

Article

Some Parents Are More Equal than Others: Discrimination against People with Disabilities under Adoption Law

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Abstract: Article 23 of the Convention on the Rights of Persons with Disabilities (CRPD) explicitly includes ‘the adoption of children’ as a right to which people with disabilities are equally entitled. Despite the CRPD having been in force for over nine years, research is yet to consider whether CRPD signatory states have brought their respective adoption regimes in line with their obligations under art 23 of the CRPD. Using the laws of the Australian state of Victoria by way of case study, this article aims to shed light on the difficulties people with disabilities still face when attempting to adopt children. In terms of methodology, this article conducts an interpretive critique of Victoria’s adoption law against art 23 of the CRPD, which it interprets mainly through the lens of the social model of disability. Ultimately, this article finds that Victoria’s adoption framework closely resembles the adoption regimes of many other CRPD signatories, yet it clearly fails to uphold Australia’s obligations under the CRPD. This is both as a result of the words of the legislation as well as their implementation in practice. This article proposes a suite of changes, both legislative and cultural, to bring Victoria’s adoption framework in line with art 23, which it hopes will serve as a catalyst for change in other CRPD signatory states.

Keywords: adoption; adoption law; CRPD; disability; disability rights; people with disabilities; social model; medical model; Victorian adoption law

1. Introduction

Parenthood is held out to be a transformative part of human life (Chapman et al. 2015). It is therefore unsurprising that many people with disabilities desire to be parents (Shakespeare et al. 1996; Frohmader 2009). While critiques of society’s privileging of parenthood exist, these do not detract from the claims of people with disabilities to this right (Warner 2000).

Despite this, recent research has shown that people with disabilities face disproportionate difficulty becoming and being parents—be it as a result of forced sterilisation (Kempton and Kahn 1991; Fennell 1992; Arstein-Kerslake 2015), higher rates of child removal (Llewellyn et al. 2003; Booth et al. 2005; IASSID 2008), over-representation in out-of-home care (Australian Institute of Family Studies 2016) or lack of access to assisted reproductive technologies (Frohmader 2009). Most of this research has focused on supporting the right of people with disabilities to conceive children or to retain custody of children often presumed to be their biological children. Where research has considered the ability of people with disabilities to become parents by other means, it has mostly considered assisted reproductive technologies like in vitro fertilisation (IVF). For example, a recent consideration of parenting laws in a report by the Victorian Law Reform Commission (VLRC 2007) identified disability as a significant barrier to IVF. In contrast, its consideration of adoption was far shorter and identified same-sex attraction as the only hurdle to adoption.

Limited research does exist on the discrimination faced by people with disabilities who attempt to become parents through adoption (Wates 2002; National Council on Disability 2012; Fleming 2015). Yet, often this research stops short of critiquing the legal systems that govern adoption, instead focusing on the prejudices of adoption workers and relinquishing parents (i.e., the biological parents of the adopted child). More importantly, no research has considered adoption as a right protected by the Convention on the Rights of Persons with Disabilities (CRPD)¹. While art 23 of the CRPD explicitly guarantees the right of people with disabilities to adopt, the question of whether or not CRPD signatory states have actually implemented their art 23 obligations through domestic legislation has so far evaded scrutiny. Now that the CRPD has been in force for over nine years, there is a need for such analysis.

This article seeks to fill this gap in research by conducting an interpretive legal analysis of the adoption regime of one CRPD signatory state, and critiquing that regime against art 23 of the CRPD. Using the adoption regime of the Australian state of Victoria by way of case study, this article will argue that people with disabilities are systematically prevented from becoming parents by the legal systems that govern adoption, in breach of their human rights under the CRPD.

In terms of structure, Part II contextualizes this article by outlining the strong political, social and theoretical connections between adoption and other threads of disability advocacy. Part III discusses this article's methodology, namely how it uses the state of Victoria as a case study to explore how the adoption rights are governed through written law. Part IV discusses the theories of disability relevant to this essay, namely the medical model, the social model and Shelley Tremain's deconstructionist critique of the social model. Part V introduces art 23 of the CRPD which protects people with disabilities' right to adopt. Part VI provides a break-down of the legal structure through which adoption occurs in the state of Victoria. Part VII analyses Victoria's adoption regime against the requirements of the CRPD, which it interprets primarily through the lens of the social model. Part VIII provides recommendations for the Victorian Parliament, the Committee on the Rights of Persons with Disabilities and disability advocates and allies to pursue change to Victoria's adoption regime and more broadly. Part IX discusses the related but tangential issue of 'passing', and how the distinction between hidden and visible impairments can further affect the impact of an adoption system on the disability community.

While this article may sometimes refer to three broad classes of disability—physical, intellectual and mental health—it makes every effort not to conflate all people with disabilities during the course of analysis, and not to extrapolate broad stroke solutions that do not reflect this diversity within the disability community.

2. Snapshot of Adoption in Australia

Adoption is the legal process by which a couple (the 'adoptive parents') become the legal parents of a child under the age of 18, replacing the child's birth or biological parents (which the Victorian legislation refers to as 'relinquishing parents'). Legally speaking, an adoption order extinguishes all rights of the relinquishing parents in relation to the child (unless it specifically mentions such rights), and entitles the adopted child to all the rights of a biological child in their new adoptive family.

This said, there are different types of adoption (and other forms of caregiving), many of which fall outside the scope of this essay. This Part will limit this article's scope of enquiry to local adoptions.

2.1. Local Adoption in Perspective

At the highest level, it is important to distinguish adoption from other ways that non-biological parents may care for children, namely out-of-home care (OOHC). OOHC is a state-based statutory system which includes relative care (where a child is cared for by a relative), foster care (where a child is cared for by an unrelated carer) and residential care (where a child is cared for in a communal

¹ Convention of the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

residential building). From the outset, it must be stated that the number of adoptions is minuscule compared to the number of children in out-of-home care. In the Australian Institute of Health and Welfare's (AIHW) latest reporting period, there were only 278 adoptions in Australia ([Australian Institute of Health and Welfare 2016](#)). This compares to 11,581 Australian children admitted to OOHC in 2014–2015 ([Australian Institute of Family Studies 2016](#)).

OOHC can be informal or formal. Informal OOHC is where a biological parent consents to their child going into the OOHC system, whereas formal OOHC occurs as a result of the state forcibly removing a child through a care and protection court order. It is important to establish that biological parents with disabilities, as well as children with disabilities, are both over-represented in the OOHC system ([Senate Community Affairs References Committee 2015](#)). While this issue lies outside the scope of the article, future research should focus on this phenomenon, as the rights of such parents clearly also come within the scope of art 23 of the CRPD.

Of the 278 adoptions which occurred in Australia in 2015–2016, there are different types of adoption. This article only deals with Australian child adoption, as distinct from intercountry adoption. Local adoptions accounted for 196 (or 71%) of the adoptions in the last reporting period, compared to 82 intercountry adoptions (29%) ([Australian Institute of Health and Welfare 2016](#)). While many of the same processes and issues discussed in this article remain relevant to intercountry adoption, intercountry adoption involves less clear-cut Australian regulation, is highly dependent on the Hague Convention and the legal regimes of foreign jurisdictions and involves other complex issues (such as the consent of birth parents) that can obscure the operation of disability human rights.

Of these adoptions, some are considered 'local adoptions' while others are considered 'known child adoptions'. Local adoptions are where the adopted child has had no previous contact or relationship with the adoptive parents. In contrast, known child adoptions are where such contact has occurred (e.g., where a child adopted by a step-parent or relative). In the latest reporting period, there were 45 local adoptions (23%) versus 151 known child adoptions (77%) in Australia. As the successful adoptive parents in known child adoptions are chosen by virtue of their pre-existing relationship with a child (erasing the need to assess whether they would be good parents), known child adoptions obviously lie outside the scope of this article.

Importantly, the AIHW ([Australian Institute of Health and Welfare 2016](#)) report confirms that consent of relinquishing parents is obtained 100% of the time in the case of 'local adoptions'. The presence of consent in cases of local adoption is important for this article, as the input of the relinquishing parent is a factor later discussed. This said, it is important to acknowledge the oftentimes problematic circumstances in which parents 'consent' to the removal of a child, such as duress and economic hardship ([Anthony and Rijswijk 2012](#)).

Notably, the statistics relevant to the consent of the relinquishing parents in the case of 'known child adoptions' are omitted from the AIHW report ([Australian Institute of Health and Welfare 2016](#)). As parents with disabilities are already known to disproportionately lose their children to state caregivers, the experiences of relinquishing parents in known child adoptions is an important area for other research to consider.

2.2. Demographics of Local Adoption

There are very few publicly available statistics to do with the relinquishing and adoptive parents involved in local adoptions. In their latest article, the AIHW reports only on age and marriage status of relinquishing parents. The median age of relinquishing mothers was 26 (5 years below median age of all Australian mothers), with range of 14–42, and that 93% were unmarried. As for adoptive parents, almost all (96%) were married and 94% were aged 30 or more.

These statistics perhaps create the illusion of a harmonious system where willing birth parents give up children to loving adoptive parents, and obscure the operation of complex societal factors such as race, class and Indigenous status. In its report on the OOHC system, the [Senate Community Affairs References Committee \(2015\)](#) shed light on some of the factors which can prevent biological

parents from caring for their children such as family violence, drug and alcohol misuse, poverty and homelessness and lack of family support services. They also pointed to Indigenous Australians and people with disabilities as two groups disproportionately at risk of losing children to a formal child care court order. It would be logical to assume that these same factors play some kind of role in the decision-making of relinquishing parents involved in adoption as well.

Having now established the specific field of enquiry, this article will discuss the context for choosing this field of enquiry, and the important interplay between this field of enquiry and other threads of disability research and advocacy.

3. Context and Critical Connections

Given the relative rarity of adoption, let alone local adoption, the question arises: why focus on adoption? First, the rarity of adoption does not diminish the claim of people with disabilities to this right. An important reason for the choice of this article's topic is, of course, that people with disabilities desire to become parents, including via adoption (Shakespeare et al. 1996; Frohmader 2009).

Second, no country's adoption regime exists in a vacuum. Adoption law is just one aspect of how a country governs how and when its citizens are allowed to parent. In the Australian context, state governance of family formation has a long and sad history which includes the forcible removal of children not only from people with disabilities, but also from Indigenous Australians (known as the Stolen Generations) (Attwood 2001) and more recently, from migrants (Horin 2010). In the context of disability advocacy, adoption law is merely one instance in a well-documented history of the Australian government interfering in the family formation of people with disabilities, from the forcible removal of children to restricted access to alternative parenting procedures like IVF (Frohmader 2009; Arstein-Kerslake 2015). Underpinning and entwining these different restrictions on the parenting rights of people with disabilities is the same unwritten notion that the parenting abilities of people with disabilities are different and lesser, and therefore that it is the state's role to control the reproductive and caring rights of people with disabilities.

