Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Submission to the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability

Parents and children with disability

December 2022

The Public Advocate has approved this submission. It is a public submission.

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria, 3053
Ph: 1300 309 337

NRS: 1300 555 727
www.publicadvocate.vic.gov.au

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Recommendation 3

State and territory governments should amend relevant legislation to give the relevant Children’s Court jurisdiction to review decisions of the relevant child protection service where protective orders have been made, and to place conditions on all orders, including for the provision of appropriate support services for families.

Recommendation 4

Australian governments should provide all parents with disabilities support and evidence based education programs to enable their children to thrive within their families wherever possible rather than being removed and placed in care.

Recommendation 5

The Commonwealth Government should:

(a) consider how the full range of rights and interests of children under international law can best be incorporated into the *Family Law Act 1975* (Cth)

(b) amend the *Family Law Act 1975* (Cth) to:

   (i) include a rebuttable presumption that disability is not, per se, a barrier to parenting

   (ii) state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility

   (iii) give preference to a natural parent in determining who shall have residence and parenting responsibility for a child

   (iv) provide that where the parent has a disability, before making orders that persons other than natural parents have parental responsibility for a child, the court must be satisfied that:

      A. appropriate supports have been provided to the family;

B. parenting capacity was assessed with supports in place; and

C. the parent is unable to adequately parent the child.

Recommendation 6

The Commonwealth Government should ensure family consultants, lawyers and court staff receive specialist education in the area of disability and parenting.

Recommendation 7

The Family Court and Federal Circuit Courts should make appropriate accommodation for persons with disabilities in the court processes and not draw adverse inferences about parenting capacity from those accommodations.

Recommendation 8

The Commonwealth Government should

(a) amend the Family Law Rules 2004 (Cth) to:
  (i) provide that the Family Law Rules 2004 (Cth) apply to matters dealt with in the Federal Circuit Court under the Family Law Act 1975 (Cth), to the extent of any inconsistency between them and the Federal Circuit Court Rules 2001 (Cth)
  (ii) provide that parenting orders made with the consent of a litigation guardian be subject to judicial review in accordance with United Nations Conventions.
(b) ensure that organisations with experience in disability are adequately resourced to deliver litigation guardian services
(c) ensure that family members who are appointed as litigation guardians are provided with support and advice from organisations with expertise in disability and litigation guardianship
(d) ensure that guidelines for case guardianship/litigation guardianship are developed by an appropriate body.

Recommendation 9

Australian governments should ensure that government-funded disability advocacy is made available to parents with a disability with cases in the family law system through either disability advocacy organisations or an independent statutory body.

Recommendation 10

The Australian Government should amend the *Family Law Act 1975* (Cth) to provide for the involvement of an advocate in the legal processes in which parents with a disability are a party.

Abbreviations

ATSI	Aboriginal and Torres Strait Islander
CISO	Corrections Independent Support Officers
CALD	Culturally and Linguistically Diverse
CYFA	Children Youth and Families Act 2005
DFFH	Department of Families, Fairness and Housing
DHHS	Department of Health and Human Services
ITP	Independent Third Person
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate

1. About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services, that works to safeguard the rights and interests of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

The Public Advocate has seven functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect, and exploitation. To this end, OPA provides a range of critical services for people with cognitive impairment or mental health issues, including guardianship, advocacy, and investigation services. In 2021-22, OPA was involved in 1976 guardianship matters (972 which were new), 457 investigations, and 297 cases requiring advocacy.[1] In recent years, the profile of its clients has begun to change. As in previous years, the complexity of cases remains a key feature of guardianship matters, each of which has multiple dimensions ranging from complex disability presentations and service provision arrangements to complex family dynamics. A key contributor to this increasing complexity is the introduction of the National Disability Insurance Scheme (NDIS), and the interface with the justice system, in addition to the lack of appropriate and accessible housing for people with complex and challenging support needs.

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the *Guardianship and Administration Act* 2019 and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA supports a full-service communications function with 120 publications in print or PDF[2], a website attracting approximately 150,000 visitors last year and strong media relations. It also operates an Advice Service which provided 10,133 instances of advice last financial year, 1348 of which related to abuse. OPA also coordinates a community education program for professional and community audiences across Victoria to engage on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney.[3]

OPA is supported by approximately 600 volunteers across three volunteer programs: the Community Visitors Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program. The ITP Program is an on-call, state-wide service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when making formal statements to Victoria Police. In 2021-22, ITPs attended a total of 3,969 interviews. CISOs are experienced ITPs who support prisoners who have an intellectual disability at Governor's disciplinary hearings at Victorian prisons and/or remand centres. CISOs attended 49 hearings in Victorian prisons during 2021-22.[4]

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[1] Office of the Public Advocate, *Annual Report 2021-22* (2022) 9.
[2] Ibid 49.
[3] Ibid 10.
[4] Ibid.

