

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 26 April 2024

Question date: 29 April 2024

Paul Scarr asked the following question:

1. Please refer to the issues raised by Mr Graham Connolly on page 8 of his submission in relation to the 'litigation guardian' (noting that it is now referred to as a 'litigation supporter')? From the Department's perspective, how have the issues raised by Mr Connolly been addressed by the amendments to the Bill made by the Government? How does the Department respond to any residual issues raised by Mr Connolly in this regard?

The response to the question is as follows:

a) Clause 67 now provides that a person can be appointed where a person lacks decision-making ability. It no longer refers to a person not understanding the nature and consequences of a proceeding.

The clause also includes a presumption that all people have decision-making ability, which cannot be rebutted solely on the basis that a person has a disability, in accordance with principle 2 of Recommendation 6.6 and Recommendation 6.7 of the Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (DRC Report). A litigation supporter is not appointed if other measures can be put in place to support their effective participation in the proceeding.

The ability for the Tribunal to appoint a litigation supporter is intended to enhance access to the Tribunal so that a party can meaningfully participate in a proceeding and ensure an effective review of an administrative decision that affects them. It is therefore appropriate that there are no limits on the kinds of matters in which a litigation supporter can be appointed. The AAT and stakeholders (including Disability Advocacy Network Australia, Disability Advocacy NSW and National Legal Aid) identified a need for this provision during public consultation. This provision rectifies a current gap in the AAT Act, which does not provide for the appointment of a litigation supporter.

Without the ability to appoint a litigation supporter, there may be matters which the Tribunal is unable to progress, resulting in some vulnerable parties being unable to get a decision in their matter.

b) Litigation supporters, or equivalents, can be appointed in a number of other jurisdictions, such as in the Federal Circuit and Family Court. There are no general indemnity or immunity provisions for a person appointed to those roles in other federal jurisdictions.

c) The concept of ‘personal and social wellbeing’ is drawn from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability which reflects the approach taken in the Australian Law Reform Commission’s National Decision-Making Principles. This approach has also been adopted in other jurisdictions, such as in the *Guardianship and Administration Act 2019* (Vic). It recognises that a person’s personal and social wellbeing depends on a person’s individual circumstances and ensures that a person-centred approach is taken, rather than a welfare and interests approach. The rules or practice directions may set out further guidance as to what could be included within the concept of personal and social wellbeing.

d) In accordance with subclause 67(10), the Tribunal may remove a litigation supporter if the litigation supporter has a conflict of interest in representing the party. An order to remove the litigation supporter could arise because the litigation supporter discloses a conflict of interest or because a conflict of interest has otherwise been brought to the Tribunal’s attention.

e) The litigation supporter should, wherever possible, support the party to make decisions in relation to the proceeding, including in relation to whether they may wish to appeal a decision of the Tribunal.