



Inquiry into the Child Protection and Other Legislation Amendment Bill 2020

**Submission to the Legal Affairs and Community
Safety Committee**

August 2020

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 children and young people in out-of-home care or staying at a visitable site, and adults with impaired decision-making capacity. The purpose of OPG is to advocate for the human rights of our clients.

The OPG provides individual advocacy to children and young people through the following functions:

- the child community visiting and advocacy function, which monitors and advocates for the rights of children and young people in the child protection system including 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), and
- the child legal advocacy function, which offers person-centred and legal 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.

The OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. When performing these functions, the OPG is required to seek and take into account the views and wishes of the child to the greatest practicable extent.

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

- The guardianship function undertakes both supported and substituted decision-making in relation to legal, 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 investigations 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, the 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 the 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 inquiry

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission on the *Child Protection and Other Legislation Amendment Bill 2020* (the Bill) to the Legal Affairs and Community Safety Committee (the Committee). The views contained in this submission are that of the OPG and do not purport to represent the views of the Queensland Government.

The OPG's experience in advocating for individual children in care has demonstrated the importance of permanency and stability in a child's life. The OPG also recognises that adoption offers stability in situations where it is not possible, or is not in the child's best interests, for the child to remain with their birth parents. The OPG is in a unique position in that it also administers the legislative function of advocating for the rights and interests of adults with impaired decision-making capacity. This submission focuses on the rights and interests of birth parents with impaired decision-making capacity under formal public guardianship (*Guardianship and Administration Act 2000*) and the importance of these rights being upheld in considering permanency options for a child.

The Public Guardian recommends:

1. The Bill be amended to ensure the rights of birth parents with disability are protected when decisions are being made about permanency options for their children by incorporating adequate safeguards for birth parents with disability, in particular, those with decision-making impairments, to meet the requirement of recognition and equality before the law under section 15 of the *Human Rights Act 2019*.
2. Adequately fund legal representation of birth parents, particularly given the significant impact of adoption on the legal relationship between children and birth parents.
3. The *Adoption Act 2009* be amended to ensure consistency with the *Guardianship and Administration Act 2000* for matters of adoption and dispensation with the need for the parent's consent to the adoption.
4. The *Adoption Act 2009* be amended to provide clarity around the role and functions of a formal guardian for the matter of dispensation.
5. The *Adoption Act 2009* be amended to provide greater protection and safeguards for the rights of parents with impaired decision-making capacity for matters of adoption and dispensation.

Rights of birth parents with impaired decision-making capacity

The Public Guardian may be appointed by the Queensland Civil and Administrative Tribunal (QCAT) to make decisions in a range of areas for some parents who have impaired decision-making capacity (such as for legal matters, but not relating to property or financial). In performing this function, the OPG has come across 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 at a position of disadvantage, based on the existence of a disability itself, representing a notable potential breach of their human rights. We refer the Committee to Article 22 of the Convention on the Rights of Persons with Disabilities which provides as follows:

No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

It is the OPG's view that the *Child Protection Act 1999* (Child Protection Act) and the *Adoption Act 2009* (Adoption Act) do not consistently protect persons with disabilities against interference with their families, as required by Article 22. This is evident in instances where a child has been placed into out-of-home care in the absence of actual substantiated harm, on the basis that a parent has a disability and it is unknown if they will be able to meet the needs of a developing child in the future. In some cases, firstborn children have been placed in out-of-home care at birth from parents that have decision-making impairments and for whom an order for long-term guardianship to the Chief Executive is sought in relation to the child. In the view of the OPG, this has occurred in some instances without adequate exploration of the adult's actual ability to parent or identification of the actual risks to the child. The OPG is concerned the Bill creates a risk of permanent removal of children from parents with impaired decision-making capacity in circumstances where the original removal of the child was based solely on the parent's disability rather than evidence of harm or inability to parent.

While the introduction of the *Human Rights Act 2019* in Queensland will drive system reform in terms of human rights recognition, this needs to be accompanied by a legislative framework that ensures the rights of birth parents with disability are protected when decisions are being made about permanency options for their children.

Support services

Before adoption is considered as an option for a child, parents with impaired decision-making capacity must be able to access specialist services designed to provide them with the disability support they need to provide a safe and nurturing environment for their child. Unfortunately, this is not always the case. As disability support is a different service system to that of child protection and is federally funded by the National Disability Insurance Scheme (NDIS), the OPG is concerned that this makes it a complex area for a child protection agency to navigate and accommodate, therefore potentially resulting in adoption becoming a more stable pathway than reunification by default.

In the interests of committing to the principles in the Child Protection Act, the OPG recommends that changes to child protection mechanisms be made to allow children and parents to remain together on a and receive funded support, either at home or in specialist accommodation for families, in circumstances where no actual harm to the child has been substantiated, or otherwise where it is safe for children to remain at home with appropriate support. In the OPG's experience, child safety decisions in relation to parents with impaired decision-making capacity may be made based on risk of harm, assuming parents are without any disability support, or that they can only parent appropriately if the support is 24/7, rather than on the basis of substantiated harm or risk of harm when disability supports are in place or are not in place. Parents with impaired decision-making capacity should be allowed the opportunity to address the risk, with appropriate supports and safeguards.

