

# Submission to the Legal Affairs and Community Safety Committee:

## Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families.

September 2019

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## About CREATE Foundation

CREATE Foundation is the national consumer body representing the voices of almost 45,800 children and young people in the out-of-home care system, as well as those who have transitioned from care up to the age of 25.

Our vision is that all children and young people with a care experience reach their full potential, in line with our mission to:

**CONNECT** children and young people to each other, CREATE and their community; to

**EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard; to

**CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services, and increase community awareness.

We run programs and services across all Australian states and territories for children and young people in foster care, kinship care, and residential care. Our research reports and articles, submissions and policy development allow us to advocate for a better care system.

At CREATE we believe that to improve the care system, we need to listen to the people who have experienced the system firsthand. This is why youth participation is the foundation of our advocacy. Everything we do is shaped by the voices of children and young people with a care experience.

## Introduction

CREATE welcomes the opportunity to comment on options for reform to child protection legislation in Queensland, as part of ongoing reforms to the *Child Protection Act 1999*. CREATE is committed to ensuring that relevant policy, legislation, and practice changes occur through the consideration of the lived experiences of children and young people who are or already have experienced out-of-home care, who can be regarded as experts in their own lives.

CREATE has previously commented on the changes made to the *Child Protection Act 1999* (the Act) and the reforms resulting from the Queensland Child Protection Commission of Inquiry (2013). This response reflects the views and opinions expressed by children and young people in care regarding specific questions raised in the Discussion Paper.

A core function of CREATE's work is ensuring that the rights of children and young people in out-of-home care are upheld and are the central focus of all work we do. We achieve this by ensuring young people's views and voices are part of the discussions that directly impact them, allowing us to confidently advocate with them and on their behalf. Through consultation, CREATE can monitor how the rights of children and young people are being upheld by comparing their experiences with the *National Standards for Out-of-Home Care* (the *National Standards*), (FaHCSIA, 2011) and the *Charter of Rights for Children in Care* (Department of Child Safety, Youth and Women, 2018).

CREATE is supportive of policy reform that gives further voice to children and young people involved in the child protection system.



## Option 1. Reinforce human rights in the legislative framework

CREATE recommends that a human rights and child rights framework is adopted whenever working with children and young people in the child protection system, and that children and young people are supported to be aware of their rights. However, it is also important that young people are empowered through knowing what they are entitled to, and how to access supports. CREATE therefore supports all options in this section as further outlined below.

CREATE supports option 1A to include a preamble recognising the human rights context of the Act. The preamble would establish the rights of children and young people in child protection matters in keeping with Australia's signing of the *United Nations Conventions on the Rights of the Child* and the *United Nations Declaration on the Rights of Indigenous Peoples*. CREATE believes that the principles for children and young people's participation should also be established in the preamble to ensure that children and young people's views are taken into account in the decisions being made about their lives.

CREATE welcomes the intention of 1B and 1C, to develop a broader purpose of the Act to include a wellbeing focus and general principles for administering the Act. This legislation has very powerful implications for the lives of children and young people with a care experience, as it shapes the basis for the important decisions about their lives while they are in the care of the state, and can determine the support offered after being discharged from care. It is important that the state, through legislation, espouse more ambitious goals for children and young people than "protection". If the state is going to assume legal responsibility for children and young people, i.e., become the "corporate parent", then it should ensure their immediate and ongoing safety as well as adequately resource their long-term outcomes (i.e., well-being). It should also be acknowledged that the system itself inadvertently and often causes harm and trauma to children and young people. A commitment across government to work to actively avoid systemic harm by supporting children and families earlier, before and when they come into contact with the tertiary system, is essential. This allows responsibility to extend beyond one government department to all areas of the universal child and family support system.

CREATE consulted with children and young people in out-of-home care in QLD about their views and experiences of involvement when going to court for protection matters. When determining what is in the child's best interests, children and young people assert that they are not always provided with all of the information necessary for decision-making from adults in their lives. At times this is done ostensibly for their protection, but young people strongly believe their views should be sought in consideration of their "best interests" (CREATE, 2008). When asked to nominate the three most important things the court should consider when making a decision about them, children and young people spoke about "Having a Say", "Family" and "Impact on Young Person", as summarised in Table 1 (CREATE, 2008). A common message from many young people consulted was that their opinions and wishes should carry a similar weight to other factors in the best interest framework.

