

POLICY STATEMENT

Requests to act as a Litigation Guardian

The Public Guardian is sometimes asked to act as a litigation guardian. For adults with impaired decision-making capacity, such requests are made in a variety of circumstances, including personal injury actions or litigating child protection or family law proceedings. Similarly, the Public Guardian may be asked to act as a litigation guardian for a child or young person in matters such as anti-discrimination or human rights complaints.

Role of the Office of the Public Guardian

The statutory powers and functions of the Public Guardian are contained in the *Public Guardian Act 2014* (PGA). The Office of the Public Guardian (OPG) is an independent statutory office established to protect the rights and interests of adults with impaired decision-making capacity, and children and young people in the child protection system (foster care, kinship care and residential care) and staying at other visitable sites such as youth detention centres, some disability accommodation services and Authorised Mental Health Services.

- For children and young people, this means providing visiting and individual advocacy services - advocating for their rights, access to services and, where appropriate, their independence and choice, ensuring their views and wishes are taken into consideration when decisions are made about them. It also means supporting them to raise formal complaints with relevant agencies.
- For adults, this includes exercising supported decision-making or acting as a substitute decision maker of last resort, protecting them from neglect, exploitation and abuse by exercising wide investigative powers and providing visiting and individual advocacy services to protect their rights, access to services, independence and choice. It also means supporting them to raise formal complaints with relevant agencies.

Public Guardian's policy statement

The *Public Guardian Act 2014* does not provide any express or implied authority for the Public Guardian to undertake all actions required to perform the role of a litigation guardian. Therefore, the Public Guardian will not act as litigation guardian for adults, children or young people clients.

For adults

The *Public Guardian Act 2014* does not provide the Public Guardian with express authority to undertake all actions integral to litigation, agreeing to a settlement, executing a deed of settlement, and forfeiting other legal rights and remedies on behalf of the plaintiff. Decisions and actions relating to proceedings that may result in damages awarded as compensation are generally outside the jurisdiction of the Public Guardian as they are decisions of a financial nature ordinarily made by a financial administrator, such as the Public Trustee.

Where a guardian is appointed by the Queensland Civil and Administrative Tribunal (QCAT) for personal matters (including legal matters), a Court can be satisfied that by virtue of the guardian's statutory obligation pursuant to the *Guardianship and Administration Act 2000*, the rights and interests of the adult would be protected, particularly if the Public Guardian is appointed (see *Dawson & Beasley* [2015] FCCA 480 (3 March 2015) and subsequent appeal *Public Guardian (Queensland) & Beasley and Ors (No.2)* [2015] FamCAFC 201 (21 October 2015)).

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If the proceedings concern a legal matter relating to property or finances, a financial administrator may be best placed to protect the adult's rights and interests.

For children and young people

The *Public Guardian Act 2014* does not provide the Public Guardian with express authority to act on behalf of a child or young person to commence a proceeding, directly instruct a lawyer and make decisions on behalf of a child or young person regarding the conduct of the matter, agree and execute a deed of settlement, and forfeit other legal rights and remedies on behalf of the plaintiff.

Decision making for children and young people who do not have legal capacity is generally exercised by either their parents, or the Chief Executive of Child Safety pursuant to the provisions of the *Child Protection Act 1999*.

Liability as to costs

The Public Guardian, as a publicly funded entity, will not accept the liability for costs associated with appointment as a litigation guardian. Costs may include retaining legal representation for an adult, child or young person client, or costs awarded by the court against the client. This considers that a litigation guardian is entitled to an indemnity for costs and expenses properly incurred; however, in practice, an indemnity will not be of assistance if the adult, child or young person has no funds/insufficient funds. Further, the Public Guardian, in the role of a litigation guardian, cannot be insured for liability arising from adverse cost orders.