Angelique was not present in Court. Angelique did not have a litigation guardian. Although she had agreed to her father having the care of her daughter at his home, and although her solicitor told the guardian that she was fully able to give him these instructions, OPA expresses concerns that any parent should be absent from Court when such a significant decision is made. After the court order was made, Carly, now just 15 months old, went to live interstate with her maternal grandfather and step-grandmother and, at that point, with Angelique. Unfortunately, Angelique's accommodation there has again broken down and she is now living back in another area of Victoria with only phone and Skype contact with her daughter and family. Angelique is making plans for holidays and contact with her daughter but the actual access she enjoys is substantially different from that envisaged by the actual Court order.

Within the legal culture, consent is always seen as preferable to contest and a negotiated outcome is regarded as a success.<sup>116</sup> However, having consented to a protective order on the basis of reunification, the parent can then find that little action is taken by DHHS towards actual reunification. Reunification is described as the "default" position adopted by DHHS until, and unless, it makes a decision that the children should not be reunified. This is extremely misleading to anyone outside the child protection system who reasonably assumes that if there is a reunification goal, action will be taken to achieve that goal within the time frame of the protective order. In 2011/12, 1332 Custody to the Secretary Orders (CTSO) were made in Victoria. In the same year, 1401 CTSOs were extended.<sup>117</sup> On the assumption that 1% to 3% of these orders would have been contested and that some orders would have been based on a non-reunification plan, it is clear that the majority of CTSOs are extended, with children not being reunified with their parents during the time of the initial order despite the reunification goal.

The former government submitted to the Victorian parliament the *Children Youth and Families Amendment Bill 2014*. That legislation did not pass through Parliament in the last sitting before the 2014 election and it is not known whether the Labor government will re-introduce it. The legislation would provide for child safety conferences within the Children's Court system, presented as enabling families to take the lead in making arrangements for the safety of children and thus avoiding multiple court appearances and interim orders before final decisions are made. In her second reading speech, the then Minister stated that, as these conferences would not result in a solution being imposed on a family, lawyers would not have a role as

<sup>115</sup> CRPD Article 23(4). While it could be argued that if a parent consents to an order that removes their child from their care, this cannot be said to be against their will, the parent may be advised not to contest the order sought by DHHS. They may be advised that their child will return more quickly if they agree to what DHHS is asking, they may not be able to gather sufficient evidence to contest the order or they may not have funding to pursue their case.

<sup>116</sup> Power P, Child protection, research materials. Children's Court Victoria, 5:59

<sup>117</sup> *ibid.* 39-40

advocate before a decision maker and would generally not have a direct voice in the discussions. Their role would be one of advising their clients on the legal implications of any decisions made. The Minister stated that these processes would involve less distress for children and families than the current adversarial processes.<sup>118</sup> While processes that actually reduce the stress for parents and children are laudable, the Public Advocate expresses concern that the inherent power imbalance between Child Protection and families in these situations is not being recognised and that the diminished role for lawyers will further accentuate this power imbalance and place families under even greater pressure and stress.

**Recommendation 9:** Respondent parents in the Children’s Court should have the opportunity to file an affidavit in response to any disposition report provided to the Court by DHHS.

**Recommendation 10:** The Children's Court should develop a practice guideline aimed at ensuring that parents with disability understand the implications of any proposed consent order. Children's Court orders for the removal of children from their parents, including orders made by consent, should be subject to judicial review.

### 3. Conclusion

This paper raises issues relating to the best interests of children who come from families where the parent has a disability and makes recommendations for changes to child protection policy and practice that the Public Advocate considers would better promote the flourishing of these children and their families.

In summary, perceptions about the capacity of parents with disability to successfully raise their children should be subjected to rigorous examination and, where necessary, corrected. All families should be approached first from the perspective of finding what supports and assistance are needed to solve problems and strengthen the family’s ability to successfully raise their children, rather than from the perspective of focusing on the risks of their children being abused and neglected. Assessments of capacity and need should be integrated into the provision of education and support and be provided in the ways that research shows are most successful. Where there is an unacceptable risk of harm that cannot be alleviated, the out-of-home care system should be improved in ways that promote the flourishing of children and support their family of origin, rather than severing these fundamental relationships. Finally, child protection processes should be evaluated to see how they can be made less intimidating, critical and negative and more open, supportive and compassionate towards families.

The Public Advocate of Victoria urges the Victorian government to accept the recommendations of this report.

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<sup>118</sup> Victorian Parliamentary debates, Legislative Assembly, Wednesday 7 May 2014. 1455-1466

## Appendix

### Child protection in Victoria: from 2000 to the present

This overview looks at how the issues relating to parents with a disability and their children have been viewed during the period since 2000 and the significance and impact of changes in legislation, governmental reviews and international conventions for parents with disabilities.

#### Office of the Public Advocate

In July 2003, following a forum titled *Strengthening every Family*, OPA and the Victorian Parenting Centre (now the Parenting Research Centre) developed a plan to improve the service system response to families where a parent has a disability.<sup>119</sup>

The key issues and needs identified in the plan were:

- the development of a shared understanding of what is adequate or “good enough” parenting
- the development and utilization of empirically validated supports and services for families where the parent has a disability
- the need to develop and promote clear practices for services to work together where a parent has a disability
- a legislative framework and legal system that promotes support of the family whilst also ensuring adequate protection for children and young people at risk.

