



Women
With
Disabilities
Australia
(WWDA)

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

Hon Mark Dreyfus KC, MP
Attorney-General
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Family Law Reform
Attorney-General's Department
Via Email: FamilyLawReform@ag.gov.au

25th February 2023

Re: Submission to the Family Law Amendment Bill 2023

Dear Attorney-General,

I write to you from Women With Disabilities Australia (WWDA)¹ in relation to the *Family Law Amendment Bill 2023* (hereafter referred to as 'The Bill'). While WWDA acknowledges and supports the attempt to reform and simplify legislation relating to family court proceedings, we are concerned about the potential unintended impacts that The Bill threatens to have on women with disability who are parents.

As you may be aware, WWDA is the National Disabled People's Organisation (DPO) and National Women's Alliance (NWA) for women, girls, feminine identifying, and non-binary people with disability in Australia. As a DPO² and an NWA,³ WWDA is governed, run, led, staffed by, and constituted of, women, girls, feminine identifying, and non-binary people with disability. WWDA uses the term 'women and girls with disability', on the understanding that this term is inclusive and supportive of, women and girls with disability along with feminine identifying and nonbinary people with disability in Australia.

As noted in many, many previous submissions to inquiries into the Family Law Act, domestic and family violence and associated issues, women and girls with disability experience and face significantly higher rates of all forms of violence than the general population, but our experiences are often not recognised in legislation.⁴

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations



Women
With
Disabilities
Australia
(WWDA)

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

In Australia, the legal definition of 'domestic violence' varies across jurisdictions and most do not contain definitions which do justice to, nor encompass, the range of domestic/family settings in which women and girls with disability may live or occupy. They do not contain definitions which capture the range of relationships and various dimensions and experiences of domestic and family violence as experienced by people with disability, (particularly women and girls with disability).

The definition of 'family member' and 'relative' in the Family Law Act 1975 are not broad enough to encompass the range of 'domestic relationships' that many people with disability may be in, such as those living in institutional, segregated and residential settings. The limiting definition does not cover paid and/or unpaid carers, restricting the ways in which people with disability can seek protection or redress from domestic/family violence perpetrated by carers (either formal, or informal).⁵ Whilst WWDA supports the proposed changes to the definition of 'member of the family' in The Bill, which extends the definition to recognise Aboriginal and Torres Strait Islander notions of 'family' and 'kinship,' we note that this change still does not encompass the broad range of individuals who are, or may be, part of women with disabilities' family circle.

In addition, there are several concerns for women with disability in how the proposed changes will impact court proceedings. Across Australia, women and girls with disability, in particular women with intellectual and cognitive disability, are more likely to be represented in the family court system, than our non-disabled counterparts. As is well documented, women and girls with disability, are more likely to be subject to all forms of gender-based violence and are less likely to have domestic and family violence services available to support us. We are also at higher risk of separation/divorce than men with disability and often experience difficulty maintaining custody of our children when the Family Court is engaged post-separation/divorce.⁶ Several of these issues have been recognised in the new *National Plan to Prevent Violence Against Women and their Children 2022-2032*.

While it is recognised that The Family Law Act and associated court proceedings require reform and simplification, WWDA is concerned that the proposed amendments to the Act could, unintentionally increase discrimination against women with disability in court proceedings. Namely, it is noted that the proposed repeal of the 'presumption of equal shared parental responsibility' and the associated requirement for Courts to make decisions based on the 'best interests of the child' could exacerbate the ableism that has been found to often underpin court decisions around custody arrangements in relation to mothers with disability.

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations



Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

In Australia, women and girls with disability already encounter numerous barriers once they are involved in a court matter related to state removal of their children. A recent study conducted about the experience of parents with intellectual disability in court matters for example, discussed parents describing feelings of powerlessness, not being heard and assumptions of incompetence.⁷

This is also reinforced by evidence that court proceedings are influenced by ableist assumptions about women with disability. In a 2013 report by the Victorian Office of the Public Advocate (OPA) which examined the removal of children from the care of parents with a disability through the family law system, it was asserted that court proceedings involving people with disability in Australia appear to be based on the following broad and discriminatory propositions:

- 'People with disabilities cannot be competent parents;'
- 'It is rarely in the best interests of a child to be raised by parents with a disability.'⁸

These propositions are reflected in a number of WWDA member's experiences. For example, Leanne, a mother and woman with intellectual disability, stated the following about her interactions with the child protection system:

My disability has unfortunately made it very difficult to parent in a physical way. Child protection workers measure my parenting ability to the same conditions that they measure other parents who don't have a disability. This is a fact of the system I'm in and it has made it very hard to 'prove myself' to be a fit parent in the Department's eyes. I have fought disability discrimination and unfortunately lost due to the very high burden of proof the Department were asking for. Unfortunately, my children were placed on long term orders because the Department thinks that even though I'm willing, I am not able to parent my children.⁹

Based on these discriminatory assumptions (and the broader experiences of WWDA members), it is clear that ableist stereotypes around the capabilities of women with disability are inherent in decisions surrounding child custody arrangements; and that the impact of this, therefore needs to be considered in relation to the proposal that courts should make decisions purely on the 'the best interests of the child' and not on 'the presumption of equal shared parental responsibility.'

