



THE LAW SOCIETY  
OF NEW SOUTH WALES

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11 May 2015

The Hon. Senator George Brandis QC  
Commonwealth Attorney-General  
PO Box 6100  
Senate  
Parliament House  
CANBERRA ACT 2600

By email: senator.brandis@aph.gov.au

Dear Attorney-General,

**Case Guardians and Litigation Guardians in the Family Court of Australia and the Federal Circuit Court of Australia**

I am writing on behalf of the Family Issues Committee ("Committee") of the Law Society of New South Wales. The Committee represents the Law Society on family law issues, as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society's membership.

The Committee requests that you give urgent consideration to the implementation of:

- (a) a nomination process for the appointment of case guardians and litigation guardians; and
- (b) funding for case guardians' and litigation guardians' legal costs

in the Family Court of Australia and the Federal Circuit Court of Australia.

Currently there are no arrangements in place with the Attorney-General's Department for the nomination of a case guardian or litigation guardian (referred to in this submission collectively as "litigation representative") in circumstances where a court accepts that a party does not have the capacity to conduct proceedings on their own behalf and no other independent person is available for appointment.

Where there is no litigation representative, the court proceedings cannot progress and the court may dismiss the proceedings or delay the proceedings indefinitely pending the appointment of a litigation representative. This clearly has very serious

consequences for the parties involved; and particularly for any children involved in the proceedings.<sup>1</sup>

Where there is no litigation representative for appointment, clear access to justice issues arise. The courts and legal practitioners are also adversely affected.

There is currently no funding available to meet litigation representatives' legal costs where they cannot be paid by the party themselves. Litigation representatives are eligible to seek assistance from the Attorney-General's Department's disbursement support scheme, however, this scheme does not provide financial assistance for legal costs. The absence of funding for litigation representatives' legal costs means that suitable nominees are less likely to accept an appointment because they are personally liable for the costs and expenses of the legal practitioner.<sup>2</sup>

The absence of a source of funds for litigation representatives' legal costs results in significant delays in family law proceedings.<sup>3</sup> In the Committee's view, this has had unjust consequences for litigants.

## **1. The power to appoint a case guardian or a litigation guardian**

The Family Law Courts' powers to appoint a litigation representative are set out below. The legislation providing the courts with these powers also clearly enables the Attorney-General to nominate and appoint litigation representatives.

### **1.1 Family Court of Australia**

The *Family Law Rules 2004* (Cth) ("Family Law Rules") provide for the appointment of a "case guardian". A "case guardian" is defined as "...a person appointed by the court under rule 6.10 to manage and conduct a case for a child or a person with a disability, and includes a next friend, guardian ad litem, tutor or litigation guardian".<sup>4</sup> A "person with a disability" is defined as a person who "...does not understand the nature or possible consequences of the case; or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case".<sup>5</sup>

Rule 6.08(1) of the Family Law Rules requires the appointment for any person with a disability, providing that "...a person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian".

A case guardian may be appointed by way of an application by a party or by a person seeking to be appointed as a case guardian or on the Court's own motion.<sup>6</sup>

Under r.6.11 the Court may request that the Attorney-General nominate a person to be a case guardian if, in the opinion of the Court, a suitable person is not available.

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<sup>1</sup> See submission in Response to the Australian Law Reform Commission *Issues Paper 44: Equality, Capacity and Disability in Commonwealth Laws*, the Hon Diana Bryant AO, Chief Justice of the Family Court of Australia, 17 January 2014, p 9. Accessed on 21 April 2015 at [http://www.alrc.gov.au/sites/default/files/subs/22.\\_hon\\_diana\\_bryant\\_ao\\_submissionequalitycapacitydisability.pdf](http://www.alrc.gov.au/sites/default/files/subs/22._hon_diana_bryant_ao_submissionequalitycapacitydisability.pdf).

<sup>2</sup> As above p 8.

<sup>3</sup> As above p 9.

<sup>4</sup> *Family Law Rules 2004* (Cth) Dictionary.

<sup>5</sup> As above Dictionary.

<sup>6</sup> As above r 1.10, 6.10.