Community Visitors are independent volunteers empowered by law to visit Victorian accommodation facilities for people with disability or with mental health issues. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that they are not subject to abuse, neglect, or exploitation. In their annual report, Community Visitors relate their observations on the quality and safety of the services they visit and make recommendations to the Victorian State Government. More than 400 Community Visitors visit across three streams: disability services, supported residential services and mental health services. In 2021-22, Community Visitors made 3411 statutory visits, including to sites of criminal and civil detention.[5]

2. OPA's Engagement with this Royal Commission

OPA is pleased to make a submission to the Royal Commission on Violence, Abuse, Neglect and Exploitation of People with Disability on the topic of parents with disability.

OPA welcomes the continued opportunity to contribute to this Royal Commission. The Public Advocate and has given evidence to the Royal Commission at the following hearings:

- Public hearing 3 in December 2019 in Melbourne to speak about violence in group homes

- with two Community Visitors and an OPA Community Visitor Coordinator at Public hearing 13 on preventing and responding to violence, abuse, neglect and exploitation in disability services (a Case Study)

- Public hearing 26 on the topic of Homelessness including experience in boarding houses, hostels and other arrangements; and

- Public hearing 30: guardianship, substituted and supported decision making in November 2022.

In November 2019, OPA released a report, *I'm too scared to come out of my room*, *Preventing and responding to violence and abuse between co-residents in group homes* that was submitted to the Royal Commission in response to the Group Homes Issues Paper.

OPA has contributed additional submissions on the following topics:

- Health care for people with cognitive disability
- The Criminal Justice System
- Emergency Planning and Response
- Restrictive Practices
- Rights and Attitudes
- Employment

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[5] Ibid.

- Violence and Abuse in People's Homes
- First Nations People with Disability (with Connecting Home)
- Emergency Planning and Response
- Safeguards and Quality
- Culturally and Linguistically Diverse People with Disability
- Homelessness, including experience in boarding houses, hostels and other arrangements

3. About this Submission

This submission applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society

- recognises that most challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual

- considers impairment as an expected dimension of human diversity

- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

4. Overview

Parents and children with disabilities experience systemic abuse and discrimination in the child protection system and, to an extent, in the Family Law system.

In Australia and internationally, the family is recognised as the best environment for raising children wherever possible. The United Nations *Convention on the Rights of Persons with Disabilities* that Australia signed in 2007 and ratified in 2008 provides that people with disabilities have the right to family life, including the right to have children and receive supports to raise their children.[6]

Federal and State governments provide a range of universal and specialist services to support families. However, where a parent has a disability, particularly a cognitive disability, children are removed from their family at a rate many times greater than where the parents do not have a disability.

At the same time, a child with a disability is also more likely to be removed from the care of their parent if a perceived parental inability to provide care for their child with additional needs means that their child is judged to be at risk. A significantly larger number of children with disabilities are also relinquished to child protection because

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[6] United Nations *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 23(1)(3)(4).

their families are unable to receive the supports and funding necessary to care for them at home.

There is little acknowledgment in child protection legislation and policies that most families love their children and want them to have a good life.[7] They do not intend to be neglectful or abusive towards their children but they may need help, sometimes on an on-going basis. There is often a focus on removal rather than providing adequate support for families to remain together. This is compounded for parents with disability as a result of discrimination and unconscious bias about their capability to parent, undermining the right to family life. These systemic failures cause harm, particularly to parents and children with disability.

OPA respectfully suggests that this submission be read in conjunction with the submission by the Parenting Research Centre.[8] That submission comprehensively discusses how parents with intellectual disabilities can be supported to provide the type of care that will enable their children to flourish. It summarises the strong evidence base from Australia and internationally of what supports and parenting programs, tailored to the needs of parents with intellectual disabilities, have been shown to be effective. It draws attention to current gaps in practice across the family support, child protection and disability sectors in Australia in relation to this evidence.