Given this interconnectedness between adoption and all the other ways that the state denies people with disabilities the right to parent, writing about—and fighting for—greater adoption rights for people with disabilities has other important legal, political and social consequences for people with disabilities. As adoption is one part of an integrated legal system overseen by a central government, reforming this one part of the system will help spur change in other parts of the system. Often (but not always), these consequences will be positive, in that fighting for greater rights via adoption often reinforces the same arguments that will help people with disabilities achieve advances in other parenting rights. For example, the argument developed in this article that people with disabilities have an equal parenting ability to people without disabilities when societal barriers are removed, could equally be used to argue for greater rights for people with disabilities in relation to IVF, or to argue that people with disabilities should not be sterilised.

Third, on top of developing the topic of disability parenting generally, this article argues that adoption law is a particularly important signpost for how the government—and society more broadly—views the parenting ability of people with disabilities. Adoption differs from other issues to do with the parenting rights of people with disabilities such as child removal, sterilization and IVF in that it is not about restricting the ability of people with disabilities to have or care for their own children. On the contrary, it is about selecting—often from extremely large pools of prospective adoption applicants—the 'ideal' family for a given adoptive children. It therefore has to do with how the government views the idea of family, and how people with disabilities fit into that conception. Accepting that law has the ability to shape societal views (Gelber and McNamara 2015), Victorian adoption law thus has important connections to how our society views the parenting capabilities of people with disabilities.

Having stated these reasons, it is also important to acknowledge that fighting for greater adoption rights does not always align exactly, theoretically speaking, with the other rights movements emanating

from within the disability community. An important example of this are the significant issues to do with the forcible removal of children from parents with disability and the over-representation of children with disabilities in state care (Llewellyn et al. 2003; Booth et al. 2005; IASSID 2008). In the context of that debate, strong emphasis is often put on the inalienable and irrevocable rights of the biological parent(s) (Senate Community Affairs References Committee 2015). The issue of adoption by a parent or parents with a disability, by contrast, tends to set up a dichotomy between the rights of the biological or relinquishing parents, and those of the adoptive parents (with a disability).

As is the case with all minorities, not all rights movements emanating from within the one community will always align exactly. Yet, it is important not to eschew progress that has been made in other related fields, nor to close off the opportunity of future progress in those fields. In this instance, where an argument can be used to justify greater rights of adoptive parents can also be used bolster the state's ability to remove children from people with disabilities, then that argument is not preferable because it gives people with disabilities not real net gain in terms of rights. Therefore, this article sees these two issues as inextricably connected and seeks to temper all its arguments—and suggested solutions—so as not to reinforce the phenomenon of child removal from people with disabilities.

Furthermore, it is still possible to advocate for greater adoption rights for people with disabilities without supporting the notion that the state can take children away from people with disabilities. An important distinction to draw between local adoption and the forced removal of children from parents with disabilities is that only in the former situation have the parents consented to the removal of their child. Already, this provides a basis on which the views of the relinquishing parents in local adoptions can be attributed given different weight to the views of relinquishing parents in situations where the state is forcibly removing children.

Therefore, adoption law is an important field of enquiry both in and of itself, as well as because of its important connections to theoretical and political constructions of family. While fighting for greater rights for adoptive parents could, at a surface level, be seen to erode the rights of people with disabilities seeking to maintain custody of their children, it is this article's argument that progress in one sphere is not mutually exclusive with progress in the other. Through nuanced conversation, disability advocates from all theoretical perspectives can bring their causes forward at the same time. This article endeavours to play a part in that conversation.

4. Methodology

This article is concerned with words. More specifically, it is concerned with the capacity of words in legal instruments—from official Acts of Parliament to the regulations and manuals created by bureaucrats—to oppress and to liberate. This article does not only concern itself with the beliefs and prejudices of those who oversee the adoption process; it also seeks to illuminate how the behavior of those decision-makers is often predetermined by the laws, regulations and manuals that they are legally obliged to follow. In this way, this article posits that, despite the common notion of law serving an anti-discrimination function, discrimination can also be insidiously embedded in legal systems (Hellman and Moreau 2013).

It is, however, impossible to speak about the impact of words in the abstract. In order to elucidate how discrimination emanates from the legal instruments that govern adoption, this article has chosen a concrete case study: the adoption regime of the Australian state of Victoria. Methodologically speaking, this article is an interpretative analysis of legal instruments: namely, the CRPD and the myriad legislative instruments that govern adoption in Victoria.

While it may appear that an analysis of Victorian law is of limited import when it comes to addressing the discrimination faced by people with disabilities worldwide, it should be noted that Victoria's adoption regime possesses many of the characteristics typical of adoption regimes around the world: statutorily enshrined health requirements; court orders that a person is a suitable candidate for adoption; and wide-ranging discretion conferred to adoption workers and relinquishing parents.

For example, one problem intrinsic to Victorian law is that in order to adopt, a person with a disability will be assessed against legislative criteria such as ‘health’ and ‘financial circumstances’ to determine whether they are a ‘fit and proper person’ to adopt. These very same criteria are present in the equivalent New South Wales², Queensland³ and Western Australian legislation (Department for Child Protection and Family Support 2016). Beyond Australia, Adoption Panels in the UK also assess a person’s ‘suitability to parent’ by considering both health and financial circumstances (Department for Education 2014). The same is true in many states of the United States (Fleming 2015). Hence, the plain words of adoption legislation around the world is often very similar, and even when the words change, the ideas and structures within that legislation that give rise to discrimination against people with disabilities often remain the same.

Other problems discussed in this article—such as the prejudice held by adoption workers and relinquishing parents, or how adoption agencies fail to provide services or information specific to people with disabilities—have nothing to do with the specific words of Victorian legislation, and everything to do with discriminatory attitudes and prejudice against people with disabilities. Such attitudes are well proven to exist far beyond the state of Victoria and therefore such analysis remains relevant to any CRPD signatory state (Sutherland 1981).

Equally, the solutions offered in this article can also have application beyond Victoria. While this article offers the specific wording that the Victorian Parliament should adopt in amending the Adoption Act 1984 (Vic)⁴, lawyers and disability advocates could read these suggested changes for their purposive effect, and then advocate for amendments to their own laws that would achieve the same outcome. The legislative amendments suggested by this article seek to bring Victoria’s adoption laws in line with Australia’s obligations under the CRPD, and therefore they remain relevant to any country that is a signatory to the CRPD who is therefore bound by the same obligations as Australia.

Therefore, this article concerns itself with discrimination through written law. While many of the examples used will come from Victorian legislation, this article is hoping to engage in a larger conversation around how adoption is currently governed, and how existing adoption regimes can be changed to adhere to the CRPD.

5. Theoretical Underpinnings

Disability literature provides several theoretical models through which this article will argue its thesis. As in all bodies of scholarship, there exists a variety of voices and not all those voices are always perfectly reconcilable. In this section, this article will present the main schools of thought to which it refers or relies, while pointing out the various unresolved tensions which exist.

5.1. The Medical Model

The earliest, and sadly the most prevalent, model of disability is the medical model. While the medical model of disability is no longer orthodoxy in academic circles or for disability advocates, it nonetheless continues to pervade societal thinking about people with disabilities (Frohmader 2009).

In essence, the medical model tells us that disability is determined by reference to, and is a result of, a person’s ‘biological deficit’ or impairment (Shakespeare 2013). Inherent in the medical model paradigm is a norm of able-bodiedness from which people with disabilities deviate. Under the medical model, people with disabilities are yoked to their impairment in a way that makes them inherently less functional than a person without a disability (Sutherland 1981; Shakespeare 2002). Under this model, any difficulties that a person with a disability faces flow causally from their impairment. A person with a disability is perceived and studied as a ‘personal tragedy’ (Barnes and Mercer 1997), and the

² Adoption Regulation 2015 (NSW) reg 45.

³ Adoption Act 2009 (Qld) ss 122 and 124

⁴ Adoption Act 1984.

corresponding role of research and treatment is to reduce, obscure or otherwise ‘cure’ the disability or its impact (Hunt 1966; Kayess and French 2008).

Applied in the context of parenthood, the medical model tells us that people with disabilities will be less capable parents on account of their impairment. This is because implicit in the medical model conception of parenthood is the idea that there is a normal way to parent a child (Frohman 2009; Radcliffe 2008). By virtue of their impairment, people with disabilities are viewed as ‘naturally unsuited’ to the ‘nurturant reproductive’ role of parenthood (Frohman 2009; Collins 1999). The medical model thus offers a zero sum and static conception of parenting: it is not enough that a person with a disability could fulfill the same function in a different way; or moreover, that they would simply provide a different but equally valid version of parenting altogether.

The medical model emerged from the Enlightenment period and dominated academic discourse about people with disabilities until three decades ago (Shakespeare 2002, 2013). At its height, the medical model dominated all discourse—medical, academic, political and mainstream—about disability. For example, in 1980, the World Health Organisation (WHO) essentially enshrined a medical model conception of disability in its International Classification of Impairments, Disabilities and Handicaps by defining disability as ‘any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being’. Worse still, the medical model was harnessed to justify numerous eugenic policies and laws: under the medical model, people with disabilities possessed defective genetic material, and by sterilizing, segregating or otherwise preventing people with disabilities from having children, you could ostensibly remove this genetic material from society (Arstein-Kerslake 2015).

While such eugenic policies thankfully became less common (though by no means absent), the medical model continued to shape academic perceptions of people with disabilities’ fitness to parent even into the 1990s. For example, a spate of flawed psychological research from the 1980s and 1990s found that ‘disability severely limits parenting ability and often leads to maladjustment in children’ (Kirshbaum and Olkin 2002; Crawford 2003). Only in the 2000s was it uncovered that these findings, while presented as fact deduced from scientific experimentation and sociological research, were actually pathological assumptions based on the authors’ own prejudices (Kirshbaum and Olkin 2002; Crawford 2003).

And while the medical model is now much more taboo in most academic circles, it is still insidiously prevalent in wider society. As recently as last year, the Office of the Public Advocate strongly castigated the widely held but ‘mistaken belief that a diagnosis of disability, particularly cognitive disability or mental disorder, constitutes a static and irremediable barrier to effective parenting’ (Carter 2016). One reason for the medical model’s continued predominance in the social consciousness is that ‘the voices and experience of women with disabilities are almost non-existent in the literature on reproduction and parenting’ (Frohman 2009). A second reason is that matters of family are seen to be distinctively private, and so are resistant to lobbying and advocacy efforts (Frohman 2009). A third reason is that where parents with disabilities ask for help, this is used against them as ‘proof’ that they are inadequate parents, creating an environment in which people with disabilities are pressured to parent behind closed doors (Grue and Laerum 2002; Frohman 2009).

