



Review of the *Child Protection Act 1999*

Submission to the Discussion Paper – Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families

September 2019

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 the OPG is to advocate for the human rights of our clients.

The OPG provides individual advocacy for children and young people through the following two programs:

- the child community visitor program, 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 advocacy program, which offers person-centred and legal advocacy for children and young people in the child protection system.

The OPG provides an independent voice for children and young people to raise concerns and express their views and wishes. The OPG's child community visitor program independently monitors and advocates for children and young people staying at visitable locations and facilitates the identification, escalation and resolution of issues by and on behalf of children and young people. The OPG's child advocacy program elevates the voice and participation of children and young people in the child protection system in decisions that affect them. 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 visitor programs:

- The guardianship program 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 program 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 visitor program 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.

In 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.

When appointed by the Queensland Civil and Administrative Tribunal (QCAT) as guardian, the Public Guardian routinely makes complex and delicate decisions on health care, service provision and accommodation, and guides adults through legal proceedings in the criminal, child protection and family law jurisdictions. Some of the Public Guardian's adult guardianship clients are parents of children that interface with the child protection system.

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.

Position of the Public Guardian

The OPG welcomes the opportunity to provide a submission on the *Discussion Paper – Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families* (the discussion paper). The views contained in this submission are that of the OPG and do not purport to represent the views of the Queensland Government.

The issues and recommendations raised in this submission supplement those made in the Public Guardian's submissions to the reviews of the *Child Protection Act 1999* (CPA) in February 2016 ([Attachment A](#)) and later in January 2017 ([Attachment B](#)). The recommendations made in all of these submissions are critical to the positive transformation of the child protection system in Queensland and to enable better outcomes in improving care and post care for these children and young people.

The discussion paper outlines legislative options for changes to the CPA that centre around three priorities:

- Reinforcing children and young people's rights in the legislative framework,
- Strengthening children and young people's voices in the decisions that affect them, and
- Reshaping the regulation of care.

The OPG supports the government's commitment to these priorities and the development of options to achieve positive outcomes through legislation. This submission details the position of the OPG on all of the options provided for in relation to each of the three priorities. These are set out to align with the three options tables presented in the discussion paper.

We have also taken the opportunity to raise related issues which are critical to reforming the child protection system and could be achieved through legislative recognition, as supported by policy and practice.

Summary of recommendations

The Public Guardian recommends:

- A preamble in the CPA that specifically recognises the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations Convention on the Rights of the Child (UNCRC), the Declaration on the Elimination of Violence Against Women (UNDEVAW) the Declaration on the Rights of Indigenous Peoples (UNDRIP), and the United Nations Convention on the Rights of People with a Disability (UNCRPD).
- A mechanism to explicitly prohibit the ability of the child protection system to discriminate against a parent's ability to care for a child on the basis of their disability
- A broadening of the title and purpose of the CPA with a focus on providing support to families and children.
- The CPA mandates that the "best interests of the child" consideration cannot be used to justify the overriding of a child's legislative right to participate.
- The 'Charter of rights for a child in care' (the Charter) to be expressly provided for at key decision-making points in the CPA.
- A revision of the Charter that expands its application to all children who are in contact with, or subject to ongoing intervention, within the child protection system.
- Inclusion of a specific right in the CPA that a child or young person has the right to have decisions made, and that these decisions must be made within a reasonable period of time.
- A child or young person to be informed about the Charter and their rights in a format appropriate to their age, maturity and ability to understand.
- The CPA to expressly obligate all parties with service delivery obligations under the child protection system to uphold the Charter.
- That the department be required under the CPA to report on outcomes linked to the Charter.
- The Charter includes a child's right to expect in the provision of their care enjoyment of their childhood, feeling safe and cared for, and feeling supported to develop into adulthood.
- Introduction of a right of action against the state for a breach of the Charter.
- That Government consider the introduction of a redress scheme for children or young people who have suffered significant detriment as a result of the rights in the Charter not being adhered to.
- Providing for a child or young person to be able to apply to the QCAT for a review of a Permanent Care Order.
- Letters advising the outcome of a reviewable decision to be made available to children and young people or their appointed representative in easy-speak English, and that this letter explain the decision, the process behind it and next steps, while avoiding jargon.

- The CPA mandate that a child be supported to participate in processes regarding decisions that affect them and the development of practice directions for Child Safety staff to underpin the legislation that align with existing practice frameworks such as the Strengthening Families Protecting Children Framework for Practice.
- An amendment to include the OPG as a party that is expressly able to act as a support person under s 99V(3) of the CPA.
- A provision in the CPA mandating that decision-making and information support be provided to parents with impaired decision-making skills or abilities.
- That licensing criteria be introduced requiring residential care providers to demonstrate their ability to meet the needs of high-risk children.
- That licensing application assessments include investigation as to whether a service provider can provide the most appropriate support environment for children and young people.
- Consideration be given to adopting a restrictive practices model equivalent to the statutory regime for adults with impaired decision-making capacity.
- The CPA to include a provision requiring the department to monitor and report on the use of any behavioural modifying medication in their annual report.
- The CPA to include a provision imposing penalties for residential care service providers who unnecessarily and consistently request a police presence in response to the behaviour of children and young people in their care.

Priority area one: Reinforce human rights in the legislative framework

Following the passage of the HRA in Queensland earlier this year, this is an ideal opportunity to enshrine the human rights of children and young people in the CPA; legislation designed to protect their rights and wellbeing. In particular, a reassessment of the human rights framework of the CPA, namely the Act's purpose and principles, the Charter and reviewable decisions are all elements that will contribute to greater recognition of human rights in the CPA. The discussion paper has proposed six options for changes to the CPA to support the reinforcement of human rights. The OPG's position on each of these options is provided below.

