

# Department of Communities, Child Safety and Disability Services

Submission on the discussion paper for the review of  
the operation of the *Adoption Act 2009*

Public Guardian  
March 2016

## About the Office of the Public Guardian

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

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

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

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

## Children and young people

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

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

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

## Adults

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

OPG's charter with respect to adults with impaired capacity is to:

- make personal and health decisions if OPG is their guardian
- make health decisions as the statutory health attorney of last resort
- investigate allegations of abuse, neglect or exploitation
- advocate and mediate for people with impaired capacity, and
- educate the public on the guardianship and attorney systems.

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

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

## Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to comment on the review of the operation of the *Adoption Act 2009*.

The OPG has considered the *Adoption Act 2009* (Adoption Act) and has made a number of recommendations relating to the operation of the Adoption Act and its impact on the OPG's clients, summarised below. The OPG has not had direct involvement in an adoption matter. Accordingly, while the discussion paper has been taken into consideration, this submission focuses on key issues particularly pertinent to the OPG's clients rather than providing specific answers to the questions raised in the discussion paper.

The OPG would be pleased to lend any additional support as the review progresses. Should clarification be required regarding any issues raised, the OPG would be happy to make representatives available for further discussions.

## Summary of recommendations

- Recommendation 1:** Consideration should be given to whether the role of recognised entities in the adoption process should be expanded under the *Adoption Act 2009*.
- Recommendation 2:** Consideration should be given to amending the *Adoption Act 2009* to ensure consistency with the *Guardianship and Administration Act 2000* for matters of adoption and dispensation with the need for the parent's consent to the adoption.
- Recommendation 3:** Consideration should be given to amending the *Adoption Act 2009* to provide clarity around the role and functions of a guardian for the matter of dispensation.
- Recommendation 4:** Consideration should be given to amending the *Adoption Act 2009* to provide greater protection and safeguards for the rights of parents with impaired capacity for matters of adoption and dispensation.

## Review of the operation of the *Adoption Act 2009*

The OPG is a human rights agency and service provider to children and young people in the child protection system and adults with impaired capacity. The OPG has reviewed the operation of the Adoption Act in the context of the OPG's clients and has identified key issues relating to the governing legislation and its implementation.

Adoption can provide children with permanent, stable care in situations where it is not possible, or is not in the child's best interests, for the child to remain with their birth parents. However, in practice adoption does not often occur (there have been 130 overseas adoptions and 40 Queensland adoptions during the last five years).<sup>2</sup> The OPG supports the practice of adoption if it is based on robust, evidence-based decisions and upholds the rights of all parties. In particular, the OPG submits that legal representation for parents is vital to ensure their rights are appropriately protected during the adoption process. Section 233 of the Adoption Act provides that the parties to a proceeding may be represented by a lawyer. It follows that Legal Aid funding needs to be available to support representation of the parents, particularly given the significant impact of adoption on the legal relationship between children and birth parents.

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<sup>2</sup> Discussion paper: *Public Consultation for the Review of the operation of the Adoption Act 2009*, Department of Communities, Child Safety and Disability Services, 2015, accessed 8 March 2016 at <https://www.communities.qld.gov.au/resources/childsafety/about-us/legislation/review-operation-adoption-act-discussion-paper.pdf>.

The OPG also recommends that consideration be given to whether there should be an increased role for recognised entities in the adoption process, which is currently limited to consultation with the Chief Executive to determine an ‘appropriate Aboriginal or Torres Strait Islander person’ for the child.<sup>3</sup> There may be scope for recognised entities to play a greater role under the Adoption Act to ensure appropriate provision of services and information to children, young people and families in Aboriginal and Torres Strait Islander communities. If it is determined appropriate to expand the role of recognised entities in the area of adoption, it will also be important to ensure they are provided with suitable and ongoing training to ensure they are equipped to perform their expected role and functions.

**Recommendation 1:**            **Consideration should be given to whether the role of recognised entities in the adoption process should be expanded under the *Adoption Act 2009*.**

## ***Adults with impaired capacity***

There is an inconsistency between the guardianship provisions of the Adoption Act and the *Guardianship and Administration Act 2000* (GAA) with respect to parental consent to adoption. Consequently, the rights of adults with impaired capacity may not be adequately protected in adoption matters.

The Adoption Act provides that an adoption order cannot be made unless each parent consents to the adoption.<sup>4</sup> ‘Consent’ means consent freely and voluntarily given by a person with capacity to give the consent.<sup>5</sup> ‘Capacity’, to consent to an adoption, means capability to understand the nature and effect of the adoption, freely and voluntarily make decisions about the adoption, and communicate the decisions in some way.<sup>6</sup>

In circumstances where an adult parent does not have capacity to consent to the adoption, the Chief Executive must apply to the Queensland Civil and Administrative Tribunal (QCAT) for a declaration about the parent’s capacity to give consent.<sup>7</sup>

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

- QCAT has made a declaration that the parent does not have capacity to give the consent, and
- a guardian has been appointed under the GAA, or the Chief Executive has applied to QCAT for an order appointing a guardian, for the matter of the dispensation.<sup>8</sup>

The Childrens Court may make an order dispensing with the need for the relevant parent’s consent to the adoption if (inter alia) QCAT has made a declaration that the relevant parent does not have capacity to give the consent.<sup>9</sup> However, the Childrens Court must not give the dispensation unless satisfied it would be in the child’s best interests for arrangements for the child’s adoption to continue to be made.<sup>10</sup> If the child has any views about the relevant parent and is able to express the views, having regard to the child’s age and ability to understand, the court must consider the views.<sup>11</sup>

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<sup>3</sup> *Adoption Act 2009*, s.318.

