Queensland
Family & Child
Commission

Rethinking rights and regulation – Options for Legislative change *Child Protection Act 1999*

Submission

The Queensland Family and Child Commission (QFCC) was established on 1 July 2014 under the *Family and Child Commission Act 2014* (Qld)(the Act). Under the Act, the QFCC was established to:

- promote the safety, wellbeing and best interests of children and young people
- promote and advocate the responsibility of families and communities to protect and care for children and young people
- improve the child protection system.[1]

The Act provides the QFCC with a range of functions. These functions include: 'to provide leadership and give expert advice to relevant agencies about laws, policies, practices and services'.[2]

It is under this remit the QFCC makes this submission in response to the Department of Child Safety, Youth and Women's (DCSYW) legislative review of the *Child Protection Act 1999 – Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families: Discussion Paper* July 2019.

This submission provides responses to ten questions posed within *Rethinking rights and regulation*, through consideration of and comment on each of the fourteen options presented in the discussion paper.

Queensland Family and Child Commission
PO Box 15217
Brisbane City East QLD 4002
qfcc.qld.gov.au

Submission contact
Policy and Advocacy Leadership
Email: policy@qfcc.qld.gov.au
Phone: 07 3900 6000

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[1] Refer section 4 of the *Family and Child Commission Act 2014* (Qld)
[2] Refer section 9(1)(g) of the *Family and Child Commission Act 2014* (Qld)

Part One – Reinforce human rights in the legislative framework

The United Nations *Convention on the Rights of the Child* (UNCRC) was developed to address the unique vulnerabilities of children and ensure their specific needs are addressed. The UNCRC treaty was ratified by Australia in 1990 and explicitly documents Australian governments' commitment and duty to ensure all children within Australia enjoy the rights set out in that treaty.[3]

The United Nations *Vienna Convention on the Law of Treaties* requires a treaty be binding upon each party in respect of its entire territory[4] and, as such, the Queensland Government is bound by the UNCRC.

The recent assent of the *Human Rights Act 2019* in Queensland has been instrumental in the broad promotion of individual and organisational responsibility in relation to human rights. While the *Human Rights Act 2019* creates a legislated rights framework for all Queenslanders, it does not specifically focus on the various rights of children and in particular the unique rights of children living in out-of-home care or requiring protection.

The QFCC welcomes the opportunity to further advocate for the amendment of the *Child Protection Act 1999* (the Act) and to strengthen child protection services in Queensland.

Recommendation

The QFCC recommends:

- **adoption of *Option B*** – rights will be best reflected in the Act by the amendment of the Act's purpose, noting:
    - the rights reflected should represent the comprehensive rights of children, as described by the United Nations *Convention on the Rights of the Child*
    - cultural rights must be a central element of the amended purpose
- **DCSYW revise the Charter of Rights (*Option E*)**, including the extension of these rights to all children who come in contact with the child protection system
- **DCSYW revise the framework for reviewable decisions (*Option F*)**

Options supported

Option 1B – *Developing a broader purpose for the Act than 'the protection of children'.*

Noting, the QFCC understands Option B is proposing that the purpose of the Act be amended to include formal recognition of the rights of children and a statement of specific rights that would be promoted through the exercise of the Act.

Children are rights holders and, as such, the Act in place to provide for the protection of children[5] must provide for their rights.

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[3] Australian Human Rights Commission, About Children's Rights [webpage], viewed 16 August 2019, https://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights

[4] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 29.

[5] Refer to section 4 – Purpose of the Act, of the *Child Protection Act 2019*

The purpose of any Act establishes an expectation or focus for all functions and powers included within the legislative framework.

Revising the Act's purpose to include a rights focus, in addition to the existing purpose to provide for the protection of children, will purposely promote the responsibility of all officers, entities and services to routinely apply a rights focus to the realisation of all legislative principles and directions.