OPTION 1A: Introducing a preamble recognising the human rights context of the Act

The OPG supports this option of introducing a preamble that provides an overarching human rights framework, and specifically recognises key human rights instruments. Recognition should certainly be given to key underpinning international instruments such as the UDHR, the ICCPR, and the ICESCR which underpin the human rights recognised under the Queensland *Human Rights Act 2019* (HRA). However, given the context and relevance to families it is also recommended that several other key conventions are also expressly referenced in the Preamble. Specific reference should be made to the UNCRC, the UNDEVAW, the UNDRIP, and the UNCRPD.

Given the significant overrepresentation of children and young people from Aboriginal and Torres Strait Islander backgrounds, it is key that recognition of the survival, inter-generational trauma and the specific cultural needs and human rights of Aboriginal and Torres Strait Islander children and young people and their kin are recognised under the CPA. Further, in the experience of the OPG as guardian for many parents who have a 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 the introduction of the HRA will drive system reform in terms of human rights recognition, this will need to be accompanied by a cultural shift in the child protection system that does not discriminate against people with a disability. This cultural shift must meet the human rights obligations placed upon government to provide decision-making and parenting support to parents with a disability, particularly in order to meet the requirement of recognition and equality before the law (s 15 HRA).

OPTION 1B: Developing a broader purpose for the Act than 'the protection of children'

The CPA currently provides for a purpose that is extremely narrow and focused, namely 'to provide for the protection of children' (s4 CPA). The problem with this narrow purpose is that it constrains the achievement of the broader agenda of the proposed reforms, namely to both recognise and uphold human rights, and support families and children. Such a narrow remit drives and fosters a culture of 'protectionism' rather than 'support'. If this purpose is not changed, it is questionable as to whether any real or lasting reform in the culture and service delivery of the child protection system can be achieved.

The OPG strongly recommends broadening the purpose that moves away from protectionism, towards a more positive focus on providing support to families and children. There should be a clear legislative intent on providing support to parents and children as the most effective means to ensure the welfare of a child. Further, if the principles are to reflect the legislative intent behind these reforms, we recommend a principle be included regarding a commitment to early intervention and providing support to families.

To enforce that this is a significant change in purpose, and therefore service delivery culture, it is strongly recommended that the change of purpose is reflected in the name of the CPA to reflect a focus on family support, as well as protecting children. For example, the *Child and Family Support (and Protection) Act* could capture the new focus on providing greater support to families. This would better serve to both modernise and strengthen the existing legislative framework.

OPTION 1C: Introducing specific matters to be considered when determining what is in a child's best interests

The 13 principles for administering the CPA at section 5 do provide a level of guidance as to what is in the best interests of the child. However, currently, the CPA does not provide a list of specific matters for decision makers to consider in determining what is in the best interests of the child for the purposes of the CPA.

In performing its individual child advocacy function, particularly through expressing the views of children, the OPG has observed that best practice should ensure that determining the 'best interests of the child' needs to occur on an individualised case-by-case basis. This incorporates gathering of robust evidence, sound assessments, and decision-making that is informed by all of those impacted by the decision. However, the OPG recognises there could be benefit in providing guidance within the legislation that is with respect to matters that a decision-maker must consider when determining what is in the best interests of the child or young person. Depending upon the nature of the guidance provided, such information might guide a decision-maker in how to conduct a more objective assessment as to what is in the child's best interests, limiting the subjectivity interpretation by the decision maker in accordance with their own experiences and opinions.

Section 60CC of the *Family Law Act 1975* (Cth) is an example that could be followed regarding what should be taken into consideration when determining a child's best interests, noting that the first two factors (below) are primary considerations, with the first factor having the greatest weight. Considerations include:

- The need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect, or family violence,
- The benefit to the child of having a meaningful relationship with both parents,
- Views expressed by the child and any facts (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views,
- The extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child; to spend time, or communicate with the child,
- The extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child,
- The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either of his or her parents, any other child, or other person with whom the child has been living,
- The practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis,
- The capacity of each of the child's parents, and any other person (including any grandparent or relative of the child) to provide for the needs of the child, including emotional and intellectual needs,
- The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and either of the child's parents and any other characteristics of the child that the court thinks are relevant,
- If the child is an Aboriginal and Torres Strait Islander child: their right to enjoy his or her culture (or enjoy that culture with other people who share that culture), and the likely impact any proposed order will have on that right,
- The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents,
- Any family violence involving the child or a member of the child's family,
- If a family violence order applies (to the child or a member of the child's family), any relevant inferences that can be drawn from the order, taking into account the nature of the order, the

circumstances in which it was made, any evidence admitted in proceedings for the order, any findings by a court in proceedings for the order, and any other relevant matter,

- Whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child, and
- *any other fact or circumstance that the court thinks is relevant* (emphasis added).

A child's right to participate should be recognised as a key right under the CPA. Therefore, the OPG recommends that the legislation should mandate that the "best interests of the child" consideration cannot be used to justify the 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 the instances of professionals using "best interests of the child" to override a child or young person's right to participate, which is observed as occurring sometimes in the experience of OPG's Community Visitors and Child Advocate Legal Officers.

OPTION 1D: Embedding a rights focus throughout the legislation to ensure children and young people are aware of their rights and how to exercise them

The OPG supports this option. However, a rights focus in legislation must be accompanied by provisions that operationalise these rights in practice. Without mandated provisions driving a change in practice, legislative changes based on principles embodied only in the introduction (or currently a Schedule) of the CPA are unlikely to achieve any real change in the service delivery culture.