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations



Women
With
Disabilities
Australia
(WWDA)

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

Whilst WWDA supports the need to simplify and streamline 'The Best Interests of the Child Principles' we would like to flag that the wording in proposed list of new best interest factors retains wording which promotes ableism towards disabled parents.

In particular, Principle 5, which requires courts to consider 'the capacity of each proposed carer of the child to provide for the child's development, psychological and emotional needs,' is likely to further decrease the likelihood of disabled parents' likelihood of retaining custody of their children when considering that the justice system already assumes parents with disability are inherently 'incapable'.

Many women and girls with disability are not afforded the right to make their own decisions because others determine that they 'lack capacity' to do so. Such judgements often lead to substitute decision-making processes whereby others decide on behalf of a woman or girl, what is in her 'best interest.' This is particularly the case for women and girls with intellectual disability – where the diagnosis of intellectual disability is assumed to equate with a lack of capacity to make decisions. Substitute decision-making and 'best interest' approaches have been thoroughly criticised as fundamentally contravening the UN Convention on the Rights of Persons with Disabilities (CRPD) and as intrinsically value laden. In practice, the 'best interest' approach most often serves the interests of guardians, families, carers and service providers.

For example, as stated by Professor Ian Kennedy:

The best interest's formula may be beloved of family lawyers but a moment's reflection will indicate that although it is said to be a test, indeed the legal test for deciding matters relating to children, it is not really a test at all. Instead, it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. Meanwhile, they engage in what to others is clearly a form of 'ad hocery'.¹⁰

Additionally, it must be highlighted that the ableism inherent in the justice system is particularly detrimental for First Nations women with disability, whose experience with the justice system also intersect with settler colonial practices of child removal. As Damian Griffis, Chief Executive Officer (CEO) of First Nations People with Disability Network (FPDN) has stated:

The child protection system is hostile and complicated. Child removal is an ever-present threat, and reality in our communities. It has become part of the

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations



Women
With
Disabilities
Australia
(WWDA)

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

community vernacular, and families live with the legacies of trauma from the removal of their parents and grandparents. First Nations people with disability are often coerced to surrender their children.¹¹

While The Bill attempts to address cultural issues that face First Nations families by proposing courts consider 'the child's opportunities to connect with and maintain the child's connections to the child's community, culture and country,' it is unlikely that provision will outweigh the impact of a justice system that is underpinned by a racist, ableist history and legal precedent.

In order to ensure The Family Law Act and associated court system is fair and inclusive of women with disability and First Nations women, a much more extensive and community focussed consultation process is essential. In line with previous submissions to government and non-government inquiries, WWDA reiterates our calls for the Australian Government to conduct a national inquiry into the ableism experienced by women and girls with disability in Australian legal and justice systems and to fully fund mandatory disability awareness and inclusion training for **all** legal practitioners (consistent with recommendations to Australia from the UN Committee on the Rights of Persons with Disabilities), that are co-designed and implemented with people with lived experience with disability.

Additionally, governments must take steps to ensure that all women are afforded the accommodations and supports they require to fully participate in informed decision-making, when subject to the Family Court system. Due to the inaccessibility and unaffordability of legal advocacy and services, women with disability who are subject to court appearances experience extreme difficulty accessing accessible legal supports, including lawyers with experience working with people with disability.

If a woman with disability *does* access a lawyer, it is not unusual for lawyers to apply to have guardians appointed in their place. Lawyers commonly do this if they are of the view they cannot take instructions from their clients due to a cognitive or psychosocial disability.¹² While the lawyer might view the appointment of a guardian as being in the clients 'best interests,' their appointment, in practice, removes autonomy from the individual and can further contribute to assumptions of incapacity to parent.

Instead of appointing a legal representative in place of the voice of a woman with disability, WWDA has continually reiterated that governments' have human rights obligations to provide support to women with disability in the exercise of legal capacity and decision-making, not replace such support with substitute decision making. The urgency of replacing substitute decision-making regimes with supported decision-

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

making frameworks, is a long standing recommendation to Australia from several of the international human rights treaty monitoring bodies (of the treaties to which Australia is a party). It is clear that the ongoing practice of substitute decision-making (for people with disability) is in contravention of a number of the international human rights treaties to which Australia is a party.

In the context of reforming family law, any amendments to The Family Law Act should include provisions that mandate courts to provide any accommodations and supports that individuals require to fully participate in the judicial system. This should include, but not be limited to: free legal representation, disability informed support people and information that is accessible, such as in Auslan, plain English and Easy Read formats.

