



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

The next chapter in child protection legislation for Queensland: Directions Statement

Review of the *Child Protection Reform Amendment Bill 2017 (Qld)*

August 2017

Health, Communities, Disability Services and Domestic
and Family Violence Prevention Committee

"Disabilities are not liabilities but true test of abilities."

Emmanuel Ayeni

"Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

Eleanor Roosevelt

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

QAI's Recommendations on the Directions Paper and the Child Protection Reform Amendment Bill 2017 (Qld):

- The *Child Protection Act 1999* (Qld) must balance the benefits of providing children with stability and security with the benefits of keeping children with their biological parents. This means that children should be kept with their biological parents wherever the parents are able to provide the children with a safe, loving and non-abusive family environment, irrespective of whether or not a child or parent has a disability. This is so even where the parents need additional supports, as compared with parents without disability, to care for their children and especially in the initial period of learning to parent. Keeping biological families together strongly correlates to positive outcomes for children.
- Safeguards must be put in place, at all stages of the child protection process, to ensure that this principle is not be displaced by the fact that a parent has an intellectual or cognitive disability or a mental illness.
- Appropriate support must be provided to parents with disability, in terms of:
 - meeting their basic needs for support in a holistic way;
 - supporting them to develop the parenting skills and resources to appropriately respond to their children's needs;
 - providing them with guidance and support at times during their parenting journey when they may encounter difficulties.
- Relevant factors to consider in the calculus of whether it is appropriate for a permanent care order to be made must include:
 - Explicit acknowledgement that disability (including intellectual and cognitive disability and mental illness) does not detract from the ability of a person to be a loving, nurturing and able parent;
 - Recognition of the importance of love and family, community and cultural ties and connections;
 - Recognition of the potential adverse impacts of trauma, anxiety, unhappiness and grief that may be experienced by the child and by the parents when families are separated;
 - The unique needs different parents with disability may have, particularly in the initial period when they are learning to parent.
- The Government should sponsor a proactive awareness-raising campaign designed to raise awareness that parents with disability – including parents with intellectual disability and Aboriginal and Torres Strait Islander parents with disability – can be appropriate and loving parents.
- All staff working in the child protection area must be trained on issues specific to parents with disability, including their potential support needs and the falsity of adverse prejudicial assumptions regarding the impact of disability on parenting ability.
- Government funding must be provided to disability advocacy organisations to enable the provision of specialist, independent advocacy and support for all parents with an intellectual or cognitive disability or mental illness whose children are involved in child protection processes or who face the risk of removal of their child from their care, including by the making of a permanent care order. Advocacy must be available at all

stages, including in all meetings with Department staff and in all legal proceedings.

- All parents with disability who are subjected to an investigation by the Department of Communities, Child Safety and Disability Services should be connected with a culturally appropriate advocate tasked with providing support and assistance until cessation of the investigation.
- Given our knowledge that women with disability are particularly vulnerable to violence and abuse, there should be appropriate, disability-specific supports provided to any parent with disability and their children trying to escape from a domestic violence situation.
- The Department should broaden the scope of this inquiry to properly consult with and hear the voices of people with disability to inform a more equitable, inclusive and fair system that will support the future social and economic health of Queensland.

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our expertise in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the challenges, issues, needs and concerns of individuals who are the focus of this inquiry.

QAI deems that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. Further, QAI believes that all communities should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour. Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

QAI has made submissions to previous stages of review of the *Child Protection Act 1999* (Qld), insofar as the proposed reforms impact upon the rights of persons with disabilities. We thank the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (Committee) for the opportunity to make a submission to this further stage of the review.

International human rights principles relevant to this review

The Convention on the Rights of Persons with Disabilities (CRPD), which Australia has signed and ratified, protects a number of rights that are relevant to this review. Importantly, Article 5 of the CRPD establishes the right to equality and non-discrimination for persons with disability, which is a basic human right also recognised and protected by a number of other international treaties and conventions. Article 6 protects the rights of women with disabilities, while Article 7 protects the rights of children with disabilities. Article 7 posits the best interests of the child as a primary consideration, and the over-riding objective of the Child Protection legislation is consistent with this. Article 12 of the CRPD prescribes the right to equal recognition before the law by people with disabilities, with Article 13 establishing the right to access to justice for people with disabilities, on an equal basis with others. Article 23 of the CRPD establishes the right of all people with disabilities to respect for home and the family, including rights relating to marriage, fertility and child bearing. Importantly, this provision requires that:

- the best interests of the child are paramount in cases including guardianship, wardship, trusteeship, adoption and that Australia provides appropriate assistance to people with disabilities in the performance of their child-rearing responsibilities;

- children with disabilities have equal rights with respect to family life;
- a child will not be separated from his/her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child, and that *in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.*

The Convention on the Rights of the Child is also relevant. Article 9 provides:

1. *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*
2. *In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*

Permanency Framework and Permanent Care Orders

Concerns with Permanent Care Orders

The Bill proposes the introduction of permanent care orders as a new type of child protection order. Permanent care orders are described as 'providing a child with a more stable and secure family arrangement and greater certainty so they can get on with their lives knowing that their permanent guardian has the authority to make decisions about their care'.