To contribute to this shift, the OPG recommends that the Charter (currently Schedule 1 CPA) be enshrined not only in the main body of the CPA (rather than as a Schedule) but also expressly provided for at key decision-making points. Decision makers should be required to identify the charter rights effected 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 s13 of the Queensland *Human Rights Act 2019*. 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.

OPTION 1E: Revising the Charter of Rights for children in care

The OPG strongly endorses a revision of the Charter that sets out rights that clearly reflect the UNCRC. We further support the inclusion of other human rights specific to the Queensland context such as cultural rights impacting families and children from Aboriginal and Torres Strait Islander backgrounds, or where children or family members have a disability related human right. The right to participation and information should be foundational rights for all children and young people interacting with, and in, the child protection system to enable them to access and exercise their human rights.

The following are suggestions regarding how the existing Charter could be strengthened under the CPA:

Right to express views

While a 'right to be consulted' is currently provided for in the Charter, a right for a child or young person to express and have their views heard *before* a decision that affects them is made should be enshrined in the Charter.

Right to decisions, and that decisions are made within a reasonable period of time

There is currently no provision within the Charter that recognises the child's right that decisions affecting them *must be* made. There is also no right for such decisions to be made in a timely manner. In the OPG's experience, a child or young person often has no rights where a decision is *not made*, such as no decision being made in relation to finding an appropriate placement. This means that the child has no right of review, or any course of action available to them, if the department fails to make a placement decision for them. Therefore, it is recommended that a specific right be included that a child or young person has the right to have decisions made, and that these decisions must be made within a reasonable period of time, such as 30 days.

Right to safe housing

While the Charter includes the right of a child to be provided with a safe and stable living environment, it does not have a specific right to safe housing. The OPG through its individual child advocacy function often comes across circumstances where a child or young person with complex needs and/or high risk behaviours does not have access to safe housing due to the limited available options for placement. This has resulted in children as young as 10 finding themselves homeless, with the only option available to them being a homeless shelter, living on the streets, or self-placing with an unapproved carer. An express right to safe housing in the Charter could oblige all parties involved in the child protection system to ensure that every child or young person who comes into the child protection system, including those with complex needs, has the right to access, and be placed in, safe housing.

The inclusion of the right to housing in the Charter would align with the *Universal Declaration of Human Rights* (UNDHR Article 25) and the ICESCR (Article 11), both of which provide for the right to adequate housing. This also reflects Article 3 of the UNCRC and the obligation upon state institutions, services and facilities in taking actions in the best interests of the child to ensure that there are adequate standards to ensure the safety, and health of children in their care or protection.

Focus on support

We further recommend that Queensland adopt some of the language used in the National Standards for children in care (National Standards) which has a focus on encouraging children and young people to be supported to participate in decisions affecting their lives. Specifically, Standards 7-11 of the National Standards which state explicitly that children and young people have the right to be supported in order to realise certain rights.

The National Standards are as follows:

Standard	Descriptor
Standard 1	Children and young people will be provided with stability and security during their time in care.
Standard 2	Children and young people participate in decisions that have an impact on their lives.
Standard 3	Aboriginal and Torres Strait Islander communities participate in decisions concerning the care and placement of their children and young people.
Standard 4	Each child and young person has an individualised plan that details their health, education and other needs.
Standard 5	Children and young people have their physical, developmental, psychosocial and mental health needs assessed and attended to in a timely way.
Standard 6	Children and young people in care access and participate in education and early childhood services to maximise their educational outcomes.
Standard 7	Children and young people up to at least 18 years are supported to be engaged in appropriate education, training and/or employment.
Standard 8	Children and young people in care are supported to participate in social and/or recreational activities of their choice, such as sporting, cultural or community activity.
Standard 9	Children and young people are supported to safely and appropriately maintain connection with family, be they birth parents, siblings or other family members.
Standard 10	Children and young people in care are supported to develop their identity, safely and appropriately, through contact with their families, friends, culture, spiritual sources and communities and have their life history recorded as they grow up.
Standard 11	Children and young people in care are supported to safely and appropriately identify and stay in touch, with at least one other person who cares about their future, who they can turn to for support and advice.
Standard 12	Carers are assessed and receive relevant ongoing training, development and support, in order to provide quality care.
Standard 13	Children and young people have a transition from care plan commencing at 15 years old which details support to be provided after leaving care.

Implementation of the Charter

In order for the intent behind the Charter to be realised the OPG recommends that a child or young person is informed about the Charter and their rights in a format appropriate to their age, maturity and ability to understand. The child or young person should also be informed, again in the appropriate manner, about the Public Guardian and other entities that can provide support if they consider that the Charter is not being complied with. These obligations should be placed on child safety officers and enshrined in the CPA.

We also recommend that the CPA expressly obligate all parties with service delivery obligations under the child protection system to uphold the Charter. Providing Information about the Charter to all relevant parties should be the express responsibility of the department. Failure to uphold the Charter could attract a penalty under the CPA.

Focus on outcomes

To ensure the rights under the Charter are being consistently upheld, the OPG recommends that the department be required under the CPA to report on outcomes linked to the Charter. It is therefore recommended that the Charter 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 the department. 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."

