



# Policy

## Other Person Guardianship

### Summary

Section 38(1)(d) of the Children’s Protection Act 1993 (the Act) provides that the Court may place a child, until the child attains 18 years of age, under the guardianship of the Minister or such other person or persons (not exceeding two) as the Court thinks appropriate in the circumstances of the case. The decision to grant guardianship lies with the Youth Court of South Australia.

Transfer of guardianship provides certainty of long term care to vulnerable children who cannot live at home due to abuse and neglect. The transfer of guardianship is undertaken considering the best interest of the child and their long term care and children remain the paramount consideration and focus. Transfer of guardianship provides children with increased confidence and security in regard to their ongoing care once a guardianship order is discharged at 18.

If it is considered in the child’s best interests, children will continue to have contact with their birth family to help build a strong and healthy sense of identity. Aboriginal children and children from culturally diverse backgrounds, have a right to maintain the connection with their community and culture of origin.

The grounds for the application are ‘that the child is already in a successful care arrangement, the carer(s) have demonstrated a commitment to the child, and it is identified to be in the best interests of the child for guardianship to be transferred to the carer(s)’.

The transfer of guardianship to a carer does not sever parental rights, but replaces prescribed decision making for a child requiring care and protection. The carer as the child’s guardian holds the duties, powers, responsibilities and authority that by law, parents have in relation to their birth children with some exclusions. Following the transfer of guardianship the carer assumes most parental functions without having to consult the department.

Table 1 - Document details

<b>Publication date</b>	May 2017
<b>File number</b>	DCSI/15/18152-1
<b>Related legislation</b>	<i>Australian Passports Act 2005</i> <i>Births, Deaths and Marriages Registration Act 1996</i> <i>Children’s Protection Act 1993</i> <i>Family and Community Services Act 1979</i> <i>Family Law Act 1975</i> <i>Guardianship of Infants Act 1940</i> <i>Transplantation and Anatomy Act 1983</i>
<b>Related policies, procedures, guidelines, standards, frameworks</b>	<ul style="list-style-type: none"> <li>• Aboriginal identity planning policy</li> <li>• Care planning policy</li> <li>• Care support payments (family based) procedure</li> <li>• Change of name practice guide and procedure for children under guardianship</li> </ul>



	<ul style="list-style-type: none"><li>• Charter of Rights for Children and Young People in Care</li><li>• Children's Protection Act 1993</li><li>• Civil claims policy and procedure</li><li>• Death of a child or young person under custody or guardianship of the Minister: practice guide and procedure</li><li>• Other Person Guardianship Panel terms of reference</li><li>• Rapid Response Framework: Whole of Government Services for Children and Young People under Care and Protection Orders</li><li>• Standards of Alternative Care in South Australia</li></ul>
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<b>Executive director responsible (position and office)</b>	Executive Director Out of Home Care
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Table 2 - Revision record

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12/04/2017	0.8	Amended
24/4/17	0.9	Amended final draft
16/05/2017	1.0	Final draft for approval
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## 1. Title

Other Person Guardianship

## 2. Purpose

This policy clarifies the Department for Child Protection (DCP) position regarding the transfer of legal guardianship of a child to a carer.

## 3. Scope

This policy applies to:

The transfer of legal guardianship of children in out-of-home care is undertaken in the best interest of the child and who are in the care of kinship carers and foster carers, who have demonstrated a long term commitment to the child.

Department for Child Protection (DCP) staff involved with case management of children who may be eligible to be placed under an OPG order

Parents of children placed under OPG orders.

## 4. Policy detail

### 4.1 Eligibility

- 4.1.1 The application to court for transfer of guardianship will proceed when the OPG Eligibility Criteria are assessed to have been met in relation to carers:  
(See *Appendix 1- OPG Eligibility Criteria and Step by Step assessment competencies*).

### 4.2 Aboriginal children

- 4.2.1 OPG for Aboriginal children requires special consideration in the context of the historical removal of children from their communities and the subsequent dislocation of families and loss of cultural identity.
- 4.2.2 To ensure that the traditions and values of the family and community into which the child was born are valued and respected and that cultural connections are developed, maintained and strengthened, DCP workers must consult with appropriate staff, family and community members regarding the cultural needs of Aboriginal children in line with DCP requirements (Aboriginal Cultural Identity Support Tool (ACIST)).