Further still, in some cases, children have special needs which require specialist intervention and positive behaviour support. This funded support is allocated to foster carers, youth workers, respite carers and specialist disability residential care facilities to support them to care for children. However, parents with impaired decision-making capacity may have never received any of the same support at home and are not offered the same support during contact with the child.

Recommendation 1:

The Bill be amended to ensure the rights of birth parents with disability are protected when decisions are being made about permanency options for their children by incorporating adequate safeguards for birth parents with disability, in particular, those with decision-making impairments, to meet the requirement of recognition and equality before the law under section 15 of the *Human Rights Act 2019*.

Legal advice and support

Given the ramifications of any order concerning permanency for a child, particularly an adoption order, birth parents must be provided with access to legal advice and representation throughout the entirety of the child protection and processes.

Legal advice is particularly important when birth parents are involved in discussions with professionals and the Department of Child Safety, Youth and Women (DCSYW) about their ability to provide a safe and nurturing environment for their children. For example, parents are not always aware that their views are being recorded, and ‘off the cuff’ remarks or statements can potentially be used against them for the purposes of determining custody and access rights. Legal representation is even more critical where the parent has an intellectual, cognitive or psychosocial disability, with parents requiring additional support to ensure that they fully understand and are aware of their rights and how such information will be used in child protection proceedings. Most importantly, it is in the best interests of the child or young person that their parents are also made aware of what will happen with the information they provide before they express their views. The absence of legal advice in these circumstances can be a further obstacle to reunification for families where one or both parents have impaired decision-making capacity.

Section 233 of the *Adoption Act 2009* provides that the parties to a proceeding may be represented by a lawyer. It follows that Legal Aid funding needs to be available to support representation of the parents, particularly given the significant impact of adoption on the legal relationship between children and birth parents.

Recommendation 2:

Adequately fund legal representation of birth parents, particularly given the significant impact of adoption on the legal relationship between children and birth parents.

Safeguards under the *Adoption Act 2009*

The OPG wishes to raise an ongoing issue regarding the Adoption Act which relates to birth parents with impaired decision-making capacity and has a direct impact on the Bill before the Committee. OPG is concerned that, should attempts at reunification fail and adoption be pursued as contemplated by the Bill, the Adoption Act does not provide adequate safeguards to protect the rights and interests of birth parents with impaired decision-making capacity, specifically the absence of protection around the dispensation of consent.

In the OPG's submission to the Queensland Government on the review of the Adoption Act,¹ it identified an inconsistency between the guardianship provisions of the Adoption Act and the *Guardianship and Administration Act 2000* (Guardianship and Administration Act) with respect to parental consent to adoption, which may compromise the rights of a parent with impaired decision-making capacity in adoption proceedings. To date, this issue has not been addressed in the legislation.

The Adoption Act provides that an adoption order cannot be made unless each parent consents to the adoption.² 'Consent' means consent freely and voluntarily given by a person with capacity to give the consent.³ 'Capacity', to consent to an adoption, means capability to understand the nature and effect of the adoption, freely and voluntarily make decisions about the adoption, and communicate the decisions in some way.⁴

In circumstances where an adult parent may not have capacity to consent to the adoption, the Chief Executive must apply to QCAT for a declaration about the parent's capacity to give consent.⁵

The Chief Executive may apply to the Childrens Court for an order dispensing with the need for the consent of a parent to the child's adoption if:

- QCAT has made a declaration that the parent does not have capacity to give the consent, and
- a guardian has been appointed under the Guardianship and Administration Act, or the Chief Executive has applied to QCAT for an order appointing a guardian, for the matter of the dispensation.⁶

The Childrens Court may make an order dispensing with the need for the relevant parent's consent to the adoption if (inter alia) QCAT has made a declaration that the relevant parent does not have capacity to give the consent.⁷ However, the Childrens Court must not give the dispensation unless satisfied it would be in the child's best interests for arrangements for the child's adoption to continue to be made.⁸ If the child has any views about the relevant parent and is able to express the views, having regard to the child's age and ability to understand, the court must consider the views.⁹

Dispensation with the need for consent is not a matter prescribed under the Guardianship and Administration Act for which a guardian may be appointed. Further, the Guardianship and Administration Act expressly prohibits the appointment of a guardian for a 'special personal matter', which includes a matter relating to consenting to adoption of a child of the adult under 18 years.¹⁰

The Adoption Act does not specify the guardian's purpose or functions with respect to the matter of dispensation; however, the Explanatory Notes to the Adoption Bill 2009 provide that the appointment of a guardian for the matter of dispensation 'will enable the guardian to act in the parent's interests in

¹ https://www.publicguardian.qld.gov.au/data/assets/pdf_file/0020/573221/20160311-opg-submission-on-the-review-of-the-adoption-act-2009.pdf

² *Adoption Act 2009*, ss.16 and 175.

