



Criminal Procedure Review Magistrates Courts

**Office of the Public Guardian submission
September 2022**

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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 adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes structured (supported and substitute) 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 investigation 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 specific classes of 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, 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 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.

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

- child advocacy, which offers person-centred 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, and
- child community visiting, 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 care facilities, youth detention centres, authorised mental health services, and some disability funded facilities).

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

Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the Criminal Procedure Review – Magistrates Courts. The views of the Public Guardian contained in this submission do not represent the views of the Queensland Government.

This submission raises issues relating to criminal procedures in Magistrates Courts and the *Justices Act 1886* (Justices Act) as identified by OPG while providing services to adults with impaired decision-making capacity. A summary of the Public Guardian's recommendations appears below.

The Public Guardian recommends:

1. Police Prosecutions be put to proof to establish whether they have the evidence to prove charge/s against an adult with impaired decision-making capacity before the adult is expected to establish a mental health defence.
2. Parameters be introduced into Magistrates Courts procedures around the ability of Police Prosecutions to oppose an application under section 172 of the *Mental Health Act 2016* in circumstances where charges are pending that are irrelevant to summary charges.
3. Explore whether a more supportive process can be designed for personally serving adults with impaired decision-making capacity with a summons, with a copy of the document also provided to the adult's guardian if applicable.
4. Consider alternatives to issuing a warrant for a failure to appear for an adult with an intellectual or cognitive impairment whose circumstances prevent their physical attendance in court.
5. A matter should not be able to be dealt with ex parte until the respondent has received advice to determine whether they have a defence available.
6. The *Justices Act 1886* be amended to provide clarity around the procedures detailed in sections 552A, 552B and 651 of the *Criminal Code Act 1899*.
7. Targeted support be provided to people with disabilities who are victims of crime at all stages of the legal process to ensure they can pursue legal action against perpetrators and obtain justice from the courts.
8. A review of legal processes and legal training be undertaken to better identify people with undiagnosed cognitive or intellectual disabilities to ensure they are appropriately supported.

OPG's role in the adult criminal justice system

OPG promotes and protects the rights and interests of individual adults with impaired decision-making capacity in contact with the criminal justice system when appointed by the Queensland Civil and Administrative Tribunal (QCAT) as the adult's guardian to make decisions for legal matters (not relating to property or financial matters).

Many adults with impaired decision-making capacity may have a limited understanding of the complex justice system and what is required of them should they encounter it. They may have little or no understanding of their legal rights and may lack the ability to identify and engage with services that could support them. OPG's advocacy for adult guardianship clients in legal processes is a critical safeguard to ensure vulnerable people's rights are upheld and they are not limited or denied access to their legal rights because of their disability or impairment.

Guardianship clients can be involved in various areas of law that impact on their rights such as:

- being vulnerable to charges of criminal offences and being the victim of criminal offences
- as parents in child protection proceedings
- as aggrieved and/or respondents to applications for domestic violence protection orders.

Where QCAT appoints the Public Guardian for legal matters affecting an adult, OPG will work with the adult to make decisions to progress their legal matters (other than those relating to financial issues). OPG's guardians for legal matters do not provide direct legal representation. They ensure the adult has access to legal advice and representation, so their impairment does not negatively impact their access to justice. Guardians "stand in the shoes" of the adult to provide instructions to legal representatives, if the person is unable to provide instructions themselves.

Access to bail

A procedural issue encountered by OPG clients with impaired decision-making capacity when engaging with Magistrates Courts relates to impediments to bail. Of specific concern are clients who are on remand in custody with legal proceedings on-foot (as opposed to having been sentenced to a term of actual imprisonment). These clients, who have not been sentenced, experience significant difficulties bringing successful applications for bail within a reasonable timeframe.

This delay can be further protracted by the sometimes complex interplay of responsibilities between different service providers. For example, clients remanded in custody, but already subject to orders made under the *Mental Health Act 2016* can experience delays in a grant of bail with the Chief Psychiatrist or the client's treating team being required to authorise/approve the client's bail address/accommodation within the community. Additional delays are also experienced by OPG clients who, while remanded in custody, are charged with further serious offences and a reference of the client's mental state for the charges is filed with the Mental Health Court. These are unnecessary periods of detention that directly relate to a person's disability.

Access to a mental health defence

Under section 172 of the Mental Health Act, a Magistrates Court has the power to dismiss complaints for simple offences if the court is reasonably satisfied on the balance of probabilities that the person charged with the offence is unfit to stand trial, or was or appears to have been, of unsound mind when the offence was committed. This is known as a "mental health defence". As part of our role in supporting and advocating for people with impaired decision-making capacity, OPG's guardians have noted obstacles in a mental health defence being granted by a Magistrates Court to clients entitled to this important legal safeguard.

