Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: CSSC@parliament.qld.gov.au

Dear Committee Secretary

Child Protection and Other Legislation Amendment Bill 2020

Thank you for the opportunity to provide feedback on the Child Protection and Other Legislation Amendment Bill 2020. The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation that will have significant impacts on the child protection system in Queensland.

I refer to our previous submission dated 3 August 2020 which provided feedback on the previous Bill introduced 14 July 2020 which lapsed when the 56th Parliament was dissolved on 6 October 2020. We note that this submission largely replicates our previous response.

This response has been compiled by the QLS Childrens Law Committee, Human Rights and Public Law and First Nations Legal Policy Committee, whose members have substantial expertise in the matters associated with the child protection system in Queensland.

1. Introductory remarks

Children and young people occupy a special place in our community. Due to their age and vulnerability the rights, interests and wellbeing of children and young people must be protected and promoted. Due to their special status, the death of a child or young person is always tragic. The death of a child at the hands of another is an even greater tragedy. The findings delivered by Deputy State Coroner Bentley of the Coroners Court of Queensland following the inquest into the death of Mason Jet Lee set out the events and circumstances that led to the death of a very young child.

This necessitates a review to ensure that the best interests of all children are protected and that systems failures and inequities are acknowledged and addressed. Further, it highlights the necessity that frameworks and systems that are designed to protect children are funded appropriately to address the increasing demands for child safety services as highlighted by the Queensland Child Protection Commission of Inquiry.

Child Protection and Other Legislation Amendment Bill 2020

2. Clause 8 – Amendment of s5BA (Principles for achieving permanency for a child)

Clause 8 of the Bill seeks to amend section 5BA of the *Child Protection Act 1999* which outlines the principles for achieving permanency for a child. The Society does not support clause 8 and the proposed changes to section 5BA of the *Child Protection Act 1999* for the reasons stated below.

First, the amendment is unnecessary as the permanent need met by adoption is already met within the Child Protection Framework. Permanent Care Orders ("PCO") are already available. PCOs are provided for in section 61 (g) of the *Child Protection Act 1999* and were established to permit long-term guardianship of a child to a suitable person, other than a parent of the child or the chief executive.[1]

PCOs provide a scheme setting out the legal arrangements for a child's care that provide a sense of permanence and long-term stability. The Queensland Government website states in relation to PCOs:[2]

> This order is suitable when a child cannot be safely reunified with their parents and the child requires a permanent home that can provide them with stability as well as physical, relational and legal permanency. This order will only be made if the Childrens Court is satisfied that the permanent guardian will meet their obligations under a PCO, which includes preserving the child's identity, relationships with their birth family and connection to their culture of origin.[3]

PCOs provide permanence and stability for children and young people whilst retaining connectedness with family, community and culture, identity and language. In contrast, adoption severs the legal relationship between the child and the child's birth parents (unlike child protection orders) and creates a new identity for the child, including a changed birth certificate. Adoption orders do not expire when the young person turns eighteen.[4]

The primary difference between PCOs and adoption orders are that with PCOs, children and young people have the ability to maintain a connection with their biological parent/s. Therefore, PCOs provide a more flexible approach to the long-term care of children and young people in the child protection system. In our view, the availability of adoption orders for children in the out-of-home care system within a two year period is a significant step and may be considered a disproportionate response.

Furthermore, as PCOs are a relatively recent reform, it would be prudent that more time be invested in assessing the uptake and efficacy of PCOs before the more definitive reforms in clause 8 are implemented. PCOs have been legislatively implemented for less than two and a half years. In this regard, the Director of Child Protection Litigation reported that there was a 25.2% increase in the child protection orders made granting long-term guardianship of

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[1] *Child Protection Act 1999* s 4.
[2] Ibid s 61(g).
[3] Queensland Government, *Types of Childrens Court Orders*: https://www.qld.gov.au/community/caring-child/foster-kinship-care/information-for-carers/rights-and-responsibilities/legal-matters/types-of-childrens-court-orders#PSO.
[4] Department of Child Safety, *Changes to Queensland's child protection legislation - Youth and Women Frequently Asked Questions for Carers and Care Services*: https://www.csyw.qld.gov.au/resources/dcsyw/about-us/publications/legislation/faqs-carers-care-services.pdf, p 20.

