public guardian

Department of Communities, Child Safety and Disability Services

Submission on the discussion paper for the review of the *Child Protection Act 1999*

Public Guardian
February 2016

About the Office of the Public Guardian

On 1 July 2014, the Office of the Public Guardian (OPG) was established as a new independent statutory body to protect the rights and wellbeing of vulnerable adults with impaired decision-making capacity, and children and young people in out-of-home care (foster care, kinship care, residential care) and youth detention. This new statutory body was created as a result of the acceptance by Government of recommendations contained in the report from the Queensland Child Protection Commission of Inquiry (the Carmody Inquiry), *Taking Responsibility: A Roadmap for Queensland Child Protection*.[1]

The OPG combines roles that were previously separately undertaken by the Office of the Adult Guardian, and the community visitor function of the former Commission for Children and Young People and Child Guardian.

Visitable sites for child and adult community visitors include mental health services authorised under the *Mental Health Act 2000*.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out OPG's legislative functions and powers, and the *Powers of Attorney Act 1998* regulates the authority for adults to appoint representative decision-makers, and who can act as statutory health attorneys.

Children and young people

The OPG supports children and young people through two specific programs:

- the community visitor program, which aims to ensure children and young people in out-of-home care are safe and are being properly cared for, and
- the child advocate program, which gives children engaged with the child protection system an independent voice, ensuring their views are taken into consideration when decisions are made that affect them.

The *Child Protection Act 1999*, section 74 and Schedule 1, sets out the Charter of rights for a child in care. This Charter establishes core rights that apply to every child and young person who is in the child protection system in Queensland, including the right to be provided with a safe and stable living environment, and to be placed in care that best meets their needs, and is culturally appropriate.

Adults

The OPG also works to protect the rights and interests of adults who have an impaired capacity to make their own decisions, recognising that everyone should be treated equally, regardless of their state of mind or health.

Our charter with respect to adults with impaired capacity is to:

- make personal and health decisions if appointed their guardian or attorney
- investigate allegations of abuse, neglect or exploitation
- advocate and mediate for people with impaired capacity, and
- educate the public on the guardianship system.

The OPG provides an important protective role in Queensland by administering a community visitor program to protect the rights and interests of the adult if they reside at a visitable site.

[1] Recommendation 12.7, Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection*, June 2013 available at http://www.childprotectioninquiry.qld.gov.au/publications.

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Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to comment on the review of the *Child Protection Act 1999*.

The OPG supports the review of the *Child Protection Act 1999* and acknowledges that much progress has been achieved in the first stage of the child and family legislative reforms. The OPG also supports the new practice framework and improved case management support which are being undertaken ahead of the comprehensive legislative review. This submission affirms the prominence of the Charter of Rights for a child in care contained in Schedule 1 of the *Child Protection Act 1999* and advocates for a positive obligation on the State to take a greater role in the child protection system.

The OPG has considered the *Child Protection Act 1999* and has made a number of recommendations for legislative reform, summarised at page 16. While the discussion paper has been taken into consideration, this submission focuses on key issues particularly pertinent to the OPG's clients rather than providing specific answers to the questions raised in the discussion paper.

The OPG would be pleased to lend any additional support, including assistance with potential drafting, as the child protection legislative review progresses. Should clarification be required regarding any issues raised, the OPG would be happy to make representatives available for further discussions.

Review of the *Child Protection Act 1999*

The OPG is a human rights agency and service provider to children and young people in the child protection system. The OPG has reviewed the *Child Protection Act 1999* in the context of the OPG's clients and has identified key issues which may be remedied or improved with legislative reform. The OPG acknowledges that some issues experienced by stakeholders relate to implementation and risk aversion, and therefore may be better addressed through change management. The OPG would be supportive of practical initiatives and education to address the culture and practice within the child protection system to achieve a cultural shift in the implementation of the governing legislation.

1.0 Legislative principles and objectives

A key outcome of the Child Protection Commission of Inquiry (the Carmody Inquiry) recommendations is the shift in focus to providing greater, and more timely support and intervention for families and children. Accordingly, the OPG suggests that child protection legislative reform needs to have a clear agenda and be guided by the overarching principles of early intervention, a holistic (whole of government) approach and family focus. As part of this holistic approach, it is critical that there is greater engagement between the Director-General of the Department of Communities, Child Safety and Disability Services (DCCSDS) and other agencies. While it is important to recognise and affirm the rights of children and young people; the legislation also needs to promote the enforceability of rights, and support of people in the exercise of those rights.