When it comes to adoption legislation, the medical model is directly relevant in three ways to the parenting rights people with disabilities enjoy. First, Victoria’s—and other countries’—adoption regimes were written and passed by Parliament long before the medical model became so taboo; therefore, in many instances, the old words of the legislation still mirror medical model ideas. Second, adoption regimes from around the world, including Victoria’s, almost always involve the unfettered decision-making of caseworkers and relinquishing parents. As the medical model continues to pervade societal thinking about people with disabilities, many decision-makers will logically hold medical model views (Frohman 2009). Third, it is important to remember that even successful adoptive parents will likely face stigma based on medical model thinking even if they are successful in adopting a child: ‘community attitudes rather than their physical limitations caused the major

problems for mothers with disabilities’ (Westbrook and Chinnery 1995; Frohmader 2009). While this article focuses on change needed to allow people with disabilities to adopt in the first place, future research must explore how to support successful adoptive parents with disabilities to overcome that stigma.

5.2. The Social Model

The social model was the first paradigm shift to occur in thinking about disability since the medical model came to dominate medical and societal discourse. Specifically, the social model refers to the structural analysis of people with disabilities’ exclusion that emerged from Britain in the 1970s (Malacredia 2009). Its central thesis is perhaps best expressed by the following statement from the Union of Physically Impaired Against Segregation (UPIAS) (1974), an advocacy network instrumental in the development and propagation of the social model:

[I]t is society that disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society.

The social model is a structural model because it explains disability in relation to, and as a direct result of, ‘contemporary social organisation’ (UPIAS 1974). Under the social model, disability is a ‘social creation’ (Shakespeare 2013) resulting from the ‘lack of fit between a body and its social environment’ (Goering 2015). Essentially, disability is reimagined as a form of social oppression (Oliver 1996; Finkelstein 1980; Abberley 1987), analogous to the exclusion of other minority groups (Hahn 1988). Further, the social model reverses the causal chain suggested by the medical model: it is not people’s impairments themselves but rather socially constructed barriers that cause disability (Barnes and Mercer 1996).

At the heart of the social model is a distinction between impairment and disability (Shakespeare 2013). Under the medical model, the concept of impairment is yoked to the concept of disability by virtue of the fact that disability is defined as the possession of an impairment (Sutherland 1981; Shakespeare 2002). In contrast, the social model severs these two terms: while the former is a ‘private reality’, the latter is a societal construct (Goering 2015). This idea is encapsulated in UPIAS’ (1974) definition of disability as ‘[t]he disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments’.

Applied in the context of parenting, the social model tells us that if people with disabilities face difficulties when parenting, it is only because of the way society is structured to make raising a child easiest for those without a disability (Frohmader 2009). Thomas and Curtis (1997) posit that these barriers infiltrate many layers of society: they are ‘attitudinal, institutional and environmental’. Further, Frohmader (2009) explains that these barriers pervade every stage of parenthood, at least for women: ‘when they think about having a child, become pregnant, come into contact with maternity and related services and when they become parents’.

Perhaps the best evidence of socially constructed barriers to parenting is the testimony of parents with disabilities who describe the creative and ingenious measures they take to overcome such barriers. For example, the Facebook group Wheelie Good Moms (2016) features mothers who are also wheelchair users. On the group’s page, they share the ways they amend their daily routine to overcome barriers to parenting, such as modifications to change tables, cots and strollers so as to be wheelchair-friendly. Such modifications throw into harsh relief the minutiae of everyday life—down to the height of change tables—that stand to make parenting difficult for people with disabilities.

The social model is relevant to this article mainly because of its explicit endorsement in the CRPD, the legal instrument that guarantees the right of people with disabilities to adopt. As this article will discuss in Part III, the CRPD explicitly endorses the social model as the appropriate paradigm through which to interpret the legal obligations of signatories (see the preamble and art 1).

More broadly, it is also a normative benchmark for how adoption law and practice should operate in general. Within disability scholarship, it has significant ‘currency’ (Goodley 2011). Normatively speaking, Shakespeare (2013) argues that the social model is a better way of thinking about people with disabilities for three reasons: first, it is helpful instrumentally in allowing researchers to identify the barriers facing people with disabilities; second, it is effective politically because it is ‘easily explained and understood’; third, it is helpful psychologically because it places the onus for creating change on society, not the individual.

5.3. Beyond the Social Model

While for a significant time, the social model of disability was considered ‘orthodoxy’ in the disability community (Barnes 2003; Shakespeare 2013), this is no longer the case. Initial critiques focused on the separation between the theoretical social model and the daily bodily experiences of impairment felt by many people with disabilities (Shakespeare 2013). This critique was particularly pertinent in the context of parenting: Chapman et al. (2015) found that some parents ‘placed illness and impairment at the very centre of their parenting’. They gave such examples as ‘a parent feels sad at not being able to pick their child up to comfort them when they have hurt themselves, or to carry a child upstairs to put them in bed when they are asleep’. Despite these critiques, the social model still remained ‘orthodoxy’ from a theoretical perspective, at least in the early years after the turn of the millennium.

More recently, however, disability scholarship has questioned the social model, also from a theoretical perspective. One of the most well-known critiques is that offered by Shelley Tremain (the *deconstructionist* critique). At the heart of Tremain’s critique is a deconstruction of the impairment/disability dichotomy set up by the social model of disability (Goodley 2011). As discussed, the social model of disability concedes that impairments are ‘essential, biological characteristics of a ‘real’ body upon which recognizably disabling conditions are imposed’ (Tremain 2002). Tremain (2002) deconstructs the impairment/disability dichotomy which underpins the social model of disability, by arguing that the concept of impairment is as constructed and illusionary as the concept of disability which it allegedly underlies. This is because impairments only exist in comparison of ‘rather culturally specific regulatory norms and ideals about human function and structure, competence, intelligence, and ability’. While the social model posits that culture acts on impairments to create disability, Tremain argues that cultures creates both disability and impairments: ‘impairment has been disability all along’.

In turn, and applying Michel Foucault’s concept of *biopower*, she argues that conceptualising impairments as intrinsic biological attributes helps sustain oppressive power structures. She argues that the social model of disability is actually damaging for people with disabilities because it ‘legitimise[s] the disciplinary regime that generated it in the first place’. It does this by perpetuating the myth of a healthy or normal body, in contrast to which people with disabilities remain categorized as *other* and therefore receive differentiated, and lesser, treatment. Goodley (2011), summarising Tremain’s work, posits that ‘Tremain has made the case that this conception of impairment as a naturalized phenomenon endangers the potentially critical work of disability studies’.

Tremain’s critique has important consequences for adoption law. As it is a predominantly discursive theory, these consequences often have to do with language. For example, the social model might celebrate explicit legislative protections for adoptive parents with impairments, whereas Tremain’s theory suggests that such affirmative protections still relegate people with disabilities to a category of *otherness* and therefore jeopardise their integration in society.

5.4. Which Model Then?

It is hardly surprising that not all disability writers agree on the theoretical basis of disability advocacy. Even outside of the approaches listed in this article, disability writers in different parts of the world each have their own way of articulating disability theory (e.g., the cultural model in the US and Canada and the relational model in Nordic countries) (Goodley 2011). In addition, critiques of

old models such as Tremain's, as well as new models such as the human rights model (Blanck et al.), continue to emerge.

Yet, it has long been a guiding and fundamental principal of disability research that writing remain grounded in emancipation and prioritise progress over theoretical squabbles (Barnes 2003). To this end, this article posits that no one approach need be understood as the sole or guiding theoretical basis of change to adoption regimes. A better approach is perhaps one which finds the synchronicities between them and draws on their respective strengths. The social model and Tremain's critique are not mutually exclusive in all respects. Both models seek to illuminate the social barriers currently facing people with disabilities, and place the onus squarely on governments and other power structures (as opposed to people with disabilities themselves) to bring about the required change.

This said, one important difference between the social model and Tremain's critique is that only the former is explicitly referred to in the CRPD as the lens through which each article is to be read. As such, the social model of disability is legally binding on signatories: it is incumbent on signatory states to adopt the social model as a purposive approach when implementing their treaty obligations. For this reason, this article will rely most heavily on the social model in interpreting the articles of the CRPD. In doing so, this article acknowledges that arguments underpinned by the social model hold the most weight, legally speaking, and may therefore provide the quickest and most sure route to emancipation for people with disabilities. Nevertheless, this article will, where possible, also draw on Tremain's and other critiques and theories to develop a notion of best practice with regard to adoption regulation.

6. The Human Right to Adopt

As a benchmark against which to measure the Victorian adoption framework, this article refers to art 23 of the CRPD.

6.1. *The Convention*

Before the implementation of the CRPD in 2006, there were very few protections for people with disabilities to be found in international instruments. Despite a plethora of instruments explicitly naming other minority groups and granting them affirmative protections, such affirmative protections were virtually inexistent for people with disabilities⁵ (art 25 of the Universal Declaration of Human Rights (1948) was an exception to this, yet even then it only guaranteed an 'adequate' standard of living for people with a 'disability'). While broad-brush instruments like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights purported to prevent discrimination against any person (including people with disabilities)⁶, these generic instruments ultimately failed to generate the kind of protections that people with disabilities were asking for and desperately needed (Freeman et al. 2015; Kayess and French 2008).

The CRPD was the first binding international human rights instrument to explicitly address disability. It goes beyond a mere anti-discrimination treaty: it creates new state obligations—both positive and negative—which were absent from any prior treaty. Further, the CRPD is binding on all signatories (as at the time of writing, there are 160, including Australia) and includes an international monitoring mechanism: the Committee on the Rights of Persons with Disabilities (the Committee) (Freeman et al. 2015). The CRPD represented the first real pan-national attempt to protect the rights of people with disabilities, and explicitly enshrined the social model of disability in its interpretive principles (see Part B) (Goodley 2011; Kayess and French 2008).

⁵ Art 25 of the Universal Declaration of Human Rights. GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (entered into force 10 December 1948).

⁶ International Covenant on Civil and Political Rights. Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

The CRPD's legitimacy as a benchmark flows not just from its passage as a United Nations General Resolution, but also from the method of its construction and implementation. It entailed unprecedented 'centrality of persons with disability and their respective organisations in the CRPD negotiation process' (Kayess and French 2008). For example, disability rights non-governmental organisations (NGOs) were active members of the Ad Hoc Committee charged with drafting the CRPD (Kayess and French 2008). Further, people with disabilities continue to be involved in the implementation and monitoring of the CRPD, with a majority of the eighteen Committee members identifying as people with disabilities (Office of the High Commissioner on Human Rights 2016).