QAI holds significant concerns about the impact that the introduction of permanent care orders will have on parents with disability. While QAI agrees with the sentiments of the Hon Fentiman MP that providing greater permanency and stability for children and young people is central to supporting their needs, we are concerned that there will be many unintended, negative consequences that flow from the introduction of permanent care orders.

As noted by the Anti-Discrimination Commissioner of Queensland, it is important that legal systems that seek the best interests of Australia's children enable rather than disable families.¹ This requires that child protection systems take a holistic view of a desirable outcome that does not place in opposition the needs of parents and children but rather understands that the best interests of parents and children most often align.

The Commission of Inquiry described permanent care orders as 'somewhere on the continuum between a long-term guardianship order and adoption'.² QAI submits that these orders are essentially permanent guardianship orders that will apply until a child reaches 18 years of age without hope of reunification. The orders represent a quasi-adoption process, where the parent's rights are pared back to minimal visitation rights only. The process lacks the rigorous checks and balances required by the adoption process to ensure that the child remaining with the parent or reunification with the child's family following separation is not

¹ Kevin Cocks. *Human rights of parents with intellectual disability*, 19 November 2012. Available at <http://www.adcq.qld.gov.au/about-us/the-commissioner/speeches>.

² Explanatory Notes to the Child Protection Reform Amendment Bill 2017, 6.

possible. QAI is concerned about the permanent restriction of the rights of biological parents in circumstances where a rigorous process has not first been followed.

Under the new 65AA of the Act, variation or revocation of permanent care orders may only be ordered by the Children's Court on application by the litigation director following a referral by the chief executive. The litigation director is only empowered to apply for variation or revocation of a permanent care order where satisfied that:

- the child has suffered significant harm, is suffering significant harm, or is at an unacceptable risk of suffering significant harm; and
- the child's permanent guardian is not able and willing to protect the child from harm; or
- the child's permanent guardian is not complying, in a significant way, with their guardian's obligations.

Limiting the scope to vary or revoke orders in this way is purported to provide children with greater certainty and stability and indeed this may be the outcome in some cases. However, narrowing the process in this way denies parents any power to seek to have a permanent care order varied or revoked. The biological parent's powers are restricted to lodging a complaint with the Department if they consider the guardian is not complying with their obligations. Importantly, there is no scope for an order to be varied or revoked because the parent's circumstances change such that they may be the most appropriate person to care for their child.

This stands to have catastrophic effects for parents with episodic mental illness, including parents who suffer from severe post-natal depression. It also leaves little scope for parents with disability who may require a period of intensive support and assistance while they are learning to parent but may ultimately be able to care for their children (and the best person to do so).

In the Explanatory Memorandum, it is noted that limiting the power to apply for variation or revocation of a permanent care order to the litigation director is a potential departure from the principle that sufficient regard be given to an individual's rights and liberties, including natural justice and proportional intervention.³ Yet it is justified by the Government on the basis that it is 'necessary to provide for the permanency needs of children in out-of-home care, where reunification with family is not possible,' with reference made to the underlying belief that instability in a child's living and care arrangements is widely recognised as having negative long-term impacts. While there are limitations and safeguards proposed, in our view none of these are sufficient.

Parents with disabilities

QAI is deeply concerned that the proposed legislative amendments will further entrench already damaging assumptions and stereotypes about the parenting abilities of people with disability. We have previously made submissions to the ongoing reviews of the child protection legislation on this issue and, due to its significance, will briefly revisit this issue now.

³ Explanatory Notes to the Child Protection Reform Amendment Bill 2017, 21.

Parents with disability, particularly parents with intellectual or learning disabilities, are at greater risk than any other parent of losing parental custody of their child.⁴ Mayes and Llewellyn note:⁵

The view remains widely held that people with intellectual disability are unlikely to be able to be good enough parents and that they are unlikely to be able to learn to parent appropriately. There is good evidence that the decision to remove a child from parents with intellectual disability is more likely to be based on prejudicial views about the capabilities of these parents than on evidence of child neglect or maltreatment.