The primary purpose of Queensland's child and family legislation should be twofold, encompassing principles of both child protection and family support. The OPG recommends legislative amendment to more clearly articulate that the family has primary responsibility for a child's wellbeing. This would facilitate focus on early intervention and support rather than on tertiary intervention at the crisis stage, which is the current model of the legislation. The Chief Executive's role to recognise and exercise rights could also be more clearly articulated. The legislation currently contains a general principle that the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family (s.5B(c) of the *Child Protection Act 1999*); however, this principle should be given greater focus both legislatively and in practice. Ideally, the legislative framework should focus on early intervention and family support so that tertiary intervention is a matter of last resort only. It may even be appropriate to reconsider of the name of the *Child Protection Act 1999* to reflect a new focus on all stages of support for children, young people and families.

The OPG submits that the *Child Protection Act 1999* should include a principle which imposes an obligation on the state to make real efforts to provide support to children, young people and families prior to tertiary intervention. While the state has limited ability to interfere in family affairs, there should be a presumption requiring efforts to provide support when tertiary intervention is proposed and an onus to explain why the presumption should be displaced in appropriate cases (for example, where there is an immediate risk of harm to the child). The OPG advocates for a new practice framework and a social model which facilitates partnerships between the state, service providers and families.

Recommendation 1:	**Consideration should be given to renaming the *Child Protection Act 1999* to reflect the focus on all stages of support for children, young people and families.**
Recommendation 2:	**The *Child Protection Act 1999* should be amended to more clearly articulate that the family has primary responsibility for a child's wellbeing, including the right to support to fulfil this responsibility.**
Recommendation 3:	**The *Child Protection Act 1999* should be amended to include a presumption that family support will be provided prior to tertiary intervention, where it is safe to do so in the circumstances.**

2.0 State support

The following are issues in the *Child Protection Act 1999* relating to state support.

2.1 Transitioning

The provisions of the *Child Protection Act 1999* relating to transitions to independence and in and out of care do not provide children and young people with adequate support. These provisions should be expanded to establish statutory entitlements and supports for children and young people undergoing these processes.

Schedule 1 of the *Child Protection Act 1999* sets out the Charter of Rights for a child in care (the Charter). The Charter provides (inter alia) that a child in need of protection, who is in the custody or under the guardianship of the chief executive under the Act, has a right 'to receive appropriate help with the transition from being a child in care to independence, including, for example, help about housing, access to income support and training and education' (Schedule 1, paragraph (k) of the Charter).

Section 75 of the *Child Protection Act 1999* provides, relevantly:

(1) This section applies to a child or person who is or has been a child in the custody or under the guardianship of the chief executive.
(2) As far as practicable, the chief executive must ensure the child or person is provided with help in the transition from being a child in care to independence.
(3) Without limiting subsection (2), the help may include financial assistance provided under section 159.

The legislative provisions of interstate Australian jurisdictions set out below are examples of more robust transition to independence frameworks which may provide guidance for reform.

Victoria

Paragraph 16(1)(g) of the *Children, Youth and Families Act 2005* (Vic) provides that the Secretary has a responsibility 'to provide or arrange for the provision of services to assist in supporting a person under the age of 21 years to gain the capacity to make the transition to independent living where the person has been in the custody or under the guardianship of the Secretary, and on leaving the custody or guardianship of the Secretary is of an age to, or intends to, live independently'. Subsection 16(4) provides that the kinds of services that may be provided to support a person to make the transition to independent living include:

(a) the provision of information about available resources and services;
(b) depending on the Secretary's assessment of need—
(i) financial assistance;
(ii) assistance in obtaining accommodation or setting up a residence;
(iii) assistance with education and training;
(iv) assistance with finding employment;
(v) assistance in obtaining legal advice;
(vi) assistance in gaining access to health and community services;
(c) counselling and support.

New South Wales

Similarly, s.165(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) imposes an obligation on the Minister for Family and Community Services 'to provide or arrange such assistance for children of or above the age of 15 years and young persons who leave out-of-home care until they reach the age of 25 years as the Minister considers necessary having regard to their safety, welfare and well-being'. Assistance may be provided to a person after they reach the age of 25 years at the Minister's discretion (s.165(3) refers).