This position aligns with prior recommendations of the QFCC, notably:

- its submission of 29 February 2016 to the Department of Communities, Child Safety and Disability Services in response to, *Supporting families and protecting children in Queensland: a new legislative framework – Public consultation for the review of the Child Protection Act 1999*
- its submission of 13 January 2017 to the Department of Communities, Child Safety and Disability Services in response to, *The next chapter in child protection for Queensland: options paper*.

Human rights legislation

The recognition of rights within the purpose of the Act will also support DCSYW to provide a strong response to the new human rights legislation due to come into force in January 2020.

The *Human Rights Act 2019* consolidates and establishes statutory protections for certain human rights, including:

- those drawn from the *International Covenant on Civil and Political Rights*
- rights to health services and education drawn from the *International Covenant on Economic, Social and Cultural Rights*
- and property rights drawn from the *Universal Declaration of Human Rights*.[6]

However, the *Human Rights Act 2019,* as a standalone legislative framework does not include a detailed focus on the rights of children, as is comprehensively recorded in the UNCRC. This specificity must be maintained within child-focussed legislative instruments, such as the Act and the *Youth Justice Act 1992.*

Cultural rights

As a special consideration, the QFCC underscores the importance of specific cultural rights for Aboriginal and Torres Strait Islander children.

Article 30 of the UNCRC provides that *people of indigenous origin shall not be denied the right, in community with other members of his or her group, to enjoy her or his own culture and to use her or his own language*.[7]

The QFCC is of the view that:

- reflection of child rights in the Act will best be achieved by the amendment of the Act's purpose to include the statement of rights
- any amendment of the purpose of the Act must reflect the specific rights of children as recorded in the UNCRC
- the inclusion of cultural rights be a central consideration in the broadening of the purpose of the Act, including for the purposes of future consultation.

[6] Explanatory Notes, Human Rights Bill 2018 (Qld), p. 2.
[7] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 30.

Option 1E – *Revising the Charter of Rights for children in care.*

The *Charter of Rights for a child in care* (the Charter) establishes a range of rights for children in care. This includes a focus on:

- the provision of a safe and stable living environment, for children and young people
- consultation with children and young people about decisions that affect them, and
- maintaining a relationship with family and community.

The QFCC supports the timely revision of the Charter of Rights to ensure it is both contemporary and able to meet the unique needs of children and young people requiring protection and care.

The QFCC recommends DCSYW consider extending the applicability of the Charter beyond children in care to include all young people who are in contact with the functions of the Act or the exercise of its powers. For example, children on Permanent Care Orders.

Option 1F – *Revising the reviewable decisions framework.*

Having recourse to the review of an administrative decision is comparative to the right to due process under the *United Nations Universal Declaration of Human Rights*.

The QFCC supports the revision of the reviewable decisions framework, to make sure children and young people have the opportunity to pursue a review of the broadest set of decisions possible.

While as many decisions as possible should be included in the reviewable decisions framework, it will be important to consider including as reviewable decisions:

- those regarding the involvement and appointment, or otherwise, of Aboriginal and Torres Strait Islander Independent Entities
- the refusal to deal with complaints regarding the use, or otherwise, of Aboriginal and Torres Strait Islander Independent entities or Culturally and Linguistically Diverse organisations.

In addition, the discussion paper states that Option 1F could include 'improving awareness of decisions that are reviewable'.[8] QFCC notes that this is not something that can be legislated for.

Other options ***not*** supported

Option 1A – *a preamble recognising human rights context of the Act in included in the Act*

The QFCC acknowledges the inclusion of a preamble recognising the rights context of the Act would improve its consistency with approaches in other acts, such as the *Domestic and Family Violence Act 2012*. However, the QFCC does not recognise a preamble as the most effective avenue for promoting or embedding children's rights within the Act. Further, a large number of individuals are involved in employing the Act on a day-to-day basis many of which may not have a legal background. This may result in the unintended consequence of inconsistent recognition and application of a preamble in practice.

Cultural safety issues associated with Option A

The issue of post-ratification attachment of preambles to government legislation has precedent in Australia.

Former Prime Minister John Howard proposed a preamble for the Constitution of Australia, which included the specific cultural reference: '…honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country…'.