Further research considering the prevalence and outcomes for parents with disabilities and their children in Australian court proceedings presents a similar picture, highlighting that despite evidence that abuse and maltreatment is rare among the children of people with disabilities, high rates of child removal from parents with psychiatric disability or intellectual disability are reported.⁶

In the context of concerns that we must remove societal barriers preventing people with disability from participating as equal citizens to meet the second limb of the National Disability Strategy (NDS) (rights protection, justice and legislation), which was developed by the Council of Australian Governments (CoAG) to give effect to Australia's obligations under the CRPD, Legal Aid Qld stated in 2008:⁷

We are concerned that decisions to remove children from parents with disability are made on the basis of the disability, rather than on the parent's capacity to parent effectively and appropriately.

As discussed further below, it is not only this limb of the NDS that is relevant, but all six themes. In March 2017, building upon extensive research QAI had undertaken, we convened a forum: Walk the Talk: Realising the 2010-2020 National Disability Strategy and our human rights promises. A detailed report was prepared to help to broadly disseminate the findings and the outcomes of this forum. Taking a holistic view, it is evident how inter-related all six themes of the NDS are and how we must address the barriers faced by people with disability in each of these areas if we are to realise the right of all people to live an ordinary, inclusive life in the community.

A study examining stereotyping of parents with intellectual disability and child protection reported unusually high rates of children being removed from parents with intellectual disability.⁸ This research found that, in some cases, the individual capabilities and unique

⁴ In Australia, almost 1 in 10 cases brought before the children's court featured a parent with intellectual disability. In comparison to population estimates of less than 1%, this is a significant overrepresentation when compared to parents with psychiatric disability, or substance abuse issues: Rachel Mayes and Gwynnyth Llewellyn, 'What happens to parents with intellectual disability following removal of their child in child protection proceedings?' (2009) *Journal of Intellectual and Developmental Disability* 34 (1): 92-95, 92. In Australia one-third of parents with learning difficulties experience the removal of at least one of their children: Tim Booth, Wendy Booth and David McConnell, 'Care proceedings and parents with learning difficulties: comparative prevalence and outcomes in an English and Australian court sample'.

⁵ Rachel Mayes and Gwynnyth Llewellyn, 'What happens to parents with intellectual disability following removal of their child in child protection proceedings?' (2009) *Journal of Intellectual and Developmental Disability* 34 (1): 92-95, 92.

⁶ Gwynnyth Llewellyn, David McConnell and Luisa Ferronato, 'Prevalence and outcomes for parents with disabilities and their children in an Australian court sample' (2003) *Child Abuse & Neglect* 27: 235-251, 236.

⁷ Legal Aid Queensland, Developing a 2010-2020 *National Disability Strategy*, CoAG, 2008, <http://www.legalaid.qld.gov.au/about/policy/Policy%20submissions%20and%20research/Forms/General.aspx>. Cited in National Disability Strategy, 38.

⁸ David McConnell and Gwynnyth Llewellyn, 'Stereotypes, parents with intellectual disability and child protection' (2002) *Journal of Social Welfare and Family Law* 24 (3): 297-317, 297.

circumstances of each parent had not been given due consideration by child protection authorities and courts, whilst in others parents needing help with their children were not being offered these services prior to their children being removed.⁹ The authors noted the research evidence showing both a significant over-representation and more intrusive outcomes for parents with intellectual disability.¹⁰ Against this, they note that allegations of child abuse being perpetrated by parents with intellectual disability are quite rare.¹¹ As the authors note:¹²

Review of [the] literature suggests the influence of two prejudicial presumptions about parents with intellectual disability, (1) that these parents will inevitably mistreat their children or put them at risk from others, (2) that any perceived parenting deficiencies are irremediable and that there is little point in offering such parents support. These presumptions have been found to pervade child protection and court processes in Australia ... there is a strong tendency to conflict intellectual disability with perceived parenting deficiencies; such that parents were often presumed to need 24-hour supervision over the long term.

The perpetuation of this stereotype is particularly alarming when we consider that the child of a parent with a disability is far more vulnerable to abuse and neglect when placed in state or foster care. While the research does not show a correlation between parental disability and parental abuse, the disproportionate rates of abuse and neglect of children in state or foster care is well documented.¹³ The impact on children of this double trauma on children – separation from their parents and subsequent abusive treatment – is of high economic and social cost to society. If the approach and accompanying mindsets are changed, there will be benefits for all concerned. In the context of the ultimate socio-economic costs associated with failing to respect the human rights of all involved, the cost of providing appropriate support are insignificant.