This submission focusses on the experience of the Office of the Public Advocate in Victoria of the child protection and Family Law systems as they relate to parents with a cognitive disability[9]

Particular issues discussed include:

- Unborn child notifications in Victoria's child protection system
- The risk framework and risk assessment tools adopted within child protection
- The short timeframes within which decisions must be made about permanent care under the Victorian Children Youth and Families Act 2005 (CYFA)
- The experience of children with disabilities in the child protection system.
- The limitations of litigation guardianship in both the child protection and family law systems.
- Systemic concerns about the operation of the family law system when a parent has a disability.

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[7] Individual practitioners may acknowledge the love that parents have for their children but argue that this is not sufficient to protect them. Disposition reports provided to the Children's Court rarely mention the love between parents and children.
[8] Parenting Research Centre, *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (2019) 8. Report Template_v6 (parentingrc.org.au)
[9] In this submission, the term cognitive disability includes intellectual disability, acquired brain injury and other conditions that affect brain functioning.

On the basis of experience working with parents and children with disabilities in the child protection and family law systems, the submission makes ten recommendations for reform of the child protection and family violence systems to improve outcomes for parents with disability.

5. Background

Australia has a dark history of sterilising women with disabilities. The procedure was historically performed without the girl's or woman's consent and justified on the basis of eugenics, making menstrual management easier for carers and/or preventing the birth of unwanted children. The prevailing view was that the sexuality of women with disabilities should be suppressed as far as possible. Attitudes have gradually softened over recent decades but the view that people with cognitive disabilities cannot raise children successfully lingers on.

With deinstitutionalisation and the move of people with disabilities into the community, more women with disabilities are having children and wishing to raise their children. It is not possible to obtain accurate statistics on the number of people with disabilities who are parents. Generalised estimates suggest that parents with an intellectual or cognitive disability make up 1% to 2% of the population. A recent Australian report indicates that the number of parents with intellectual disabilities living with their children is only .41% of families.[10] This is consistent with international estimates that children are removed from parents with intellectual disabilities in 40% to 60% of cases.[11] Parents with other disabilities are more likely to have their children removed than parents without a disability but less likely than those with cognitive disability.

Erroneous beliefs and assumptions that a diagnosis of disability is an irremediable barrier to effective parenting and constitutes a serious risk to the safety of the child are embedded in both legislation and practice. This is leading to the unnecessary removal of children from their parents and detrimental consequences for the best interests of children, families and society as a whole.

The following inquiry to OPA from a medical practitioner illustrates how an erroneous assumption made about the decision-making capacity of parents with intellectual disability could have excluded them from involvement in an important decision about their child's health.

> A young child whose parents have intellectual disability required medical treatment. The health practitioner sought a decision by OPA in relation to the proposed medical treatment, based on the erroneous belief that that the parents' intellectual disability, in and of itself, meant that they could not make a decision about whether to consent to the medical treatment.
> The parents were the child's medical treatment decision maker under Victorian legislation.

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[10] Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers* (SDAC) 2000

[11] Victorian Parenting Centre *Understanding and supporting parents with learning difficulties* (2003) 4.

> Because of the assumption the health practitioner had made, they had not made a time to meet with the parents to discuss the proposed treatment and assess if one or both of them had decision-making capacity to make the decision. When the health practitioner did so, following advice from OPA about the definition of decision-making capacity in the legislation and about capacity being decision-specific, the health practitioner determined that the parents did, in fact, have capacity to make the decision in relation to the proposed medical treatment.

Children with disabilities also make up a disproportionate number of child protection clients and have poor life outcomes compared to children without disabilities caught up in the child protection system.

6. The child protection system

6.1 Unborn child notifications

For many women with disabilities, their first contact with child protection will be when someone makes an unborn child report under section 29 or 32 of the *Children Youth and Families Act 2005* (Vic) (CYFA). In these circumstances, child protection or a community-based child and family service organisation is authorised to provide advice and assistance to the mother before the birth of her child.

The Victorian Child Protection Manual, Unborn child reports – advice section identifies circumstances in which an unborn child report to Child Protection is appropriate. These include where:

- there are significant concerns about a parent’s capacity to care for a child after birth such as when the parent has a significant intellectual disability or an unsupported young person who is under 20 years of age; and
- a mother will likely give birth to a child with complex medical needs and/or disability and may encounter difficulty in providing the necessary level of care for the child.[12]

While the involvement of the mother prior to the birth of her baby is voluntary, once the baby is born an investigation can be conducted by child protection and a protective application made. The woman who has just given birth can find herself in court within two days and her baby can be placed in the care of the hospital or discharged to foster carers. Little, if any, support is given to the mother in such a traumatic situation.