Australian Capital Territory

The *Children and Young People Act 2008* (ACT) provides an example of a detailed transition to independence structure. Chapter 15, Part 15.5 (Transition to adulthood) provides comprehensive rights, obligations and supports to assist young people and adults under the age of 25 years to transition to independence. Subsection 529D(1) states that the director-general must prepare a transition plan for a young person who is in out-of-home care and at least 15 years old. The director-general must develop the plan in consultation with the young person, and may also consult others (s.529E refers). Subsection 529I(1) states that the director-general may provide appropriate services to a young person, or young adult, who has previously been in out-of-home care. The director-general may also provide financial assistance if satisfied that the assistance is for an appropriate purpose and reasonably necessary considering the young person's, or young adult's, circumstances (s.529J(2) refers). If the young adult resides with their previous out-of-home carer, s.529JA allows financial assistance to be provided to the carer. Section 529K makes provision for entitlement to personal items, and ss.529L, 529M and 529N allow and facilitate access to protected information.

The OPG submits that the legislation should also provide a robust staged framework for children and young people when transitioning in and out of care. For example, the current provisions relating to the transition from supervision to non-supervision do not allow for a graduated removal of supervision. The OPG recommends that before an order for supervision is revoked, the legislation require the court to:

- give consideration to the reasons why supervision was initially required
- establish what has changed to warrant complete removal of supervision, and
- affirm that removal of supervision is appropriate in the circumstances.

Recommendation 4:	**The provisions of the *Child Protection Act 1999* relating to transitions to independence should be expanded to establish statutory entitlements and supports for children and young people undergoing this process.**
Recommendation 5:	**The *Child Protection Act 1999* should be amended to place stringent criteria on the revocation of an order for supervision, allowing for a graduated removal of supervision, if appropriate, in the circumstances.**

2.2 All reasonable efforts

The OPG supports recommendation 13.20 of the Carmody Inquiry and submits that the legislation should be amended to provide that 'all reasonable efforts' must be made by DCCSDS to provide support services to the child and family. Recommendation 13.20 of the Carmody Inquiry states that:

> *the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to provide that:*
> - *before granting a child protection order, the Childrens Court must be satisfied that the department has taken all reasonable efforts to provide support services to the child and family*
> - *participation by a parent in a family group meeting and their agreement to a case plan cannot be used as evidence of an admission by them of any of the matters alleged against them.*

As part of this obligation, the OPG recommends that the legislation be amended to provide that 'all reasonable efforts' must be made to return a child in care to their family (reunification). The legislation contains a general principle that if a child is removed from the child's family, support should be given to the child and the child's family for the purpose of allowing the child to return to the child's family if the return is in the child's best interests (s.5B(f) of the *Child Protection Act 1999*). However, this principle should be given greater focus both legislatively and in practice.

This principle does not appear to be an obligation in all interstate jurisdictions. However, s.276(2)(b) of the *Children, Youth and Families Act 2005* (Vic) provides that:

> *the Court must not make a protection order that has the effect of removing a child from the custody of his or her parent unless [inter alia] the Court is satisfied by a statement contained in a disposition report in accordance with s.558(c) that all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in the custody of his or her parent.*

Recommendation 6:	**The *Child Protection Act 1999* should be amended to provide that 'all reasonable efforts' must be made by DCCSDS to provide support services to the child and family. In particular, 'all reasonable efforts' must be made to return a child in care to their family if the return is in the child's best interests and it is safe to do so in the circumstances.**

2.3 Expressing views and wishes

There is inadequate provision in the *Child Protection Act 1999* for children and young people to participate in decision-making processes in a meaningful and informed manner. Section 5E of the *Child Protection Act 1999* provides steps to be undertaken when obtaining a child's views under the legislation. When giving a child an opportunity to express their views, the child should be given an opportunity, and any help if needed, to respond to any decision affecting the child. If a child's wishes are not followed, the child should be provided with reasons for that decision. The OPG notes s.10 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) which provides (inter alia) that:

> *(1) To ensure that a child or young person is able to participate in decisions made under or pursuant to this Act that have a significant impact on his or her life, the Secretary is responsible for providing the child or young person with the following:*
> *(a) adequate information, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision-making and any relevant complaint mechanisms,*
> *(e) information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision,*

To facilitate this mechanism, there should be a provision that enables children and young people to be informed about risk when expressing their views and wishes for a particular process or course of action, taking into

consideration the age and vulnerability of the child. That is, any expression of a child's views and wishes needs to be informed by risks to the child and their family. This may include educating children about their parents' problems or behaviour and what it may mean for the child (for example, if a parent is unwell, the child is informed that the parent may exhibit *X* behaviours which may have *Y* risks for the child). Such a provision would be consistent with the core value of participation articulated in the new *Strengthening Families Protecting Children Framework for Practice* which acknowledges that 'child protection interventions are more likely to lead to meaningful and lasting change when children, young people, parents and their networks are active participants in assessment, planning and decision-making processes'.[2]