Many children and young people are unaware of the *Charter of Rights* within the Child Protection Act 1999 and appropriate channels through which to make a complaint. In CREATE's recent *National Survey* (McDowall, 2018), it was observed that 30% of respondents in QLD were aware of the *Charter*. For this reason, Options 1D and 1F are supported to ensure that children and young people are aware of their rights, under both the *Charter* and the Human Rights Legislation. Furthermore, the *Charter of Rights* should be enshrined in the main body of the Act, making it a legislative obligation to uphold, and ensure the system remains accountable. It is important that the system itself should be held responsible to uphold the rights of children and young people, rather than the onus being on children to advocate for their rights. To support this, there should also be clear complaints processes along with an independent oversight and review body that can investigate complaints and negotiate appropriate remedies when children and young people's rights are

breached. A stronger stance needs to be taken on ensuring accountability, and responding to reported rights violations.

**Table 1. Young People’s Views on What Courts Should Consider**

What is important for children and young people	What this means to children and young people
Having a say	<p><i>“Listening to what the child or young person wants.”</i></p> <p><i>“If I like the people I am living with”</i></p> <p><i>“Where I think I should go”</i></p> <p><i>“Allow the young person to speak”</i></p> <p><i>“Ask the young person for help in making the decision”</i></p>
Family	<p><i>“That I want to go home to my birth parents”</i></p> <p><i>“Seeing my family”</i></p> <p><i>“Having contact with my baby brother”</i></p> <p><i>“Relationships with other family members”</i></p> <p><i>“See mum”</i></p> <p><i>“Have longer contact”</i></p> <p><i>“Being with my sister”</i></p> <p><i>“Being with my relatives”</i></p> <p><i>“Reintegration with family”</i></p> <p><i>“Is there abuse occurring in the family?”</i></p>
Impact on Young Person	<p><i>“What’s best for me”</i></p> <p><i>“How I feel”</i></p> <p><i>“The need of the child or young person”</i></p> <p><i>“How this will affect my life”</i></p> <p><i>“Just because I act ok is this how I really feel?”</i></p>

## Other changes pertaining to children’s rights

To monitor and progress the rights frameworks within the legislation, there is a need for both baseline data and regular surveys of children and young people with regards to their rights and their views regarding the child protection system. This requires a party independent from government to continue regular surveys and consultations with children and young people to inform all relevant parts of the child protection system. It is important to have a baseline understanding with relation to children and young people’s rights in care now, and to identify ongoing gaps in policy and practice as the Human Rights legislation is implemented in 2020.

In a recent Youth Advisory Group meeting (August 2019), young people were asked by the QLD CREATE team to consider what would be useful additions to the *Charter of Rights*. Responses reflect practice requirements and include the following.

*“Making sure the thing I asked for gets done”*


*“Trust a person – listen to them”*

*“Outcome or action from what I have said”*

Young people also noted they were not all aware of the Charter and suggested the following:

*“Require CSO to go through Charter of Rights each time they do a case plan”*

*“Definitely put Charter of Rights in kids apps [e.g. KICBOX]”*



*“Should all be framed from child’s perspective not Department’s.”*

## **Option 2. Strengthening the voices of children and young people in decision making**

Children and young people in out-of-home care have the right to participate in decisions that affect their lives. These rights are enshrined in the United Nations *Convention on the Rights of the Child* (UNCROC, Article 12 & 13). The UNCROC makes clear that all young people are independent subjects and therefore, have rights. Participation should be meaningful, continuous, and occur within a range of levels, from the individual to systemic. Including young people in decision-making ensures that policy decisions, programs, and services are appropriate and responsive to their individual needs, which has been shown to improve long-term outcomes.