The Cummins Report into Victoria’s child protection system in 2012 noted that, although pre-birth notifications (as they were then called) had been in place since 2007 there had been no review or evaluation conducted. The report recommended in

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[12] Victorian Government, *Child Protection Manual, Unborn child reports – advice* https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/intake/unborn-child-reports-advice

2012 that this should be followed up but this has not been done.[13] We therefore have no data available on the number of unborn child notifications of mothers with disabilities, or the number of cases where a protective application is made after the baby's birth. However, the experience of advocates from organisations such as the Family Inclusion Network (FIN) and the Victorian Advocacy League for Individuals with Disability (VALID) is that an increasing proportion of their work involves mothers with intellectual disabilities where an unborn child report has been made and where an application for a protective order is made when the baby is born.[14] The urgency of this work has intensified with the shortened time frames for decision-making under the permanency amendments to the CYFA.

6.2 Risk and risk assessments

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.

Research indicates that the 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 mental health issues, where the parent or child has a disability, single and young parents and parents who abuse alcohol and drugs.[15]

The Cummins Report 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 of children by their parents. Intellectual disability, mental health problems and the parent's history of abuse and neglect were named among the six.

There is considerable evidence of the education and supports that are effective in enabling parents with cognitive disabilities to successfully parent their children. However, the continued removal of children from their parents indicates that these supports are not being provided or that the research evidence is being ignored by the authorities.[16] This may also reflect a lack of awareness of these supports in the child protection workforce or a lack of capacity in the system to invest the time and resources required to undertake this work.

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[13] Philip Cummins, Dorothy Scott, Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, (Victorian Government Printer, 2012) 149.

[14] The co-ordinator of a service supporting pregnant women with special needs has stated that almost all the babies that are ultimately removed from their parent's care soon after birth have a mother with a cognitive disability.

[15] Sharynne Hamilton and Valerie Braithwaite, *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, Regulatroy Institutions Network (ANU Canberra, 2014) 8-13.

[16] For a more comprehensive discussion on these issues see Barbara Carter, Office of the Public Advocate, *Rebuilding the village: Supporting families where a parent has a disability Report 2: Child Protection* (2015).

This is especially concerning as there is little evidence that parents with disabilities abuse their children, with most children being removed from parents with disabilities on the grounds of neglect or risk of neglect.[17]

In the context of the dominant risk paradigm of child protection legislation and practice, conscious and unconscious bias about parents with disability as reflected in the use of inappropriate assessment tools and a failure to take up evidence-based approaches, can result in disproportionality of response towards parents with disabilities in child protection decision-making.[18]

The current all-or-nothing approach of providing no support and then removing children to manage any risk of harm does not serve the best interests of children and their families. A model of co-parenting between carers and families has recently been developed by the Australian Centre for Social Innovation, operating in Sydney and Adelaide. Under this model, carers and families work together and children continue contact with their parents rather than going into permanent foster care.[19]

Another option that should be available is shared parenting care and responsibility between parents and the State, based on the provisions of the *Family Court Act 1998* (Cth) for shared parental responsibility. Such an option would require changes to the CYFA to enable the Children's Court to make such an order. In the case plan permanency hierarchy of the CYFA (s167(1)) such an order could come in third place after family preservation and family reunification.

6.3 Short timeframes for decisions about permanent care

The 2017 permanency amendments to the CYFA have reduced to twelve months the time that a child can be in out-of-home care before decisions must be made about permanent removal from their parents' care. In exceptional circumstances, this can be extended to 24 months. The amendments also took away the ability of the courts to include conditions in Care by Secretary Orders about such things as contact with family.

Parents need to demonstrate to child protection that they can safely and permanently resume the care of their child within twelve months. This is particularly difficult for parents with disabilities given the lack of, and serious delays in getting NDIS supports in place, and their likely on-going need for education and support to meet the changing needs of their children through their life-stages.

Although the amendments were justified by the then Department of Health and Human Services (DHHS) on the grounds that they would achieve permanency and stability for children, they refer only to a child's legal status. However, children in the

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[17] Australian Institute of Health and Welfare: *National Framework for protecting Australia's children 2009 – 2020* (2009)

[18] For a discussion on perceptions of risk in particular groups, see Emily Keddall, Ian Hyslop, Ethnic inequalities in child welfare: The role of practitioner risk perception, *Child and Family Social Work* (2019) 1-12 https://doi.org/10.1111/cfs.12620; Eileen Munro, *Avoidable and unavoidable mistakes in child protection work*, British Journal of Social Work 26(6) (1996) 6-7.