children.[5] The Director of Child Protection Litigation further stated that the increase in the number of orders granting long-term guardianship made in the 2018-19 financial year evidences a greater percentage of children within the statutory care system being afforded legal permanency.[6]

Second, the Society is concerned about the impact of the proposed reforms on Aboriginal and Torres Strait Islander children and young people. The Coroner has noted the over-representation of Aboriginal and Torres Strait Islander children in the child protection system. It is our strong submission that there be in-depth and culturally appropriate, respectful consultation with Aboriginal and Torres Strait Islander Peoples. The importance of this consultation cannot be understated – both for these responses and for decisions the department makes in placements.

From a legislative perspective, decisions concerning Aboriginal and Torres Strait Islander children and young people must accord with the provisions set out in section 5C of the *Child Protection Act 1999*, and the child placement principles statement therein.[7] It is essential that whenever an Aboriginal and or Torres Strait Islander child is removed from their biological parent or parents and placed in out-of-home-care, that he or she maintain their connection to their culture of origin to the maximum extent possible.[8]

Clause 8 appears to dilute the protections afforded by section 5C of the *Child Protection Act 1999*.[9] The placement principle posits that, if an Aboriginal or Torres Strait Islander child is to be placed in care, the child has a right to be placed with a member of the child's family group.[10] We understand that this does not occur in all circumstances. In some cases, it appears that there has been inadequate consultation with family and community. It is our view that the Department must, in all cases, undertake full and proper formal consultation with family and community leaders before determining that suitable kin carers cannot be located. The identification of suitable kin carers is crucial considering that clause 8 of the Bill would allow adoption orders to be made within a two year period, thus severing a child's connection to community. The Society does not support the dilution of this salient aspect of the legislation, the purpose of which is to provide for the protection of children.[11]

Third, the provision does not accord with the guiding principles set out in section 6 of the *Adoption Act 2009*. Section 7 of the *Adoption Act 2009* sets out additional principles concerning Aboriginal and Torres Strait Islander persons. This provision mandates that because adoption (as provided for in this Act) is not part of Aboriginal tradition or Island custom, adoption of an Aboriginal or Torres Strait Islander child should be considered as a way of meeting the child's need for long-term stable care only if there is no better available option.[12] In our view, the availability of PCOs is a better option.

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[5] Director for Child Protection Litigation: Annual Report 2018-2019, https://www.dcpl.qld.gov.au/__data/assets/pdf_file/0011/637886/tabled-dcpl-annual-report-2018-19-5620t36.pdf, p 7.
[6] Ibid p 14.
[7] *Child Protection Act 1999* s 5C.
[8] These rights are secured by the charter of rights for a child in care as set out in schedule 1 of the *Child Protection Act 1999*.
[9] *Child Protection Act 1999* s 5C.
[10] Ibid s 5C(c).
[11] Ibid s 4.
[12] *Adoption Act 2009* s 7(1)(a).

Clause 8 appears to be contrary to section 7 of the *Adoption Act 2009*,[13] and also appears to erode the protections of section 5C of the *Child Protection Act 1999*.[14] In our view, the proposed amendment to section 58A should require a different hierarchy of placement order for Aboriginal and Torres Strait Islander children where adoptions are expressed as a last resort. This is consistent with the approach in section 10A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Fourth, the two year timeframe in which a parent must address issues of concern is too short.[15] There are a variety of factors that might impact a parents' ability to address issues of concern in this short two year time period. These issues are complex, multi-faceted and individualised. For example, families experiencing the effects of inter-generational trauma may require longer than two years to remedy issues of concern. Geographic disadvantage might also play a role where persons in remote communities, with reduced or delayed access to services, might also be unable to address issues of concern within two years. In addition, a two year period prior to adoption may not serve the best interests of the child.[16]The PCO regime allows the flexibility of retaining the ability for reunification, whilst permitting parents more time to address issues.