The *Charter of Rights* for a child in care (The Charter), at Schedule 1 of the Act, establishes that children and young people have, as stated at #4 within the Charter “the right to be consulted about, and to take part in making decisions affecting the child’s life (having regard to the child’s age or ability to understand), particularly decisions about where the child is living, contact with the child’s family and the child’s health and schooling.” The *Charter* further states that participation is a right, not an option, (Department of Child Safety, Youth and Women, 2019). The *Charter* aligns with obligations following Australia’s ratification in 1990 of UNROC; however, the obligations are not actioned in a consistent way. As previously mentioned, the *Charter* should be moved to the main body of the Act and guide the approach to all of the decisions being made about children and young people.

Standard Two of the *National Standards for Out-of-Home Care* (FaHCSIA, 2011) recognises the importance for children and young people in out-of-home care to be involved in decisions that directly affect them. This relates to aspects of care such as care planning, transition planning, and family contact arrangements,


Recent research by the CREATE Foundation (McDowall, 2018) found that, nationally, fewer than half (43.6%) of children and young people knew about their case plan, and just over half of these young people (57.1%) had been involved in its development. In Queensland, 53% of young were aware of their case plan. Young people also reported participating in formal meetings only 37% of the time.

Overall, 67.5% of respondents claimed they were able to have a say at least “Reasonably often”; however, 15.7% reported they had this opportunity “Rarely” or “Never.”

*“I was moved out of one of my happy placements into a placement that wasn’t so happy, and I didn’t get a say in that”.*

*“I don’t want to go to residential care but they say there’s nothing else. Because it’s all they have got, I have to go. No one tells me what to expect. No one cares that I don’t want to go. I like the carers I’m with now, but they are old and I have to leave at the end of March”.*

CREATE asked children and young people whether they felt they were given the chance to have a say in decisions that affected their lives, and whether they felt listened to. While two-thirds of young people felt they could have a say in decisions reasonably often, they felt heard and listened to about 70% of the time. This is similar to what CREATE found in an earlier report against the *National Standards* where 63% of young people reported having a say (McDowall, 2013). Similar results were reported by the Australian Institute of Health and Welfare (e.g., 67%; see AIHW, 2015). Young people in general felt they could have a say in decisions about day-to-day things (like what to have for dinner), recreational activities, education, and family contact, but had little say in decisions about placement.



*“Why can’t the department listen to me? I feel unsafe in my current situation and just want to live with my pop”.*

The participation of children and young people in the decisions being made about them (and their future) is established in Section 5, “Principles for administration of the Act”, Section 51, outlining how case planning is to proceed; and Section 74, “Charter of rights for a child in care”. However, CREATE has found consistently that children and young people are not always involved in decision-making, nor are they necessarily aware of their rights to be heard and to make a complaint about certain decisions. The provision in Section 74 (2) that **“As far as reasonably practicable** [emphasis added], the chief executive must ensure the charter of rights for a child in care in schedule 1 is complied with in relation to the child”, by adding the qualifying phrase, has possibly led to a situation whereby decisions are made about children and young people’s lives without hearing from them or talking to them about the reasons for decisions. Revised legislation will need to improve how young people’s participation is achieved, making it more difficult to avoid, so that participation in decision-making by children and young people is ensured throughout family support and child protection processes and not just at the convenience of systemic processes.

Thus it is not enough to merely consider the views of children and young people. Their preferences need to also be included to ensure they have a sense of agency over the decision making process. Decisions made must be explained to the satisfaction of the young person. It is important to know what is significant for a young person, which is often at odds with what adults in their lives consider important. CREATE recommends a legislative requirement to report on outcomes of children and young people *as identified by them* to facilitate continuous improvement of policy and practice in this area.