Recommendation 7:	**The *Child Protection Act 1999* should be amended to allow a child or young person an opportunity to respond to any decision affecting them. In addition, the child or young person should be provided with reasons for the decision, particularly if their wishes are not followed.**
Recommendation 8:	**The *Child Protection Act 1999* should be amended to expressly permit children and young people to be informed about risks particular to their situation when facilitating their right to express their views and wishes on a matter, in a manner appropriate to the age and vulnerability of the child or young person.**

3.0 Information sharing

In the OPG's experience, a significant barrier to stakeholders providing timely and quality services is a culture which has led to limited information sharing between agencies. The *Child Protection Act 1999* should be amended to better facilitate information sharing between relevant stakeholders, thereby enabling all agencies to more effectively fulfil their duties in supporting children, young people and families. Imposing a statutory timeframe for the provision of information would address the operational and cultural issues underpinning the informing sharing framework.

The New South Wales information sharing framework, set out below, may provide guidance for reform.

New South Wales

Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides an example of a statutory framework for the exchange of information and coordination of services between agencies and stakeholders. Section 245A states, relevantly:

> *(1) The object of this Chapter is to facilitate the provision of services to children and young persons by agencies that have responsibilities relating to the safety, welfare or well-being of children and young persons:*
>
> *(a) by authorising or requiring those agencies to provide, and by authorising those agencies to receive, information that is relevant to the provision of those services, while protecting the confidentiality of the information, and*
>
> *(b) by requiring those agencies to take reasonable steps to co-ordinate the provision of those services with other such agencies.*
>
> *(2) The principles underlying this Chapter are as follows:*
>
> *(a) agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,*
>
> *(b) those agencies should work collaboratively in a way that respects each other's functions and expertise,*

[2] *Strengthening Families Protecting Children Framework for Practice: Foundational Elements*, p. 5, February 2015 available at https://www.communities.qld.gov.au/resources/childsafety/practice-manual/framework-pr-elements.pdf.

(c) each such agency should be able to communicate with each other agency so as to facilitate the provision of services to children and young persons and their families,

(d) because the safety, welfare and well-being of children and young persons are paramount:

(i) the need to provide services relating to the care and protection of children and young persons, and

(ii) the needs and interests of children and young persons, and of their families, in receiving those services,

take precedence over the protection of confidentiality or of an individual's privacy.

Section 245E states that 'prescribed bodies are, in order to effectively meet their responsibilities in relation to the safety, welfare or well-being of children and young persons, required to take reasonable steps to co-ordinate decision-making and the delivery of services regarding children and young persons'. Sections 245C, 245CA and 245D govern the exchange of information between prescribed bodies and from other persons to prescribed bodies, while s.245F restricts the use of information provided under Chapter 16A. Section 245G grants protection from liability or breach of professional conduct for a person, acting in good faith, who provides any information in accordance with Chapter 16A. The provision of information under Chapter 16A is not prevented by a provision of any other Act or law that prohibits or restricts the disclosure of information (s.245H refers).

The OPG submits that a similar statutory information sharing framework between agencies and stakeholders in Queensland would allow for a collaborative and cohesive approach to providing child protection services. The OPG acknowledges that any expansion of the confidentiality provisions to improve information sharing would require strengthening safeguards to ensure that only appropriate information is shared or disclosed.

Recommendation 9:	**The confidentiality provisions of the *Child Protection Act 1999* should be reviewed and expanded to enable and facilitate stakeholders to access and exchange relevant and timely information, including a statutory timeframe for the provision of information.**

4.0 Risk

The following are issues in the *Child Protection Act 1999* relating to risk.

4.1 Threshold to litigate

Sections 14 and 15 of the *Child Protection Act 1999* provide for risk assessment to be conducted when harm is alleged and investigated respectively. However, there is no legislative obligation on Child Safety to conduct or review a risk assessment before a child protection matter is brought before a court or tribunal. Before an application for a child protection order is filed Child Safety should conduct a review of whether the child is in need of protection and the best response to those identified protection concerns.

In the OPG's experience, child protection litigation in the Childrens Court can be predominantly focussed on whether Child Safety and the parents of the subject children can reach an agreement or the parents are prepared to "consent" to the order being sought. This accepted practice can lead to a lack of evidentiary focus on the factors that the Magistrate is required to consider under s.59 of the Child Protection Act 1999 and ultimately what are in the best interests of the individual child.

