



Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Submission on Rights and Attitudes

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About the Office of the Public Guardian

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

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

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

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

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

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

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

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

Submission to the Royal Commission

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission on the *Issues Paper – Rights and attitudes* to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission). The views contained in this submission are that of the OPG and do not purport to represent the views of the Queensland Government.

This submission and our recommendations address the issues raised in the issues paper where they relate to the experiences of the OPG and the people that we serve.

The Public Guardian recommends:

1. The Commonwealth Government consider the introduction of a national Human Rights Act which explicitly recognises the rights of people with a disability.
2. That medical professionals receive awareness training to identify any potential discriminatory attitudes or unconscious bias that may be informing their decision making about people with impaired decision-making capacity.
3. That medical professionals and service providers be educated on the rights of people with impaired decision-making capacity to make decisions about their own body.
4. That adequate safeguards and supports be in place to ensure the rights of birth parents with disability are protected when parenting orders are being considered for their children.
5. Adequately funded legal representation of birth parents in any discussions on parenting orders, particularly those concerning adoption.
6. The Commonwealth Government legislate for and fully fund a national community visitor program.

Rights-based advocacy

As a human rights organisation, the OPG has an inherent rights-based approach to all of the work we perform for our clients, which include adults with impaired decision-making capacity and children and young people in out-of-home care, or staying at a visitable site who may have a disability. The OPG works to protect the rights and interests of adults with impaired decision-making capacity to make their own decisions, recognising that everyone should be treated equally, regardless of their state of mind or health. In fact, the legislation governing decision making by the Public Guardian is underpinned by rights adopted from the United Nations Convention on the Rights of People with a Disability (CRPD). Through our activities advocating for and supporting adults with impaired decision-making capacity, the OPG has a direct role in implementing obligations and ensuring rights as prescribed by the CRPD.

We refer the Royal Commission to the OPG's previous submissions, including the case studies contained therein, on health care for people with cognitive disability and the criminal justice system. Both highlight the OPG's commitment to the rights of our clients and the impact that advocacy can have on promoting and safeguarding the rights of people with impaired decision-making capacity. The OPG will also be providing additional information and relevant case studies that relate to rights and attitudes in our future submissions to the Royal Commission, including the issues paper on restrictive practices.

Human Rights Act 2019 (Qld)

The introduction of the *Human Rights Act 2019* (the Act) in Queensland was welcomed by the OPG as a mechanism by which to embed human rights considerations in public sector decision making. Rights-based decision making is at the cornerstone of the work performed by the OPG, and the reflection of this fundamental principle in the Act is an initiative strongly supported by the OPG. The Act also provides another very important layer of accountability for government and its partners in the non-government sector.

However, the OPG considers that human rights protections could be further strengthened by legislatively recognising the full range of rights as set out in the CRPD. While the CRPD is referenced in the Act, there is no explicit recognition of the rights of people with a disability. It is our belief that true realisation of the systemic change intended by this Act could be better achieved through specific reference to the rights of people with disabilities. The OPG understands that Queensland is exploring the possibility of a Charter of Rights for people with disability in its review of the *Disability Services Act 2006*. Should this proposal be adopted, the OPG is hopeful the Act will operate together with a Charter to ensure the highest standard of rights protection for people with disability in Queensland.

The OPG also considers the Act could be further strengthened by the inclusion of a stand-alone legal remedy for a contravention of the Act. While the intentions of the legislation in educating and raising awareness of human rights are a positive step in rights protection, we believe a stand-alone legal remedy for breaches of the Act is critical method of deterrence from actions that may constitute a significant breach of fundamental human rights.

With the introduction of the Act in Queensland, in addition to the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Victoria), and the work of the Royal Commission, it is very timely to consider a Human Rights Act being introduced at the national level. Beyond rights recognition in decision-making at the federal level, a national human rights legislative framework would raise awareness and encourage discussion on the rights of people with impaired decision-making capacity across the whole of Australia. These outcomes could be the key to changing the attitudes towards people with a disability that can lead to violence, abuse, neglect and exploitation.