To summarise, WWDA is concerned that the proposed reforms to The Family Law Act will exacerbate ableism and discrimination against women with disability in the court system, and further increase the already high rates of child removals among disabled parents. As is well evidenced, specific cohorts of women with disability, such as First Nations women with disability and women with intellectual and psychosocial disability are at particularly high risk. In order to minimise the impact of the Family Law Amendment Bill 2023 and any associated reforms to the family court, WWDA strongly advises that the Attorney General's Department give consideration to implementation of the following recommendations:

Recommendations specific to the Family Law Amendment Bill 2023

1. That the Australian Government extend the consultation process on Family Law Amendment Bill 2023 and commit adequate time and resourcing to workshop wording with people with disability and their representative organisations, to ensure that ableist and discriminatory stereotypes are removed from assessments about parenting.
2. That the Australian Government extend the proposed amendments to the definition of 'member of the family' in the *Family Law Act 1975* to include the range of 'domestic relationships' that many people with disability may be in, including with carers, support workers, guardians and more.
3. That the Australian Government review the proposal to repeal the 'presumption of equal shared parental responsibility,' with specific consideration given to the impact that this

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations



Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

reform could have on the ability of parents with disability, and in particular women with intellectual and cognitive disability, to maintain and retain custody of their children.

4. That the Australian Government revise the wording of 'The Best Interests of the Child' Principle 5, giving attention to the ability of the wording to exacerbate discrimination against women with disability and First Nations women in parenting arrangement decisions.
5. That the Australian Government ensure that provision is included in The Family Law Act and associated legislation that mandate courts to provide any accommodations and supports that individuals need to fully participate in the judicial system.

Recommendations for the Australian Government more broadly

6. That Australian Government in association with State and Territory Governments commission a national inquiry into ableism (including gendered ableism), discrimination and segregation experienced by women and girls with disability in Australian legal and justice systems.
7. That the Australian Government and State and Territory Governments commit to the elimination use of substituted decision-making in court and tribunal proceedings, including for parents with disability in child protection proceedings; introduce supported decision-making in justice systems and provide access to associated supports and resources for people with disability to fully participate in court proceedings, on an equal basis as others.
8. That the Australian Government develop and deliver mandated disability awareness training for, all actors in the justice system (including for eg: police, judges, lawyers, court officials, prison staff) in co-design with people with disability and their representative organisations. Such training must be gendered.
9. That the Australian Government in consultation with women with disability and their representative organisations commission a national inquiry into the attitudinal, legal, policy and social support environments that give rise to removal of babies and children from



Women
With
Disabilities
Australia
(WWDA)

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
Certificate of Merit, Australian Crime & Violence Prevention Awards 2008
Nominee, UNESCO Prize for Digital Empowerment of Persons with Disabilities 2020
Nominee, National Disability Awards 2017
Nominee, French Republic's Human Rights Prize 2003
Nominee, UN Millennium Peace Prize for Women 2000

parents with disability (including First Nations
parents with disability), at a rate at 10 times higher than non-
disabled parents.

WWDA thanks you for the opportunity to provide this Submission in response to the proposed
Amendments to the Family Law Amendment Bill 2023.

Your sincerely

Carolyn Frohmader
Executive Director
Women With Disabilities Australia

Finalist, 100 Women of Influence Awards 2015
Australian Human Rights Award (Individual) 2013
State Finalist Australian of the Year 2010
Inductee, Tasmanian Women's Honour Roll 2009
Australian Capital Territory Woman of the Year Award 2001

¹ See: <https://wwda.org.au/>

² Disabled People's Organisations (DPOs) are recognised around the world, and in international human rights law, as self-determining organisations led by, controlled by, and constituted of, people with disability. DPOs are organisations of people with disability, as opposed to organisations which may represent people with disability.

³ There are six National Women's Alliances (NWA's) funded by the Office for Women (OFW) in Australia. WWDA is the NWA for women with disability <<https://www.pmc.gov.au/office-women/grants-and-funding/national-womens-alliances>>.

⁴ E.g. Women with Disabilities Australia (WWDA) (2021). 'Response to the Violence and Abuse of People With Disability at Home Issues Paper of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability'. April 2021. WWDA: Hobart, Tasmania.

⁵ Ibid, p. 19.

⁶ Women With Disabilities Australia (2016) '[WWDA Position Statement 1: The Right to Freedom From All Forms of Violence](#)', Hobart, Tasmania.

⁷ Susan Collings, Margaret Spencer, Angela Dew and Leanne Dowse (2018) "'She Was There If I Needed to Talk or to Try and Get My Point across": Specialist Advocacy for Parents with Intellectual Disability in the Australian Child Protection System,' 24(2) *Australian Journal of Human Rights*, p. 162.

⁸ Barbara Carter (2010) 'Whatever Happened to the Village? The Removal of Children from Parents with a Disability,' *Family Law – The Hidden Issues Report 1*, OPA Victoria.

⁹ Leanne Claussen (2020) '[Leanne's Story](#)', *Our Site*.

¹⁰ Ian Kennedy, Patients, Doctors and Human Rights, in *Human Rights For The 1990s: Legal, Political And Ethical Issues* 81, 90–91 (1991)

¹¹ Lisa Hindman (2020) 'First Nations People with Disability Raise Injustice, Discrimination at Disability Royal Commission,' Media Release, 23 November 2020.

¹² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 101

Women With Disabilities Australia (WWDA)

wwda.org.au

Ph: +61 438 535 123

PO Box 407, Lenah Valley, 7008 TASMANIA

WWDA has Special Consultative Status with the Economic and Social Council of the United Nations