Enforcement of the Charter

In order to give weight to the Charter and the CPA, the OPG recommends introducing a right of action against the state for a breach of the Charter. This right of action would need to be accompanied by appropriate remedies and/or penalties if a government entity is found to have breached the Charter. To ensure a genuine impact of the Charter on transforming the current and ongoing improved welfare of children and young people in the child protection system will only be realised if it is accompanied by an appropriate enforcement, scheme that is supported with appropriate and effective penalties.

While not necessarily a legislative requirement, it is also recommended that the Government consider the introduction of a redress scheme for children or young people who have suffered significant detriment as a result of the Charter not being adhered to.

Case example:

John** is a 14-year-old child subject to a Child Protection Order granting long term guardianship to the Chief Executive, Child Safety until he attains 18 years of age. John identifies as being Aboriginal.

In February, John was granted bail by a Children's Court on conditions including that he resides at an address approved by the department and not leave that address unless accompanied by a representative from the department. John was placed at a 4 bed emergency accommodation model that provides overnight accommodation only and no support or supervision between 9am and 3pm daily (as it is closed). The OPG believed his location to be completely unsuitable for John's care needs and failed to provide an appropriate level of support and stability, particularly considering his bail conditions. John fled his placement and was subsequently listed as a 'missing person'.

John was remanded in custody in mid-March with his bail application dismissed due to John not being provided with an appropriate placement. Bail was again refused in late March when the department was unable to secure a placement. In early April, John was granted bail to reside with his Grandmother. Soon after, John absconded from his Grandmother's care and was listed as a missing person. It is unclear whether John's views and wishes were considered prior to placing him with his Grandmother. The OPG later received reports that, when spoken with about leaving his grandmother, said words to the effect 'they did not want me when I was little' and that 'no one cares about me'.

On 7 May John presented to Youth Justice seeking a placement and stayed overnight on 7 and 8 May. It was reported that he had no phone credit and had lost a lot of weight. On 9 May, Youth Justice services advised the OPG that John had been returned to custody. Due to a lack of capacity at the detention centre, he remained in a Watch House pending his court appearance on 10 May.

By failing to provide John with a suitable placement tailored to meet his individual care and support needs, which contributed to his criminalisation, John's rights under the CPA were not being met, namely, the right to be provided with a safe and stable living environment and the right to be placed in care that best meets the child's needs and is most culturally appropriate (Schedule 1, CPA). Without adequate support and supervision, he remained at continued risk of breaching his bail conditions and of criminalisation.

While considerable endeavours were made by the department to secure a suitable placement for John, it is evident that vulnerable children such as John need a system that can respond to their individual support needs to minimise the risk of further criminalisation.

***Names have been changed for privacy reasons*

OPTION 1F: Revising the reviewable decisions framework

One of the issues that the OPG has observed facing children and young people in the child protection system is that some decisions, or failures to make decisions may not be 'reviewable' decisions by the

Queensland Civil and Administrative Tribunal (QCAT). Often a child or young person has no right of recourse to force a decision to be made, for example where a placement decision fails to be made, or is taking several months to be made, leaving the child homeless or even ‘couch surfing’ with friends. Any revision of the reviewable decisions framework should include more robust review rights for children and young people, including the right to review the following:

- A failure to make a decision they have requested, for example, a decision not to change their placement.
- Decisions about contact with people who are important to the child or young person but who do not fall under the definition of “family”, for example, previous carers.
- A lack of action by the department regarding a particular matter.
- A decision not to pursue an application for long-term guardianship.
- A failure to provide a placement.
- A failure to place them in a family-based placement.

The OPG is also 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 s65AA of the CPA the Director of Child Protection Litigation (DCPL) can apply to the Childrens Court for an order to vary or revoke a permanent care order 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 (s65 CPA). Division 3A of the CPA 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 by the department to refuse to deal with a complaint about a PCO under s80D(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, the OPG recommends that a child or young person be able to apply to the QCAT for a review of a PCO.

Right to be informed of reviewable decisions

Under the Charter, children and young people have the right to be given information about decisions and plans concerning their future and personal history. However, these letters are generally not provided in an accessible format that can be easily understood by children and young people in keeping with their age, maturity or ability to understand. Accordingly, letters advising the outcome of a reviewable decision should be made available to children and young people or their appointed representative on request. In order to support a child or young person to understand the decision, the letters themselves should clearly lay out in easy speak English, the decision, the process behind it and next steps, and avoid jargon.

Recommendations:

- A preamble in the CPA that specifically recognises the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations Convention on the Rights of the Child (UNCRC), the Declaration on the Elimination of Violence Against Women (UNDEVAW) the Declaration on the Rights of Indigenous Peoples (UNDRIP), and the United Nations Convention on the Rights of People with a Disability (UNCRPD).

- A mechanism to explicitly prohibit the ability of the child protection system to discriminate against a parent's ability to care for a child on the basis of their disability
- A broadening of the title and purpose of the CPA with a focus on providing support to families and children.
- The CPA to mandate that the 'best interests of the child' consideration cannot be used to justify the overriding of a child's legislative right to participate.
- The Charter to be expressly provided for at key decision-making points in the CPA.
- A revision of the Charter that expands its application to all children who are in contact with, or subject to ongoing intervention, within the child protection system.
- Inclusion of a specific right in the CPA that a child or young person has the right to have decisions made, and that these decisions must be made within a reasonable period of time.
- A child or young person to be informed about the Charter and their rights in a format appropriate to their age, maturity and ability to understand.
- The CPA to expressly obligate all parties with service delivery obligations under the child protection system to uphold the Charter.
- That the department be required under the CPA to report on outcomes linked to the Charter.
- 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.
- Introduce a right of action against the state for a breach of the Charter.
- Government to consider the introduction of a re-dress scheme for children or young people who have suffered significant detriment as a result of the rights in the Charter not being adhered to.
- Providing for a child or young person to be able to apply to the QCAT for a review of a Permanent Care Order.
- Letters advising the outcome of a reviewable decision should be made available to children and young people or their appointed representative in easy speak English, the decision, the process behind it and next steps, and avoid jargon.