Recommendation 1:

The Commonwealth Government consider the introduction of a national Human Rights Act which explicitly recognises the rights of people with a disability.

Attitudes in health services

The OPG has raised a number of matters relating to rights and attitudes in health services in our submission to the Royal Commission on health care for people with cognitive disability, which we encourage the Royal Commission to re-examine in the context of this inquiry regarding rights and attitudes. We would like to take the opportunity to raise two further issues that specifically concern the attitudes of health professionals and the impact this has on the rights of people with impaired decision-making capacity.

Medical treatment and life-sustaining measures

Discriminatory attitudes and unconscious bias in health services towards people with a disability can have a devastating impact on a person's health, wellbeing and sense of self-worth. This can be apparent

when the Public Guardian is asked to consent to withhold or withdraw life-sustaining measures for a person with impaired decision-making capacity. During the course of providing supporting information to inform the request for consent, medical professionals can create the impression that they are basing a decision not to provide further medical treatment (such as exploratory surgery), or request consent to withhold or withdraw life sustaining measures, in part on their view of the person's quality of life as a result of their impairment and co-morbidities. This attitude goes against the right of a person with impaired decision-making capacity to be offered the same health opportunities as others without an impairment. Even if this impression is not a true reflection of the attitude of medical professionals towards people with impaired decision-making capacity, it can, in some instances, be communicated in this way. This attitude, be it genuine or perceived, regarding the value or quality of a person's life who has a disability highlights the need for medical professionals to be better informed on the rights of people with a disability. It is critical that health services are aware of discriminatory attitudes that may be, unconsciously or otherwise, informing their decision making in relation to the provision of health care to people with a disability as well as the phrasing and language they use when speaking about a person with a disability and their quality of life.

Recommendation 2:

That medical professionals receive awareness training to identify any potential discriminatory attitudes or unconscious bias that may be informing their decision making for people with impaired decision-making capacity.

Reliance on medication without consent

Unconscious bias and discriminatory attitudes about the rights of persons with a disability to make decisions about their own body can lead to medication being administered without consent and not for the treatment of a specific medical condition. For example, there appears to be a commonly held attitude that people with impaired decision-making capacity are asexual and do not need to learn about sexual relationships or health. This presumption can lead to men with a disability displaying inappropriate sexual behaviour, having never received adequate sexual education or support. This behaviour can then create a perception in the community that men with a disability may be sexual deviants, for whom the only treatment option is anti-androgen medication administered without proper consent. This is a clear example of the consequences of ill-informed community attitudes about the sexuality of people with impaired decision-making capacity and the negative impact these attitudes can have on people with a disability who have the right to control what happens to their own body. It also raises the question whether administration of this medication is a restrictive practice to control behaviour, rather than treatment of a health condition. If so, it is a fundamental principle that behaviour regulation should come through positive behaviour support strategies, and restrictive practices should not be used except as a last resort and to protect against the risk of harm to the adult or others.

Adults with impaired decision-making capacity should be educated on sexual behaviour in the same way that others in the community are, to support their understanding and exploration of sexuality in ways that are socially appropriate and safe. Likewise, there should be greater education of the health profession and the wider community to understand and overcome any preconceptions or negative attitudes regarding the sexuality of adults with impaired decision-making capacity. The OPG strongly recommends that service providers and the medical profession be educated on the rights of people with impaired decision-making capacity to make decisions about their own body.

Recommendation 3:

That medical professionals and service providers be educated on the rights of people with impaired decision-making capacity-making to make decisions about their own body.

Rights of parents with impaired decision-making capacity

An issue of concern for clients of the OPG regarding rights and attitudes is the discrimination often experienced by parents with impaired decision-making capacity.