[8] Refer *Rethinking rights and regulation*, p. 14.

The addendum of this preamble to the Constitution was one of two proposals for the 1999 Referendum. At the time, there was concern the preamble would not progress the rights of Aboriginal and Torres Strait Islander Peoples. The referendum was defeated and, despite scepticism about the effect the preamble would ultimately have, groups of Aboriginal and Torres Strait Islander people viewed this as a failed opportunity to formally recognise First Nations Australians.

In the contemporary environment, debate has moved on to questions of sovereignty and of treaty as central to the progression of cultural rights for Aboriginal and Torres Strait Islander peoples. In this context, the inclusion of a rights focus, including cultural rights, within the preamble to the Act could appear anachronistic.

The QFCC does not support Option A.

Option 1C – *specific matters to be considered when determining what is in a child's best interests are introduced into the Act; and*

Option 1D – *a rights focus is embedded throughout the legislation to ensure children and young people are aware of their rights and how to exercise them*

The Act, in its current form, includes rights-based principles through most Chapters.

While the rights elements of the existing legislative framework are relatively sound, the strengthened application and translation of these requirements into routine practice may be a more relevant action.

Should additional rights focused direction be further embedded throughout all sections of the Act, the likely result is the development of an overly prescriptive Act, where unintended conflicts of rights are likely.

For example, prescriptive legislative direction on balancing the rights of the child with the rights of the parent or family may result in ambiguity and confusion in its translation to practice. The resulting impact of this conflict is potentially poorer outcomes for children, or instances where the rights of parties other than the child are incorrectly prioritised.

The QFCC does not support Option C or D.

Part Two – Strengthen the voices of children and young people in decision making

The UNCRC represents a rights framework to address the specific vulnerabilities of children and promotes and reinforces the concept of children as agents in their own right, who actively engage in the world and construct their subjective selves.[9]

Children and young people have told the QFCC they are experts in their own lives, and they want their views to be valued and inform the considerations of decision makers.[10]

All children should be safeguarded the right to participate in decision making that affects them.

Recommendation

The QFCC recommends:

- **the adoption of *Option B* and *Option C*** – the Act will include information about how children can express their views and will be strengthened to ensure children can influence decisions that affect them
- DCSYW remain sensitive to the fact:
  - *Option B* and *Option C* require meaningful consideration of the potential for (re-)traumatisation
  - circumstances will exist where there is a tension between a child's right to express their views and the requirements for decision making processes
  - *Option B* and *Option C* will require a reduction in bureaucratic processes.

Options supported

Option 2B – *information about how children can express their views is included in the Act; and*

Option B is understood to refer to including within legislation specific provisions that detail the range of mechanism by which children can express their views to decision makers and influence decision making.

Option 2C – *additional requirements in the Act strengthen procedural fairness in decision making*

Option C is understood to mean that legislative provision will be made to strengthen procedural fairness for children, enabling them to better influence the decisions that are made about them.

Adoption of options B and C will provide a range of direct and indirect methods by which children can express their views in decision making processes. Detailing a range of options for participation in the legislative framework will support and facilitate children to express their views to decision makers, even in challenging circumstances. Taking a more structured, formal approach to requiring the voices of children and young people in decision making processes will also strengthen they ways the sector includes children who are very young or who experience difficulties communicating.

[9] Australian Institute of Family Studies 1996, *Citizen Child: Australian law and children's rights,* viewed 16 August 2019, https://aifs.gov.au/publications/citizen-child-australian-law-and-childrens-rights/1-childrens-rights-setting-scene

[10] The State of Queensland (Queensland Family and Child Commission) 2018, *This place I call home: The views of children and young people on growing up in Queensland*, viewed 23 August 2019, https://www.qfcc.qld.gov.au/ (p. 12).

Procedural fairness

The QFCC is supportive of strengthening provisions in the Act relating to procedural fairness for children and young people where child protection decisions affect them or impact on their rights.

While the Act requires that the exercise of child protection jurisdiction align with the principle of the paramountcy of the safety, wellbeing and best interests of the child, even the best child protection decisions will have consequences for children and will not be without emotional, psychological, cultural and physical effects.