Priority area two: Strengthening the voices of children and young people in decision making

The discussion paper sets out three options for amendments to the CPA designed to strengthen the rights and participation of children and young people in decisions that are being made about their future. Given the OPG's critical role in ensuring an independent voice for children and young people through its child advocacy function, we have a strong interest in ensuring that the voices of children and young people are strengthened within the child protection system. The following sets out OPG's responses and recommendations in relation to the three options proposed under this section.

OPTION 2A: Ensuring the relevant principles and provisions encourage and empower children and young people to meaningfully participate in decisions that affect them

Mandating Practice to uphold CPA Principles

The OPG recognises that the CPA as it stands does make some provision for the participation of children and young people in decisions that are made about them.

However, there are significant practice issues that impact on these rights being actualised operationally. From the experience of OPG through its individual child advocacy function the following are practice issues that can hinder the right of participation:

- Sections 5D and E of the CPA clearly articulate a child's right to express their views and the right to information; however, professionals do not always recognise these rights in practice when making decisions, whether from lack of understanding or wilful ignorance.
- Section 51L(1)(a) of the CPA provides that a child must be given the opportunity to participate in a family group meeting *unless it would be inappropriate because of the child's age or ability to understand*. From the OPG's experience, this has been used as a catch-all reason for not providing a child the opportunity to participate.
- A focus on the outcome, without considering that the process is equally important. Notably a process that supports the participation of children and young people in decisions about them.
- The right to participation can be overlooked in order to avoid difficult conversations. The focus of the right to participate can also be distracted by disagreements amongst the professionals present about what is in a child's best interests.
- Professionals can lack an understanding that 'having a say' does not mean that the child 'decides'. Professionals often mis-understand the intent of the principle of views and wishes, and field it through a 'safety' lens, rather than considering the well-being and need for the child to have their 'voice' heard in the process.
- Adults (parents, kin, professionals and child safety officers) involved in discussions about a child's welfare may be comfortable when the views expressed by the child or young person align with their thoughts but can be less supportive when they conflict with their views.
- In some instances, the supporting adult (foster or kinship carer or child safety officer) may not agree with the child's choice to participate so will not transport them to the court or relevant meeting. This stops a child from either accessing or exercising their fundamental rights under the CPA.

The CPA needs legislative provisions that mandate a child be supported to participate in these processes, not only in principle, but also at key points where a child's views and wishes are ascertained, and they should have the opportunity to participate recognised. The legislative provisions should ensure that where a decision is likely to have a significant impact on a child's life, that they are supported through access to, and provision of adequate information to participate, as well as assistance to do so. Further, a definition of what is a 'significant' impact on the child's life should take into consideration what the child considers to be 'significant' to them.

To support these operational issues, we also recommend the development of practice directions to underpin the legislation that align with existing practice frameworks such as the *Strengthening Families Protecting Children Framework for Practice*.

Case example:

Mary** is a 9-year-old girl who has lived with the same foster carers since she was 12 months old. Mary is from a large family (group of five siblings) who has experienced significant early trauma.

In 2017, the department made an application for a Long-Term Guardianship Order. Whilst enquiring if the department had sought the child's views and wishes regarding the order, concerns were raised by the CV in relation to the child's current involvement in their case planning, given the child's increased age and development. Concerns were also raised regarding the continued lack of sibling contact. The child raised with the CV that she would like to have more contact with her siblings.

The carer has continued to express that she does not feel that visits from a CV are required. The carer has also requested that family contact is not be discussed as she feels it is upsetting for the young person. However, records indicate that this is a topic which the child raises during every visit with her CV.

It is apparent that throughout this child's time in care several decisions, including the decision to withhold information regarding biological family and restricting contact, have been primarily made by the carer and the child safety officer with minimal input from the child herself. It appears that in this circumstance, the wishes of the child have been minimised due to the carers desire to protect the child from the trauma associated with their biological family. However, in doing so, the right under the charter in relation to connection to biological family and community has also not been met primarily due to a lack of inclusion of the child's views.

***Names have been changed for privacy reasons*

Representation of a child's views at QCAT

Where an application is made to the QCAT to review a decision made under the *Child Protection Act*, the child has the right to express his or her views about matters relevant to the review (s 99U CPA). However, there are currently obstacles under the CPA that hinder a child's ability to access this right. Under s 99V(3) of the CPA a child can choose to have the applicant and other parties present when expressing their views to QCAT provided they are 12 or older and represented by a lawyer or other representative. It appears to OPG that the provision has been interpreted as not allowing a child to choose to give evidence or express their views in the presence of the parties unless they have direct legal representation. The provision does not provide for recognition of support by an OPG Child Advocate Legal Officer in lieu of direct legal representation.

To address this obstacle to participation, the OPG recommends an amendment be made to include the OPG as a party that is expressly able to act as a support person under s 99V(3). This amendment would eliminate the need to rely on a legal representative (and Legal Aid's resources) simply to enable a child or young person to exercise their right to participate and express their views.