³ *Adoption Act 2009*, s.17(1).

⁴ *Adoption Act 2009*, Schedule 3 Dictionary.

⁵ *Adoption Act 2009*, s.29; *Guardianship and Administration Act 2000*, s.146(1).

⁶ *Adoption Act 2009*, ss.30 and 35.

⁷ *Adoption Act 2009*, s.39(1)(b).

⁸ *Adoption Act 2009*, s.39(3).

⁹ *Adoption Act 2009*, s.39(5).

¹⁰ *Guardianship and Administration Act 2000*, s.14(3) and Schedule 2, Part 2, s.3(d).

relation to a proceeding for the dispensation by, for example, engaging a lawyer to represent the parent in the proceeding'.¹¹

This corresponds with the provisions of the Guardianship and Administration Act which apply such that where an adult appears to lack capacity for a legal matter, a guardian may be appointed for legal matters not related to financial or property matters.¹² Decisions by a guardian for an adult's legal matters may include obtaining a legal representative for the adult, and providing instructions to the legal representative as to the further conduct of the adult's legal matters on the basis of the adult's views and wishes and legal advice received.

A guardian must apply the General Principles (and the Health Care Principle in health matters) which are detailed in the Guardianship and Administration Act when performing a function or exercising a power under that Act for a particular matter in relation to an adult with impaired decision-making capacity for that matter. It should be noted that a guardian will be appointed on the terms considered appropriate by the tribunal, and the appointment may, for example, be restricted to certain matters, not extending specifically to legal matters.

The OPG is concerned that the appointment of a guardian for the matter of dispensation under the Adoption Act is inconsistent with the guardianship framework under the Guardianship and Administration Act, which expressly provides that a guardian may not be appointed for a matter relating to consenting to adoption of a child of the adult under 18 years. The OPG notes that a relevant guardianship appointment must be for the matter of dispensation, and therefore it will be important to consider the terms of any QCAT appointment to confirm the appointment relates to dispensation. The OPG considers that a broad guardianship appointment alone should not be sufficient, noting that in appointing a guardian, QCAT is required to consider the person's appropriateness for appointment, with one of the considerations including the person's competence to perform functions and exercise powers under an appointment order.¹³

The OPG also considers the provisions of the Adoption Act should clearly articulate that the guardian's role in dispensation matters does not include the provision of consent as a substitute decision-maker for the relevant adult. Rather, it should be clear that the guardian's involvement relates to assisting the adult during the proceedings, which would align with the apparent intent as outlined in the Explanatory Notes to the Adoption Bill 2009. The guardian's role, for example, could be similar to that applicable to legal matters which includes functions such as assisting the adult to access legal services in relation to the proceeding, or to bring or defend a proceeding.

It is further noted that a guardian does not act as a direct legal representative for the adult. Accordingly, given a key role for the guardian would relate to assisting them to access legal services, access to Legal Aid for persons with impaired decision-making capacity in adoption cases should be a priority.

The OPG also considers that the Adoption Act does not provide adequate protection and safeguards for parents with impaired decision-making capacity. The Explanatory Notes to the Adoption Bill 2009 acknowledged that 'the dispensation of a parent's consent overrides their ordinary right to make decisions about arrangements for their child's future care and upbringing. However, there is a need to balance the wellbeing and best interests of the child with any right of the child's parent to make decisions about the child's long-term care'.¹⁴ Notwithstanding those comments, this recognition of the

¹¹ Explanatory Notes to the *Adoption Bill 2009*, pg.35.

¹² *Guardianship and Administration Act 2000*, s.12 and Schedule 2, Part 2, s.2(i) and Part 3, s.18.

¹³ *Guardianship and Administration Act 2000*, s.15.

¹⁴ Explanatory Notes to the *Adoption Bill 2009*, pg.16.

parent's right is not clearly reflected in the guardianship provisions of the Adoption Act. Consequently, there is a risk that children of parents with an intellectual or cognitive disability may be removed and adopted solely on the basis of the parent's disability.

While the OPG recognises that the best interests of the child is the paramount concern of the Childrens Court in deciding whether to dispense with the need for the parent's consent to the adoption, the OPG submits that the Adoption Act should provide other factors which the court must take into consideration, including the General Principles of the Guardianship and Administration Act and the right of parents with impaired decision-making capacity to raise and maintain a relationship with their children.

Recommendation 3:

The *Adoption Act 2009* be amended to ensure consistency with the *Guardianship and Administration Act 2000* for matters of adoption and dispensation with the need for the parent's consent to the adoption.

Recommendation 4:

The *Adoption Act 2009* be amended to provide clarity around the role and functions of a guardian for the matter of dispensation.

Recommendation 5:

The *Adoption Act 2009* be amended to provide greater protection and safeguards for the rights of parents with impaired decision-making capacity for matters of adoption and dispensation.