Police Prosecutions put to proof

An initial obstacle to a client being granted a mental health defence is the requirement that they first establish whether they have a mental health defence available to them, which under the current process must occur before Police Prosecutions is put to proof of its case. It can be challenging to determine whether a mental health defence is available to a client without first knowing the evidence of the matter. OPG recommends that Police Prosecutions be put to proof in the first instance to establish whether they have the evidence to prove the charge/s against the person, before the person is required to establish the availability of a mental health defence.

OPG has observed Police Prosecutions opposing an application under section 172 of the Mental Health Act on the basis that other charges are still pending in the Mental Health Court. This occurs even if the other charges are completely irrelevant to the summary charges.

OPG has also encountered obstacles with the Court Liaison Service not having access to Mental Health Court material which further delays proceedings for adults who have impairments. These procedural delays in the Magistrates Court are contrary to the expeditious dealing of these matters, causing unnecessary delays for vulnerable clients.

Recommendation 1:

Police Prosecutions be put to proof to establish whether they have the evidence to prove charge/s against an adult with impaired decision-making capacity before the adult is expected to establish a mental health defence.

Recommendation 2:

Parameters be introduced into Magistrates Court procedures around the ability of Police Prosecutions to oppose an application under section 172 of the *Mental Health Act 2016* in circumstances where charges are pending that are irrelevant to summary charges.

Summonses

OPG has concerns around procedures adopted for serving a summons to attend Magistrates Court to an adult with impaired decision-making capacity for whom the Public Guardian has been appointed to make decisions in legal matters. In these circumstances, we do not consider it is in accordance with a person's human rights to recognition and equality before the law¹ to use OPG as a substituted service, in place of our client being personally served with these important documents.

Instead of being utilised as a substituted service, OPG could be provided with a copy of the document once the adult receives the summons. We acknowledge the convenience of serving a document to OPG; however, this must not be at the expense of the rights of a person with a disability to full and effective participation throughout a proceeding.

While it is important to uphold a person's rights by effecting personal service of court documents, it must also be recognised that this can be a challenging process for an adult with impaired decision-making capacity, particularly if the adult is alone at the time of service. The presence of another person to support the adult during service can greatly assist the adult to understand the document and participate in the process. This may be the adult's support person, or an informal support such as a family member or neighbour, if appropriate. OPG recommends the process for personally serving adults with decision-making capacity be reviewed to ensure it both upholds the adult's rights and supports them to understand and participate in the process.

¹ The inherent dignity, individual autonomy, full and effective participation and inclusion in society of people with a disability are fundamental rights under the United Nations [Convention on the Rights of Persons with Disabilities](#).

Recommendation 3:

Explore whether a more supportive process can be designed for personally serving adults with impaired decision-making capacity with a summons, with a copy of the document also provided to the adult's guardian if applicable.

Notifications

An important element for notifications in the Magistrates Court is the Queensland Wide Interlinked Courts database (QWIC). QWIC records details of court appearances (e.g. dates, court location of appearance) for criminal matters as well as outcomes of court appearances (e.g. sentences). OPG has experienced obstacles to matters proceeding in the Magistrates Court that stem from delays in events such as warrants, summons and notices to appear not being recorded in QWIC in a timely manner. While there may be several factors contributing to these delays, it remains that OPG clients have been involved in matters where the recording in QWIC of an event has taken several months. Given that courts rely on QWIC for status updates on an individual client appearing before them, outdated information can result in significant procedural delays. OPG clients have received a notice to appear and presented to court only to be advised that there was no record of the notice in QWIC. As a result, the matter could not proceed until a later date. For a person with an intellectual or cognitive impairment, these delays can be particularly confusing and distressing, both physically and mentally.

OPG understands there is no proactive process between QCAT and the Queensland Police Service for notification of guardianship orders that are in place. OPG clients have suffered delays to court appearances because OPG has not received timely notification that a guardianship client has been charged with a crime and is therefore unable to support their decisions in relation to their legal matter. While addressing this issue may be outside the scope of this review, it is a procedural issue that is affecting the progression of proceedings in the Magistrates Court for adults with impaired decision-making capacity.

Warrants for failure to attend court

A procedural issue of concern to OPG is the issuing of warrants to clients with impaired decision-making capacity for a failure to attend court. OPG has supported clients who have been issued a warrant while they are subject to a Forensic Order or Treatment Authority and are involuntarily detained in a secure Authorised Mental Health Service or the Forensic Disability Service. Warrants have also been issued to clients who require 24/7 support to meet their needs, as well as clients who have no means to attend court due to the nature of their impairment.

Issuing a warrant for a failure to appear to an adult whose impairments can legitimately prevent them from attending court is not the most appropriate response to the situation and is considered to be an ineffective use of resources. OPG recommends alternative strategies be explored when a person with an impairment has been charged with a crime that would require physical attendance in court. For example, the Magistrates Court processes could provide for the adult to appear by video, or for the adult's appearance to be excused entirely if appropriate. Other options for consideration could include releasing the client from their place of detainment under a provision of the *Bail Act 1980* or into the care of a service provider to support their attendance at court.