*“I believe that carers, CSOs and other workers play the “I’m the adult and you’re the young person”, power card way too much and I think that if they were to stop playing it remove ALL the “power cards” as such and treat the young people as equals then the young people will feel more safe, happy and a part of things”.*

Genuine participation requires caseworkers not only to understand the importance of participation, but also to uphold the principles of respect in working with young people by providing necessary opportunities and support to facilitate young people being involved in decision-making (McDowall, 2016a). This requires the provision of appropriate resourcing and training for caseworkers, including how decision-making processes are made accessible to young people, such as utilising child-friendly resources and technology. Furthermore, the growing concern regarding child safety officer (CSO) caseloads and high staff turnover has a negative impact on the capacity to develop meaningful relationship between CSOs and young people, and their level of engagement and participation in decisions. Research identifies that the formal decision making processes in child protection can be intimidating and alienating for young people, especially if they lack information and feel unsupported by adults attending the meetings, who may be strangers to the young people (Cashmore, 2002). Strong trusting relationships between staff and young people are critical, which requires appropriately equipped and skilled staff with time and resources. Administrative and bureaucratic processes should not hamper CSO’s ability to support and engage with young people in a meaningful and relational way.

## **Participation of Aboriginal and Torres Strait Islander children and young people**

CREATE is committed to partnering with Aboriginal and Torres Strait Islander children and young people and supporting them to become the lead decision-makers for their future. Self-determination in the lives of children and young people is a fundamental human right, which is also embedded in the United Nations *Convention on the Rights of the Child* (1989), stating that a child has the right to “enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language” (Article 30).





CREATE's 2018 national survey identified that only 17.9% of Aboriginal and Torres Strait Islander young people knew about their cultural support plan nationally, with only 15% of young people in Queensland being aware of having a cultural support plan. CREATE acknowledges and endorses the options proposed in Option 2; however, care plans for Aboriginal and Torres Strait Islander children and young people must include reasonable actions to ensure the maintenance and development of an Aboriginal and/or Torres Strait Islander child's identity and encourage the young person's connection to culture, tradition, language, and country (McDowall, 2016b). These are essential and positive steps to rectify the lack of cultural planning, which require genuine participation of children and young people.

Ongoing engagement with Aboriginal and Torres Strait Islander communities and peak bodies is required to ensure the commitments made in this amendment continue to be informed by relevant cultural groups and are upheld. CREATE defers specific recommendations around Aboriginal and Torres Strait Islander children to Indigenous community organisations (such as Queensland Aboriginal and Torres Strait Islander Child Protection Peak and SNAICC).

CREATE supports all options to strengthen the participation principles in legislation. Broadening the purpose of the Act and expanding the focus of decision-making to encompass a longer term view of children and young people's lives is supported by what children and young people have been telling CREATE for many years. Involving children and young people in the decision-making process is critical at all points. Taking these views into account from the time that children and young people first come into contact with family support and/or child protection systems aligns with the *Strengthening Families Protecting Children Framework for Practice* (Department of Child Safety, Youth and Women, 2013).

### **Other changes pertaining to the participation of children and young people**

CREATE strives to ensure that the views of children and young people are respected, that their contributions are not tokenistic, and that children and young people are considered active participants in decision-making (McDowall, 2016a). The *Participation Principles* can be drawn from the *Children and Young People's Participation Strategy* (GForce, 2013), which was developed with children and young people in out-of-home care. The *Children and Young People's Participation Strategy* is available on the Department's website and offers a framework for including children and young people in decision-making throughout their time in care. CREATE is aware through delivering training to Child Safety Officers (CSOs) that awareness of the resource is relatively low.

Establishing *Participation Principles* in the Act would further articulate the rights of children and young people, and needs to be reinforced with practices that enable the meaningful participation of children and young people in decision making. Participation for children and young people in out-of-home care should be facilitated at both the individual level and the systemic level. Addressing violations of rights must occur to hold all systems and individuals to account, which includes adequately resourcing and training all relevant staff and carers to maintain a rights and best practice approach.

Participation principles include:

- All children and young people have a right to participate in decision-making about their own life; participation should not be limited by ability, age, ethnicity, personal circumstances, or behaviour. Decisions include those about their immediate circumstances, day-to-day care and support, and their life course.
- All children and young people will be supported to participate in decision-making and have their views heard, throughout their time in the child protection system.
- Engaging with Aboriginal and Torres Strait Islander children and young people to facilitate their participation, is specifically recognised as important.