An evidence based risk assessment may require Child Safety to seek (either by information notice or subpoena) critical information from other agencies to inform its risk assessment. That decision should not be driven by whether or not the parent is going to agree or consent to the order being sought. The difficulty for Child Safety is balancing the ongoing engagement from a therapeutic/casework perspective with the parents against the need for relevant, best and expert evidence to inform risk assessments and decision making. In some instances it is also a critical issue that the information be sought contemporaneously. Risk assessments in relation to the

child/young person or the parent may further inform the referral to appropriate support services and the need for formal assessments in relation to particular issues.

Where risk assessment is conducted, it can be informed by hearsay and therefore key issues may not be identified (e.g. underlying or undiagnosed mental health issues). However, as noted above under *Information sharing*, this may be remedied by expanding the confidentiality provisions of the legislation to allow stakeholders to exchange pertinent and timely information.

Recommendation 10: **The *Child Protection Act 1999* should be amended to provide that an authorised officer must conduct a risk assessment when a child protection matter commences before a court or tribunal.**

4.2 Decisions not to take a child into care

There is no statutory obligation on DCCSDS to inform stakeholders, nor a mechanism by which stakeholders may seek a review, of decisions *not* to take a child into care under Chapter 2, Part 1 of the *Child Protection Act 1999*.

The OPG recommends that the *Child Protection Act 1999* be amended to allow for review of a decision by the Chief Executive of Child Safety not to take a child into care. To facilitate this mechanism, the OPG recommends that the amendment include a statutory obligation imposing DCCSDS to advise mandatory reporters if:

- their harm notification has been screened out as a child concern report, which does not warrant an investigation and assessment, or
- where the result of an investigation and assessment is that the child will not be brought into care.

Case study – Hailey, 17

Hailey was a seventeen year old girl who first came to the attention of the child protection system after a notification of harm was made by a mental health practitioner to Child Safety regional intake services. Hailey was assessed as having a mental health condition and detained under an Involuntary Treatment Order after she presented to a regional Queensland emergency department suffering acute delusional episodes and episodes of self-harm.

Upon admittance to the mental health unit for treatment, Hailey was assessed as being malnourished with a BMI of 17 and weighed less than 40kg with clear indications that this was as a result of long term neglect. Hailey's mental health condition had been brought about by a drug induced psychosis. She reported having been supplied drugs on a regular basis by her parents who both used drugs frequently. Hailey's mother also suffered from an intellectual disability and her father was a long term drug addict. Whilst Hailey tried to take care of herself using her unemployment benefit, her unemployment payments were taken by her father each fortnight and used to buy drugs. Neither parent took any responsibility for ensuring Hailey received regular meals. Whilst Hailey had a grandmother who had in the past often attempted to provide some much needed care and protection to Hailey, her grandmother's health had deteriorated in the last couple of years, to the point where she could no longer provide a level of care for Hailey.

In addition to the initial notification of harm made by the mental health practitioner, two further notifications of harm were made to Child Safety, one by a Community Visitor who was visiting Hailey whilst she was being detained in the mental health unit, and the other from a paediatrician who was providing ongoing treatment to Hailey whilst she was in hospital. Even though Child Safety intake services assessed these notifications as substantiated harm, it decided that Hailey did not require to be brought into care because it found she had a parent willing and able to protect her from future harm. Even though Child Safety's assessment was challenged by all notifiers, Child Safety upheld its assessment and decision for Hailey to return to her parent's care upon being released from hospital. In reaching its decision, Child Safety also noted that Hailey would be turning 18 in less than 12 months' time and that if there were continuing

concerns for her health and wellbeing, there was provision for the then Adult Guardian to seek an advance appointment under a guardianship order for Hailey when she turned 17½ years of age.

This matter highlights the inability to seek a formal review when Child Safety makes a decision not to bring a young person into care.

In the OPG's experience, it is generally when following up with DCCSDS in response to a mandatory notification that the OPG becomes aware of DCCSDS' decision not to take a child into care. The OPG considers that the review mechanism could be triggered when a mandatory reporter (e.g. the OPG, the Queensland Police Service, Queensland Health, the Department of Education and Training) is notified of DCCSDS' decision, thereby allowing the mandatory reporter to seek a review of the decision. To ensure best practice and accessibility, notification of the decision should include the reasons for the decision. An interested person, being a person with a sufficient and continuing interest in the child (for example, a family member, friend, service provider or agency) should also have standing to apply for a review of the decision. The review function could rest with the new Official Solicitor position within Child Safety or an interdepartmental panel of experts convened by the Official Solicitor who are relevant to the individual circumstances of the case. The panel should include a culturally appropriate person where the matter relates to an Aboriginal or Torres Strait Islander child.

An expanded information sharing framework between agencies (see Recommendation 9 above) would assist in facilitating an internal review mechanism.