[19] Australian Centre for Social innovation, *Co-parenting* (2019) www.tacsi.org.au

child protection system continue to have multiple placements throughout their childhood (an average of eight) and generally have little contact with their parents, siblings and extended families.

Importantly, there is no requirement in legislation or child protection policy for the Department of Families, Fairness and Housing (DFFH) (previously DHHS) to demonstrate that a child will be better off in out-of-home care than if they had remained with their family. Once the court has found that a child is at an unacceptable risk of harm in the care of their parents, the child can be removed from their family permanently with no legislated provision for on-going contact with their family. There is no mechanism to hold DFFH to account for the development and well-being of children in out-of-home care.

6.4 Children with disabilities in the child protection system

Children with disabilities are at greater risk of entering the child protection system and being placed in out-of-home care than children without disabilities. It is also more difficult to find foster carers for children with disabilities than for other children and there is little or no group housing available for children with disabilities.

OPA has direct experience of a child with profound disability being removed from the care of his family in circumstances where child protection acknowledged that, without disability, the family circumstances would not have caused undue concern (see Harry’s story below). Parents with disabilities are also being told that they will be unable to meet the additional needs of their child if the child also has a disability.[20]

Some children with significant disability are being “relinquished” to child protection by parents who are unable to meet the needs of their child because they are unable to obtain the level of support necessary to do so. With the introduction of the NDIA, the pressure on parents trying to negotiate supports for their child with a disability has increased greatly. OPA has been reliably informed by disability advocates that some parents who have appealed against their child’s NDIS plan have been told by NDIA that if they want more support, they should go to child protection. In 2019 there were 48 children with high level needs living in specialist state care with only half receiving some funding from NDIS. Many more are living in residential care provided by child protection. This form of care is highly unsuitable for children with disabilities and high-level needs[21]

Victoria's Commissioner for Children and Young People Liana Buchanan, who monitors child protection has stated that:

> "We have children with disability who have additional needs because of those disabilities end up being removed from their families and put in out-of-home

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[20] OPA is also aware that if the child does not have a disability, the parent with disability is at risk of being assessed by child protection as unable to meet the normal developmental needs of their child.

[21] Richard Willingham, *Advocates blames NDIS failures as families give up severely disabled children to child protection,* ABC News (9 May 2019) Advocates blame NDIS failures as families give up severely disabled children to child protection - ABC News

> care, particularly our very stretched and frankly very flawed residential care system is absolutely horrendous," [22]

At every level, children with disabilities suffer disproportionately from being placed in the child protection system. Under the legislation they are taken away from their families because they are at “unacceptable risk of harm” in the care of their parents. Their parents are found by the court to have failed to meet their child’s needs and to have harmed them or placed them at risk of harm. The consequences and harm to families are cruel and profound. Very few cases proceed to a final contested hearing in the Victorian Children’s Court. When this does happen, there is an opportunity for the whole situation to be independently examined by the court, as demonstrated in Harry’s story.

Harry’s story

> Harry is an 11-year-old boy with severe brain damage acquired at an early age. He has profound disabilities that require 24-hour monitoring and care for all of his physical needs. Harry’s most important relationship is with his father who has cared for him since birth and he responds to his father very positively. Harry’s father is also extremely well-informed about his son’s medical needs and treatment and, as his parent and primary carer, was actively involved in his son’s medical treatment.
>
> Harry was removed from his father’s care following a series of incidents involving his father’s drug use and of violence toward the father from another family member. Shortly after, a case plan for non-reunification was made. Since his removal, Harry had been living in a respite facility with his father having supervised access. DHHS planned to place him in foster care with extensive supports to be provided to the carers. For two years, DHHS was unable to find a suitable foster care placement. It was suggested by DHHS that he could be placed in an aged care facility. A counter-proposal by his advocate from the Office of the Public Advocate for a purpose-built facility with his father having effectively unlimited access and shared care was rejected by DHHS.
>
> Harry’s father had always been heavily involved with his medical care. His questions to doctors and health care providers were interpreted by some as unwillingness to accept medical advice, by others as reasonable concerns of an informed parent about his profoundly disabled son. However, during an extended period of hospitalisation, his father was not permitted to attend medical appointments and decisions and consents to medical treatment were given by DHHS with minimal involvement or input from his father.
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> By the time the matter came to a contested hearing two years later, Harry’s paediatrician had relinquished care of him and a paediatrician could not be found who was willing to work within the terms laid down by DHHS. It was also

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[22] Ibid.

clear that it was not going to be possible to find a foster care placement and that Harry was likely to remain in respite care indefinitely.

