

20th November 2018

**Advocacy for Inclusion
Online Lodgement**

Thank you for the opportunity to provide further comment on the ALRC Family Law Review. Advocacy for Inclusion welcomes the proposals in the Discussion Paper and is fully supportive of many of the recommendations that it makes. This submission has provided a brief response to the recommendations. However, our original position in response to the Issues Paper remains unchanged.

In response to the discussion paper, Advocacy for Inclusion will respond to the proposals made by the ALRC, many in which are welcomed and endorsed.

1. In particular, Advocacy for Inclusion welcomes the proposals made to Additional Legislative Issues and fully welcome the proposed amendments to the *Family Law Act 1975 (Cth)* where a supported decision-making framework for people with disability is welcomed to ensure that people with disabilities are able to exercise their legal capacity to make their own decisions.
2. We are pleased to find that the ARLC has taken on board the emphasise that the *Family Law Act 1975 (Cth)* need to include a supported decision-making framework. It is incredibly important and necessary to ensure that people with disabilities have the right to make their own choices to participate in their justice process. As part of the justice process for people with disabilities, it is wonderful to see the ALRC taking onboard Advocacy for Inclusion's (and other disability representative organisations) recommendations to ensure that the changes to *Family Law Act 1975 (Cth)* are consistent and in line with the ALRC *Report 124, Equality, Capacity and Disability in Commonwealth Laws*.
3. Proposal 3-1 notes that the *Family Law Act 1975 (Cth)* and its "subordinate legislation will be comprehensively redrafted with the aim of simplification and assisting readability" by "redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to understood by general terms".¹

Advocacy for Inclusion fully accepts this proposal but believes that it should be line with Proposal 3-2 in which "family law court forms should be comprehensively reviewed to improve usability", including Plain English and Easy English formats. In a utopian world, all legislation and legal language would and should be usable and accessible for all individuals accessing the family law system, accommodating people with disabilities, low-literacy, non-English background, etc.

¹ ALRC (2018) Family Law Review: Discussion Paper, p.xi

4. Proposal 3-8 states that the *Family Law Act 1975 (Cth)* to be amended to reconsider, by application, where there is a final parenting order in place that parties should 'seek leave' to apply for a new order. While the considerations are welcomes, particularly where it is in the 'safe and in the best interests of the child for that order to be reconsidered', it is requested that the ALRC keep in mind that parents with disabilities need to be an exception.
5. However, we remain cautious that the ARLC perhaps has not taken the recommendation of the supported decision-making framework to its full capacity in Proposal 9-3. It is to be stressed that a litigation guardian is to be appointed if absolutely necessary to ensure the person's will and preference is supported as much as it possibly be. It is expected that in this instance where decision-making capacity or basic understanding is doubted that specialised disability advocacy organisations (independent from service providers) should be involved in the assessment towards a facilitated model of support to ensure the individual has received the maximum support available to understand and participate in the justice process.
6. Proposal 9-3 also emphasises that the *Family Law Act 1975 (Cth)* must include provisions for the appointment of a litigation representative. The proposal states:

"... The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*".

Recommendations 7.3² states that the tests of capacity to exercise their legal rights or participate in legal process should be reformed to be consistent with Article 12 of the UNCRPD. Recommendation 7.4 goes on to state that the ALRC recommends that the focus should remain on whether the individual can be supported to participate in the justice system, opposed to if they have the capacity to participate at all.

It is recognised that current tests of capacity do not consider the accommodation of support or assistant for the individual. On a case-by-case basis, the availability and resources of support is to be considered by the ALRC in the review of the *Family Law Act 1975 (Cth)* and how support for individuals should trump whether or not they have the capacity to participate or not. The only concern that is raised in this submission is the potential of continuous assumption of seeking supports will be time-lengthy in a procedure, the types of supports offered and the funding to provide supports. The appointment of a litigation representative must remain the last resort option in every case.

7. With ongoing reflection to the ALRC Report, we welcome Proposal 9-6 for the Australian Government to work closely with the National Disability Insurance Agency (NDIA) to consider referrals, supports for people with disabilities. Advocacy for Inclusion continues to support a number of parents with disabilities in the ACT in the child protection system due to lack of parenting support, family support services knowledgeable of disability and legal assistance to ensure them of their rights.