Procedural fairness can be understood as the principle that a person who is affected by a decision must be provided with the opportunity to be heard and to expressed her/his views, prior to the decision being made. It is also about ensuring that the right steps are taken by the decision maker to give that person the opportunity to have their say, before arriving at a decision.[11]

Procedural fairness is particularly important, when working with children and young people, as it seeks to address the power imbalance that exists between the decision-maker and the citizen, and as it gives due respect to the dignity of individuals.

Even where not explicitly provided for, it should be presumed that the principle of procedural fairness must be respected when exercising functions and powers under legislation.[12] However, while procedural fairness is protected under common law[13], it is also important that it is reinforced in legislation.

There are a range of ways that procedural fairness could built into the Act, in addition to existing provisions. The QFCC supports the following:

- considering other areas of the Act where children could be afforded procedural fairness – for example, in the making of court assessment orders or temporary custody orders
- giving children the opportunity to provide their views on proposed courses of action, prior to a decision being made – this will ensure that children are aware of the option being considered and have the capacity to improve decisions by
- providing children with a documented explanation of a decision in child-friendly language – this is a vital part of a respectful, rights based communication and it values children's agency as autonomous beings who actively engage in the world, while building the information available to the child to consider as they grow and change to assist them understand the rationale for decisions
- supporting children's access to legal and cultural representation in a broader range of decisions under the Act – this has the capacity to ensure that children have access to the information informing decisions, improves the advice they get about potential course of action, and increases their opportunity to respond.

In making legislative change under Option B and Option C, it is important that changes are linked to, and have full consideration of, the right to make a complaint and to have the complaint formally considered, and existing processes for the receipt and resolution of complaints.

The QFCC supports both Option B and Option C. In recommending Option B and Option C, the QFCC underscores:

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[11] Ombudsman SA 2018, De-identified and Redacted Final Report Full investigation – Ombudsman Act 1972 (ref 2018/08918) [Untitled Ombudsman Report], viewed 23 August 2019, https://www.ombudsman.sa.gov.au/

[12] Ombudsman SA 2018, De-identified and Redacted Final Report Full investigation – Ombudsman Act 1972 (ref 2018/08918) [Untitled Ombudsman Report], viewed 23 August 2019, https://www.ombudsman.sa.gov.au/

[13] Australia Law Reform Commission 2016, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)*, viewed 23 August 2019, https://www.alrc.gov.au/publications/freedoms-alrc129 ch 14.

- both Option B and Option C have the potential to (re-)traumatise children (for example, where a child presents views in the presence of a perpetrator or where a child is given full explanation of decision that does not accord with her/his perspectives of the circumstances) – any new legislative provision will require consultation and careful drafting to ensure that they are sensitive to this issue
- circumstances will exist where there is a tension between a child's right to express their views and the requirements for decision making processes (for example, in cases where a child safety requires a rapid response) – this tension will likely be real in some circumstances
- both options require a reduction of bureaucratic process to make sure it is possible to appropriately and meaningfully consult with children, while meeting exacting process timeframes – particularly, those associated with court processes.

Other options ***not*** supported

Option 2A – *relevant principles and provisions encourage and empower children to participate in decisions*

The QFCC understands Option A to propose including legislative provisions that provide principles for child centred practice and guidance for how to consider children's views, as well as listings of information that children must be provided with at different points in the child protection process.

This option has the potential to create a 'legislative checklist' rather than promoting across the board participation of children and young people in decision making processes. In addition, the QFCC believes this approach is unlikely to produce significant change.

In the child protection context, a range of practice resources already exist to inform children and young people about child protection processes. In the broader context, a range of resources exist targeting improvement in the involvement of children and young people in government and business decision making.[14] It is untested, however, how effective these resources are in translating into real engagement of children in decision making.