In October 2004, OPA’s response to the options paper that formed the basis of the CYFA highlighted the following points:<sup>120</sup>

- The apparent presumption that parents with a disability are unable to meet the developmental needs of their children despite the research indicating that having a disability is not a predictor of capacity to parent.
- The lack of adequate support for these families, resulting in the removal of children to a permanent care system that can be marked by frequent changes in placements which can have a negative impact on the child’s overall development.
- Concern that being able to consider permanent placement at an earlier stage would exacerbate a trend to pursuing permanent placement rather than actively pursuing attempts to improve the functioning of the family unit and the capacity of the parents through the provision of supports that have been shown to be effective for parents with a disability.
- Concern that the proposed legislation was explicitly child centred, rather than the concerns of the child being placed within the context of the family as in the then current legislation with the consequence of legitimising an approach that views the needs of the child either in isolation from the family or at odds with those of the family.
- The need for independent advocacy for families involved with child protection.
- The need to consider the over-representation of parents with a disability in the child protection system as well as the overrepresentation of Aboriginal families in the system.
- The risk assessment framework proposed within the legislation is inconsistent with the established best practice of adopting a strengths based approach to working with families.

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<sup>119</sup> Office of the Public Advocate and Victorian Parenting Centre: *Strengthening every family strategic plan*. July 2004:2.

<sup>120</sup> Sykes, D: Submission to Protecting children: ten priorities for children’s wellbeing and safety – position paper and technical options paper. October 2004.

[http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2004/Protecting\\_Children\\_ten\\_priorities\\_submission.pdf](http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2004/Protecting_Children_ten_priorities_submission.pdf) Accessed 5 February 2014

- The realistic fear of people with a disability that their requests for help with parenting will be taken as evidence of inability to cope with the demands of parenting.
- The need to improve the capacity of child protection to work effectively and positively with parents with a disability.
- Concerns about the legislation extending the notification process to unborn children.

## Legislation, Conventions and Inquiries 2003 – 2014.

Since the “Strengthening Every Family” forum in 2003, there have been three significant developments that affect parents with a disability:

- enactment of the CYFA and the amendments to the Act following the Cummins report;
- the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the United Nations *Convention on the Rights of Persons with Disabilities 2006* (CRPD);
- the Cummins Judicial Inquiry report, “Protecting Victoria’s vulnerable children”, tabled in the Victorian parliament in February 2012 followed by the finalisation of a ten year strategic plan to implement the recommendations of the report.

## Legislation

The CYFA introduced significant changes from the previous legislation. The major changes affecting parents with a disability were:

- The best interests of the child to be paramount in all decisions. This reflects the explicit child-centred focus of the legislation.
- The best interests principle on which the Act is based includes a cumulative harm aspect.
- Additional principles were introduced to guide decision-making for Aboriginal children.
- Reports or notifications can be made to DHHS before birth if a person has significant concerns for the child’s future well-being.
- A stability plan must be prepared for a child who is placed in out of home care because of an Interim Accommodation Order or a protection order. A stability plan must look to the stable long-term out of home care for the child.
- The Act reduced the time a child is required to be in out of home care before a permanent care order can be made (only six months out of the previous twelve months).<sup>121</sup>

## Human rights legislation and conventions

Victoria has a Charter that protects families and children. Australia has signed and ratified the CRPD and the CRC. Signing and ratifying an international convention commits a country to ensuring that all its laws and policies are reviewed so that they are consistent with the convention. However, the Public Advocate contends that there are aspects of the operation of the child protection system that are contrary to the Charter and to the CRPD and the CRC.

## Victorian Charter of Human Rights and Responsibilities

The Charter provides protection for both families and children in section 17. Section 17(1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. Section 17(2) of the Charter provides that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child. Section 17(2) therefore recognises that children are entitled to special protection due to their age and vulnerability. Section 17 encompasses the protection of families and children within the one section of the Act. It encompasses all the rights of the child.

<sup>121</sup> *Child Protection: a guide for Parents and Family Members*. Western Suburbs Legal Service Inc. 2008 : 4.



Any limitation of the rights provided for in the Charter must, under section 7(2), be reasonable and justified taking into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

### **Convention on the Rights of the Child**

The CRC gives children the right as far as possible to right to know and be cared for by their parents (article 7(1)).

Article 9(1) provides that children shall not be separated from their parents against their will except when this is necessary in the best interests of the child as decided by competent authorities and subject to judicial review. An example given in the convention of where it might be in the best interests of the child to be separated from his or her parents is *where there is abuse or neglect of the child by the parents* (emphasis added). The other example given is where parents are living separately and a decision must be made about who the child will live with.

### **Convention on the Rights of Persons with Disabilities**

The CRPD commits States to ensuring that children are not separated from their parents on the basis of a disability of either the child or one or both of the parents. It also commits States to taking measures to eliminate discrimination against persons with disabilities in matters relating to parenthood and to giving persons with disabilities assistance in the performance of their child-rearing responsibilities. Article 23 relates directly to the provision of appropriate and necessary support to enable children and parents to remain together.

The CRPD recognises that women and girls with disabilities are subject to multiple discrimination and that States will take measures to ensure their human rights are protected (article 6). This article relates directly to the protection of girls and women from domestic violence.

Article 13 commits States to ensuring access to justice for persons with a disability on an equal basis with others, including the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants in legal proceedings, including the preliminary and investigative stages. This is directly relevant to the power imbalance in the child protection system, the operation of court processes and litigation guardianship and to the lack of advocacy for parents in the child protection system.

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