It is necessary to note and further recommend that in this retrospective, the *Family Law Act 1975 (Cth)* should not discriminate nor deny appropriate supports for parents with disabilities who may be ineligible or choose by their own discretion, not to engage with NDIS funding.

² ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*

8. We further recommend that the ALRC follow through the 2014 Australian Human Rights Commission (AHRC) recommendations of a Disability Justice Strategy.³ Provided that jurisdictions in Australia⁴ have already proceeded to commence their own Strategy, it is recommended that the family law system engages with each state and territory in ensuring the principles to ensure:
- Effective training to address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse.
 - People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.
 - Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.⁵
9. Finally, Advocacy for Inclusion cautiously welcomes Proposal 10-13 in which states where concerns are raised about the parenting ability of a person with disabilities in the proceeding of parenting orders. The preparation of reports regarding the parent's perceived ability to parent is already being conducted by Child Protection officers – often coupled with bias and misunderstanding of disability – is already a feature in the family law system. The dot points provided under the Proposal is of concern.

In our experience, the bias of an individual report writer (whom has no background, experience or awareness of disability) can often create more trauma and challenges when child protection is engaged for the 'best interests' of the child, without the involvement or participation of the parent. This often occurs under the guise of dot point 2 of the Proposal: that the report writer "make recommendations about how that person's disability may, or may not, affect their parenting".

It is often in this case advocacy is when the parent reaches a crisis point when navigating the family law system in the ACT. It is recommended that the implementation of a 'report writer' be an individual person with experience of disability, knowledge of services and supports available and advocacy expertise to ensure the parent is engaged and supported in their capacity to parent effectively. It is a common feature that parenting orders extending to eighteen (18) years is placed, without the parent with disability have the opportunity to engage in parenting supports to enable them to keep and form relationships with their child/ren.

It is recommended that Proposal 10-13 dot point 1 be amended from "prepare a report for the court about the person's parenting ability, including what supports could be provided to *improve* their parenting" to "prepare a report for the court about the person's parenting ability, including what supports could be provided to improvised to support and enable their parenting capacity".

³ Recommendation made by the Australian Human Rights Commission (AHRC) (2014), *Equal Before the Law: Towards Disability Justice Strategies*, in ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*, recommendations 7.7, 7.8 and 7.11

⁴ ACT, Victoria, South Australia, NSW

⁵ Recommendation 7.8 made by the Australian Human Rights Commission (AHRC) (2014), *Equal Before the Law: Towards Disability Justice Strategies*, in ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

It is also further recommended that dot point 2 be amended to reflect the *UN Convention on the Rights of the Child (CRC)* and the *Convention on the Rights of Persons with Disabilities (CRPD)*, both in which Australia is a signatory. Both Conventions provide that children should not be removed from their parents unless determined by the Court or judicial review as 'best interest' to the child. While this may be correct, disability is not a justification for removal.

Parents with disabilities can, and have been successful, in parenting their children when provided the right supports, education and knowledge. However, it is not a quick-fix and cannot be viewed as such by the judicial system – in most cases, individual support is often an ongoing process and sometimes requires time, resources and advocacy to ensure the person is best equipped.

10. Data remains key to the accountability and monitoring of parents with disabilities in the family law system. There is a need for data to demonstrate how many people with disabilities are parents Australia-wide. Importantly, there is an urgent need for States and Territories to engage in gathering data to create a picture of the involvement of parents with disabilities in the child protection system and the understanding of the basis in which disability has been identified as a risk factor.

The National Data and Reporting Framework⁶ will not be operational until 2022, however the family law system should be placing preparation to ensuring that data collection of parents with disabilities, irrespective of domestic violence or not, should be included as part of collection of data earlier than 2022.

11. In conclusion, consistent and supportive measures to drive cultural, attitudinal change across all policy areas and judicial sectors will be integral to the review and reform of the *Family Law Act 1975 (Cth)*. **Advocacy for Inclusion continues to appreciate the opportunity to contribute to this Review. We welcome further consultation on the recommendations and material raised in this submission.**

⁶ *National Plan to Reduce Violence Against Women and their Children 2010-2010*