- Children and young people have a right to decide their level of involvement in the decisions being made about their lives. This will be reviewed regularly to ensure children and young people are able to engage with decision-making over time.
- Participation is recognised as an “ongoing process of engagement and involvement”, not just a one-off event.
- The views of children and young people will be “meaningfully considered in discussions about the type of services that they and other children and young people receive.”

(GForce, 2013, p. 5, 6)

### Option 3: Reshape the regulation of care

CREATE supports the current submission of Queensland Foster and Kinship Care (QFKC, 2019) to the Committee on this section, specifically with relation to:

- Recognition that kinship care and foster care are based on different circumstances, relationships, and motivations and as such require different levels of training, assessment, and support. Furthermore, CREATE would argue that kinship care should be recognised as part of the family support system where it naturally fits, as well as the statutory system.
- Standards of care, whilst important for the protection of children and young people, can also exclude important cultural child rearing and protective measures, which may be hindered and further delegitimised if enshrined in law.
- Kinship carers are currently variably supported by the system, and the complexity of need that may exist in kinship care has to be considered further to prevent placing undue pressure on an already vulnerable family support system.
- The requirement to have blue cards or other mandatory checks for more than casual visitors or adult children who may have exited care can often work to exclude Aboriginal and Torres Strait Islander support networks, or place young people exiting care into homelessness when they are forced to leave the care environment once they turn 18. CREATE proposes that the responsibility to protect children and young people needs to be managed by ongoing processes of planning, including supervision and risk assessments, and mapped against all protective factors for all vulnerable household members. Safety is pre-eminent and can be planned for and managed by all responsible parties rather than disconnecting young people from necessary supports.
- Mapping and identification of kinship care should be conducted by those with the cultural authority to do so. CREATE defers on this to the position of the Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP).

In relation to 3A, CREATE queries the benefit of introducing a code of conduct for carers, when Standards of Care already exist. Appropriate carer selection, training, and support together with ongoing communication about Standards of Care and participation of children and young people in decision-making reinforce that the responsibility for child safety is shared and ongoing through reciprocal processes. Both 3A and 3D present options for transparent information provision and exchange, so that child safe principles are the focus in both carer selection and licensing of services. Child focussed services and carers need adequate resourcing to maintain best practices, and CREATE supports timely and appropriate exchange to continue to build the capacity of all involved. This includes the responsibility of Child Safety staff to be responsive and timely in supporting all systems of care.

In addition to the above changes to the legislation, CREATE re-asserts that improved outcomes would result from legislative changes to resource and allow young people to stay in their care placement until age 21 (CREATE, 2018). We continue to advocate for the benefits of this legislation and it would bring Queensland’s legislation into line with other countries, like the UK and US.





# Conclusion

CREATE recommends that a human rights and child rights framework is adopted when working with children in the child protection system, and that children and young people are supported to be aware of their rights.

CREATE recognises that for children and young people to participate meaningfully in decisions requires trust and respect, alongside open and honest communication. Participation of children and young people should be encouraged on an ongoing basis, through regular communication with them about their rights.


The importance of participation in case plan development, whether relating to care plans, transition plans, or cultural support plans is highly critical in promoting opportunities for young people to achieve positive self-worth and confidence. Young people need to be supported to have a say and have some control over decisions that affect their futures.

Children and young people have indicated that they consider institutions safer when children and young people, and their participation, are valued, and when adults actively listen to what they have to say (Moore, McArthur, Heerde, Roche, & O'Leary, 2016). It is important to acknowledge the importance of “feeling heard” if children and young people are to continue to invest in participation in decision-making while in out-of-home care (McDowall, 2013), and that the importance of participation by children and young people is understood and valued (McDowall, 2016a).

Ongoing support and resource provision, through practice development and oversight, will be required to ensure the purpose of these amendments are instilled and implemented at a local and front-line level. CREATE supports all efforts to monitor and hold to account all those actively and centrally involved in child protection and family support, including articulated frameworks that serve to resource and inform best practice and child safe responses. Accreditation and monitoring aspects of a care system need to be resourced and balanced alongside human resources so that quality selection, training and support of staff and carers can deliver a quality system of care.

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