The OPG submits that the introduction of this review mechanism is warranted because the mandatory reporting threshold has been raised to reporting of 'significant harm' caused by physical or sexual abuse only (ss.13E and 13F of the *Child Protection Act 1999* refers). The external review mechanisms of the *Child Protection Act 1999* should also be examined to determine whether decisions not to take a child into care are subject to appropriate scrutiny and safeguards.

Recommendation 11:	**The *Child Protection Act 1999* should be amended to provide a statutory internal review mechanism for decisions by the Chief Executive of Child Safety not to take a child into care.**
Recommendation 12:	**Consideration should be given to whether the external review mechanisms of the *Child Protection Act 1999* should be expanded to apply to decisions not to take a child into care.**

4.3 Discrepancy between 'harm' and 'significant harm'

There is conflict between the definitions of 'harm' and 'significant harm' which creates confusion and leads to inconsistent interpretation and application in practice.

Section 9 of the *Child Protection Act 1999* provides:

> *(1) **Harm**, to a child, is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.*
> *(2) It is immaterial how the harm is caused.*
> *(3) Harm can be caused by—*
> *(a) physical, psychological or emotional abuse or neglect; or*
> *(b) sexual abuse or exploitation.*
> *(4) Harm can be caused by—*
> *(a) a single act, omission or circumstance; or*
> *(b) a series or combination of acts, omissions or circumstances.*

By contrast, s.10 of the *Child Protection Act 1999* provides:

> *A **child in need of protection** is a child who—*
> *(a) has suffered significant harm, is suffering significant harm, or is at unacceptable risk of suffering significant harm; and*
> *(b) does not have a parent able and willing to protect the child from the harm.*

The threshold for a child in need of protection is 'significant harm'. However, 'harm' is already defined to be 'any detrimental effect of a *significant* nature' (emphasis added). 'Significant harm' is not defined, nor does the legislation provide guidance to differentiate between 'harm' and 'significant harm' for the purposes of determining when a child is in need of protection. The OPG submits that the *Child Protection Act 1999* should be amended for consistency to clarify what is meant by 'significant harm', by virtue of the fact that it infers a higher threshold than the statutory definition of 'harm'.

The OPG notes that s.23 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) includes a definition of 'at risk of significant harm':

> *(1) For the purposes of this Part and Part 3, a child or young person is **at risk of significant harm** if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence, to a significant extent, of any one or more of the following circumstances:*
> *(a) the child's or young person's basic physical or psychological needs are not being met or are at risk of not being met,*
> *(b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care,*
> *(b1) in the case of a child or young person who is required to attend school in accordance with the Education Act 1990—the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive an education in accordance with that Act,*
> *(c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,*
> *(d) the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm,*
> *(e) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,*
> *(f) the child was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.*
> ***Note.** Physical or sexual abuse may include an assault and can exist despite the fact that consent has been given.*
> *(2) Any such circumstances may relate to a single act or omission or to a series of acts or omissions.*
> ***Note.** See also sections 154(2)(a) and 156A(3) for other circumstances in which a child or young person is taken to be at risk of significant harm.*

This section may provide guidance as to a potential definition for 'significant harm'.

Recommendation 13:	**The *Child Protection Act 1999* should be amended to include a definition for 'significant harm' and review the definition of 'harm'.**

4.4 Notification of death or serious physical injury of a child in care

The *Child Protection Act 1999* currently does not provide for the Public Guardian to be notified of the death or serious harm of a child in care.

Section 246A provides the circumstances in which the chief executive must carry out a review about the department's involvement with a child who dies or suffers serious physical injury.

The OPG submits that there should be provision requiring the chief executive to notify the Public Guardian of the death or serious physical injury of a child, in circumstances where the child was in the chief executive's custody or guardianship at the time of the death or serious injury (see s.246A(2)(a)). The OPG considers that this is critical for the Public Guardian to fulfil the role of protecting the rights and interests of children and young people in the child protection system. Timely notification of the death or serious physical injury of a child in care would help the OPG to ensure that the matter be taken into account in terms of service delivery and reviews of practice.

Recommendation 14:	**The *Child Protection Act 1999* should be amended to provide that the Public Guardian must be notified of the death or serious physical injury of a child who was in the chief executive's custody or guardianship at the time of the death or serious injury.**

5.0 Orders

The *Child Protection Act 1999* currently does not allow for shared parenting, co-parenting or kinship care in circumstances where successive short term custody orders have been granted for the child or young person, and there is no prospect of reunification with the family.