### **4.3 Children from Culturally and Linguistically Diverse (CALD) Communities**

- 4.3.1 OPG for CALD children requires special consideration of the child and the prospective other person guardian's cultural context.
- 4.3.2 To ensure that the traditions and values of the family and community into which the child was born are valued and respected and that cultural connections are developed, maintained and strengthened, DCP workers must consult with appropriate staff, family and community members regarding the cultural needs of CALD children in line with DCP requirements (Cultural inclusion framework <http://www.statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/publications/cultural-inclusion-framework>)

### **4.4 Care plan**

- 4.4.1 The care plan sets out the intended future care arrangements for the child. The care plan must consider the child's views and be written in consultation with the other proposed guardian(s), the birth parents (where possible) and DCP. A long-term care plan must contain provisions of the following:
- Family contact
  - Cultural maintenance plan
  - Specific education and health needs, as required
  - Carer payments
  - Criminal injuries compensation
  - Change in circumstance (of child or guardian) required to inform the department
  - Post OPG support, including and specific disability support needs

### **4.5 Other Person Guardianship Panel**

- 4.5.1 In the event that a carer is not happy with the OPG assessment outcome, the carer may request a review. In this event, Other Person Guardianship Panel will meet and review the decision. This process is guided by the Other Person Guardianship Panel Terms of Reference.

### **4.6 Contact with birth family**

- 4.6.1 The OPG assessment includes competencies in managing family contact. Following the transfer of guardianship the carer will be responsible for supporting and maintaining family contact arrangements as specified in the conditions of the OPG order. However, there are a number of circumstances which prevent carers from managing family contact. The inability to manage family contact will not preclude DCP undertaking an assessment and making an application for the transfer of guardianship.
- 4.6.2 Where contact cannot be facilitated by the other person guardian (due to special circumstances) alternative arrangements are to be explored and documented in the care plan.



## 4.7 Carer Payments

- 4.7.1 Other person guardians will continue to receive a basic care subsidy to meet that individual child's needs.
- 4.7.2 Other Person Guardians will continue to receive special needs loading to meet the child's care needs where a loading assessment has been completed in accordance with the *Care Support Payments Procedure* at the discretion of the department. The loading payment is provided to fund the additional costs associated with the care of the child. The level of special needs loading will be assessed at the time of the OPG application and will remain in place for the duration of the order. There will be no case work requirement to review these arrangements.
- 4.7.3 Following transfer of guardianship the department will honour previous financial agreements in regard to the payment of school fees.
- 4.7.4 Specific financial supports that are currently being paid for by the department will continue into the future. Any additional request will be discussed at the PSW/PAC case consult. All financial agreements are to be in place prior to an assessment commencing.
- 4.7.5 Payments are subject to annual financial review by a designated officer within DCP
- 4.7.6 Payments will cease at expiry of the OPG order, when the child attains the age of 18 years or the order is revoked or the child leaves the care of the other person guardian before they attain the age of 18 years.
- 4.7.7 Where a child has attained the age of 18 years but remains enrolled in secondary or tertiary education including (VET and FLO), is undertaking the full time components of secondary education, an apprenticeship or enrolled and participating in any post high-school course on a full time basis. Payments will continue until their education is completed, providing the child remains living with the guardian. Further exploration will be undertaken in regard to interface with the NDIS and cost implications for children with significant disabilities.
- 4.7.8 Other Person Guardians who wish to reside in another State or Territory can continue to care for the child with the same rights afforded in South Australia after the orders and care plan have been registered under section 70C or 70D of the Family Law Act. The carer subsidy and special needs loading would be received regardless of the physical location of the child's legal guardian.

## 4.8 Impact on other placements

- 4.8.1 Children under other person guardianship will not be included in the total number of foster children permitted to be placed with a registered foster or kinship carer.<sup>1</sup>

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<sup>1</sup> *Family and Community Services Act 1972*, s43(3)



- 4.8.2 During the assessment the carer's capacity to continue to care for other children (either respite, short or long term care) will be discussed and will guide decisions to place the carer on hold for further placements.