In her report, *Rebuilding the village: Supporting families where a parent has a disability*,¹⁴ Victorian Public Advocate Colleen Pearce documents the alarming reality that the intellectual disability or mental illness of a parent is categorised as a major risk for their children by the Department of Health and Human Services. A key rationale behind the report was concern to bring about systems change and develop adequate human rights protections to override false, prejudicial assumptions about the unsuitability of people with an intellectual or cognitive disability or mental illness to be fit parents and help them to retain custody of their children. A core concern of this report is that, rather than the fact of the disability being something that triggers the provision of additional support for the parent, particularly in the initial stages of parenting where they are learning the basic skills involved, the disability becomes a reason to remove the child from the parent, in the absence of any other circumstances justifying this.

⁹ David McConnell and Gwynnyth Llewellyn, 'Stereotypes, parents with intellectual disability and child protection' (2002) *Journal of Social Welfare and Family Law* 24 (3): 297-317, 298.

¹⁰ David McConnell and Gwynnyth Llewellyn, 'Stereotypes, parents with intellectual disability and child protection' (2002) *Journal of Social Welfare and Family Law* 24 (3): 297-317, 300.

¹¹ David McConnell and Gwynnyth Llewellyn, 'Stereotypes, parents with intellectual disability and child protection' (2002) *Journal of Social Welfare and Family Law* 24 (3): 297-317, 301.

¹² David McConnell and Gwynnyth Llewellyn, 'Stereotypes, parents with intellectual disability and child protection' (2002) *Journal of Social Welfare and Family Law* 24 (3): 297-317, 303.

¹³ Philip Menes and Badal Moslehuddin. Transitioning from state care to state prison: a critical analysis of the relationship between leaving out of home care and involvement in the criminal justice system. *Social Alternatives*, Volume 28, No.3, 2009, pp.51-56.

¹⁴ Office of the Public Advocate. (2015) *Rebuilding the village: Supporting families where a parent has a disability*. Report 2: Child Protection.

As the Victorian Office of the Public Advocate has noted:¹⁵

When a static or fixed understanding of risk is used as the basis for child removal, the onus tends to be on parents to prove their fitness to parent, rather than on the department to investigate their parental capacity and provide any necessary supports.

Parents with disabilities, particularly those with intellectual disabilities, are likely to ‘suffer considerable disadvantage in dealing with the child protection and Children’s Court systems’ and to ‘have their capacity to care more harshly judged’ than their non-disabled counterparts.¹⁶ This constitutes discrimination against parents on the basis of their intellectual disability.¹⁷

This discrimination seems particularly unjust given the strong evidence-base that shows that the parenting skills of mothers with an intellectual disability can be improved by support and training in parenting skills.¹⁸ As Booth, Booth and McConnell note:¹⁹

In the light of this evidence base, the disproportionate number of parents with learning difficulties coming before the Family Courts can just as easily be taken as a sign of service system failure as parenting failure.

This is essentially a double failure – this vulnerable group is a subset of society that we fail to adequately support in the first place; we then also fail to support them to care for their children, perpetuating a cycle of disempowerment.²⁰ We also subject parents with disability to greater standards than parents without disability, and require them to provide evidence of their suitability to parent in circumstances where parents without disability are not scrutinised.

QAI submits that it is imperative that the support needs of parents are investigated as a first and vital step. Well before there is any contemplation of the possibility of removing a child from a parent with disability, there must be an audit taken of what issues the family are facing, and Australia’s obligations to address these issues pursuant to the National Disability Strategy, discussed above. For example – if a person is living in shared care or a group home, rather than in an accessible home in an inclusive community that meets their disability support needs, this places the entire family at risk. If one or both of the parents are living and working in segregated settings, they are less likely to have economic security and/or informal supports. If there are health issues facing a parent or child, this can impact on their ability to remain a cohesive family unit.

In circumstances where a parent with disability is being abused or controlled by a spouse, it is important to recognise that they may well have potential to be a capable parent if they are supported to leave or to stand up to the spouse. While they are unsupported in an abusive situation, it is neither appropriate nor possible to assess their ultimate ability to care for their

¹⁵ Office of the Public Advocate, Victoria. Submission to the Inquiry into the Implementation of the *Children, Youth and Families Amendment (Permanent care and Other Matters) Act 2014*. November 2016, 4.

