



# **Child Protection Reform and Other Legislation Amendment Bill 2021**

**Submission from the Office of the Public Guardian  
October 2021**



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## About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity and children and young people in out-of-home care or staying at a visitable site. The purpose of OPG is to advocate for the rights and interests of our clients.

OPG provides individual advocacy services to children and young people through its child advocacy functions, operationalised through:

- child advocates, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them; and
- community visiting and advocacy, which monitors and advocates for the rights of children and young people staying at visitable locations, including those residing in out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities).

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and community visiting and advocacy functions.

- The guardianship function undertakes structured decision-making (supported and substitute) in relation to personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigation function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision-makers under an advance health directive or an enduring power of attorney.



# Submission to the Committee

## Position of the Office of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission to the *Child Protection Reform and Other Legislation Amendment Bill 2021* (the Bill). The views of OPG contained in this submission do not represent the views of the Queensland Government.

This submission and its recommendations address the aspects of the Bill where they relate to the experiences of OPG and the people we serve. A summary of OPG's recommendations appears below.

### Office of the Public Guardian recommends:

1. The CPA be revised to include a principle that the child is entitled to be heard, even if others may not agree with the views expressed by the child.
2. The CPA to provide for parents to have the same rights to seek a review of a case plan as provided for children under section 51(V).
3. Insertion of a requirement to consider the rights of a parent to privacy in circumstances where disclosure of personal information to a carer does not relate directly to the care needs of a child.
4. The Bill provide clarification on the standard of acceptable risk to enable appropriate interpretation of what is a "risk-assessed role".
5. The 'Charter of rights for a child in care' (the Charter) to be expressly provided for at key decision-making points in the CPA.
6. The CPA to expressly obligate all parties with service delivery obligations under the child protection system to uphold the Charter.
7. Mechanisms to be incorporated into the CPA to allow for enforcement of the Charter based on a model similar to that used in the *Human Rights Act 2019*.
8. That the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) be required under the CPA to report on outcomes linked to the Charter.
9. The Charter to include a right that a child in care can expect outcomes where they enjoy their childhood, feel safe and cared for, and feel supported to develop into adulthood.
10. The CPA mandate that the "best interests of the child" consideration cannot be used to justify the overriding of a child's legislative right to participate.
11. The CPA provide for a child or young person be able to apply to Queensland Civil and Administrative Tribunal (QCAT) for a review of a Permanent Care Order.
12. A mechanism be included in the CPA to explicitly prohibit discrimination against a parent, and their ability to care for their child, based on the existence of a disability.

OPG welcomes the reforms proposed by the Bill and commends the Queensland Government for legislating to increase recognition of children's rights and facilitate meaningful participation in decisions that affect them.



OPG has detailed below, observations and recommendations on aspects of the Bill for the Committees consideration. OPG previously raised a number of these issues in a submission to the *Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families* discussion paper. However, OPG has taken the opportunity to present these important matters for further examination as the Bill is progressed.

### Clause 8 – Amendment of section 5B (Other general principles)

OPG supports the amendment to section 5B (Other general principles), which includes an additional principle as guidance on what is the best interests of the child, namely, the right for a child to express their views about what is, and is not, in their best interests. However, we draw the Committee's attention to section 7 of the *Public Guardian Act 2014* (Qld) which includes as a principle for children staying at visitable sites, that "the child is entitled to be heard, even if others may not agree with the views expressed by the child". While this additional principle may be implied by the amendment to section 5B, it has been the experience of OPG that a child's views can be dismissed by an adult in certain situations where an adult disagrees or even discounts a child's wishes. It is important for this element to be explicitly articulated in the CPA to fully enable a child's meaningful participation in the decisions that affect them.

#### Recommendation 1

The CPA be revised to include a principle that the child is entitled to be heard, even if others may not agree with the views expressed by the child.

### Clause 24 – Amendment of section 51(V) (Review of plan – no long-term guardian)

The introduction of the right for a child to seek a review of a case plan in the absence of a long-term guardian is welcomed by OPG. However, OPG notes that this right to the review of a plan has not been extended to parents. This does not appear to comply with the new purpose of the CPA which includes at section 4(c), supporting families who care for children. OPG has observed it is an area of discrimination for parents that matters will not be discussed outside of case planning, for example, reviews of contact. If a parent is afforded this same mechanism of review, they would have the opportunity to request case plans to progress matters regarding reunification with their child or children where appropriate. The same safeguards around the chief executive deciding not to review a plan would still be in place, as is the proposal for children making the request.

OPG believes it is in the best interests of the child and their family for a parent to have the right to request a case plan review at any stage and have the same parameters around chief executive decision-making as a child.