## 4.9 Post OPG Support

- 4.9.1 Children placed under an OPG order will not receive case management or other specialist support provided by DCP.
- 4.9.2 Kinship care and foster care support workers will not be required to continue to provide support to other person guardians following the transfer of guardianship. However support will continue to be provided when there are other children in out of home care being cared for by the carer.
- 4.9.3 A child placed under an OPG order is entitled to State and Commonwealth government assistance in the form of ambulance cover, school card, access to Dame Roma Mitchell Trust grants and specified benefits within the Rapid Response initiative.
- 4.9.4 A child placed under an OPG order may be entitled to Commonwealth government assistance in the form of a Health Care Card, Youth Allowance (regardless of the assets or income of the special guardian, so long as the young person meets the standard criteria) and Transition to Independent Living Allowance (TILA).<sup>2</sup>
- 4.9.5 Children placed under an OPG order with a permanent or significant disability may be eligible to become a National Disability Insurance Scheme (NDIS) participant.

## 4.10 Interstate and overseas travel

- 4.10.1 Approval from the department for interstate and overseas travel is not required once an OPG order has been granted. The Australian Passports Office has issued a guide for passport applications for individuals who have been granted guardianship by a State court<sup>3</sup>.
- 4.10.2 Where interstate travel is required for birth family contact to occur it is recommended the OPG order is registered in the Family Court to ensure the guardianship and any ancillary orders are valid outside the state of South Australian.
- 4.10.3 Where the Other person guardians who wish to relocate to another State or Territory on a permanent basis need to have resolved issues related to birth family contact.

## 4.11 Criminal injuries compensation or other legal claims

- 4.11.1 Where possible, the child's eligibility to make a claim for victims of crime compensation should be considered and noted in the child's care plan.

<sup>2</sup> Information regarding state and commonwealth benefits and referral for post OPG support can be found in the *Post OPG Work Instruction*.

<sup>3</sup> <https://www.passports.gov.au/passportsexplained/childpassports/Pages/default.aspx>



- 4.11.2 Where the Ministers guardianship has been transferred to an other person and a legal claim has been identified but not finalised it is expected the other person guardian will assume responsibility for running the claim on behalf of the child at an appropriate time.

## 4.12 Change of name

- 4.12.1 A child can choose to change his or her name informally (Eg. School) however, this name will not appear on legal or official documents including but not limited to passport, drivers licence or South Australian Certificate of Education.
- 4.12.2 In limited circumstances, a child placed under an OPG order may seek to change their name formally. The process pathway is set out in the [Change of name practice guide and procedure for children under guardianship](#)

## 4.13 Change in living arrangements

- 4.13.1 If the child's living arrangements change or the child ceases to be in the guardian's full time care, the guardian will notify the Department (as it impacts on carer subsidy payments).

## 4.14 Revocation or variation of Other Person Guardianship

- 4.14.1 Any party to the care and protection proceedings may apply to the Youth Court for the revocation or variation the order.<sup>4</sup>

## 4.15 Enforcement of an Other Person Guardianship order

- 4.15.1 There is no provision within the *Child Protection Act* to apply to the Youth Court for the enforcement of an OPG order and/or its associated orders. However, a person who contravenes or fails to comply with a care and protection order may be guilty of an offence.<sup>5</sup>

Where a party believes another party has contravened or failed to comply with the OPG and any other associated order, they may apply to vary or revoke an order.

- 4.15.2 If the OPG order is registered in the Family Court it may be possible to access enforcement provisions under the Family Law Act in certain circumstances. (A birth parent may wish to enforce, in these situations DCP do not provide advice or funding).

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<sup>4</sup> *Children's Protection Act 1993*, s40

<sup>5</sup> *Ibid*, s 44



## 4.16 Future child protection matters

4.16.1 Any future allegation of child abuse and or neglect where the alleged offender is the Other Person Guardian or family member of the Other Person Guardian will be recorded, assessed and investigated by the department (if required) as intra-familial child protection intakes.

## 4.17 Medical treatment, including palliative care of a child placed under an OPG order

4.17.1 If the patient is a child (under 16 years of age) a guardian of the child can consent to what medical treatment should be administered. If the child is of or over 16, they are considered an adult and need to provide their own consent.<sup>6</sup>

4.17.2 A DCP employee must immediately after becoming aware of a death that is, or may be a reportable death<sup>7</sup>, notify the State Coroner or a police officer of the death, unless the DCP employee believes on reasonable grounds that the death has already been reported, or that the State Coroner is otherwise aware of the death. DCP employees should refer to the *Coronial Response procedure* for further detail.