The appointment is automatic and occurs without a court order provided that the conditions of r.6.11(2) are met.<sup>7</sup>

## 1.2 Federal Circuit Court of Australia

The *Federal Circuit Court Rules 2001* (Cth) ("Federal Circuit Court Rules") provide for the appointment of a "litigation guardian". Rule 11.10 provides that "a person may be a litigation guardian in a proceeding if he or she is an adult and has no interest in the proceeding adverse to the interest of the person needing the litigation guardian".<sup>8</sup> A person needs a "litigation guardian" "...if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding".<sup>9</sup>

Rule 11.09(1) requires the appointment for any person who needs a litigation guardian, providing that "...a person who needs a litigation guardian may start, continue, respond to, or seek to be included as a party to a proceeding only by his or her litigation guardian".

A litigation guardian may be appointed by way of an application by a party or by a person seeking to be appointed as a litigation guardian or on the Court's own motion.<sup>10</sup>

Under r.11.12 the Attorney-General may appoint a person to be a manager of the affairs of a party who may also become the litigation guardian.

## 2. The importance of case guardians and litigation guardians

As noted above, the appointment of a litigation representative in court proceedings is not discretionary: it is a requirement of the Family Law Rules and the Federal Circuit Court Rules where a person is under a disability. Where this requirement cannot be met, a court may have to dismiss the proceedings or delay the proceedings indefinitely. It goes to the integrity of legal proceedings that parties before the court have the capacity to present their case or to instruct a lawyer to do so, on their behalf.<sup>11</sup>

The Committee requests that you give urgent consideration to establishing a process for the nomination of litigation representatives and the funding of representatives' legal costs to address the extensive indefinite delays experienced by people with a disability and any children involved.

### 2.1 Case studies

The following case studies provide examples of the extensive indefinite delays experienced in cases where no litigation representative is available for appointment.

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<sup>7</sup> The conditions of r.6.11(2) are that the person files a consent to act, a written nomination and a notice of address for service.

<sup>8</sup> *Federal Circuit Court Rules 2001* (Cth) r 11.10

<sup>9</sup> As above r 11.10

<sup>10</sup> As above r 11.11.

<sup>11</sup> *Merrickson & Padmore* [2013] FamCA 916 per Loughnan J at [26] cited in submission of the Hon Diana Bryant AO, Chief Justice of the Family Court of Australia, 17 January 2014, p 5.



### **Connor & Hullet [2011] FamCA 196**

This case involved parenting proceedings and orders for a father, who had been diagnosed with a mental illness, to spend time with his son. The proceedings were transferred from the Federal Circuit Court to the Family Court in April 2008. Throughout the proceedings the trial judge (Justice Murphy) expressed concerns for the father's mental health and his capacity to conduct the proceedings on his own behalf. In February 2010 interim orders were made to appoint a case guardian for the father. A suitable person was not available for appointment, so the Court requested that the Attorney-General nominate a person to be appointed as a case guardian. In October 2010 the Attorney-General's Department advised that the Department was not in a position to provide a nominee case guardian. Accordingly, in November 2010 the trial judge, with considerable concerns and reservations, revoked the order to appoint a case guardian.

In his reasons, Justice Murphy explained that, in respect to the appointment of a case guardian, the issue before the Court was both the father's capacity to properly represent himself and thus maximise his best chances in the parenting proceedings and to obtain orders which might be seen to reflect the caring and loving relationship that undoubtedly exists between the father and child<sup>12</sup>.

Justice Murphy commented (when identifying that there are still no arrangements in place for the efficient and effective appointment of case guardians), "that this is tragic for those individuals is one thing. That it has consequent tragic consequences for children is quite another"<sup>13</sup>. In His Honour's judgment which delivered the final orders in this case, Justice Murphy described the 12 month delay in the proceedings while a case guardian was sought as "tragic for the child, particularly in light of the orders which will ultimately be made in these proceedings today"<sup>14</sup>.

This case illustrates the significant detrimental impact there can be on people with a disability and children involved in proceedings where no litigation representative is available for appointment. The delays impact on the parent and child's ability to establish and maintain a regular, meaningful and in depth relationship. Further, the impact is long-term in circumstances where the party with a disability is unable to obtain orders that would maintain a fulsome and meaningful relationship with a child or children. In the Committee's view, this is clearly not in the best interests of children.

### **Dabrowa & Dabrowa [2014] FamCA 711**

This case involved parenting and property proceedings. It illustrates the extensive delays in the finalisation of the proceedings as a result of the father's chronic ill health and capacity to conduct the litigation. The case was first listed for final hearing in July 2009, but was adjourned at the father's request so that he could obtain legal representation. The final hearing was listed in January 2010, but was adjourned to April 2010 due to the father's ill health. The hearing was again adjourned as a result of the father's ill health. A final hearing was listed in February 2012 but the father failed to appear. The trial judge requested that the Attorney-General nominate a case guardian. However, no nominee was provided as the Attorney-General's Department has no procedure for the implementation of such a request. In February 2014, after extensive enquiries made by the Court to the Attorney-General's Department and

<sup>12</sup> *Connor & Hullett(2)* [2010] FamCA 1013 at [19].