6.2. Article 23

Article 23 of the CRPD is titled 'Respect for Home and Family'. It purports to deal with 'all matters relating to marriage, family, parenthood and relationships', and speaks to many issues pertinent to parents or prospective parents with disabilities, from consenting to marriage to retention of fertility.

This article is concerned with art 23(2) which provides:

States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship and adoption of children or similar institutions'; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance of persons with disabilities in the performance of their child-rearing responsibilities (emphasis added).

6.3. Interpretation of Article 23(2)

6.3.1. Words

By its plain words, art 23(2) gives a two-tier protection for people with disabilities with regard to adoption.

First, it purports to guarantee the 'rights and responsibilities' of persons with disabilities 'with regard to . . . adoption of children or similar institutions'. This frames adoption as an inalienable right, and puts (at least) a negative obligation on states not to take that right away from people with disabilities. This section applies the general prohibitions against discrimination in arts 4 and 5 of the CRPD in the context of adoption.

Second, art 23(2) puts an obligation on signatory states to render 'appropriate assistance to persons with disabilities in the performance of child-rearing responsibilities'. This goes further than the obligation to guarantee their rights: it puts a positive obligation on Parties to assist people with disabilities to exercise their rights as parents. While the plain words of that section leave it open whether the obligation to provide 'appropriate assistance' extends to helping people with disabilities become adoptive parents in the first place, previous Committee jurisprudence and the purpose of the document strongly suggest that it does.⁷

6.3.2. Purpose

Paragraph (e) of the CRPD Preamble makes it clear that the CRPD and its articles are to be understood by reference to the social model:

[Signatories are] [r]ecognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

⁷ UNCRPD (United Nations Committee on the Rights of Persons with Disability). Draft General Comment on Article 6: Women with Disabilities. CRPD/C/14/R.1. 2015.

While certain commentators point out that the CRPD perpetuates the medical model by using the term ‘persons with disabilities’ (Kayess and French 2008), jurisprudence from the Committee has reiterated the need for a purposive approach to interpretation of the CRPD in line with the social model (Kayess and French 2008).

Interpreting art 23 through the lens of the social model supports the idea that it carries both negative and positive obligations. Where difficulties carrying out parenting responsibilities are caused by societal barriers, it is logical that the state would need to provide ‘additional assistance’ to people with disabilities to help them overcome societal barriers to parenthood, including assistance to access the right to adopt.

In addition, art 3 lists the ‘general principles’ which are to guide the interpretation of all articles of the CRPD and include ‘non-discrimination’, ‘full and effective participation and inclusion in society’ and ‘equality of opportunity’. These equally support the idea that the CRPD and art 23 puts a positive obligation on the state to provide additional assistance to people with disabilities to allow them to achieve the state of full integration suggested by these principles.

6.3.3. Other Articles

Of course, no article of the CRPD is designed to be stand-alone. Other articles also elaborate on what meaning should be given to art 23. Specifically, art 2 of the CRPD defines ‘discrimination on the basis of disability’ as follows:

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination . . .

Importantly, this definition captures and prohibits both direct and indirect discrimination. The difference between them is as follows (Doyle 2007):

- Direct discrimination occurs where the legislative framework explicitly treats someone unfavorably because they are a person with a disability;
- Indirect discrimination occurs where the legislative framework does not mention disability but has the practical effect of disadvantaging people with disabilities.

In relation to art 23, this means both direct and indirect discrimination constitute a failure to ensure the ‘rights and responsibilities’ of people with disabilities with regard to adoption. That is, it is immaterial whether the rights of people with disabilities are curtailed explicitly or implicitly, because the obligation to uphold the right of people with disabilities to adopt remains unmet.

6.3.4. Best Interests of the Child

It is important to note the two-prong protection offered to people with disabilities is tempered by the assertion in art 23 that in all cases ‘the best interests of the child shall be paramount’. These words come from the United Nations Convention on the Rights of the Child⁸, and are equally present in the Victorian adoption legislation. Disability literature has shown how the words ‘best interests’ (whether used in relation to children or people with disabilities themselves) is a societal construct used by decision-makers to curtail the rights of people with disabilities (Arstein-Kerslake 2015). As such, these words seriously jeopardise the effectiveness of art 23 (and the related Victorian adoption legislation) in practice and their inclusion in art 23 is problematic.

⁸ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

‘Best interests’ is a term peppered throughout nearly all adoption legislation (be it international, national or state). While it is beyond the scope of this article to historicise the concept of ‘best interests’, it is sufficient to say that the term has been strongly criticized by disability and other writers for obscuring the interests and rights of parents with disabilities. Even more problematically, questions remain as to what term, if any, could fill its place and whether such a term could avoid creating the same problems (Steele 2016).

This said, a strict social model interpretation resolves some, if not all, of the tension created by the words ‘best interests of the child’. That is, where the state provides adequate resources to people with disabilities to overcome the hurdles to parenting they face, their parenting will match that of any person without a disability and logically, the best interests of the child are not threatened (Frohman 2009).

6.3.5. Committee Jurisprudence

In its State Reports, Concluding Observations and General Comments, the Committee provides concrete guidance on how the articles of the CRPD are to be read. Regrettably, there is little Committee jurisprudence that pertains to article 23; and in the instances the Committee has spoken to art 23, it has never specifically mentioned adoption.

Nevertheless, other Committee jurisprudence can still inform how art 23 is to be interpreted. For example, in its Draft General Comment on Women with Disabilities released May 2015, the Committee identified that in order to protect the rights of women under art 6 (‘Women with disabilities’), ‘it is necessary to ensure universal accessibility [and] design [of] product, objects, instruments and devices’ related to motherhood.⁹ The Comment gives the examples of ‘babies’ bottles with handles, prams designed to be clipped on to wheelchairs or pushed with one hand, wheelchair-accessible nappy changers’.¹ The Committee’s long list of universally accessible parenting tools exemplifies the wide scope of services likely captured by the words ‘additional support’ under art 23. This could extend beyond assistive technology to include financial support and free or affordable healthcare.

The Committee went on to say that, for the purposes of art 12 (‘Equal recognition before the law’), ‘... effective measures must be adopted to provide women with disabilities access to the support they may require in exercising their legal capacity’.¹¹ Significantly, the Committee required ‘effective measures’ despite art 12 making no direct reference to such measures or additional assistance. This strongly suggests that the reference to ‘additional assistance’ in art 23 extends to effective measures to help people with disabilities access the right to adopt in the first place (not just assistance once they have adopted). The Committee is clearly of the view that the rights enshrined in the CRPD are not worth stating unless they carry a positive obligation on signatories to help people with disabilities enjoy those rights, whether or not language alluding to such a positive obligation is present.

The CRPD is thus a complex and powerful instrument. While this article focuses on art 23, it draws on the whole text and history of the CRPD, as well as Committee jurisprudence, to extrapolate the obligations imposed on signatory states to do with adoption by people with disabilities.

7. The Victorian Adoption Framework

There are many different types of adoption and the adoption process is jurisdiction-specific, even between Australian states. This section will distinguish local adoption from other types of adoption, before describing how local adoption occurs in Victoria.

⁹ UNCRPD (United Nations Committee on the Rights of Persons with Disability) Draft General Comment on Article 6: Women with Disabilities. CRPD/C/14/R.1. 2015.

¹ Convention of the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

¹¹ UNCRPD (United Nations Committee on the Rights of Persons with Disability) Draft General Comment on Article 6: Women with Disabilities. CRPD/C/14/R.1. 2015.

7.1. The Instruments

In Australia, local adoption legislation is the responsibility of state rather than federal parliament (VLRC 2007). Nevertheless, Victoria's adoption framework is shaped by international, national and local instruments.

At an international level, Australia is a signatory to the United Nations Convention on the Rights of the Child. The treaty requires that the best interests of the child are the paramount consideration. This is enshrined directly in the Adoption Act 1984 (Vic) (the Act).

At the national level, the Commonwealth has endeavoured to standardise national adoption practices via the 1997 National Principles in Adoption (the Principles) (Department of Health and Human Services 1997) as well as the Standards in Adoption 1986 (the Standards) (Department of Health and Human Services 1986). Protocol in Victoria requires caseworkers to make reference to the Principles in assessing couples' suitability for an adoption order.

In Victoria, these international and national obligations are enshrined in the Act and the Regulations¹². The Department of Health and Human Services (the Department), a branch of Victorian executive government, issues the Adoption and Permanent Care Procedures Manual (the Manual). The Manual interprets the Act and the Regulations, effectively setting out a two-stage process for the selection of adoptive parents.

7.2. The Decision-Makers

The Act vests decision-making power with regard to adoption processes in the County Court, the Secretary of the Department and the principal officer of an approved agency.

The Court's involvement is limited to the start and end of the adoption process: they affirm or dispense with the consent of the relinquishing parents and they make the final adoption order. Given that adoption hearings are only called once a successful couple has been chosen by a caseworker, the most input a judge could feasibly have on the process of selecting adoptive parents is the rejection of a proposed couple.

As a result, all substantive decision-making power with regard to the choice of successful adoptive parents rests with the Secretary of the Department (the Secretary) or the principal officer of an approved agency (essentially providing for adoption to be undertaken by both public and private adoption agencies). In practice, the decision-making power of the Secretary and the principal officer is delegated to adoption caseworkers, who are obliged to follow the Manual in carrying out their work. In referring to 'caseworkers', this article is referring to adoption workers in both the public and private sectors.

7.3. The Approval Stage

There are two stages to the adoption process and disability is considered—both explicitly and implicitly—during both stages. The first is approval for a 'section 13 order' from the Secretary or the principal officer (i.e., a caseworker) that a person is a 'fit and proper person to adopt a child'.

The only substantive requirement for a section 13 order coming from the Act is that an applicant must be married or in a de facto couple for two years (see s 11 of the Act). According to the relevant second reading speech, s 13's purpose is 'for a child to be adopted by persons who are able to provide a secure and lasting family relationship', however the Minister did not elaborate further¹³. In this way, the Act itself is largely silent with regard to the impact of a disability on 'a section 13 order'.

As such, it falls to the Regulations to set out the substantive criteria for a section 13 order. The following criteria are relevant in the context of this article:

¹² Adoption Regulations 2008.

¹³ Hansard (Victorian Legislative Council). 12 April 2000. Parliamentary Debates (H reg Thomson, Minister for Small Business).

Reg 35(a) The health of the applicants, including emotional, physical and mental health, is suitable; and

Reg 35(d) The applicants' financial circumstances are suitable.