At the hearing, medical and allied health professionals and specialists emphasised the need wherever possible for the active involvement by parents of seriously disabled children in their care and treatment.

In assessing who should exercise parental responsibility for Harry the Magistrate stated:

> *It is the weighing of the capacity of (the father) over the Department of Health and Human Services to make those determinations that is the issue here. Both parties have inherent flaws and difficulties but I have determined that (the father) has a better capacity because ultimately I am satisfied that he has a greater interest in (Harry's) best interests.*

Evidence was also given that risks to Harry in returning to his father's care could be mitigated by the provision of services and support.

The Magistrate made a decision to return Harry to the care of his father on a Family Preservation Order. She stated that he remained a child in need of protection but that conditions could be put in place that mitigate the risk to an acceptable level. She further stated that she was unable to make a Care by Secretary Order because it was not contrary to Harry's best interests to make an order allowing him to remain in his father's care, that she was not satisfied that all reasonable steps had been taken to enable Harry to remain in his father's care and that Harry would not be at unacceptable risk of harm in his father's care.[23]

6.5 Litigation guardianship in child protection proceedings

If a parent has a cognitive disability that prevents them from instructing a solicitor in child protection proceedings, on one view, the court may appoint a litigation guardian to take their place in the proceedings. There are several problems with litigation guardianship that are unresolved. They include:

- Lack of clarity about the power of the court to appoint a litigation guardian
- Difficulty in finding an appropriate person to act as litigation guardian
- Lack of funding to pay litigation guardians in Victoria
- Lack of clarity about the role of the litigation guardian and the extent to which a litigation guardian can and/or should actively advocate for the person with a disability

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[23] *In the matter of HB* (2017) – unpublished decision of the Children's Court of Victoria

- The appointment of a litigation guardian for a person who does not have capacity to manage the legal processes of their case being taken as *ipso facto* evidence of incapacity to parent their child. Despite disability practice and thinking having moved beyond the idea of global incapacity many years ago, this argument is still used successfully in child protection proceedings against parents with disabilities.

6.6 Recommendations for reform in the Child Protection system

The child protection system in Australia is damaging to parents and children with disabilities because it effectively blames and punishes those parents and children for their disabilities, for the lack of adequate, suitable supports and for prevailing community attitudes, over which they have no control. A perceived false dichotomy between the interests of children and the interests of parents pervades the system. Child protection orders sever the legal relationship between parents and their children and irreparably harm personal and family relationships. They have been referred to in the USA as "the death penalty of civil cases". [24]

The Public Advocate does not argue that children should never be removed from their parents against their will. However, in these cases, responsibility cannot be placed solely on the parents to secure adequate supports for their children and to support their parenting.

OPA has been concerned to observe the onus being placed solely on parents with disability to show that they have secured a level of NDIS-funded supports that child protection representatives deem necessary. The NDIS system, while providing choice and control, presents significant barriers for people with disability who seek to access NDIS supports to be able to exercise their child-rearing rights. Not only does the person with disability need to provide the required reports and evidence, OPA has observed that the NDIS may refuse to fund the supports to the level that child protection say is necessary on the basis that it is not their role to fund those supports.

Rather than the onus falling solely on parents, in order for the child-rearing rights of people with disability to be promoted, everyone must take responsibility, especially when the State could have provided adequate support and protection but did not do so.

The Public Advocate makes the following recommendations to ensure a fairer system for parents and children with disability:

Recommendation 1
State and territory governments should amend child protection legislation to provide for shared care and parental responsibility between families and the State modelled on family law legislation.

Recommendation 2
State and territory governments should amend child protection legislation to ensure that when children must be removed from their families, the State is held accountable

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[24] Stephanie N Gwillim, *The Death Penalty of Civil Cases: The Need for Individualised Assessment and Judicial Education When Terminating Parental Rights of Mentally Ill Individuals,* St Louis University Public Law Review 29 (2009)

for the welfare of children in out-of-home care throughout their childhood. Children must have a better childhood than if they had remained with their parents.

Recommendation 3
State and territory governments should amend relevant legislation to give the relevant Children's Court jurisdiction to review decisions of the relevant child protection service where protective orders have been made, and to place conditions on all orders, including for the provision of appropriate support services for families.

Recommendation 4
Australian governments should provide all parents with disabilities support and evidence-based education programs to enable their children to thrive within their families wherever possible rather than being removed and placed in care.

7. The family law system

Many of the issues identified in relation to child protection are also present in the family law system. There are, however, some significant differences, both positive and negative, for parents and children with disabilities.