The *Child Protection Act 1999* provides a range of orders which may be sought for a child's protection and wellbeing; the least intrusive protection option should be used in each case.[3] This principle is reflected in s.59(e) of the *Child Protection Act 1999* which provides that the Childrens Court may only make a child protection order if satisfied that (inter alia) the protection sought to be achieved by the order is unlikely to be achieved by an order on less intrusive terms.

The OPG notes recommendation 13.4 of the Carmody Inquiry which states that:

> *the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to:*
> - *forbid the making of one or more short-term orders that together extend beyond two years from the making of the first application unless it is in the best interests of the child to make the order (subject to any proposed legislative amendment to the best interests principle arising from rec. 14.4)*
> - *allow the Court to transfer and join proceedings relating to siblings if the court considers that having the matters dealt with together will be in the interests of justice.*

The least intrusive principle is also reflected in interstate jurisdictions. Section 10(3)(a) of the *Children, Youth and Families Act 2005* (Vic) provides that consideration must be given to 'the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child' when determining what decision to make or action to take in the best interests of the child. This principle is also found in s.9(2)(c) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) which states that:

> *In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive*

[3] see page 2 of the Explanatory Notes to the Child Protection Bill 1998.

intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.

In some circumstances, the least intrusive order may be for the child to go straight into long term care. The OPG also notes that in practice, children of various ages are treated differently by the court and tribunal with respect to orders.

The OPG recommends that the provisions of the *Child Protection Act 1999* relating to orders should be expanded to allow for shared parenting, co-parenting or kinship care in circumstances where successive short custody orders have been granted, and there is no prospect of the family's reunification. This will provide the court greater flexibility to make orders suited to the particular child's circumstances.

Recommendation 15: **The *Child Protection Act 1999* should be amended to impose a positive obligation on the court to consider orders for shared parenting, co-parenting or kinship care in circumstances where successive short custody orders have been granted and there is no prospect of family reunification.**

6.0 Reasons for decisions

Section 104 of the *Child Protection Act 1999* requires the Childrens Court to have regard to the principles stated in ss.5A to 5C of the Act to the extent relevant and to state reasons for the decision when making a decision under the Act.

The recent and future legislative reforms in relation to child protection litigation practice would benefit greatly from the Childrens Court providing findings of fact as to issues in dispute and substantial reasons for decisions dealing with the court's consideration of s.59 of the *Child Protection Act 1999* ('Making of child protection order') which outlines what the court must be satisfied of before it can make a child protection order.

This would assist in the development of a body of legal decisions to guide litigation practice in this jurisdiction.

Recommendation 16: **Section 104 of the *Child Protection Act 1999* should be expanded to require magistrates to provide findings and reasons for decisions when deciding applications for a child protection order.**

7.0 Additional issues

The following matters are not recommendations for legislative amendment; they are issues for consideration to be addressed through implementation and education.

The OPG considers that many issues with the child protection system experienced by stakeholders relate to practice which has become embedded over time, rather than the legislation itself. From discussions the OPG has been involved in, many of the issues which have been raised by stakeholders do not appear to warrant a legislative response, but rather require training and education to build a culture which subscribes to the principles set out in the Act, and transparent responses where it is considered appropriate that a child be removed from their family's care.

The current legislation reflects the United Nations Convention on the Rights of the Child and its principles are procedurally fair and just; however, officers and workers are often not provided sufficient time, training and resources to give meaningful effect to the legislation. Likewise, the Charter of Rights for a child in care contained in Schedule 1 of the *Child Protection Act 1999* is an effective statement of the child's rights, but often is given insufficient regard in practice.

The OPG submits that the child protection system would benefit from improved communication, education and training for stakeholders with a commitment to building a culture which seeks to support families in the first instance; undertakes fully informed risk assessments when determining whether a child protection order is warranted and is committed to transparency, which will complement any legislative reform undertaken as part of this review.

The OPG also notes that domestic violence is closely connected to child abuse and considers that implementation of the Domestic Family Violence Prevention Strategy, when finalised, will see reciprocal benefit and improvement to the child protection system.

7.1 Aboriginal and Torres Strait Islander children

It is widely recognised that Aboriginal and Torres Strait Islander children are over-represented in the child protection system and require additional supports appropriate to their culture and customs to overcome generational disadvantage and achieve meaningful self-determination. The *Child Protection Act 1999* contains provisions which promote and foster the recognition of Aboriginal and Torres Strait Islander people with respect to family, kin, community and culture; however, there is much room for improvement in the implementation of these provisions. This may be achieved through greater community education, agency collaboration and the establishment of culturally appropriate practices, policies and frameworks.