To obtain a section 13 order, prospective couples must put their application in writing, supply evidence and attend information sessions and interviews with their allocated caseworker (Department of Health and Human Services 2001).

7.4. The Linking Stage

A section 13 order is no guarantee of an adoption order: approval for a section 13 order merely grants a couple the right to be considered during the linking stage. Linking refers to the process by which a decision is made to place a particular adoptive child with a couple who has obtained a section 13 order. The decision-making power with regard to linking is once again vested in the Secretary or the principal officer and delegated to caseworkers.

This phase of the selection process is much less transparent than the approval phase. First, the factors used to link a child with an adoptive family are less defined than those that govern the s 13 order. The Manual lists only these factors:

The age of the respective parties, race, national, cultural and social background, religion, educational capacities, personalities, geographic location, availability of support services, expectations of contact and capacities in regard to any disability (emphasis added).

Second, it is unclear who makes the decision to link a child with an adoptive couple. The plain words of the Act and the Regulations suggest all decision-making power rests with the Secretary or the principal officer (see s 20(1) of the Act and reg 36 of the Regulations), notwithstanding that they are obliged to consider 'any wishes expressed by a parent of the child in relation to the religion, race or ethnic background of the proposed adoptive parents' under s 15(1)(b) of the Act. However, General Principle 23 of the National Principles says that 'birth parents have the right to ... be involved in the planning for the placement of the child'. Such involvement is also expressly provided for by the Manual, which requires that at the time of relinquishing a child, 'birth parents are asked if they wish to be actively involved in selecting an adoptive family'. If they so wish, the Manual provides for a two-step shortlisting process undertaken by the caseworkers and birthparents together (Department of Health and Human Services 2001):

- (1) Caseworkers make an initial shortlist of 'two to three' profiles that 'have been assessed as suitable for the child';
- (2) The relinquishing parent is then able 'to indicate the couple with whom they would prefer the child to be placed'.

The Manual states that 'it is unlikely that a link would be pursued where a birth parent was opposed to that link' (Department of Health and Human Services 2001). Therefore, in practice, both relinquishing parents and caseworkers hold a degree of decision-making power during the linking stage, against the plain words of the Act and the Regulations.

In Victoria, much like in other countries, adoption thus occurs through a multi-layered, multi-tiered system involving different decision-makers with different levels of power. These stages are dictated and governed by an eclectic mix of state and federal legislation and international instruments. In the next Part, this article will discuss how the decision-making process dictated by these instruments discriminates against people with disabilities and fails to meet the obligations imposed by the CRPD.

8. Analysis

Having established both the obligations of art 23 of the CRPD as well as the way that the Australian state of Victoria regulates local adoption, this article will now directly compare the two to see whether

they align. What follows is a stage-by-stage analysis of Victoria's adoption regime, which fails in myriad ways to implement Australia's obligations under the CRPD.

8.1. Direct Discrimination during the Approval Stage

The first source of discrimination under Victoria's adoption framework occurs during the approval process for a section 13 ('fit and proper person') order. Under the Regulations, the caseworker is obliged to consider reg 35(a): the 'health of the applicants, including emotional, physical and mental health'. (While beyond the scope of this essay, reg 35(a) has important parallels to the criteria used to justify removal of children from parents with disabilities and their placement in OOHC.)

The Act's inclusion of questions of disability in the medicalised language of 'health' is problematic. This is because it focuses the analysis on the 'health of the applicants' (emphasis added), as opposed to the way society does not cater for their impairment. However, this is not a per se a breach of art 23—it all depends on what is done with the health information that a person discloses. If caseworkers use the health information disclosed by a person with a disability as a way of providing that person more tailored assistance, then reg 35(a) could well be argued to uphold art 23 of the CRPD.

Unfortunately, the Standards and the Manual provide an interpretation of reg 35(a) which offends the CRPD. According to the Standards and the Manual, being of 'physical and emotional health' means being 'able to provide for the needs of the child at least until the child achieves social and emotional independence' (Department of Health and Human Services 2001). In making such a determination, the caseworker is obliged to consider 'any health related issues raised by the applicant and its implications for parenting on a day-to-day and long term basis' (emphasis added). An example given is an impairment that 'affect[s] day-to-day coping such as limitations of mobility' (Department of Health and Human Services 2001).

In effect, the Manual requires that, for a person with a disability to be deemed 'healthy', they must be able to explain how their impairment will not affect their ability to 'provide for the needs of the child'. That is, 'fitness to parent' and disability are presumed to be negatively correlated, and the onus is on the person with a disability to disprove that assumption holds true in their personal case.

The Department's view that disability is a necessary hindrance to a section 13 order is further evidenced by the following explanation on a Department website. Under the heading 'What if I have a disability?' the response is that '[f]ull medical checks and histories are required to make sure you have the ability to care for a child now and into the future' (Department of Health and Human Services 2013).

The assumption that people with disabilities are less able to provide for the needs of a child, which the Manual forces caseworkers to adopt in assessing prospective parents, constitutes direct discrimination. This assumption prevents people with disabilities from obtaining section 13 orders, without which they cannot adopt. As such, it is a breach of the negative obligation contained in art 23 of the CRPD, not to curtail the rights of people with disabilities with respect to adoption.

8.2. Indirect Discrimination during the Approval Stage

8.2.1. Regulation 35(d): 'Suitable Financial Circumstances'

Under reg 35(d) the Secretary or authorised agency must consider the applicant's financial circumstances in determining suitability for a section 13 order.

Unfortunately, people with disabilities face significant day-to-day financial hurdles (Deane 2009). The higher cost of living faced by people with disabilities is well established (under the social model, this is because people with disabilities are forced to invest in overcoming social barriers such as ableist design) (Deane 2009). In addition, Attwood (2001) data has demonstrated that people with disabilities are less likely to be employed, thereby forcing people with disability to rely on the Disability Support Pension (DSP) to cover these costs. However, it is almost universally agreed within the disability community that the DSP is insufficient (Deane 2009). Paradoxically, it is a requirement of Australia's DSP that people with disabilities have below a certain amount in their bank accounts before becoming

eligible for the income support (Deane 2009), even though the Regulations explicitly prioritise adoptive parents with high bank balances.

In light of these proven financial barriers faced by people with disabilities, reg 35(d) falls short of the negative obligation contained in art 23 of the CRPD not to curtail the rights of people with disabilities with regard to adoption. While disability does not form an explicit part of the criteria, people with disabilities will be less able than others to fulfill the requirement of ‘suitable financial circumstances’ on account of the financial barriers they disproportionately face.

Broadly, the inclusion of ‘health’ and ‘financial circumstances’ as two stand-alone criteria in the legislation, despite the obvious connections between these two criteria for people with disabilities, evidences at best a complete ignorance for the societal barriers faced by people with disabilities. At worst, the legislation can be accused of slipping into eugenics era notions of ‘biologically fit’ parents, with essentially no room in the legislation for people with disabilities to become parents through adoption.

8.2.2. Section 11(1): Married/De Facto Couple ‘for Not Less Than Two Years’

A second potential source of discrimination is the requirement that adoptive parents be married or in a de facto relationship for two years. Putting to one side the queer critique of requiring someone to be in a couple to adopt which lies outside the scope of this article (Warner 2000), it is relevant to make two points.

First, people with disabilities are excluded from forming sexual and/or loving relationships more than people without a disability (Kempton and Kahn 1991; Fennell 1992; Arstein-Kerslake 2015; Young 2012). Given this, people with disabilities are less likely to be able to fulfill the requirement of coupledness in the Act and so are indirectly excluded from adoption. This is another failure to meet the negative obligation in art 23.

A second concern is that if a person with a disability engages in a relationship with another person with a disability, the direct and indirect discrimination that occurs under regs 35(a) and 35(d) could occur two-fold (i.e., in relation to both parents).

8.3. Direct Discrimination during the Linking Stage

As discussed, linking is, in practice, a two-stage joint decision by the caseworker and the relinquishing parent(s): the former makes a shortlist of suitable families, and the latter chooses the specific family to become the adoptive family.

The first risk of discrimination lies in the Manual’s requirement that caseworkers consider adoptive parents’ ‘capacities in regard to any disability’ (Department of Health and Human Services 2001). In a similar way to reg 35(a), this language alludes to the medical model idea that disability is a hurdle to good parenting, without being *prima facie* discriminatory.

The more insidious risk of discrimination, however, is the unclear vesting of decision-making capacity between caseworker and relinquishing parent, as well as the lack of other substantive criteria which these decision-makers must follow. This means both the short-listing and the final decision stand to be influenced not only by the personal prejudices of the caseworker, but also those of the relinquishing parent(s). As discussed above, the medical model of disability continues to shape societal views of parenting ability. As such, prejudice is a real and very likely risk. In light of this likely discrimination, this article argues that the Manual’s abdication of decision-making power to relinquishing parents is a breach of the negative obligation art 23 not to curtail the adoption rights of people with disabilities. Committee jurisprudence suggests that art 23 contemplates that

adoption processes would at least be governed by enumerated criteria and include the possibility of judicial review.¹⁴

At the very least, the abdication of decision-making power to relinquishing parents during the linking stage is a failure to meet the positive obligation contained in art 23. As discussed, the words ‘additional assistance’ in art 23 put a positive obligation on states to provide help to people with disabilities to overcome social barriers to adoption. Social barriers likely include prejudicial attitudes. This phase of the adoption framework thus falls short of the obligation to provide ‘additional assistance’ because it knowingly subjects people with disabilities to a decision-making process where they stand to be discriminated against.

Handing over this decision-making power is a complete abdication of power by the state and the courts to the broader population. It is akin to letting a population vote on the rights of a protected minority. Further, it completely undoes any other protections which may have been achieved by the legislation for people with disabilities. As the next Part will discuss, the CRPD does not dictate that relinquishing parents cannot be involved in the decision-making process; however, it does require that the state intervene—such as through education or by giving them criteria to follow—so that people with disabilities are not discriminated against.

8.4. Lack of Publicly Available Information

A widely identified problem with the provision of parenting information is that it fails to cater for people with disabilities (Frohman 2009). Unsurprisingly, this same problem applies to information about adoption. In Victoria, the only targeted information for people with disabilities relating to local adoption is the uncomfortable reminder on a generic adoption site that ‘[f]ull medical checks and histories are required to make sure you have the ability to care for a child now and into the future’ (Department of Health and Human Services 2013).