We note the vital importance of ensuring that when families present with unmet needs, there is access to voluntary services that can assist them in addressing the underlying issues. In our view, this remains inadequately addressed and should be prioritised before considering an adoption as an option. Families must have access to services and there needs to be adequate funding to support families to address the underlying issues, as well as adequate funding for legal services that can help parents to understand the legal implications and to provide advocacy before their fundamental legal right to family is taken away.

Fifth, the Society holds concerns about the operation of clause 8 in the situation where a child's biological parents have an impairment or disability. We seek clarification how parents with impairments will be assisted to participate in the adoption process and what funding is available to assist these families if clause 8 were implemented.

Sixth, clause 8 runs contrary to several of the rights protected under the *Human Rights Act 2019*, including the right to privacy and reputation,[17] family,[18] and cultural rights.[19] Section 13 of the *Human Rights Act 2019* sets out when a human right can be limited. The provision notes that when deciding whether a limit on a human right is reasonable and justifiable, there should be consideration of whether there are any less restrictive and reasonably available ways to achieve the purpose.[20] Due to the existence and use of PCOs as a mechanism to achieve permanency and stability for children in the child protection system without severing relationships with family and community, it is our submission that no change should be made

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[13] Ibid s 7.
[14] *Child Protection Act 1999* s 5C.
[15] Coroners Court of Queensland - *Findings of Inquest into the death of Mason Jet Lee, 2016/2338, 2 June 2020*, Recommendation 6(b).
[16] *Child Protection Act 1999* section 5A sets out the paramount principle which states that, the main principle for administering this Act is that the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount. The Charter of rights for a child in acre as set out in schedule 1 of the *Child Protection Act 1999* are also a relevant consideration.
[17] *Human Rights Act 2019* s 25.
[18] Ibid s 26.
[19] Ibid ss 27, 28.
[20] Ibid s 13(2)(d).

to section 5BA of the *Child Protection Act 1999*. In this regard we also recognise the relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Convention on the Rights of the Child.

We note the compatibility statement in relation to the Bill. However, there is no mechanism for self-determination by Aboriginal and Torres Strait Islander organisations to consider the appropriateness of adoption for Aboriginal and Torres Strait Islander children that would be consistent with self-determination. In our view, simply moving the order of priorities for Aboriginal and Torres Strait Islander children in section 5BA of the *Child Protection Act 1999* is insufficient and risks re-imposing past traumas experienced by stolen generations.

Seventh, we acknowledge that this proposed amendment is a recommendation of Deputy State Coroner Bentley following the inquest into the death of Mason Jet Lee, [21] which relied upon recommendation 7.4 from the Queensland Child Protection Commission of Inquiry.[22] This recommendation stated that the Department of Communities, Child Safety and Disability Services routinely consider and pursue adoption (particularly for children aged under 3 years) in cases where reunification is no longer a feasible case-plan goal. As stated earlier, Aboriginal and Torres Strait Islander children are over-represented in the child protection system. While the inquest into the death of Mason Jet Lee,[23] recommended adoption, Mason was never placed in out-of-home-care and was not an Aboriginal or Torres Strait Islander child.

The supporting rationale for adoption was that it is a method of removing children from the system.[24] The Society considers this requires further consideration before reliance can be placed on this Coroner's recommendation. In this regard, the Society notes the overrepresentation of children and young people on children protection orders who are subject of Departmental notifications in the youth justice system. This was highlighted in the Report on Youth Justice by Bob Atkinson, which noted that 51 % of children in the youth justice have had some involvement with Child Protection.[25] In our view, the more appropriate strategy is to take measures to address the systemic issues surrounding the placement of children in out-of home-care.