7.1 The removal of children where there are no protective concerns

A positive aspect of the family law system is the court's capacity to make orders for shared parental responsibility. The clear majority of orders provide for shared parental responsibility. The court also makes orders for residence and spending time (access) with each parent, based on the principle that it is in the child's best interests to have a meaningful relationship with both parents. It is very unusual for the court to make orders that do not provide for contact between the child and both their parents.

However, unlike in the child protection system, there is no requirement that the child must be found to be at unacceptable risk of harm before an order is made giving parental responsibility to someone other than the natural parents of the child. Rather, in the family law system, any person with a parenting relationship with the child may apply to the Family Court or Federal Circuit Court to have parental responsibility and residence for the child.

In these cases, the criteria for deciding issues of parental responsibility and residence include who, between the parties, can best meet the needs of the child. There is no preference given to the natural parents of the child. Thus, a child can be removed from the care of a parent with a disability and placed with another relative or person with a 'parenting relationship' where there are no protective concerns that would warrant the involvement of child protection. **Rebecca's story**

> Rebecca (who has a borderline intellectual disability) and her daughter, Melinda, lived with Rebecca's grandparents for a number of years before moving to live with Rebecca's mother in another State. Melinda commenced school at her new home and was doing well. There had been no reports to child protection authorities and no concerns that Melinda was being abused or neglected. All professionals acknowledge that there was a strong maternal

> bond between mother and daughter. Rebecca's grandparents argued that there was an equally strong bond between them and Melinda. They made an application to the Federal Circuit Court for Melinda to live with them, spending time with her mother during holidays and weekends. Rebecca eventually lost the care of her daughter to her grandparents under consent orders even though there were no protective concerns about Melinda's well-being. She retained shared parental responsibility but found this difficult to exercise because of the power imbalance.

There is an emphasis in family law, as in child protection, on the capacity to parent independently and being able to demonstrate this capacity on an on-going basis. While the steps taken by a parent to set up supports to assist them to parent more effectively may be considered favourably in determining the child's best interests, the court ultimately relies on the ability of the parent to meet the child's needs independently throughout their childhood.

This creates unintended disadvantage where a parent or child is reliant on disability support because such support is generally not guaranteed to be in place for such a long period due to the likelihood of eligibility and funding changes.

In addition, such decisions should not be reliant on a parent being able to demonstrate that they will continue to use equivalent disability support throughout such a long period. This may not be possible and undermines choice. Supports for parents with a disability, both personal family support and community support, are voluntary. There are good reasons for this, related to dignity, autonomy and human rights. A parent can cancel the service or seek to change to another agency that suits her better. She may move house to another region or state and have to re-apply for support services.

Within the framework of the act, these uncertainties and the voluntary nature of participation in community supports and services can make courts cautious about making final orders that children live with a parent where disability is present.

Ahmed and his father's story

> The child of JH and RH, Ahmed, lived with both his parents before separation. During this time, the evidence was that the father sought to distance the mother from her family because of the poor relationship between him and his wife's family. With the breakdown of the marriage, Ahmed remained living with his father and paternal grandmother. Application was made by the mother for Ahmed to move to live with her and the maternal grandmother. Federal Magistrate Ryan concluded:
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>> "On balance I am satisfied that between them the father and his mother are better able to provide consistently appropriately skilled care than the mother and her family. If for some reason something happened to the maternal grandmother the mother would have to seek out other supports in order to provide for Ahmed. If perchance something happened to the paternal grandmother the father is able to meet the

> child's needs without reliance on others. Long term this places him in a superior position than the mother in terms of ensuring consistency in the child's care".[25]

Ryan FM further concludes:
"Throughout Ahmed's life the father has maintained a strong commitment to his son's welfare and, unaided, is able to meet the child's physical, emotional and intellectual needs ... The key advantage to changing residence is that Ahmed will have the opportunity to live with his mother and maternal grandmother, both of whom love him dearly. This is counterbalanced by the mother's limitations meeting the child's long term needs and disruption to a residence arrangement that long term ensures those needs will be met".[26]

7.2 Litigation guardianship in family law matters

A particular problem in relation to litigation guardianship/case guardianship is present in family law matters. Family law cases about parenting are now usually heard in the Federal Circuit Court (formerly known as the Federal Magistrates' Court). The Family Law Rules 2004 refer to case guardians. The rules of the Federal Circuit Court refer to litigation guardians.