This lack of information is a breach of the positive obligation contained in art 23. By requiring that countries take ‘additional steps’ to help people with disabilities exercise their right to parenthood, art 23 clearly contemplates that signatories will provide information and services which educate the relevant group how to take advantage of that right.¹⁵

This lack of public information is all the more problematic in a context where people with disabilities believe that they are less, or not at all, eligible to become adoptive parents. As it happens, this conception exists widely within the disability community. Grace (2014) says: ‘So I got this idea that people would notice me with the kids and take them away if they saw me alone with them as I would be so clearly Autistic and disabled as to be disallowed from adoption’. Booth et al. (2005) echoes this sentiment, explaining: ‘I dread that I’ll be presumed incompetent from the outset and my child will be unnecessarily removed’.

Given people with disabilities hold these views, the positive obligation contained in art 23 is more extensive: ‘additional assistance’ likely extends to addressing such views until people with disabilities feel empowered to adopt, such as through public education campaigns. The online information about adoption currently provided to people with disabilities in Victoria manifestly falls below this benchmark.

As discussed, people with disabilities stand to be discriminated against both directly and indirectly by the plain words of the Victorian legislation and its interpretation by the Department’s Manual. In addition, the unfettered decision-making power of relinquishing parents and a lack of publicly available information for people with disabilities looking to adopt, ensure that at every stage of the

¹⁴ UNCRPD (United Nations Committee on the Rights of Persons with Disability) Draft General Comment on Article 6: Women with Disabilities. CRPD/C/14/R.1. 2015, para. 43.

¹⁵ UNCRPD (United Nations Committee on the Rights of Persons with Disability) Draft General Comment on Article 6: Women with Disabilities. CRPD/C/14/R.1. 2015, para. 38.

adoption process, people with disabilities stand to lose out. All these problems must be addressed for Victoria to bring its adoption regime in line with Australia's obligations under the CRPD.

9. Solutions

This article suggests the following changes to Victoria's local adoption framework. While these changes represent a significant overhaul of the current system, incorporating revision of legislation as well as cultural change within the Department and private adoption agencies, such an overhaul is necessary in order to bring Victoria's adoption framework in line with Australia's obligations under art 23. Such changes are explicitly required by art 4(b) of the CRPD, which mandates that signatories 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.

While these changes are discussed in relation to the Victorian adoption regime, many of them have broader application. The legislative changes suggested seek to enact art 23 obligations, and so can provide inspiration to lawmakers and advocates in any CRPD signatory state. Equally, the changes relating to education, information resources, and Committee and advocate action can be implemented anywhere in the world.

9.1. Action from the Victorian Parliament and the Department

9.1.1. Remove or Amend Criteria That Lead to Direct Discrimination during the Approval Stage

The direct discrimination which occurs during the approval process for a section 13 order has two sources, broadly speaking, both of which need to be addressed. First, it comes from the words of the Act and the Regulations: while these instruments do not compel caseworkers to look upon disability *disfavorably*, per se, they still compel those decision-makers to consider disability. Second, and more directly, discrimination during the approval stage derives from the Manual's interpretation of the statutory requirements. The Manual not only inversely correlates disability and fitness to parent, but it also requires that to be considered for a section 13 order, people with disabilities must explain their impairments by way of doctors' reports and medical documents ([Department of Health and Human Services 2001](#)). Such medical reports obviously encourage caseworkers to view an application from a person with a disability through the lens of the medical model, i.e., to consider that their impairment is a necessary burden on their capacity to parent.

As the Manual simply interprets the Act and the Regulations (and must be updated when the latter instruments are amended), the best option is to amend reg 35(a). However, the appropriate amendment may depend on whether a social model or deconstructionist approach is adopted. A pure proponent of the social model of disability might argue that the best option is to amend reg 35(a) by replacing the word 'health' with 'impairments', and to include a note to the effect of:

In considering the impairments of the applicants, the Secretary or authorised agency should undertake a holistic assessment, considering both the challenges that a person's impairment might pose for their ability to parent and how they might overcome them.

Such an amendment would oblige the decision-maker to consider the ways that a person with a disability can offer a different but equally valid version of parenting.

In contrast, Tremain's deconstructionist critique of the social model revolves around the fact that the category of 'impairment' reinforces the segregation experienced by people with disabilities. Under this paradigm, the best option would be to remove reg 35(a) altogether so that there is no legislative basis on which to distinguish between people with and without disabilities. However, a risk of this approach is that it fails to account for, and combat, the conscious and unconscious bias likely exercised by caseworkers and relinquishing parents during their holistic analysis.

In this case, there are no easy answers and there is a need for consultation of the disability community on this question. Perhaps one option, which lies between the two theories, is to replace the

word ‘health’ (in both the regulation and the accompanying note) with the word ‘body’ or ‘person’. Such a holistic, neutral term avoids circumscribing to the notion that there is a normal ‘healthy’ body from which people with impairments deviate, but still leaves room for the decision-maker to consider how societal barriers might make it hard for people with certain bodily characteristics (be they related to physical, intellectual or mental health disabilities) to make it hard for someone to parent.

A more ambitious amendment of reg 35(a) might also include a statutorily enshrined mechanism for applicants to provide a personal statement outlining the social barriers they face and how they might overcome them. This would give the adoptive parents a way to frame any challenges they may face as deriving from society (as opposed to any bodily quality they possess themselves).

Notably, legislative change in this area is important not only because it enshrines the protection of people with disabilities in law, but also because it sends a powerful social message about the Victorian Parliament’s commitment to people with disabilities. This can have the flow-on effect of destigmatising disability more broadly (Gelber and McNamara 2015). Obviously, the problem spoken about in this essay (that people with disabilities have difficulty adopting) connects to the systemic social problem of family formation for people with disabilities. Harnessing the signaling and symbolic power of law is but one of the useful mechanisms available to combat this broader social problem, particularly if it can get people speaking about the difficulties people with disabilities face—perhaps for the first time, in Australia.

9.1.2. Provide Financial Support to Compensate for Indirect Discrimination under reg 35(d)

Removing or amending criteria which lead to indirect discrimination would be counterproductive in this case. Not only is financial security considered by the Victorian government as necessary for successful parenting (going by reg 35(d)), but moreover, people with disabilities have consistently argued that they need greater financial support, including to raise children (Frohman 2009; National Council on Disability 2012).

Instead, the appropriate solution is to provide people with disabilities additional support so they can meet those other criteria, including financial support. Currently, people with disabilities receive no special treatment or resources to help them become adoptive parents (Department of Health and Human Services 2013). Yet, financial and other support for people with disabilities looking to adopt would allow Victoria to discharge both its negative and positive obligations under art 23: it prevents people from disabilities from being discriminated against indirectly (by allowing them to satisfy the requirement of suitable financial circumstances), while also providing them with ‘additional measures’ to exercise their right to parenthood.

9.1.3. Legislate Caseworkers’ Decision-Making Power during the Linking Stage

People with disabilities stand to face both conscious and unconscious discrimination from caseworkers during the short-listing phase of the linking stage. This can be mitigated by implementing criteria that caseworkers are obligated to follow during the short-listing process (similar to reg 35). Similar to the changes suggested for the s 13 order process, this would include a specific statement that a person will not be overlooked on account of an impairment.

9.1.4. Educate Relinquishing Parent(S), Caseworkers and Society More Broadly on the Parenting Ability of People with Disabilities

Discrimination from relinquishing parents during the linking process is a more complex obstacle. This is because the decision-making capacity of the relinquishing parent(s) is currently a protected aspect of the decision-making process, at international, national and state law. Notwithstanding that the protection of decision-making power of relinquishing parents is problematic, the government is powerless with regard to the attitudes and prejudices of relinquishing parents.

The unwillingness of relinquishing parents to consent to certain adoption orders on account of discriminatory attitudes was considered in the VLRC’s report on Assistive Reproductive Technology

and Adoption (VLRC 2007) albeit in relation to same-sex couple adoption and homophobia. In that report, the VLRC recommended that adoption be open to same-sex couples. In making that recommendation, the report contemplated that certain relinquishing parents would not want their child raised by same-sex parents on account of religious or other beliefs. This meant that same-sex couples stood to be discriminated against. To mitigate against this discrimination, the report recommended that caseworkers receive training to educate the relinquishing parents on the parenting ability of same-sex parents.

The same recommendation can be applied in this context. Without affecting a relinquishing parent's rights or autonomy, the Victorian Parliament can mandate that caseworkers educate relinquishing parents on the social model view of parenting with a disability: where people with disabilities are provided with support to overcome societal barriers, the inherent parenting ability of people with disabilities is no less than that of anyone else.

More broadly, these same educational campaigns need to be rolled out as grassroots programs for caseworkers as well as in Australian society more broadly. As discussed, the problem of adoption does not exist in a vacuum: it is intrinsically connected to the way the Australian state and society more broadly views the parenting capacities of people with disabilities. As such, the solution will require both a top-down and bottom-up approach which encompasses both immediate legal protections but also gradual re-education of the community from where a lot of ignorance and discrimination currently emanates.

9.1.5. Provide Tailored Information to People with Disabilities That Want to Adopt

As discussed, a lack of information catering for people with disabilities feeds an already pervasive societal perception that people with disabilities cannot or should not adopt. The Department needs to provide tailored, relevant information to people with disabilities about the adoption process as well as about parenting with an impairment. Even a devoted web page would be an improvement on the status quo, but other suitable services include special information sessions for people with disabilities and specialised caseworkers. This is not only required on account of the positive obligation in art 23, but is also explicitly required by art 4(h) which requires 'accessible information to persons with disabilities about . . . support services and facilities'.

9.1.6. Fund Universally Designed Technology and Programs

Even before people with disabilities investigate the possibility of adoption, many people with disabilities will be put off by the difficulties they will face being parents if they are successful in gaining an adoption order. While these difficulties are many and varied, and stem largely from societal ignorance, a specific difficulty which the government can directly combat is the lack of technology and facilities designed for people with disabilities. Not only are such technologies mandated by the positive obligation in art 23, but they are explicitly required by art 4(f) which requires that signatories 'undertake or promote research and development of universally designed goods, services, equipment and facilities'.

Such technologies and programs—from strollers to babies' bottles to parenting classes to easily intelligible parenting booklets—will have a bottom-up impact, encouraging more people with disabilities to seek to become parents (Llewellyn et al. 2010). This will increase the visibility of the current problem and further encourage change of the machinery which currently stops people with disabilities from adopting.

9.1.7. Give Support to Parents with a Disability Looking to Adopt a Child Who Also Has a Disability

In an interview with the author of this article, disability activist Booth et al. (2005) argued that parents with disabilities are sometimes uniquely placed to help a child with disabilities enjoy their full rights. She posits that children with disabilities have special needs that are better provided by parents with a similar or the same disability. This transcends knowing how to provide a child with

the physical infrastructure to mitigate the effects of an impairment: it is also a mentoring role that a person without a disability is unable to offer. In her words, [Booth et al. \(2005\)](#) says: 'I think there are things that I, as a woman with a disability, can teach a child about living in a world that doesn't represent them'. From this point of view, not only are the best interests of children with disabilities compatible with the parenting of people with disabilities; their interests are sometimes better served with the involvement of parents with disabilities.