#### Recommendation 2

The CPA to provide for parents to have the same rights to seek a review of a case plan as provided for children under section 51(V).



## Clause 32 – Amendment of section 83A – Giving information to carers and children

The additional information provided under section 83A provides further guidance on providing information to carers and children. However, OPG questions whether this guidance will see the requisite extension of confidentiality provisions for the release of this information to carers, and penalties if this information is released and/or published. Specifically, the amendments to section 83A(2)(a) which provides examples of several documents that a carer may reasonably need to provide care for a child under the CPA, including case plans, information about the child's special behavioural needs, information about the child's family and background. While this detail is welcomed, OPG is concerned about providing a copy of a case plan, given that this document is also about the parents of the child. A case plan contains private material about parents, including their backgrounds, disabilities, and what they may need to do to reunify with their child/children. A degree of caution should be exercised about the potential oversharing of personal information to parties.

OPG acknowledges the importance of a carer having access to the necessary information needed to provide the best standard of care to a child. However, we recommend greater consideration be given to a parent's right to confidentiality concerning personal information that is not relevant to the care of a child. Release of this information to a carer could in fact be contrary to the best interests of a child should inaccurate assumptions be made on a parent's ability to provide care.

OPG therefore recommends that the Bill include a requirement to consider the rights of a parent to privacy in circumstances where disclosure of personal information does not relate directly to the care needs of a child.

### Recommendation 3

Insertion of a requirement to consider the rights of a parent to privacy in circumstances where disclosure of personal information to a carer does not relate directly to the care needs of a child.

## Clause 39 – Insertion of new section 123A – Meaning of risk-assessed role

A risk-assessed role is defined in the new section 123A(1) as "a role for which the normal duties are likely to require, permit or facilitate contact with a child, that is of a type that may create an unacceptable level of risk for the child". The CPA currently in force refers instead to, at section 126(b)(iv), "the persons who will be, or are, engaged in relation to the provision of care services by the service".

OPG has some concerns regarding this new concept given the potential ambiguity around the term "unacceptable level of risk". The point at which an identified risk for a particular role becomes "unacceptable" is not specified and could be open to interpretation. The explanatory notes for the Bill state that the new section 123A will "assist licensees to conduct the required risk assessment of its roles and identify whether a role requires a suitable person". However, OPG recommends that the standard of acceptable risk be clarified and the term unacceptable risk be defined more clearly to enable objective interpretation of a risk-assessed role.



#### Recommendation 4

The Bill provide clarification on the standard of acceptable risk to enable appropriate interpretation of what is a “risk-assessed role”.

## Additional considerations

Beyond the amendments proposed by the Bill, OPG has raised below a number of additional issues for consideration in amendments to the CPA.

### Charter of Rights for a child in care

#### The operation of the Charter

OPG welcomes the Bill’s increased focus on rights and expansion of the list of rights enshrined in the Charter of Rights for a child in care (the Charter). OPG also acknowledges the changes to section 74 of the CPA under clause 29 of the Bill which clarify the obligations of the chief executive to ensure a child is informed *regularly* about the charter of rights. However, it is recommended that this is expanded to include provisions that operationalise a child’s rights under the Charter in practice. Without mandated provisions driving a change in practice, legislative changes based on principles embodied only in the introduction and schedule of the CPA are unlikely to achieve tangible change in the service delivery culture.

To contribute to this shift, OPG recommends that the Charter (currently Schedule 1 in the CPA) be enshrined not only in the main body of the CPA but also expressly provided for at key decision-making points. Decision-makers should be required to identify the charter rights affected by a decision and, if any of these rights have been overridden as part of the decision, to provide justification as to why they are overridden and how this represents a ‘least restrictive’ interference with their charter rights. This would be similar to the decision-making model under section 13 of the *Human Rights Act 2019* (HRA). Legislating this model in the CPA would ensure decisions are rights-based, comply with the HRA and provide one simple and consistent decision-making framework for decision-makers to follow.

OPG also recommends that the CPA expressly obligate all parties with service delivery obligations under the child protection system to uphold the Charter. This would ensure consistent understanding and application of the Charter rights and an assurance that all those with a part to play in a child’s life are meeting their obligations.

#### Recommendation 5

The ‘Charter of rights for a child in care’ to be expressly provided for at key decision-making points in the CPA.

#### Recommendation 6

The CPA to expressly obligate all parties with service delivery obligations under the child protection system to uphold the Charter.

#### Enforcement of the Charter

To give weight to the Charter, OPG proposes introducing a mechanism in the CPA to challenge breaches of the Charter. Such an enforcement mechanism could be modelled on the HRA, providing an opportunity for people to refer a complaint to an independent external body in circumstances where it



is alleged that Charter rights have not been adhered to. Should a determination be made that Charter rights have been breached there may be the option of setting the decision aside, or referring the decision back to the original decision maker for further consideration and redetermination. Having these mechanisms in place will be a valuable means to establish an awareness of Charter rights and the obligations on decision-makers to consider these rights when making decisions under the CPA.