The suggested amendment to s 99V(3) CPA could read as follows:

Despite subsection (2), the child may elect to give evidence or express the child's views in the presence of the parties and their representatives if the child—

(a) is 12 years or more; and

*(b) is represented by a lawyer or a separate representative **or supported by the Public Guardian.***

OPTION 2B: Including information about how children and young people can express their views

The OPG strongly supports the CPA including provisions that would enable a child or young person to personally express their views to the decision-maker, if they chose to, or through other mechanisms such as through experts, or written reports. It is important that in including provision for children and young people to express their views that appropriate support also be provided for to enable them to do so in a form they feel most comfortable. However, it is important that any legislated right to participate be accompanied by practice directions or similar to guide professionals in appropriate and effective implementation of this practice.

OPTION 2C: Including additional requirements to strengthen procedural fairness in the decision-making provisions

The OPG strongly supports the provision of children and young people with information about how their views will be recorded and used. The need for additional requirements to strengthen procedural fairness are particularly evident in the context of redactions in material provided by the Office of the Child and Family Official Solicitor/Director of Child Protection Litigation. The OPG's Child Advocates have reported instances of children expressing views to the child safety officer and being unaware that the information would be later included in an affidavit and provided to their parents. This has implications for respect given to the child's views and risks significant damage to the child and family's ongoing relationship and trust in the system and those supporting them and may even endanger their safety. If the rights of the child to participate and be supported in providing those views is to be adhered to, it is critical that they understand how the information they provide will be used *before* they have discussions with any party. The right to control what happens to this information is an essential element in securing and safeguarding a child or young person's participation.

Procedural fairness also applies to parents and their participation in discussions regarding their children. Parents involved in discussions with professionals and the department 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. This is particularly important where the parent has an intellectual, cognitive or psychosocial disability, with the responsibility being clearly placed upon the department that the parent is supported through this process to ensure that they fully understand, and are aware of their rights and how such information will be used in child protection proceedings. It remains in the best interests of the child or young person that their parents also be made aware of what will happen with the information they provide before they express their views. The Public Guardian therefore recommends that provision for this right be clearly articulated in the Act to better affect the focus of the Act of supporting families to

achieve child welfare outcomes, and that a specific provision be included mandating that decision-making and information support be provided to parents with impaired decision-making skills or abilities.

Recommendations:

- The CPA mandate that a child be supported to participate in processes regarding decisions that affect them and the development of practice directions to underpin the legislation that align with existing practice frameworks such as the Strengthening Families Protecting Children Framework for Practice.
- An amendment to include the OPG as a party that is expressly able to act as a support person under s 99V(3) of the CPA.
- A provision in the CPA mandating that decision-making and information support be provided to parents with impaired decision-making skills or abilities.
- That licensing criteria be introduced requiring residential care providers to demonstrate their ability to meet the needs of high-risk children.
- That licensing application assessments include investigation as to whether a service provider can provide the most appropriate support environment for children and young people.
- Consideration be given to adopting a restrictive practices model equivalent to the statutory regime for adults with impaired decision-making capacity.
- The CPA to include a provision requiring the department to monitor and report on the use of any behavioural modifying medication in their annual report.

Priority area three: Reshape the regulation of care

As identified in the discussion paper, the Queensland Government must have a system of regulation to ensure, carers and care services adequately look after children and young people and that the services meet certain standards. The discussion paper lists five options for changes to the CPA to enable the Queensland Government to fulfil its responsibilities to children and young people through a reshaping of the regulation of care. The current measures under the CPA include the Statement of Standards expected of the care provided to children and young people in care, licensing requirements and regulation for approving foster and kinship carers.

OPTION 3A: Clarifying the regulation of approved carers to ensure a robust, safe and transparent framework

The OPG strongly supports regulatory efforts to ensure that the child safety system is robust, safe and transparent, particularly with respect to the approval of carers.

A code of conduct would be a welcome reform as part of this framework. However, the introduction of such a code would need to be accompanied by an enforcement and sanction regime for any breaches. This may be more easily achieved by supporting the introduction of professionalised foster

carers. However, the successful implementation of such a code will inevitably depend upon quality assurance and monitoring by the department and agencies such as Foster Care Queensland. Introduction of a Code of Conduct would require the department to co-ordinate the implementation of the code, ensuring all carers were made aware of their obligations and provided with ongoing support and training to aid their continued understanding and adherence to the code.

Much like specifying the factors to consider in determining the best interests of the child (as discussed above at option 1C), the CPA should provide matters to be considered in the decision making process for approving an application to be a foster or kinship carer. However, the list of matters should be non-exhaustive to allow for any case specific circumstances that may warrant consideration.

To support the development of robust regulation, the legislation should establish objective criteria for decision makers to be considered in the assessment of carer applications. These legislative criteria should be supported by the development of publicly available decision-making guides to ensure consistency in decision making and approval processes. These guides could also provide assurance that decision makers are not merely guided by their opinion as well as support decision-makers in maintaining objectivity in making determinations.

The OPG also supports the introduction of clearer requirements for carers to demonstrate compliance when concerns are identified, and a framework to enable the department to respond appropriately to compliance issues, and in a timely way. Carer education and the provision of ongoing support and training by the department to support these measures would be a contributing factor in the success of such mechanisms, ensuring carers understand their obligations, are supported to address issues before they become critical issues of concern, and that carers also understand the associated consequences for failure to address compliance issues when raised.

OPTION 3B: Streamlining aspects of the carer assessment processes

The discussion paper proposes that aspects of the carer assessment process could be streamlined, such as including recognition between the approved carer and adoptive parent assessment frameworks, such as not requiring a person approved to be an adoptive parent to then also demonstrate they satisfy all the criteria to be a foster or kinship carer.