Finally, we note the Charter of rights for children in care set out in schedule 1 of the *Child Protection Act 1999*. The Charter recognises that the State has responsibilities for a child in need of protection who is in the custody or under the guardianship of the chief executive under the Act and establishes an extensive list of rights for children and young people in the child protection system.[26] The Society has received reports that there has been inconsistent and insufficient compliance with the Charter of rights in practice. Due to issues of funding and resourcing and the increasing demand placed on child safety services, the Society is

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[21] Coroners Court of Queensland - *Findings of Inquest into the death of Mason Jet Lee, 2016/2338, 2 June 2020*, Paragraph 939, p 106.
[22] Queensland Child Protection Commission of Inquiry - *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013): http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0017/202625/qcpci-final-report-web-version.pdf, recommendation 7.4.
[23] Coroners Court of Queensland - Findings of Inquest into the death of Mason Jet Lee, 2016/2338, 2 June 2020, Paragraph 939, p 106.
[24] Ibid.
[25] Childrens Court of Queensland Annual Report 2018-19: https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/636196/cc-ar-2018-2019.pdf, page 1.
[26] *Child Protection Act 1999* sch 1, s 74.

concerned that the best quality case work and well tested evidence is not being placed before the courts and Departmental decision makers such as the Director-General. With the reforms proposed, this lack of quality evidence has the potential to have harmful and long-lasting impacts on children and young people entering the child protection system if orders are being made without regard to the best quality evidence. Therefore, we suggest that if these reforms proceed, before decisions concerning prospects of reunification and adoption are made,[27] an independent review of the evidence to ensure compliance with the Charter of Rights,[28] child placement principles and model litigant provisions must be undertaken. The very complexity of cases coming to the attention of Child Safety services suggests the need for a more cautious and nuanced approach, taking into consideration the best interests of the child.

3. Clause 9 – Insertion of new section 51VAA

Clause 9 of the Bill seeks to insert a new provision to include review of the requirements for children under long-term guardianship of chief executive.

The Society is supportive of the review process for long-term guardianship orders as contemplated by proposed new section 51VAA. We understand that the new provision will apply to orders granting long-term guardianship of a child to the chief executive. However, the Society is concerned as to how the implementation of this provision will be funded.

The Department of Child Safety, Youth and Women has published some relevant statistics that point to a growing trend of children and young people on long-term protection orders. While not all will be subject to the review process in proposed new section 51VAA, the increase in the number of long-term protection orders is a relevant consideration when contemplating the adequacy of resources for the review of such orders.

The Department of Child Safety, Youth and Women has reported that of the 11,164 children subject to child protection orders as at 30 June 2020, 6,802 were subject to long-term orders.[29] The number of children subject to a long-term child protection order increased from 6,403 as at 30 June 2019 to 6,802 as at 30 June 2020 (an increase of 6.2 per cent).[30] Over the last five years, between 30 June 2016 and 30 June 2020 the number of children subject to a long-term child protection order increased by 15.0 per cent (from 5,917 to 6,802).[31] While not all these orders will grant long-term guardianship of a child to the chief executive, the statistics demonstrate that there is an increasing trend of children subject to long-term child protection orders.

As a corollary, we seek clarification as to what funding arrangements are being made outside of the additional funding that has already been provided to undertake these reviews. We note that significant additional funding would be required for the Department, ATSILS, Legal Aid Queensland, community legal centres, Director of Child Protection Litigation and the Public Guardian. In the absence of such funding, it is unlikely that the requirements set out in new section 51VAA will be achieved.

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[27] Ibid ss 5BA, 5C.
[28] Ibid sch 1, s 74.
[29] Department of Child Safety, Youth and Women: https://www.csyw.qld.gov.au/child-family/our-performance/ongoing-intervention-phase-permanency-planning/legal-permanency-long-term-child-protection-orders.
[30] Ibid.
[31] Ibid.

4. Funding

There is a chronic lack of funding for legal assistance services in the child protection jurisdiction. It is our strong submission that this lack of funding be addressed as a matter of priority to ensure that the best interests of Queensland children and young people and their families are protected and promoted.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

Elizabeth Shearer
President