¹⁶ Tim Booth, Wendy Booth and David McConnell, ‘Care proceedings and parents with learning difficulties: comparative prevalence and outcomes in an English and Australian court sample’.

¹⁷ Tim Booth, Wendy Booth and David McConnell, ‘Care proceedings and parents with learning difficulties: comparative prevalence and outcomes in an English and Australian court sample’.

¹⁸ Tim Booth, Wendy Booth and David McConnell, ‘Care proceedings and parents with learning difficulties: comparative prevalence and outcomes in an English and Australian court sample’.

¹⁹ Tim Booth, Wendy Booth and David McConnell, ‘Care proceedings and parents with learning difficulties: comparative prevalence and outcomes in an English and Australian court sample’.

²⁰ Tim Booth, Wendy Booth and David McConnell, ‘Care proceedings and parents with learning difficulties: comparative prevalence and outcomes in an English and Australian court sample’.

child. Yet we are concerned that it is at this point where a person is lacking support to escape from an abuse situation that a permanent care order may be made.

QAI notes that case-planning by the Department can discriminate against parents with disability, as the routine protocols and processes do not adequately meet the needs of parents with disabilities. For example, parental capacity may be assessed in ways that fail to account for a parent's disability, there is a lack of disability-specific parenting assessment programs and on-going parental education and support programs.

QAI has long advocated for the basic human rights of all people with disability to enjoy a full, ordinary life in the community. The right to parent, with appropriate support, is central to many people's vision of this.

Separation at or immediately following birth

Section 21A of the *Child Protection Act 1999* (Qld) obliges the Chief Executive to take appropriate action where he/she reasonably believes that an unborn child will be in need of protection after birth, including by investigating and assessing circumstances and/or offering help and support to the pregnant woman. The Chief Executive and authorised officers are empowered to gather information for these purposes, but their ability to share and act on this information is limited. The Bill extends this power, allowing entities to share information with each other to decide if they should inform the Department that an unborn child may be in need of protection after birth and permitting entities to give information to the Department to enable it to investigate and assess whether an unborn child will be in need of protection after birth.²¹ It is also proposed that information may be shared to enable help and support to be offered to a pregnant woman.

QAI holds significant concerns about the removals of babies from parental care at birth, based on inaccurate and damaging assumptions about the parenting abilities and suitability of parents with a disability, discussed above. We are anecdotally aware of many instances of babies being removed at birth for reason of the parent's disability. This is also an issue that has been the subject of significant alarm amongst human rights advocates and disability support groups, and has generated concerned media attention.²²

Clause 62, which facilitates the sharing of information about an unborn child and pregnant woman, is in breach of important individual rights and liberties, including privacy and confidentiality.²³ The purported justification for this human rights violation is the necessity of allowing the Department to conduct informed, rigorous investigations and assessments to decide if an unborn child may be at risk of harm after birth and to take prompt action where it is considered justified. Safeguards are proposed, yet in our view they are insufficient, and misdirected, and so will not protect the rights of parents with disabilities.

Where the information shared pertains to a parent's disability, this would be directly at odds with the requirement of the *Convention on the Rights of Persons with Disabilities*, which demands that States parties ensure 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.²⁴

²¹ Explanatory Notes to the Child Protection Reform Amendment Bill 2017, 12.

²² See for example: <http://www.abc.net.au/news/2012-10-23/calls-for-changes-to-child-removals-from-disabled-parents/4329772> and <http://www.theage.com.au/victoria/parents-with-a-disability-face-greater-chance-of-losing-children-report-20150921-gjri4e.html>.

²³ Explanatory Notes to the Child Protection Reform Amendment Bill 2017, 17.

²⁴ Article 23(4) of the *Convention on the Rights of Persons with Disabilities*.

Conclusion

There are a number of issues that must be addressed if we are to move towards a more equitable, non-discriminatory and humane child protection system. Legislation which seeks to justify direct human rights violations must be subject to very careful scrutiny. QAI submits that the justifications provided by the Government are not adequate.

The health of any society necessarily begins with its children. The framework in place in Queensland at the moment for the protection of our most vulnerable children and families is deeply flawed in key areas and this has significant ramifications for our society.

QAI calls upon the Government to take a decisive step forward, introducing legislative reform and policy development aimed at bringing about a shift in culture and attitudes that will move Queensland towards being a truly inclusive society, which supports and protects its most vulnerable people. To this end, the Department must broaden the scope of this inquiry to properly consult with and hear the voices of people with disability to inform a more equitable, inclusive and fair system that will support the future social and economic health of Queensland.