<sup>4</sup> *Adoption Act 2009*, ss.16 and 175.

<sup>5</sup> *Adoption Act 2009*, s.17(1).

<sup>6</sup> *Adoption Act 2009*, Schedule 3 Dictionary.

<sup>7</sup> *Adoption Act 2009*, s.29; *Guardianship and Administration Act 2000*, s.146(1).

<sup>8</sup> *Adoption Act 2009*, ss.30 and 35.

<sup>9</sup> *Adoption Act 2009*, s.39(1)(b).

<sup>10</sup> *Adoption Act 2009*, s.39(3).

<sup>11</sup> *Adoption Act 2009*, s.39(5).

Dispensation with the need for consent is not a matter prescribed under the GAA for which a guardian may be appointed. Further, the GAA expressly prohibits the appointment of a guardian for a 'special personal matter', which includes a matter relating to consenting to adoption of a child of the adult under 18 years.<sup>12</sup>

The Adoption Act does not specify the guardian's purpose or functions with respect to the matter of dispensation; however, the Explanatory Notes to the Adoption Bill 2009 provide that the appointment of a guardian for the matter of dispensation '*will enable the guardian to act in the parent's interests in relation to a proceeding for the dispensation by, for example, engaging a lawyer to represent the parent in the proceeding.*'<sup>13</sup>

This corresponds with the provisions of the GAA which apply such that where an adult appears to lack capacity for a legal matter, a guardian may be appointed for legal matters not related to financial or property matters.<sup>14</sup> Decisions by a guardian for an adult's legal matters may include:

- obtaining a legal representative for the adult, and
- providing instructions to the legal representative as to the further conduct of the adult's legal matters on the basis of the adult's views and wishes and legal advice received.

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

The OPG is concerned that the appointment of a guardian for the matter of dispensation under the Adoption Act is inconsistent with the guardianship framework under the GAA, which expressly provides that a guardian may not be appointed for a matter relating to consenting to adoption of a child of the adult under 18 years. The OPG notes that a relevant guardianship appointment must be for the matter of dispensation, and therefore it will be important to consider the terms of any QCAT appointment to confirm the appointment relates to dispensation. The OPG considers that a broad guardianship appointment alone should not be sufficient, noting that in appointing a guardian, QCAT is required to consider the person's appropriateness for appointment, with one of the considerations including the person's competence to perform functions and exercise powers under an appointment order.<sup>15</sup>

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

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

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

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<sup>12</sup> *Guardianship and Administration Act 2000*, s.14(3) and Schedule 2, Part 2, s.3(d).

<sup>13</sup> Explanatory Notes to the Adoption Bill 2009, pg.35.

<sup>14</sup> *Guardianship and Administration Act 2009*, s.12 and Schedule 2, Part 2, s.2(i) and Part 3, s.18.

<sup>15</sup> *Guardianship and Administration Act 2009*, s.15.

*right of the child's parent to make decisions about the child's long-term care.*<sup>16</sup> Notwithstanding those comments, this recognition of the parent's right is not clearly reflected in the guardianship provisions of the Adoption Act. Consequently, there is a risk that children of parents with an intellectual or cognitive disability may be removed solely on the basis of the parent's disability.

Article 23(4) of the Convention on the Rights of Persons with Disabilities, to which Australia is a signatory, provides that '*in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.*' In its position statement, the Office of the Public Advocate of Victoria notes that a parent with a disability is up to ten times more likely than other parents to have a child removed from their care.<sup>17</sup> The Public Advocate supports the reciprocal rights of parents and children to a family relationship which should not be unduly interfered with on the sole basis of the parent's disability. The OPG endorses the position of the Public Advocate and submits that this concern is also relevant in Queensland, notwithstanding differences between the Queensland and Victorian legislative frameworks for adoption.

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

- Recommendation 2:** Consideration should be given to amending the *Adoption Act 2009* to ensure consistency with the *Guardianship and Administration Act 2000* for matters of adoption and dispensation with the need for the parent's consent to the adoption.
- Recommendation 3:** Consideration should be given to amending the *Adoption Act 2009* to provide clarity around the role and functions of a guardian for the matter of dispensation.
- Recommendation 4:** Consideration should be given to amending the *Adoption Act 2009* to provide greater protection and safeguards for the rights of parents with impaired capacity for matters of adoption and dispensation.

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<sup>16</sup> Explanatory Notes to the Adoption Bill 2009, pg.16.

<sup>17</sup> *Position statement: The removal of children from their parent with a disability*, Office of the Public Advocate (Victoria), December 2012, accessed 7 March 2016 at <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/social-inclusion/parents-with-disability/72-the-removal-of-children-from-their-parent-with-a-disability/file>.