Resistance to engaging children can due to a range of barriers, including adult attitudes and inflexibility, lack of training for adults, lack of clarity regarding the aims and objectives of involving children, and the nature of organisations, particularly their formality, complexity and bureaucratisation. Taken together, these can lead to a tokenistic approach to consultation.[15] A more appropriate approach to improving the participation of children in decision making processes, which doesn't limit flexibility, is through formal and well-supported practice, such as professional supervision processes.

Additionally, legislating Option A may result in the unintended consequence of placing participation responsibility on the child.

The QFCC does not support Option A.

[14] Refer, for example, to the Office of the Advocate for Children and Young People's resource – Engaging children and young people in your organisation

[15] Cavet J and Sloper P 2004, *The participation of children and young people in decisions about UK service development*, Child: Care, Health and Development, 30(6), pp. 613–621.

Part Three – Reshape the Regulation of Care

The QFCC has made a range of recommendations relating to the regulation of care within a number of recently released publications. These recommendations are currently being progressed by the relevant agencies to strengthen the out of home care system in Queensland, including with regard to the regulation of care.

Recommendation

The QFCC recommends:

- **specific elements of *Option A* and *Option D* be implemented:**
  - child safe criteria be used as a basis for the regulation of carers and the Royal Commission's Child Safe Standards be used to approve and monitor care service providers
  - these be included in regulation, but not in legislation.
- **DCSYW consider *Option C*** noting effort in this space will require engagement of Aboriginal and Torres Strait Islander peoples to ensure solutions are culturally relevant and appropriate.

Options supported

Option 3A – *the regulation of approved carers be refined to ensure a robust, safe and transparent framework*

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) recommended governments require all institutions engaged in child-related work to meet its ten Child Safe Standards.[16] The Australian National Children's Commissioner, Megan Mitchell, has led the development of the National Principles for Child Safe Organisations, which reflect the Royal Commission's Child Safe Standards. The Australia and New Zealand Children's Commissioners and Guardian Groups and key sector stakeholders were consulted by the National Children's Commissioner and were instrumental in shaping the National Principals. The Council of Australian Governments (COAG) endorsed the National Principles in February 2019.[17]

While the Child Safe Standards and National Principles have been predominantly designed for organisations and institutions, rather than individuals, it may be possible to derive child safe criteria or a robust framework for application by individual carers – for example, kin and foster carers.

The QFCC is supportive of the formalisation of the child safe criteria and of these being used as a basis for the regulation of approved carers. However, it should be noted that the inclusion of the criteria in legislation may prove unresponsive to future policy developments in this space; but that their inclusion in regulation would provide a balance of formality and flexibility.

QFCC notes a key consideration within the child safe space must be the cultural connection for children who are away from their kin. This should be a primary consideration in any processes to improve regulation of approved carers.

[16] Royal Commission into Institutional Responses to Child Sexual Abuse 2014, *Final Report – Volume 6, Making institutions child safe*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney (recs 6.4 and 6.5).
[17] Australian Human Rights Commission, Child Safe Organisations [webpage], viewed 23 August 2019, https://www.humanrights.gov.au/our-work/childrens-rights/projects/child-safe-organisations

The QFCC also notes, and has previously commented on, the barriers faced by First Nations Australians in becoming approved carers.[18] DCSYW must ensure that any changes contemplated for the Act do not increase existing difficulties for Aboriginal and Torres Strait Islander people seeking to become carers.

The QFCC is not supportive of the other elements of Option 3A (dot-points two through five):

- dot-point two suggests introducing a code of conduct for carers – QFCC is concerned that this will create an unnecessary layer of bureaucracy and may not contribute to any improvement in care, given that there are already clear expectations communicated to carers
- dot-point three suggests specifying information and sources of information that will be considered in carer approvals – QFCC questions how including this in legislation will improve on the assessments, given that policy on these assessments already exists
- dot-point four suggests providing guidance to decision makers on how to assess carer applications – QFCC questions whether including this sort of guidance in legislation will be effective at changing practice, or will embed a 'tick and flick' approach to assessment
- dot-point five suggest clearer requirements for carer to demonstrate compliance where concerns are identified – again, QFCC is concerned that inclusion of this material in legislation is an outcome that can be more flexibly and effectively achieved in policy.