Under the current system, people with disabilities are paradoxically further removed from adopting children with disabilities. Such children are only linked with applicants who are considered exceptionally 'fit and proper' parents under the Manual's current (discriminatory) metric. Therefore, people with disabilities are less likely than a person without a disability to be linked with a child with a disability.

A similar scheme already exists for the adoption of Indigenous Australian children and/or children that have a particular religion (see reg 35(f) of the Regulations). A model such as this is particularly pertinent given children with disabilities are currently overrepresented in adoptive agencies ([Australian Institute of Health and Welfare 2016](#); [Department of Health and Human Services 2014](#)). This scheme goes beyond just providing additional support to Indigenous parents or those of a particular religion; it actually prioritizes their application to be an adoptive parent.

Such a scheme could already be implemented under current legislation, by reading 'cultural identity' in reg 35(f) widely to include the disability community. However, this must go hand-in-hand with more funding for parents with disabilities looking to adopt, and re-training of caseworkers to enable them to see disability not as a burden, but as a benefit, for parenting.

Of course, a risk of such support is that it suggests that parents with disabilities only adopt children of their 'own kind', further segregating people with disabilities. For this reason, any such system must be thoroughly discussed with the disability community, and should probably opt toward simply giving support to parents who already want to adopt a child with a disability, instead of always pairing prospective parents with disabilities with children with disabilities.

9.2. Action from the Committee

In addition, the Committee must take action to provide Australia and other countries with more jurisprudence on art 23. Admittedly, the Committee must use its words wisely: its State Reports often address signatories whose human rights abuses against people with disabilities relate to other very pressing issues. Nevertheless, the current lack of clarity and substance to do with art 23 makes it difficult for disability advocates to lobby the Victorian government. A General Comment from the Committee on art 23 would be ideal. In the interim, the Committee should start mentioning art 23 in its State Reports.

9.3. Action from Disability Advocates and Allies

This article does not suggest that the onus is on those suffering human rights abuses to create the necessary change. For this reason, lobbying from disability allies remains a necessity. However, a key problem with lobbying efforts may be that the current framework operates behind closed doors—many people with disabilities do not speak publicly about the discrimination they face seeking to become parents (see Part V) ([Frohman 2009](#)). As such, litigation could bring vital visibility to lobbying efforts.

Article 1 of the Optional Protocol to the CRPD allows for the making of individual complaints to the Committee about violations of the CRPD by signatories. While this article has identified a strong prima facie case for violation of art 23 by Victorian adoption law, art 2(d) of the CRPD requires that all domestic remedies have been exhausted before a complaint can be brought under the CRPD Optional protocol. Without offering a view on the merits of such claim, this article suggests that a useful direction for future research would be the viability of a claim brought by a person with a disability

who has been denied a section 13 order under the Equal Opportunity Act 2010 (Vic) or the Charter of Human Rights and Responsibilities Act 2006 (Vic).

10. Hidden Impairments

While the overarching effect of Victoria's current scheme is to disenable people with disabilities from adopting, there is a potential exception to this rule: those with invisible or hidden impairments. Hidden impairments and impairments which are not outwardly visible (Montgomery 2001). There is significant academic literature on how people with hidden impairments are treated differentially on account of their impairment being less visible (Montgomery 2001; Samuels 2003; Ginsberg 1996). Where a person with a hidden impairment is treated as a person without a disability, this is referred to as passing (Ginsberg 1996).

Victoria's adoption framework is a prime example of a situation where passing is possible. While the Regulations require disclosure of all relevant 'health' information, they do not define the meaning or scope of the word 'health'. This means that people with certain disabilities might not be required to disclose, or might choose not to disclose, certain impairments. Such hidden impairments might include sensory impairment below a certain level, learning and cognitive differences and repetitive strain injuries (Samuels 2003).

There is dissensus within the disability community on the ethics of passing. Samuels (2003) defends the right of people with disabilities to 'pass' in order to gain a more beneficial position in society. This is because, under the social model, they are in no way responsible for the structural disadvantage which they are seeking to avoid (even if they may suffer feelings of 'misrecognition and internal dissonance' as consequences of passing) (Samuels 2003).

Other theorists propose that passing creates a splinter within the disability community. Where certain people with disabilities remain invisible, this makes the overall group look smaller and makes progress on disability human rights harder to achieve (Kleege 1999). Under this view, there is a positive obligation on people with disabilities to disclose their disability during the adoption process (Wendell 1996): '[p]assing is the sign of the sell out' (Walker 2001).

A third approach to passing is offered by Cal Montgomery: his approach is to reject the distinction between visible and non-visible identities that makes 'passing' possible in the first place (Montgomery 2001). Drawing on the social model, Montgomery (2001) argues that passing refers only to whether onlookers can see the barriers that a person with a disability faces, and not whether those barriers actually exist. Therefore, passing emerges from the gaze of society, and not the actions of an individual.

For the purposes of this article, it is sufficient to note that adoption legislation can facilitate passing; in the Victorian case, the adoption legislation provides a set of criteria which draw a line (albeit a blurry one) through the disability community, making it harder for some to adopt, but not others.

There is no provision of the CRPD that deals with this phenomenon. While it is beyond the scope of this article to offer a fully-fledged solution, it recommends that the Victorian Parliament—and other CRPD signatories—be cognisant of the visible/hidden impairment dynamic in creating solutions. Those solutions which carve out exceptions for certain types of disabilities (e.g., people with mobility impairments are entitled to a section 13 order) may reinforce the divide and make long-term change more unattainable for the entire disability community. This reinforces one of the recommendations above: that the Parliament should focus on change that allows caseworkers to make holistic assessments of parenting.

11. Conclusions

The difficulty faced by people with disabilities looking to adopt is an important issue in and of itself. The CRPD expressly names adoption as a right belonging to people with disabilities. In addition, given many adoption regimes, including Victoria's, hinge on a court or panel's assessment of whether

a person could be a good parent, adoption systems have a lot to say about how the state views the family unit, and how people with disabilities fit into that conception. Given that law has the ability to shape societal views, adoption law also has important connections to how our society views the parenting capabilities of people with disabilities.

While research in the area of parenting rights (as well as Committee jurisprudence, for that matter) has tended to overlook significance of the right to adopt, this article has sought to restate its importance. Specifically, this article has shown that Victoria's adoption framework, both on article and in practice, violates Australia's obligations under art 23 of the CRPD. Paradoxically, the adoption framework that should implement Australia's obligations under art 23(2) has in fact become one of the societal barriers that Australia committed to eradicating by ratifying the CRPD.

Not only do the Act and the Regulations fail to contain any of the positive obligations envisaged by art 23(2), more worryingly, the Manual that implements Victoria's adoption law openly espouses a medical model conception of people with disabilities' ability to parent. In addition, the current framework hands over vast swathes of unfettered decision-making power to caseworkers and relinquishing parent(s), without providing affirmative protections for people with disabilities against discrimination by those decision-makers. The nuance between hidden and visible identities has the capacity to further complicate the effect of the adoption framework on the disability community.

More broadly, this article used Victoria as a case study to show that discrimination against people with disabilities does not just come from people's prejudices; it also hides insidiously within the words of adoption legislation. Any CRPD signatory with legislation which resembles Victoria's—which includes other Australian states, the UK and the many US states—must realise the discrimination emanating from their own legislative instruments and undertake meaningful reform to allow people with disabilities to adopt.

Future research must continue to explore the support which governments can offer people with disabilities once they succeed in becoming parents. Unfortunately, a more crucial first step toward adherence to art 23 for many CRPD signatories is the eradication of certain barriers to parenthood that people with disabilities face. This article has shown that one such barrier is often the adoption process.

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References

- Abberley, Paul. 1987. The Concept of Oppression and the Development of a Social Theory of Disability. *Disability, Handicap and Society* 2: 5–19. [CrossRef]
- Anthony, Thalia, and Honni van Rijswijk. 2012. Parental 'consent' to child removal in Stolen Generations cases. In *Past Law, Present Histories*. Edited by Diane Kirkby. Canberra: ANU E-Press.
- Arstein-Kerslake, Anna. 2015. Understanding sex: The right to legal capacity to consent to sex. *Disability & Society* 30: 1459–73.
- Attwood, Bain. 2001. The Stolen Generations and genocide: Robert Manne's in Denial: The Stolen Generations and the Right. *Aboriginal History* 25: 163–72.
- Australian Bureau of Statistics. 2012. Disability, Ageing and Carers, Australia: Summary of Findings. Available online: <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/A813E50F4C45A338CA257C21000E4F36?opendocument> (accessed on 28 May 2017).
- Australian Institute of Family Studies. 2016. Children in Care: CFCA Resource Sheet. Available online: <https://aifs.gov.au/cfca/publications/children-care> (accessed on 16 July 2017).
- Australian Institute of Health and Welfare. 2016. Adoptions Australia 2015-16. Available online: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129558075> (accessed on 17 July 2017).
- Barnes, Colin. 2003. What a Difference a Decade Makes: Reflections on Doing 'Emancipatory' Disability Research. *Disability & Society* 18: 3–17.
- Barnes, Colin, and Geoffrey Mercer. 1996. *Exploring the Divide: Illness and Disability*. Leeds: The Disability Press.
- Barnes, Colin, and Geof Mercer. 1997. Breaking the Mould? An Introduction to Doing Disability Research. In *Doing Disability Research*. Edited by Colin Barnes and Geof Mercer. Leeds: The Disability Press.