4.17.3 Decisions regarding the donation of organs, funeral and burial rights revert to the senior available next of kin following the death of the child.<sup>8</sup> Senior available next of kin means (in order of priority):

- (i) A parent of the child
- (ii) A brother or sister, who has attained the age of eighteen years, of the child; or
- (iii) A guardian of the child

4.17.4 A court appointed guardian (Other Person Guardian) of a child may apply to the Registrar of Births, Deaths and Marriages to request that their name be added to the Death Register and death certificate<sup>9</sup> in addition to the parents' names.

4.17.5 Where there is disagreement between the other person guardian and the child's next of kin in relation to funeral arrangements and or disposal of the child's remains, the DCP can endeavour to assist the parties to reach an agreement, at the request of one or both of the parties.<sup>10</sup>

## 4.18 Death of an Other Person guardian

4.18.1 Where the Youth Court has granted joint guardianship or parental responsibility to two persons and one person dies, the surviving person will continue as the child's guardian (subject to the terms of the order).<sup>11</sup>

<sup>6</sup> Consent to Medical Treatment and Palliative Care Act 1995 (SA), Section 6.

<sup>7</sup> Coroners Act 2003 s.3

<sup>8</sup> Transplantation and Anatomy Act 1983, s21 & s22

<sup>9</sup> Births, Deaths and Marriages Registration Act 1996 s. 38(A) & s39(3)

<sup>10</sup> Family and Community services Act 1972, s85

<sup>11</sup> Guardianship of Infants Act 1940, s12



- 4.18.2 Only the biological mother or father of the child can appoint a guardian by deed or will.<sup>12</sup> Therefore other person guardians cannot appoint a guardian by deed or will in the event of their death.
- 4.18.3 If the other person guardian's death is expected the other person guardian(s) should notify the Department.
- 4.18.4 The other person guardian may make an application to the Youth Court to vary the order to ensure there are appropriate arrangements in place for the care and protection of the child.
- 4.18.5 In the event of the death of both guardians of the child the department will give due consideration, in making arrangements for the child, in relation to the person with whom the child has an existing relationship and has been previously nominated by the guardians.

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<sup>12</sup> Ibid, s13



## 5. Roles and responsibilities

Table 2 - Roles and responsibilities

Role	Authority/responsibility for
DCP staff	Complying with mandatory requirements as established in this policy
Principal social workers and principal Aboriginal consultants	Providing expert or cultural advice on the progression of an OPG application, considering the child's best interests
OPG assessor	Conducting OPG assessments
Crown solicitor's office	Providing relevant legal advice in relation to OPG applications ensuring they are in line with current legal requirements. Progressing applications through the Youth Court.
Youth court	Making decisions as to whether the transfer of guardianship should be granted to other person/s

## 6. Monitoring, evaluation and review

This policy will be subject to review within 12 months in consultation with relevant stakeholders or earlier if required to comply with any change to applicable legislation, government or departmental policy.

## 7. Supporting documents

- Aboriginal identity planning policy
- Care planning policy
- Care support payments (family based) procedure
- Change of name practice guide and procedure for children under guardianship (under review)
- Charter of Rights for Children and Young People in Care
- Children's Protection Act 1993
- Civil claims policy and procedure
- Coronial Response procedure 2017
- Death of a child in care guideline 2017
- Other Person Guardianship Panel terms of reference
- Rapid Response Framework: Whole of Government Services for Children and Young People under Care and Protection Orders
- Standards of Alternative Care in South Australia
- Step by Step OPG Assessment tool: Manual for Assessors

## 8. References

- *Australian Passports Act 2005*
- *Births, Deaths and Marriages Registration Act 1996*
- *Children's Protection Act 1993*
- *Coroners Act 2003*
- *Family and Community Services Act 1979*
- *Family Law Act 1975*
- *Guardianship of Infants Act 1940*
- *Transplantation and Anatomy Act 1983*



## Appendix 1 - OPG Eligibility Criteria

OPG should only be considered as a suitable option for the child when ALL the following requirements are met:

<b>Other Person Guardianship (general information)</b>
The carer, child (if appropriate) and birth family have been informed about the OPG assessment process, rights and responsibilities of the OP guardians, support available post OPG. The carer has expressed their interest in pursuing OPG. <i>OPG Eligibility Criteria, OPG Policy, OPG Assessment Process, OPG brochure and other related information provided.</i>
<b>The child</b>
The child is under a Guardianship of the Minister order until the child turns 18 (GOM18 order).
The child has been under the care of the prospective guardian at least 2 years and has a close, positive preferential relationship that has been observed between the carer and the child (where multiple biological siblings live in the same placement, case managers should consider if OPG is viable and/or should be sought for all children).
<b>Exception:</b> For kinship or SCO only, <b>GOM12</b> or any other type of order in place is as a valid entry point for OPG, if <b>ALL</b> other requirements are fully met.
<b>The carer</b>
The carer is a <i>Department for Child protection approved carer</i> and their registration and DCSI Child related employment screening is current.
There are <b>no substantiated serious care concerns</b> or <b>significant patterns of substantiated moderate care concerns</b> recorded against the carer in relation to their care <b>of any child, during at least in the last 2 years</b> . Any prior to this time will be discussed as part of the application process.
The carer has verbally stated their commitment to care for the child on a permanent basis <sup>13</sup> .
The carer has demonstrated and is willing to support and allow the child to maintain their connection with the birth family into the future (face to face, phone, email or any other means) where safe and appropriate to do so.
The carer has demonstrated their willingness and ability to support and maintain the child's connection with their culture of origin (where applicable).
If OPG is granted, it is anticipated that the carer will be able to continue to manage the day to day needs for the child and no case management will be required from DCP.
<b>The placement</b>
The child has a current <i>SBC annual review and case plan (guardianship)</i> .
If the child is Aboriginal, an Aboriginal Cultural Identity Support Tool (ACIST) has been completed and the connection with country and culture will be maintained.
If the child is from a culturally and linguistically diverse background (CALD), a cultural plan has been created and is in place.

<sup>13</sup> Verbal commitments are the only requirement at the initial stage of the process. These statements will be objectively corroborated with the assessment process



## Other person guardianship Step by Step assessment competencies; descriptions

<b>Attitudes and connections</b>	<b>Motivation</b>	Motivation is realistic and appropriate
	<b>Support networks</b>	Network of support is in place
	<b>Financial resources</b>	Financial stability is demonstrated
	<b>Cultural respect and understanding</b>	Cultural differences are understood and valued
	<b>Aboriginal cultural competence</b> <i>(only used when assessing suitability as guardian for an Aboriginal child or young person)</i>	Aboriginal cultural competence is demonstrated by active participation in networks within Aboriginal communities, understanding extended family and kinship relationships in an Aboriginal context and use of Aboriginal community organisations and key people providing relevant services
	<b>Attitudes to birth family</b>	Attitude to birth families is non-judgemental and recognises the benefit to children having contact with their birth family
<b>Personal resilience</b>	<b>Attachment</b>	Life history demonstrates ability to form secure attachments
	<b>Trauma, grief and loss</b>	Trauma has been constructively addressed and adversity has prompted reflection, learning and growth
	<b>Dealing with stress</b>	Stress is dealt with realistically and constructively
	<b>Relationship with partner</b> <i>(only if prospective guardians are a partner couple, or if the prospective guardian has an established relationship with a non-live in partner)</i>	Relationship is supportive, characterised by warmth, constructive patterns of decision making and dealing with conflict
	<b>Fertility</b> <i>(if applicable)</i>	Focus is on meeting the needs of the child who is the subject of the guardianship order, in the context of dealing with a wish to have own child



<b>Child focused nurture</b>	<b>Provide nurturing care</b>	Care characterised by warmth, nurture, empathy and playfulness is demonstrated
	<b>Understand developmental trauma</b>	Understanding of the effects of developmental trauma is demonstrated
	<b>Promoting a child's positive self-image</b>	Ability to promote the positive self-image of children is demonstrated
	<b>Promoting a child's identity</b>	The connection between children and their birth family and culture is supported
	<b>Meeting day to day needs</b>	Needs of children at different stages of development can be identified and met
	<b>Managing behaviour</b>	Difficult and challenging behaviour of children can be responded to appropriately
	<b>Impact on own children (<i>if applicable</i>)</b>	The impact of providing care on own children is identified and can be responded to appropriately
<b>Working with others</b>	<b>Work with service providers</b>	Complex interactions with service providers can be initiated and directed
	<b>Promoting educational engagement</b>	Educational engagement of children can be promoted
	<b>Managing birth family contact</b>	Safe contact between a child and their family can be initiated and maintained
	<b>Commitment to on-going development by learning from others</b>	Willingness and ability to develop skills in caring is demonstrated