Recommendation 4:

Consider alternatives to issuing a warrant for a failure to appear for an adult with an intellectual or cognitive impairment whose circumstances prevent their physical attendance in court.

Matters dealt with ex parte

OPG has observed several issues concerning the way in which ex parte matters are dealt with in the Magistrates Courts and the impact it has on adults with impaired decision-making capacity. In OPG's experience, the correct balance is not always achieved.

OPG acknowledges the benefits of matters being dealt with in the absence of a respondent as occurs through the ex parte process. However, when a respondent has impaired decision-making capacity, there are added complexities that could have an impact on the criminal history of a person who may have a legitimate mental health defence. To achieve a better balance between efficiency and fairness, a matter should not be dealt with ex parte until the adult has received advice to determine whether they have a defence available.

Recommendation 5:

A matter should not be able to be dealt with ex parte until the respondent has received advice to determine whether they have a defence available.

Legislative clarity

There are several provisions in the *Criminal Code Act 1899* (Criminal Code) that are unclear and can lead to confusion and delays to proceedings in the Magistrates Court. The review presents an opportunity to provide clarity around these processes in the *Justices Act* given the direct applicability to the processes and procedures in the Magistrates Court.

OPG recommends the *Justices Act* include a procedure as an alternative to sections 552A and 552B in the Criminal Code. Section 552A of the Criminal Code sets out the "charges of indictable offences that must be heard and decided summarily if the prosecution elects to have the charge heard and decided summarily". Section 552B sets out the "charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial". It has been the experience of OPG that, in practice, these provisions do not provide sufficient clarity as to whether the prosecution or the defence can elect for a matter to be dealt with summarily or on indictment. Certainty around this issue would provide a clearer pathway for practitioners to explore options for clients. OPG would welcome provisions in the *Justices Act* to clarify this ambiguity.

OPG has also identified the need for a clear procedure, as an alternative to section 651 in the Criminal Code, which would allow for summary and indictable matters to be dealt with globally, regardless of causal link, in the interests of efficiency. Section 651 of the Criminal Code (*Court may decide summary offences if a person is charged on indictment*) sets out that "if an indictment has been presented against a person before a court, the court may also, subject to section 652 (2) to (4) and subsection (2), hear and decide summarily any charge of a summary offence that has been laid against the person". Like sections 552A/B, OPG has observed this to be challenging to interpret in practice, leading to procedural delays for clients.

Recommendation 6:

The *Justices Act 1886* be amended to provide clarity around the procedures detailed in sections 552A, 552B and 651 of the *Criminal Code Act 1899*.

Clients as victims/witnesses

OPG has observed that many people with impairments, particularly those with a cognitive or intellectual impairment, can experience difficulty with having their complaints progressed. Discrimination against people with a disability in the criminal justice system is no more apparent than when their credibility as a witness is called into question when reporting a crime, be that to a member of their support network or to the police, or participating in a court process. Communication difficulties are an obstacle for many OPG clients when it comes to providing evidence as a witness in front of the Magistrates Court. OPG has observed a lack of appropriate and readily available support for persons with impaired decision-making capacity throughout these stages of participation.

This potentially infringes on the human rights of a person with a disability under section 15 of the *Human Rights Act 2019*, which provides the right to recognition and equality before the law.

Recommendation 7:

Targeted support be provided to people with disabilities who are victims of crime at all stages of the legal process to ensure they can pursue legal action against perpetrators and obtain justice from the courts.

Undiagnosed disabilities

Training for legal representatives could be improved to support increased recognition of potential undiagnosed disabilities.

Inadequate or insufficient training can lead to issues with identifying or appropriately addressing clients' impairments and consequently exploring possible defences. The rapid pace of Magistrates Court and duty lawyer settings are not well equipped to identify or accommodate adults with disability, particularly cognitive or intellectual disability.

The nature of OPG clients' disabilities and any associated communication barriers, coupled with any additional cultural/social considerations means our clients frequently use gratuitous concurrence to finalise their involvement with the legal process as quickly as possible.

The culmination of the above is that clients will provide instructions to enter pleas of guilty to offences (both simple and serious), resulting in criminal convictions often carrying serious sentences, when they may otherwise have valid defences available. In OPG's experience this pattern is particularly prevalent within our client base who have complex diagnoses (for example, acquired brain injury, borderline personality disorder), dual diagnoses and/or undiagnosed disabilities (as compared to a mental illness or intellectual disability).

Recommendation 8:

A review of legal processes and legal training be undertaken to better identify people with undiagnosed cognitive or intellectual disabilities to ensure they are appropriately supported.

Conclusion

OPG is optimistic that the review of the criminal procedure laws in Queensland's Magistrates Courts will yield positive outcomes for people with impaired decision-making capacity who interact with the criminal justice system.