Option 3D – *the system for approving and monitoring care service providers is robust*

As with Option A, QFCC supports the Child Safe Standards being used to approve and monitor care service providers, and that the Standards may be better suited to regulation rather than legislation.

Option 3C – *requirements for regular visitors are clarified –*

The QFCC understands Option C to refer to:

- developing a consistent definition of 'regular visitor' for foster and kinship care and for other home-based care forms, such as family day care and standalone care services
- mandating that 'regular visitors' to foster and kinship care households, and the other home-based care households, be required to hold a Blue Card.

In the report – *Recommendation 28 Supplementary Review: A report on information sharing to enhance the safety of children in regulated home-based services – When a child is missing*, QFCC made recommendations regarding developing a consistent definition of 'regular visitor' (recommendation 28.4) and mandating that regular visitors to all regulated home-based services hold a blue card (recommendation 28.7).[19]

The QFCC views these recommendations as a necessary step along the path to improving the safety of children in care.

As is noted in the QFCC's *Review of the blue card system*, a range of barriers exist for First Nations Australians seeking to become approved carers.[20] Effort in this space will require engagement of Aboriginal and Torres Strait Islander peoples to ensure that definitions and blue card requirements are culturally relevant and appropriate.

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[18] The State of Queensland (Queensland Family and Child Commission) 2017, *Keeping Queensland's children more than safe: Review of the blue card system*, viewed 23 August 2019, https://www.qfcc.qld.gov.au (pp126-130).
[19] The State of Queensland (Queensland Family and Child Commission) 2016, *Recommendation 28 Supplementary Review: A report on information sharing to enhance the safety of children in regulated home-based services – When a child is missing*, viewed 16 August 2019, https://www.qfcc.qld.gov.au/
[20] The State of Queensland (Queensland Family and Child Commission) 2017, *Keeping Queensland's children more than safe: Review of the blue card system*, viewed 23 August 2019, https://www.qfcc.qld.gov.au (pp126-130).

Other options *not* supported

Option 3B – *aspects of the carer assessment process are streamlined*

The QFCC understands Option B to mean further developing assessment processes for approved carers and prospective adoptive parents so that adoptive parents automatically satisfy approved carer requirements and vice-versa.

While Option B may streamline approval processes and contribute to an increase in the number of foster carers, a range of issues exist that are likely to preclude the practical achievement of this:

- The group of people seeking to adopt children may be relatively exclusive from the group of people seeking to be foster or kinship carers. This is particularly likely with respect to people seeking to adopt children from overseas.
- Adoption assessment will need to include different items to the foster care assessment, and there is a higher level of screening and assessment of people seeking to adopt. This is based on the reality that adoption and fostering are fundamentally different.
- There are a set of children's safety issues associated with foster care, which are unlikely to be present in the adoptive realm. These safety issues may be associated with ongoing parental contact and histories of violence within a foster child's biological family.
- It is questioned whether alignment could be achieved in practice, adoption processes and foster care are regulated under entirely separate pieces of legislation.

Each of these items appear likely to limit the benefit gained from a framework recognising the joint status of approved carers and adoptive parents.

QFCC does not support Option B.

Option 3E – *an accreditation model for regulating care is adopted*

Should Queensland seek to move to an accreditation model, it will need to be a single model that deals with both the accreditation of licensed care services and carers.

Any move towards accreditation will likely require a significant and prolonged financial commitment from the Queensland Government, and lengthy discussions and decisions regarding the bearer of the cost of compliance. Should the cost of accreditation fall on individual care providers, this is likely to create another barrier for community members seeking to become foster or kinship carers.

Should DCSYW consider transitioning to an accreditation model, this would require in-depth consultation with stakeholders from across the sector, to ensure additional barriers for care approvals are not created. The decision to support or not support an accreditation model would require a greater level of detail and information be provided and resolved by DCSYW in addition to the content provided in this discussion paper.

The QFCC does not support the implementation of an accreditation model.