

28 February 2022

Queensland Human Rights Commission
Review of Queensland's Anti-Discrimination Act
City East Post Shop
PO Box 15565
City East QLD 4002

Via email: adareview@qhrc.qld.gov.au

Dear Commissioner,

Thank you for the opportunity to provide a submission to the discussion paper, *Review of Queensland's Anti-Discrimination Act 1991*.

The Public Guardian, through the Office of the Public Guardian (OPG), supports a range of vulnerable children and adults who can experience many forms of discrimination. For example, our adult clients with impaired decision-making capacity have experienced the impact of discriminatory attitudes and unconscious bias in health services that can result in sub-optimal health treatment and/or negative health outcomes. The impact of discrimination is also experienced by parents with impaired decision-making capacity who may be denied specialist services to support them in retaining custody of their children based on an inaccurate assumption they are unable to meet the care needs of a child. Children who are in the child protection system may experience discrimination in schooling or housing, based on their trauma history and care arrangements. This is not an exhaustive list, and there are many other examples.

Despite experiencing discrimination, action under the *Anti-Discrimination Act 1991* (ADA) is not often advocated to OPG's clients or pursued as a mechanism of resolution on behalf of our clients. Should an action occur that could be linked to an act of discrimination based on particular attributes, to achieve a satisfactory resolution, OPG is more likely to advocate for resolution of the issue directly with the person or body involved on the client's behalf, in accordance with the client's views and wishes. The fact that discrimination claims under the ADA are generally not pursued by clients may be indicative of systemic issues around accessibility, availability of support, the operation of the conciliation process, and awareness of ADA's complaint mechanisms.

To further illustrate this, I draw your attention to an issue relating to accessibility of the ADA for children and young people. This is an ongoing area of concern that OPG has identified as part of our role in providing individual advocacy services to children and young people in the child protection system.

The processes and procedures for bringing a complaint to the QHRC presents significant obstacles for children under child protection orders. A child who, by virtue of their age, lacks legal capacity to participate in QHRC proceedings and who does not have protective parents to pursue proceedings for them is unlikely to have means to pursue and resolve a complaint of discrimination. This is particularly the case when the claim is against a government body or other external agency that is well resourced to legally respond to the complaint, conciliation process and potential Tribunal hearing. Beyond the practicalities of pursuing such a claim, children and young people in the child

protection system find it difficult to stay engaged with the formalities of the complaint processes and have a general distrust of government agencies, often associated with their child protection history.

Accessing the QHRC complaints process presents significant challenges, for example, the conciliation hearing is legalistic in nature and can involve formal Deeds of Settlement. This is particularly evident where a child in the care of the State wishes to make a discrimination complaint against their legal guardian, the Chief Executive of Child Safety. For a person aged under 18 years to bring a claim under the ADA, they must be represented by a legal guardian. For children in the child protection system, their guardian is the Chief Executive of Child Safety. When the complaint under the ADA concerns decisions made by Child Safety, if the Chief Executive of Child Safety were to act as litigation guardian or agent for a child in the QHRC complaints process this would present a clear conflict of interest. A litigation guardian is appointed in circumstances where a court determines that a person does not understand the nature and possible consequences of a legal proceeding or is not capable of giving adequate instruction to a lawyer for the conduct of a proceeding¹. This may be because the person is aged under 18 or where the person has impaired decision-making capacity. The person appointed to the role of litigation guardian protects the processes of the Court and ensures that the interests of the person under 18 are not disadvantaged in a litigation proceeding. A litigation guardian plays an important role when action is taken under the ADA as the matter may lead to a Deed of Settlement with a monetary payout, which would need to be signed by the litigation guardian on behalf of the child. It would be inappropriate for the Chief Executive of Child Safety to sign such a deed when the discrimination claim is being made in relation to actions taken by their office.

OPG may make a complaint or refer a complaint about services provided by a service provider on behalf of a relevant child² to the Human Rights Commissioner under the ADA³. OPG can also support a child to access a direct representative lawyer. However, OPG cannot be appointed by a court or tribunal to act as a guardian or decision-maker for a child and as such cannot make decisions or provide instructions to a lawyer on a child's behalf. Even though there may be the ability for the QHRC to approve OPG as an agent under the ADA, this would still be outside the remit of the Public Guardian's statutory powers and functions under the *Public Guardian Act 2014*. It would not be appropriate for OPG, as an oversight agency, to commence making decisions for children in care.

There is provision for the Public Trustee to be appointed as litigation guardian for a child or young person. However, this service is not free of charge and would require upfront payment of fees which could present significant challenges for a child in care. The Public Trustee may also be unable to lead the anti-discrimination matter before the QHRC. Where this occurred, a child would need access to free legal assistance to progress the matter, which can be a challenge to obtain. In the absence of a suitable agent to make decisions on their behalf, children are left with few avenues of recourse should they experience discrimination that could amount to a breach of the ADA.

To address these obstacles, and for the ADA to have practical value to OPG's adult guardianship clients, and children and young people under child protection orders, OPG recommends there be:

- readily accessible mechanisms for vulnerable persons to obtain funded specialist representation to pursue a complaint under the ADA to the QHRC on their behalf, and
- the complaint (and conciliation) processes are modernised or adapted for children in care to enable complainants or their representation (as outlined in the dot point above) to

¹ Federal Circuit Court of Australia, *Federal Circuit Court Rules 2001*, rule 11.08 "Person who needs a litigation guardian".

² *Public Guardian Act 2000*, s 52 "When is a child a relevant child".

³ *Ibid* s 144(5)(a).

participate in the processes without the need for legal representation and litigation guardians.

OPG welcomes the QHRC's review of Queensland's *Anti-Discrimination Act 1991* and is optimistic that measures will be taken to improve accessibility to the ADA. Should you require further information regarding this feedback, please contact [REDACTED]

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Shayna Smith'.

Shayna Smith
Public Guardian