<sup>13</sup> *Connor & Hullett* [2011] FamCA 196 at [51]-[52].

<sup>14</sup> *Connor & Hullett* [2011] FamCA 196 at [55].



Law Society of NSW, a private solicitor agreed to take the role of case guardian for the father. A final hearing was listed on July 2014 and final orders were delivered in the same month. At the time the final orders were made, the father had not had any contact with his three children since June 2009.

This case illustrates the significant delay in proceedings that can result where no litigation representative is available for appointment. It took over four years for a final hearing to be held in this case, and two years to find a suitable case guardian after the Court had ordered that a case guardian was necessary. In this case, the parties, children and Court were clearly adversely affected by the extent of the delay.

### **3. Indemnity and statutory protections**

The Committee is of the view that a statutory scheme providing indemnity or protection to people who act as litigation representatives should be introduced. The difficulty of identifying a guardian available for appointment is compounded without such statutory protections.

No statutory protections under Commonwealth laws are currently provided. This is in contrast to statutory protections provided for *guardians ad litem* (or litigation guardians) in the New South Wales jurisdiction.

Prior to 2010 in New South Wales, some protection was provided at common law for litigation representatives. However, guardians acting in good faith were required to cover the costs of their own defence, should legal proceedings be commenced against them.<sup>15</sup> In 2010, a statutory defence was introduced with the intention that the Crown Solicitor would act on behalf of a *guardian ad litem* who had acted in good faith, in the event that legal proceedings were commenced against them.<sup>16</sup> The statutory defence provides that anything done or omitted to be done by a *guardian ad litem* appointed by a Court or Tribunal to represent an incapacitated person to proceedings does not subject the *guardian ad litem* personally to any action, liability, claim or demand if the thing was done, or omitted to be done, in good faith for the purpose of representing the incapacitated person. Instead any such liability attaches to the Crown.<sup>17</sup>

The Committee strongly suggests that statutory protections, similar to the statutory defence in NSW legislation, should be provided in the Family Law Rules and Federal Circuit Court Rules.

### **4. International law obligations**

In 2008, Australia ratified the Convention on the Rights of Persons with Disabilities ("Disability Convention") and acceded to the Optional Protocol to the Convention on the Rights of Persons with Disabilities in 2009.

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<sup>15</sup> See second reading speech of the Hon John Hatzistergos, Attorney General, 9 December 2010, page 1, accessed at [https://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/18ddaff9c0fa8f87ca2577e40018d5ec/\\$FILE/LC%2013510.pdf](https://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/18ddaff9c0fa8f87ca2577e40018d5ec/$FILE/LC%2013510.pdf) on 13 April 2015.

<sup>16</sup> See *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

<sup>17</sup> See NSW Justice webpage - Statutory Protection for Guardian ad Litem Panel Members, <http://www.gal.nsw.gov.au/Pages/Statutory-Protection-GAL.aspx>, accessed on 13 April 2015.

Article 13(1) of the Convention reads:

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

The Committee endorses the view of the Law Society's Human Rights Committee that the lack of provision of a nomination process and funding for litigation guardians' legal costs by the Commonwealth Government may be a breach of Article 13.

The Committee notes also that, in 1991, Australia ratified the Convention on the Rights of the Child ("Rights of the Child Convention").

Relevant Articles in Rights of the Child Convention read:

Article 3(1)

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 9

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.



3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

The Committee, and the Human Rights Committee, are of the view that the indefinite delay, or dismissal, or both, of family law proceedings due to the unavailability of litigation representatives in matters where children are involved is not in the best interests of children as understood in the Rights of the Child Convention. The Human Rights Committee also notes that Australia is bound under international law by the terms of both Conventions, and must observe their terms in good faith.<sup>18</sup>

## 5. Australian Law Reform Commission

In December 2014, the Australian Law Reform Commission's Report 124: *Equality, Capacity and Disability in Commonwealth Laws* ("Report") was published. The Committee understands that the Government has yet to announce whether or not it will respond to the Report's recommendations. The Government is also yet to announce a timetable should it decide to respond.