While the OPG understands the desire to reduce red-tape and perceived bureaucratic administrative processes within the child safety system, the two processes do not align in principle and practice and should not be streamlined.

Streamlining processes should not be at the expense of a robust assessment regime with the best interests of the child the primary consideration. The example in the discussion paper of not requiring a person approved to be an adoptive parent to also demonstrate they satisfy all of the criteria to be a foster or kinship carer begs the question as to whether this would result in foster or kinship care by an adoptive parent becoming adoption by another name. To satisfy the criteria of a foster or kinship carer would require recognition (by the carer) of the very different role that is being undertaken, and the different intention, principles and purpose of the child safety system. While certain processes,

such as criminal history, and blue card approval processes could be streamlined, there are significant concerns if streamlining of processes were any broader.

The OPG would require significant further detail on what this would involve before offering support, including involvement in a comprehensive public consultation process regarding any proposed changes.

OPTION 3C: Streamlining aspects of the carer assessment processes

The discussion paper has proposed that the requirements for ‘regular visitors’ to foster and kinship carers’ homes are consistent. The OPG is reluctant to lend support to this option without further clarification on what constitutes a “regular visitor”. If the term is too broad, such as including the weekly grocery delivery driver, this may deter potential carers from participation in the child protection system. There is also a significant concern that young adults who have previously been in the child protection system and obtained a criminal history record as a child, may not be able to re-visit their foster or kinship carers if the young adult is unable to obtain a blue card. This would further isolate a young person post-care from key relationships that they may have developed during their time in care, or as part of their kin-ship community.

The OPG would require significant further consultation and detail on this matter before offering support. It would also involve consideration of clear exceptions to enable on-going relationships and support to children who have transitioned from the child protection system.

OPTION 3D: Ensuring the system for approving and monitoring care service providers is robust, providing safe outcomes for children and young people

The OPG fully supports ensuring the system for approving and monitoring care service providers is robust and provides safe outcomes for children and young people.

Similarly to the proposed regulation of approved carers, the OPG recommends that there is legislative clarity on the criteria upon which licensing decisions are made. This should include a non-exhaustive list for consideration when assessing a licensing application, guidance for decision makers and clear requirements for demonstrating compliance are all supported. This should be accompanied by enforcement mechanisms that have ‘teeth’. To implement such changes, it is critical that the introduction of such a system is accompanied by information and training to support understanding and compliance.

There are a number of ongoing issues relating to service provider licensing that remain of concern to the OPG which are outlined below.

Placement for children and young people with complex behaviours

The OPG’s Community Visitors have identified that children can be refused placements by residential care service providers if they exhibit complex behaviours. The OPG has observed cases in which service providers will end a child’s placement or refuse them a placement at all, leaving the child homeless if the department is unable to identify an alternative placement. This can be significantly challenging for the department to resolve particularly when the child is informed of the refusal and required to move out on the same day. Community Visitors have received reports of young children

as young as 10 being sent to a hotel to stay with a support worker or being referred to a homeless shelter armed only with a go-card. Both circumstances pose obvious significant risks to the safety and wellbeing of the child.

In some instances, the department has advised OPG that the Placement Services Unit has made over 90 requests to agencies to seek a placement for a particular young person and all were unsuccessful for reasons including: lack of staffing availability, lack of safe co-tenancy options, and no properties available. This is demonstrating a systemic and legislative failure to fulfil the rights of children and young people, often with complex and challenging behaviours as a direct result of the trauma they have experienced, to a safe and stable living environment and their right to permanency and safe care and connection. In the OPG's experience, there have also been instances of children and young people with complex needs being blacklisted by service providers based merely on reputation or rumour.

The department is often resorting to using homeless shelters as a 'placement' option. While this is clearly inadequate and inappropriate, and does not meet the Charter obligation of providing a child with a safe and stable living environment, it also significantly infringes other rights under the Charter, such as the right to be placed in care that meets a child's needs, or to have access to education, or privacy. Children of school age who are sent to a homeless shelter have been required to return to the shelter by 3pm in order to secure a bed. With most school days ending at 3pm, these children are having to make the choice between an education and the safety of a roof over their head. Both of which are fundamental human rights being denied to vulnerable children in the most need of protection.

To address this issue, the OPG recommends that licensing criteria be introduced requiring residential care providers to demonstrate their ability to meet the needs of high-risk children such as those described above, including providing sufficient staffing levels. This would avoid providers being able to refuse or remove children and young people in this category. A service provider who does refuse/remove these children should face a cancellation of their licence and a potential penalty for breaching a licensing condition.

An alternative is the department identifying nominated residential care providers to be the placement of last resort. These licensed providers must have capacity to take in a child when refusal would lead to homelessness.

We acknowledge that tightening licensing criteria in this way could lead to some service providers withdrawing their services from the market due to the increase in compliance costs. However, if the purpose of the CPA is to secure the welfare and safety of children and young people there must be enforceable measures put in place to protect those most vulnerable in the child protection system from falling through the gaps in the system

Quality of care

An issue identified by the OPG's community visitors is the need for services to be required to provide more than just food and shelter for a child or young person in their care. It is important that these children and young people are provided with the necessary quality supports to feel settled and comfortable at their placement. The OPG's CVs have identified the need for children and young people to have structured days planned and executed by the service provider as well as house rules

consistent to that of a family such as communication, appropriate conflict resolution and attendance at school. The OPG therefore recommends that licensing application assessments include investigation as to whether a service provider can provide the most appropriate support environment for children and young people in the child protection system.