There are two sets of rules potentially applying to family law matters heard in the Federal Circuit Court. Under the Federal Circuit Court Rules, a person who needs a litigation guardian may only become a party to proceedings through his or her litigation guardian. The litigation guardian is required to act in accordance with the rules. The rules are procedural and give no guidance as to the way in which a litigation guardian should conduct himself or herself or whether they are permitted or required to act in the interests of the person for whom they are appointed.

Under the Family Law Rules, the term case guardian is used to refer to a litigation guardian. These rules require the case guardian to do anything required by the rules to be done by a party. They also allow the case guardian to do anything permitted by the rules for the benefit of the party. Importantly, if a consent order is sought (other than an order relating to practice or procedure), the case guardian must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party's best interests. Under these rules, therefore, the case guardian must act for the benefit of the person and file an affidavit stating why any proposed consent order is in their best interests. The two sets of rules have different emphases and the existence of two sets of rules is, in itself, confusing.

The Federal Circuit Court Rules (1.05(2)) state that where the rules of the court are insufficient or inappropriate, the Court may apply the Federal Court Rules or the Family Court Rules "in whole or in part, or modified or dispensed with, as necessary". Part 1.05(3)(a) of the Federal Court Rules states that, without limiting sub-rule 1.05(2), the Family Law Rules apply, with necessary changes, to family law and child support proceedings. This indicates that whether the Federal Circuit Court Rules are

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[25] *JH and RH* [2005] FMCAfam 584.
[26] Ibid.

seen as insufficient or inappropriate is a matter to be decided by the court in the particular case.

Rebecca's story (continued)

> A litigation guardian was appointed by the Federal Circuit Court for Rebecca in relation to the application made by an extended family member for parental responsibility of her daughter, who was under ten years old. The litigation guardian was advised by Rebecca's legal representatives that she could not consider Rebecca's best interests in deciding whether to accept a consent order. She was also advised that she could not do anything for the benefit of Rebecca in preparing the case. Instead, she was advised that a litigation guardian is required to consider the state of the evidence and act as a dispassionate assessor of that evidence, taking no active part in the case. No affidavit was filed in Rebecca's case when orders were made by consent and none of the legally trained professionals in the Court was aware of the relevant provision of the Family Law Rules. Rebecca cannot appeal against the orders because the orders were made by consent.

7.3 Recommendations for reform in the Family Law system

Recommendation 5

The Commonwealth Government should:

(a) consider how the full range of rights and interests of children under international law can best be incorporated into the *Family Law Act 1975* (Cth)

(b) amend the *Family Law Act 1975* (Cth) to:

  (i) include a rebuttable presumption that disability is not, per se, a barrier to parenting

  (ii) state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility

  (iii) give preference to a natural parent in determining who shall have residence and parenting responsibility for a child

  (iv) provide that where the parent has a disability, before making orders that persons other than natural parents have parental responsibility for a child, the court must be satisfied that:

    A. appropriate supports have been provided to the family;

    B. parenting capacity was assessed with supports in place : and

    C. the parent is unable to adequately parent the child.

Recommendation 6

The Commonwealth Government should ensure family consultants, lawyers and court staff receive specialist education in the area of disability and parenting.

Recommendation 7

The Family Court and Federal Circuit Courts should make appropriate accommodation for persons with disabilities in the court processes and not draw adverse inferences about parenting capacity from those accommodations.

Recommendation 8

The Commonwealth Government should

(b) amend the Family Law Rules 2004 (Cth) to:
    (iii) provide that the Family Law Rules 2004 (Cth) apply to matters dealt with in the Federal Circuit Court under the Family Law Act 1975 (Cth), to the extent of any inconsistency between them and the Federal Circuit Court Rules 2001 (Cth)
    (iv) provide that parenting orders made with the consent of a litigation guardian be subject to judicial review in accordance with United Nations Conventions.
(b) ensure that organisations with experience in disability are adequately resourced to deliver litigation guardian services
(c) ensure that family members who are appointed as litigation guardians are provided with support and advice from organisations with expertise in disability and litigation guardianship
(d) ensure that guidelines for case guardianship/litigation guardianship are developed by an appropriate body.

Recommendation 9

Australian governments should ensure that government-funded disability advocacy is made available to parents with a disability with cases in the family law system through either disability advocacy organisations or an independent statutory body.

Recommendation 10

The Australian Government should amend the *Family Law Act 1975* (Cth) to provide for the involvement of an advocate in the legal processes in which parents with a disability are a party.

8. Concluding comments

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. These changes would lessen the systemic abuse inherent in the present system for parents and children with disabilities and, indeed, for all families.