The Report provides specific recommendations in respect to "litigation representatives" in the federal courts with a focus on the reform of laws and legal frameworks affecting people who may need decision-making support rather than on how and by whom such support should be provided and funded.<sup>19</sup>

The Committee notes, however, that although outside the terms of reference, the Report included a section on the appointment of litigation representatives in order "...to draw attention to the valid and urgent concerns of leading stakeholders..." regarding the availability of appropriate support and funding.<sup>20</sup>

The concerns expressed in the Report further support the need for urgent implementation of a nomination process for the appointment of litigation representatives and funding for representatives' legal costs.

## 6. Guardians ad litem in NSW courts and tribunals

In 2009, the NSW Department of Justice established a panel of people eligible for appointment as a *guardian ad litem* (or litigation representative) in matters before the Children's Court of NSW.<sup>21</sup> The panel has been expanded and is now available to all NSW courts and tribunals<sup>22</sup>.

The Department of Justice administers the panel and the appointment of a *guardian ad litem* where a court has ordered it to do so. A *guardian ad litem* is appointed three working days after the Department receives a court order. Guardians are remunerated for their time and expenses according to a set fee schedule. The Department has adopted a dual representative model for proceedings where parties may lack capacity or are unable to represent themselves. The appointed *guardian ad litem* instructs a legal representative on behalf of the party. This model maintains the important distinction between the roles of the *guardian ad litem* and the legal

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<sup>18</sup> See Article 26 of the *Vienna Convention on the Law of Treaties* ATS 1974 No.2.

<sup>19</sup> Australian Law Reform Commission Report 124 *Equality, Capacity and Disability in Commonwealth Laws* p 193.

<sup>20</sup> Report 124 p 220.

<sup>21</sup> *Guardian ad Litem Handbook*, NSW Department of Justice, 1 January 2012.

<sup>22</sup> As above, p 13.



representative. The procedure for appointing a legal representative varies depending upon the jurisdiction in which the *guardian ad litem* has been appointed. In most jurisdictions, a legal representative is provided by way of a grant of Legal Aid.<sup>23</sup>

Committee members who have represented clients in matters before the Children's Court of NSW where a *guardian ad litem* has been appointed, are of the view that the appointment process is efficient and cost effective and successfully provides access to justice for people with disabilities.

The Committee requests that you consider the operation of the *guardian ad litem* panel in NSW with a view to the implementation of a similar model of nomination and appointment for the Family Court and Federal Circuit Court.

## **7. The role of the litigation guardian after court proceedings are finalised**

The Committee notes further that once proceedings have been completed, a litigation representative no longer has standing to make decisions in respect of the implementation of orders made by the Court. For example, liaising with an agent and negotiating a sale price for property where the Court has made an order for the sale of the former matrimonial home. A litigation representative is not authorised to decide or agree upon a sale price, nor to sign a contract for sale or a transfer, without power of attorney or a guardianship order. While the issue of signing a transfer may be overcome by having an order made to provide for a Registrar of the Court to sign such a document to implement an order<sup>24</sup>, there is no scope to facilitate the decision-making surrounding the sale by way of a Court order.

At present, the role of a litigation representative ceases as soon as the proceedings are completed. In NSW, the indemnities and statutory protections afforded to formally appointed *guardians ad litem* also cease.

The Committee has observed a gap in services provided to a party who requires a litigation representative. In most cases a party who required the appointment of a litigation representative to conduct Court proceedings also requires support and assistance to implement the orders made by the Court. The party may also find it difficult to understand when proceedings have ceased and that the litigation representative is no longer able to assist the party. This means that the party be required to implement Court orders without assistance, which may be difficult to achieve.

The Committee is of the view that legislative change is required to either:

- (a) expand the role of a person who has been appointed as a litigation representative after proceedings are finalised. The role could be expanded to enable the litigation representative to assist with the implementation of Court orders; or
- (b) create a new category of support person who will assist a party to implement Court orders after proceedings are finalised. A person who was appointed as a litigation guardian could be appointed to a support person role after proceedings are finalised for the purpose of assisting a party to implement Court orders.

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<sup>23</sup> As above, pp 26-27.

<sup>24</sup> Refer to s 106A of the *Family Law Act 1975* (Cth).





The Committee would be grateful for an opportunity to discuss these concerns. Questions can be directed to Emma Liddle, policy lawyer for the Committee. Emma is available on 9926 0212 or [emma.liddle@lawsociety.com.au](mailto:emma.liddle@lawsociety.com.au).

Yours sincerely,



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**President**

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