7.2 Child protection litigation practice

As noted above, in practice child protection litigation can be focused on a mediation model that has been brought over from the model of litigation adopted in private family law matters. In these cases, focus can often be placed on obtaining a parent's agreement to the order sought to avoid the court process. However, it should be remembered that the agreement of the parents is not a relevant factor to the making of a child protection order (s.59 of the *Child Protection Act 1999* refers). As a consequence, quality risk assessment can be compromised and relevant information from other agencies (e.g. Queensland Health) may not be obtained or shared. The OPG also notes that early settlement of matters with an aim to avoid court may not be driven always by the best interests of the child. It is possible for Child Safety and the parents to agree on the order sought yet a Separate Representative appointed, a Direct Representative instructed by a child/young person or a Child Advocate-Legal Officer supporting a child/young person to express their views and wishes may take a different position with respect to the order sought.

7.3 Legal Aid

The OPG submits that Legal Aid funding should continue to be available to parents when a matter proceeds to a hearing and it is contested by one or more parties. Parents need legal support to be able to challenge decisions and ensure that their position is appropriately represented and advocated during litigation.

The OPG supports recommendation 13.11 of the Carmody Inquiry which provides that 'the State Government review the priority funding it provides to Legal Aid Queensland with a view to ensuring that increased funding is applied for the representation of vulnerable children, parents and other parties in child protection court and tribunal proceedings'. In conjunction, the Carmody Inquiry recommended that 'Legal Aid Queensland review the use of Australian Government funding received for legal aid grants to identify where funding can be used for child protection matters' (recommendation 13.12). It is understood that there will be changes to funding availability in the future and the OPG is supportive of child protection duty lawyer services being implemented by Legal Aid Queensland.

Summary of recommendations

Recommendation 1:	**Consideration should be given to renaming the *Child Protection Act 1999* to reflect the focus on all stages of support for children, young people and families.**
Recommendation 2:	**The *Child Protection Act 1999* should be amended to more clearly articulate that the family has primary responsibility for a child's wellbeing, including the right to support to fulfil this responsibility.**
Recommendation 3:	**The *Child Protection Act 1999* should be amended to include a presumption that family support will be provided prior to tertiary intervention.**
Recommendation 4:	**The provisions of the *Child Protection Act 1999* relating to transitions to independence should be expanded to establish statutory entitlements and supports for children and young people undergoing this process.**
Recommendation 5:	**The *Child Protection Act 1999* should be amended to place stringent criteria on the revocation of an order for supervision, allowing for a graduated removal of supervision, if appropriate, in the circumstances.**
Recommendation 6:	**The *Child Protection Act 1999* should be amended to provide that 'all reasonable efforts' must be made by DCCSDS to provide support services to the child and family. In particular, 'all reasonable efforts' must be made to return a child in care to their family.**
Recommendation 7:	**The *Child Protection Act 1999* should be amended to allow a child or young person an opportunity to respond to any decision affecting them. In addition, the child or young person should be provided with reasons for the decision, particularly if their wishes are not followed.**
Recommendation 8:	**The *Child Protection Act 1999* should be amended to provide for children and young people to be informed about risks particular to their situation when facilitating their right to express their views and wishes on a matter, in a manner appropriate to the age and vulnerability of the child or young person.**
Recommendation 9:	**The confidentiality provisions of the *Child Protection Act 1999* should be reviewed and expanded to enable and facilitate stakeholders to access and exchange relevant and timely information.**
Recommendation 10:	**The *Child Protection Act 1999* should be amended to provide that an authorised officer must conduct a risk assessment when a child protection matter commences before a court or tribunal.**
Recommendation 11:	**The *Child Protection Act 1999* should be amended to provide a statutory review mechanism for decisions by the Chief Executive of Child Safety not to take a child into care.**
Recommendation 12:	**Consideration should be given to whether the external review mechanisms of the *Child Protection Act 1999* should be expanded to apply to decisions not to take a child into care.**
Recommendation 13:	**The *Child Protection Act 1999* should be amended to include a definition for 'significant harm' and review the definition of 'harm'.**
Recommendation 14:	**The *Child Protection Act 1999* should be amended to provide that the Public Guardian must be notified of the death or serious physical injury of a child who was in the chief executive's custody or guardianship at the time of the death or serious injury.**

Recommendation 15: **The *Child Protection Act 1999* should be amended to allow orders for shared parenting, co-parenting or kinship care in circumstances where successive long term custody orders have been granted and there is no prospect of family reunification.**

Recommendation 16: **Section 104 of the *Child Protection Act 1999* should be expanded to require magistrates to provide findings and reasons for decisions when deciding applications for a child protection order.**