#### Recommendation 7

Mechanisms to be incorporated into the CPA to allow for enforcement of the Charter based on a model similar to that used in the *Human Rights Act 2019*.

#### Focus on outcomes

To ensure the rights under the Charter are being consistently upheld, OPG recommends that DCYJMA be required by the CPA to report on outcomes linked to the Charter. The Charter should also include a right that a child in care can expect outcomes where they enjoy their childhood, feel safe and cared for, and feel supported to develop into adulthood.

Implementation of this right focused upon outcomes of children and young people in care could be linked with the annual reporting requirements of DCYJMA. This would be consistent with recommendation 8 of the Queensland Family and Child Commission's report, *Keeping Queensland's children more than safe: Review of the foster care system, Blue Care and Foster Care Systems Review*, which recommended that:

*"the Queensland Family and Child Commission works with the Department of Communities, Child Safety and Disability Services; the Office of the Public Guardian; and the child protection sector to provide a more outcomes-based account of the experiences and perspective of children and young people who rely on child protection services to stay safe and well. This should be reflected in the annual report produced by the Queensland Family and Child Commission provide a more outcomes based account of the experiences and perspective of children and young people who rely on child protection services to stay safe and well."*

#### Recommendation 8

That DCYJMA be required under the CPA to report on outcomes linked to the Charter.

#### Recommendation 9

The Charter to include a right that a child in care can expect outcomes where they enjoy their childhood, feel safe and cared for, and feel supported to develop into adulthood.

### Right to participate

To further enshrine a child's right to participate in decision that affect them, OPG recommends that the CPA mandate that the "best interests of the child" consideration cannot be used to justify overriding of the child's legislative right to participate. The legislation should clearly articulate that it is in the best interests of the child to be included in decisions regarding their circumstances and to be provided with the tools and support to exercise this right as is appropriate to their age, maturity and capacity.



Specifying a child's legislative right to express or demonstrate their views and wishes as an indisputable consideration could address instances of professionals using "best interests of the child" to override a child or young person's right to participate.

#### Recommendation 10

The CPA mandate that the "best interests of the child" consideration cannot be used to justify the overriding of a child's legislative right to participate.

### Permanent Care Orders

OPG remains concerned about the lack of review mechanisms available under the CPA for a child or young person subject to a Permanent Care Order (PCO). There are some review mechanisms relating to a PCO, for example, under section 65AA of the CPA the Director of Child Protection Litigation (DCPL) can apply to the Childrens Court for an order to vary or revoke a PCO for a child. However, this contrasts to other child protection orders, wherein the DCPL, a child's parent, or the child may apply to the Childrens Court to vary or revoke the order (section 65 CPA). Division 3A of the CPA as in force provides for complaints about Permanent Guardians to be made to the chief executive (child safety) and Schedule 2 does make a PCO reviewable for the person making the complaint to review a decision DCYJMA to refuse to deal with a complaint about a PCO under section 80D(1). However, there is no provision for a child or young person to apply to QCAT regarding the grant of a PCO. Given the significance of the decision and the impact on the prospect of a family reuniting, OPG recommends that a child or young person be able to apply to QCAT for a review of a PCO.

#### Recommendation 11

The CPA provide for a child or young person be able to apply to QCAT for a review of a Permanent Care Order.

### Parents with a disability

It has been the experience of OPG as guardian for many parents with disability, there remains significant issues in relation to the way the child protection system can regard a parent's disability (particularly an intellectual, cognitive or psychosocial disability) as evidence of their inability to care for their child. This can often mean parents with disability are disadvantaged based on the existence of a disability itself. While Queensland's HRA is driving system reform in terms of human rights recognition, this needs to be accompanied by a cultural shift in the child protection system that does not discriminate against people with disability. This cultural shift must meet the human rights obligations placed upon government to provide decision-making and parenting support to parents with disability, particularly in order to meet the requirement of recognition and equality before the law (section 15 in the HRA).

OPG therefore recommends a mechanism in the CPA to explicitly prohibit discrimination against a parent, and their ability to care for a child, based on the existence of a disability.

#### Recommendation 12

A mechanism be included in the CPA to explicitly prohibit discrimination against a parent, and their ability to care for their child, based on the existence of a disability.



## Conclusion

OPG is optimistic that the Bill will fulfill its purpose of better supporting children in care and strengthening the participation of children in decisions that affect them. OPG is happy to meet to discuss any of the matters raised in this submission and to participate in consultation on any new drafts of the Bill.