- Blanck, Peter, Eilionóir Flynn, and Gerard Quinn. Forthcoming; *A Research Companion to Disability Law*. Galway: Ashgate.
- Booth, Tim, Wendy Booth, and David McConnell. 2005. The Prevalence and Outcomes of Care Proceedings Involving Parents with Learning Difficulties in the Family Courts. *Journal of Applied Research in Intellectual Disabilities* 18: 7–17. [CrossRef]
- Brown, Jax Jacki. 2015. Australia's Coming Around on Same-Sex Adoption, But Will It Ever Happen For People With Disability? Available online: <http://junkee.com/australia-is-on-board-with-same-sex-adoption-but-will-things-ever-change-for-those-with-disability/71088#mPzv7RO2kBhRUh7Q.99> (accessed on 4 April 2016).
- Carter, Barbara. 2016. Rebuilding the Village: Supporting Families Where a Parent Has a Disability. Available online: <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/241-rebuilding-the-village-supporting-families-where-a-parent-has-a-disability-report-2-child-protection-2015?path=> (accessed on 28 May 2017).
- Chapman, Rohhss, Sue Ledger, Louise Townson, and Daniel Docherty. 2015. *Sexuality and Relationships in the Lives of People with Intellectual Disabilities: Standing in My Shoes*. London: Jessica Kingsley Publishers.
- Clarke, Harriet, and Richard Olsen. 2003. *Parenting and Disability: Disabled Parents' Experiences of Raising Children*. Bristol: The Policy Press.
- Collins, Carol. 1999. Reproductive Technologies for Women with Physical Disabilities. *Sexuality and Disability* 17: 299–307. [CrossRef]
- Crawford, Nicole. 2003. Parenting with a Disability. *Monitor on Psychology* 34: 68.
- Deane, Kirsten. 2009. SHUT OUT: The Experience of People With Disabilities and Their Families in Australia. Available online: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/shut-out-the-experience-of-people-with-disabilities-and-their-families-in-australia> (accessed on 6 April 2016).
- Department for Child Protection and Family Support. 2016. Thinking about Adoption? Available online: <https://www.dcp.wa.gov.au/FOSTERINGANDADOPTION/ADOPTIONANDHOMEFORLIFE/PAGES/ALLABOUTADOPTION.ASPX#1> (accessed on 28 May 2017).
- Department for Education. 2014. Draft Statutory Guidance on Adoption. Available online: http://minimumstandards.org/adoption_statutory_guidance_2014.pdf (accessed on 28 May 2017).
- Department of Health and Human Services. 1986. Adoption Standards. Available online: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/adoption-and-permanent-care-standards-1986> (accessed on 4 November 2016).
- Department of Health and Human Services. 1997. National Principles in Adoption. Available online: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997> (accessed on 4 November 2016).
- Department of Health and Human Services. 2001. Adoption and Permanent Care Manual. Available online: http://www.dhs.vic.gov.au/_data/assets/pdf_file/0012/589593/apc_procedure_manual_2aug04.pdf (accessed on 4 November 2016).
- Department of Health and Human Services. 2013. Adoption and Permanent Care—Frequently Asked Questions. Available online: <http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-and-permanent-care-frequently-asked-questions#content-heading-14> (accessed on 4 April 2016).
- Department of Health and Human Services. 2014. Adoption. Available online: <https://www.betterhealth.vic.gov.au/health/healthyliving/adoption> (accessed on 4 April 2016).
- Doyle, Oran. 2007. Direct Discrimination, Indirect Discrimination and Autonomy. *Oxford Journal of Legal Studies* 27: 537–53. [CrossRef]
- Fennell, Phil. 1992. Balancing Care and Control: Guardianship, Community Treatment Orders and Patient Safeguards. *International Journal of Law and Psychiatry* 15: 205–35. [CrossRef]
- Finkelstein, Victor. 1980. *Attitudes and Disabled People: Issues for Discussion*. Leeds: World Rehabilitation Fund.
- Fleming, Grace. 2015. Disability Discrimination of Prospective Adoptive and Foster Parents. Master's thesis, University of Minnesota, Minneapolis, MN, USA.
- Freeman, Melvyn Colin, Kavitha Kolappa, Jose Miguel Caldas de Almeida, Arthur Kleinman, Nino Makhshvili, Sifiso Phakathi, Benedetto Saraceno, and Graham Thornicroft. 2015. Reversing hard won victories in the name of human rights: A critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities. *The Lancet Psychiatry* 2: 844–50. [CrossRef]

- Frohman, Carolyn. 2009. Parenting issues for women with disabilities in Australia. Available online: <http://wwda.org.au/wp-content/uploads/2013/12/parentingpolicyarticle09.pdf> (accessed on 6 April 2016).
- Gelber, Katherine, and Luke McNamara. 2015. The Effects of Civil Hate Speech Laws: Lessons from Australia. *Law and Society* 49: 631–64. [CrossRef]
- Ginsberg, Elaine. 1996. *Passing and the Fictions of Identity*. Durham: Duke University Press.
- Goering, Sara. 2015. Rethinking disability: The social model of disability and chronic disease. *Current Reviews in Musculoskeletal Medicine* 8: 134–38. [CrossRef] [PubMed]
- Goodley, Dan. 2011. *Disability Studies: An Interdisciplinary Approach*. London: SAGE Publications.
- Grace, Elizabeth. 2014. Your Mama Wears Drover Boots. In *Criptiques*. Edited by Caitlin Wood. San Bernardino: May Day Publishing.
- Grue, Lars, and Kristin Laerum. 2002. 'Doing Motherhood': Some experiences of mothers with physical disabilities. *Disability and Society* 17: 671–83. [CrossRef]
- Hahn, Harlan. 1988. The Politics of Physical Differences: Disability and Discrimination. *Journal of Social Issues* 44: 39–47. [CrossRef]
- Hellman, Deborah, and Sophia Moreau. 2013. *Philosophical Foundations of Discrimination Law*. Oxford: Oxford University Press.
- Horin, Adele. 2010. Refugee Children Removed. The Sydney Morning Herald: Available online: <http://www.smh.com.au/nsw/refugee-children-removed-20100418-smn6.html> (accessed on 16 July 2017).
- Hunt, Paul. 1966. A Critical Condition. In *Stigma: The Experience of Disability*. Edited by Paul Hunt. London: Geoffrey Chapman.
- IASSID (International Association for the Scientific Study of Intellectual Disabilities). 2008. Parents Labelled with Intellectual Disability: Position of the IASSID Special Interest Research Group on Parents and Parenting with Intellectual Disabilities. *Journal of Applied Research in Intellectual Disabilities* 21: 296–307.
- Kayess, Rosemary, and Phillip French. 2008. Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities. *Human Rights Law Review* 8: 1–34. [CrossRef]
- Kempton, Winifred, and Emily Kahn. 1991. Sexuality and People with Intellectual Disabilities: A Historical Perspective. *Sexuality and Disability* 9: 93–111. [CrossRef]
- Kirshbaum, Megan, and Rhoda Olkin. 2002. Parents with Physical, Systemic or Visual Disabilities. *Sexuality and Disability* 20: 65–80. [CrossRef]
- Kleege, Georgina. 1999. *Sight Unseen*. New Haven: Yale University Press.
- Llewellyn, Gwynnyth, David McConnell, and Luisa Ferronato. 2003. Prevalence and outcomes for parents with disabilities and their children in an Australian court sample. *Child Abuse and Neglect* 27: 235–51. [CrossRef]
- Llewellyn, Gwynnyth, Rannveig Traustadottir, David McConnell, and Hanna Bjorg Sigurjonsdott. 2010. *Parents with Intellectual Disabilities: Past, Present and Futures*. Chichester: Wiley-Blackwell Publishing.
- Malacredia, Claudia. 2009. Performing Motherhood in a Disablist World: Dilemmas of Motherhood, Femininity and Disability. *International Journal Qualitative Studies in Education* 22: 99–117. [CrossRef]
- Montgomery, Cal. 2001. A Hard Look at Invisible Disability. Available online: <http://www.ragged-edge-mag.com/0301/0301ft1.htm> (accessed on 19 August 2017).
- National Council on Disability. 2012. National Disability Policy: A Progress Report. Available online: https://ncd.gov/progress_reports/Aug202012 (accessed on 17 July 2017).
- Office of the High Commissioner on Human Rights. 2016. Elected Members of the Committee on the Rights of Persons with Disabilities. Available online: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (accessed on 17 July 2017).
- Oliver, Michael. 1996. *Understanding Disability: From Theory to Practice*. New York: St. Martin's Press.
- Radcliffe, Victoria. 2008. "Being Brave": Disabled Women and Motherhood. Master's dissertation, The University of Leeds, Leeds, UK.
- Samuels, Ellen. 2003. My Body, My Closet: Invisible Disability and the Limits of Coming out. *Journal of Lesbian and Gay Studies* 9: 233–55. [CrossRef]
- Senate Community Affairs References Committee. 2015. Out of Home Care. Available online: http://www.aph.gov.au/binaries/senate/committee/clac_ctte/completed_inquiries/2004-07/inst_care/report/report.pdf (accessed on 17 July 2017).
- Shakespeare, Tom. 2002. The Social Model of Disability: An Outdated Ideology? *Research in Social Science and Disability* 2: 9–28.

- Shakespeare, Tom. 2013. The Social Model of Disability. In *The Disability Studies Reader*. Edited by Lennard Davis. New York: Routledge.
- Shakespeare, Tom, Kath Gillespie-Sells, and Dominic Davies. 1996. *The Sexual Politics of Disability: Untold Desires*. New York: Cassell.
- Steele, Linda. 2016. Court authorised sterilisation and human rights: Inequality, discrimination and violence against women and girls with disability. *UNSW Law Journal* 39: 1002–37.
- Sutherland, Allan. 1981. *Disabled We Stand*. London: Souvenir Press.
- Thomas, Carol, and Penny Curtis. 1997. Having a Baby: Some Disabled Womens' Reproductive Experiences. *Midwifery* 13: 202–9. [CrossRef]
- Tremain, Shelley. 2002. On the Subject of Impairment. In *Disability/Postmodernity: Embodying Disability Studies*. Edited by Marian Corker and Tom Shakespeare. London: Bloomsbury Publishing.
- UPIAS (Union of the Physically Impaired Against Segregation). 1974. Policy Statement. Available online: <http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf> (accessed on 28 April 2016).
- VLRC (Victorian Law Reform Commission). 2007. Assisted Reproductive Technology & Adoption. Available online: <http://www.lawreform.vic.gov.au/all-projects/art-adoption> (accessed on 6 April 2016).
- Walker, Lisa. 2001. *Looking Like What You Are: Sexual Style, Race and Lesbian Identity*. New York: New York University Press.
- Warner, Michael. 2000. *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*. Cambridge: Harvard University Press.
- Wates, Michele. 2002. Disability and Adoption: How Unexamined Attitudes Discriminate against Disabled People as Parents. *Adoption and Fostering Journal* 26: 49–56. [CrossRef]
- Wendell, Susan. 1996. *The Rejected Body: Feminist Philosophical Reflections on Disability*. New York: Routledge.
- Westbrook, Marry T., and Darien Chinnery. 1995. The Effect of Physical Disability on Women's Childbearing and Early Childrearing Experiences. *Australian Disability Review*, 3–17.
- Young, Stella. 2012. Don't Look Past My Disabled Body. *The Sydney Morning Herald*. Available online: <http://www.smh.com.au/lifestyle/life/citykat/dont-look-past-my-disabled-body--love-it-20120712-21ycy.html> (accessed on 4 April 2016).



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