OPTION 3E: Adopting an accreditation model for regulating care

The discussion paper proposes that the child protection system could move away from a licensing system and transition towards an accreditation model for regulating care. While there are benefits in accreditation models, the concern is that transitioning the system would not address the fundamental problems that are already plaguing the system under a licensing model. Any successful model (whether accreditation or licensing) is dependent upon the ability to enforce compliance with the standards that have been established.

It is not clear how changing the regulatory model will transform the problems currently endemic within the child safety service system and its service delivery culture, or whether it will be a mere distraction from addressing the larger problems that underpin the system as outlined above. While the discussion paper refers to the New South Wales' accreditation model as a potential model for Queensland, further detail regarding any evaluations of the weaknesses, strengths and successes of the New South Wales model would need to be provided before a substantive commitment could be made in support of such a proposal.

Recommendations:

- That licensing criteria be introduced requiring residential care providers to demonstrate their ability to meet the needs of high-risk children.
- That licensing application assessments include investigation as to whether a service provider can provide the most appropriate support environment for children and young people.

Other issues

Behaviour monitoring medications

Whilst not explicitly referenced in the discussion paper, the OPG wishes to take this opportunity to re-iterate our concerns about the administering of behaviour monitoring medications to children and young people in care.

As discussed in the OPG's submission to the department on *The next chapter in child protection legislation for Queensland: Options paper* ([Attachment C](#)), concerns remain around the lack of regulation regarding the use of behaviour modifying medications being prescribed for children and young people in the child protection system. Allegations have been made that, in some instances, these medications are being sought so that trauma or distress related behaviours are easier to manage for the carer or residential service-provider, without regard to the potential implications to the growing brain – or the rights of the child. Without an appropriate regulatory scheme, there is a risk that such medication will be used in place of proper carer-training or resourcing. This is the same

problem currently raised in the disability and aged care sectors – and there are many similarities here.

The use of behavioural medications has serious side effects and implications in terms of a child's development. The OPG has acquired anecdotal information that some residential care facilities 'doctor shop' to find doctors that will provide prescriptions for behaviour medication, and in some instances allegations have been made that the medications appear to be administered to children in their care as a 'punishment rather than treatment'. The OPG has also been apprised of allegations that there have been threats to placement and to relinquish the child if the facility is not able to utilise behavioural medications.

In Queensland, the *Guardianship and Administration Act 2000* (Qld) (GAA) and the *Disability Services Act 2006* (Qld) collectively regulate the use of restrictive practices for adults with impaired decision-making capacity in Queensland disability service settings. Prior to the introduction of this statutory regime, the use of restrictive practices in the Queensland disability sector was self-regulated and was subject to misuse.

The OPG recommends that consideration should be given by the Queensland government to adopting a model equivalent to the statutory regime for adults with impaired decision-making capacity. This regime has proven strength in safeguarding an adult's rights and interests through comprehensive regulation of the assessment, approval, monitoring and review of the use of restrictive practices by disability service providers that includes the establishment of a positive behaviour support plan which is designed to reduce and eliminate the use of restrictive practices. While the OPG has received several reports regarding this issue, there is no formal data available to substantiate the anecdotal evidence we have been apprised of. Accordingly, greater transparency is needed from service providers and the department to monitor the use of behaviour modifying medication on children in care. It is therefore recommended that the CPA include a provision requiring the department to monitor and report on the use of any behavioural modifying medication in their annual report.

Recommendations:

- Consideration be given to adopting a restrictive practices model equivalent to the statutory regime for adults with impaired decision-making capacity.
- The CPA to include a provision requiring the department to monitor and report on the use of any behavioural modifying medication in their annual report.

Criminalisation of children in care

An ongoing concern for the OPG is the criminalisation of children and young people in out-of-home care, particularly those living in residential care.

The OPG is aware of several residential care providers contacting police when children and young people in the residence exhibit challenging, but not necessarily criminal, conduct. Within a normal family context, no parent would call upon the police to manage the challenging (non-criminal) behaviour of their child. Being subjected to a police response for this behaviour at such an early age

(often for only a minor matter), that is an understandable by-product of childhood trauma, only entrenches a negative attitude to law enforcement in these young people and a lack of trust in the adults who ought to be who are responsible for supporting and caring for them. Such behaviour is invariably a response arising from childhood trauma, where the child or young person feels helpless, trapped and pushed beyond their ability to cope.

With the reliance upon police to manage such behaviours, these children become stigmatised, with their behaviours labelled as criminal, and a criminal response being adopted based on conduct that would not be treated as such in a family home.

This issue was identified by the Queensland Family and Child Commission (QFCC) in 2018 which led to the development of the “Joint agency protocol to reduce preventable police call-outs to residential care services” (the protocol) developed between the Department of Child Safety, Youth and Women, Queensland Police Service and residential service providers. The multi-agency commitment under the protocol to establish consistent and responsive policies, procedures and practice to address the issue of criminalisation of children living in residential care is certainly a welcome initiative. However, despite the protocol, these preventable police call-outs continue to impact children and young people living in residential care. The review of the CPA is an ideal opportunity to provide firm deterrence to service providers who default to a police presence in response to the behaviour of children and young people in their care that would not be classed as criminal.

Reducing the high rate of preventable police call-outs to residential care services requires decisive action. The OPG therefore recommends an amendment to the CPA that will impose penalties for residential care service providers who consistently call on police in response to managing the challenging behaviour of children and young people. Government has a responsibility to drive change to improve outcomes for children.

Recommendation:

- The CPA to include a provision imposing penalties for residential care service providers who unnecessarily and consistently request a police presence in response to the behaviour of children and young people in their care.