The Public Guardian may be appointed by the Queensland Civil and Administrative Tribunal (QCAT) to make decisions in a range of areas for some parents who have impaired decision-making capacity (such as for legal matters, but not relating to property or finances). In performing this function, the OPG has identified 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. In the OPG's experience, child safety decisions in relation to parents with impaired decision-making capacity may be made based on risk of harm, assuming parents are without any disability support, or that they can only parent appropriately with 24/7 support, rather than on the basis of substantiated harm or risk of harm when disability supports are in place or are not in place. This can often mean parents with disability are at a position of disadvantage, based on the existence of the disability itself, representing a potential and significant breach of their human rights.

The OPG refers the Commission to Article 22 of the CRPD which provides as follows:

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

In the OPG's experience, the child protection system does not always protect persons with disabilities against interference with their families, as required by Article 22. This issue is discussed below in relation to the provision of support services and legal services.

Support services

One mechanism to support parents with impaired decision-making capacity and their children to remain together are specialist services designed to provide parents with a disability the support they need to provide a safe and nurturing environment for their child. Unfortunately, these services are not always made available. As disability support is a different service system to that of child protection and is mostly federally funded by the National Disability Insurance Scheme (NDIS), this can make it a complex area for child protection agencies to navigate and accommodate, therefore potentially resulting in long term or permanent care orders, including adoption, becoming a more stable pathway than reunification. It is the view of the OPG that parents with impaired decision-making capacity should be allowed the opportunity to address any perceived risks, with appropriate supports and safeguards to facilitate reunification with their children before any decisions are made about placement and permanency for a child.

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

Negative attitudes and unconscious bias towards the parenting abilities of people with impaired decision-making capacity can have a devastating impact on the lives of parents and their children. It is imperative that these attitudes are challenged in the child protection system, and safeguards and appropriate supports be put in place to prevent unjustified interference with their family, as required by Article 22 of the CRPD.

Recommendation 4:

That adequate safeguards and supports be in place to ensure the rights of birth parents with disability are protected when parenting orders are being considered in the child protection system.

Legal advice and support

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

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

The OPG submits that Legal Aid funding must be available to support representation of parents with impaired decision-making capacity in any discussions about parenting orders. This is particularly important when an adoption order is being considered, given the significant impact of adoption on the legal relationship between children and birth parents.

Recommendation 5:

Adequately funded legal representation of birth parents in any discussions on parenting orders, particularly those concerning adoption.

Advocacy services

Advocacy is essential to give effect to, and realise, the human rights of persons with disability. Not only can advocacy assist in opening doors for people with disability to participate in everyday life, but it can address injustices and power imbalances, improving the quality of services provided, and change attitudes within the community and service systems. Specialist individual advocacy is particularly important for people with a cognitive impairment (especially for those who are non-verbal), who face unique challenges in being able to self-advocate.

The role of community visitors in the NDIS complaints system

The OPG's community visitors perform a critical advocacy role for people with impaired decision-making capacity as part of their function in monitoring visitable sites across Queensland. Community visitors give a voice to the otherwise silent participant, who may not even understand that they have certain rights, let alone how to wield or protect those rights. Community visitor services have proven particularly valuable within the National Disability and Insurance Scheme (NDIS) complaints system, most notably in relation to monitoring, advocating for issue resolution, and supporting persons with impaired decision-making capacity to exercise their rights.

Given the high incidence of active participants with an approved plan in the NDIS having a diagnosis of intellectual disability, autism or psychosocial disability, community visitors are vital in ensuring that these participants are able to make complaints, access and navigate complaints mechanisms, and achieve resolution of issues that matter to them. Persons with these types of disabilities face inherent challenges in relation to raising issues and complaints. This includes significant personal, physical, mental and systemic barriers these participants may have to overcome in order to develop basic skills to self-advocate. Community visitors are a vital source of support for this cohort to identify issues of concern and help them to address and resolve issues.

People with impaired decision-making capacity in all states and territories, whether or not they are an NDIS participant, should be entitled to the same dedicated advocacy of community visitors to be made aware of and access their rights. Accordingly, the OPG recommends the Commonwealth Government legislate for and fully fund a national community visitor program.

Recommendation 6:

The Commonwealth Government legislate for and fully fund a national community visitor program.