LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

**SUBMISSION REGARDING THE
CHILD PROTECTION AND OTHER LEGISLATION AMENDMENT BILL 2020**

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Mothers in the child protection system

Whenever changes to child protection orders are being considered, we should bear in mind that removing a child from his or her parents – most often their mother – is **one of the most intrusive forms of intervention the state can undertake**. For many mothers, having their children removed is just as much of a threat to their liberty and wellbeing as being imprisoned.

Despite the gravity of the consequences of removal of a child, the legal protections that exist in criminal procedure – such as the high standard of proof, the safeguards around the admissibility of evidence, the protection from self-incrimination and the emphasis on the importance of legal representation – do not apply in a child protection context.

Yet, there is a profound power imbalance in child protection matters, and a substantial difference between the parties in terms of knowledge, strategy, confidence, and emotional strength. On one hand, you have a detached government department, with all its resources, experience and immense power to dramatically alter people's private and family lives, against a parent who may have low educational attainment, may have mental illness or cognitive impairment, may be a victim of domestic violence, may be homeless. Even if the parent does not experience one or more of these struggles, they will still be emotional, angry and in a panic stricken state. A parent in this position is unable to effectively advocate for themselves.

Prof Heather Douglas (UQ Law School) and I have been researching child protection law for over a decade, and in the course of this research, mothers have been described as being 'totally in the dark', 'not knowing that they can even ask questions', they 'feel intimidated', they feel under pressure from the department to consent to arrangements that they do not understand, not having any resources, sometimes not even speaking the language. They can also make admissions without knowing the consequences that might have for them and their children.

Mothers in the child protection system are described in our research this way:

'totally in the dark'	'quite resentful'
'out of their depth'	'very fearful'
'don't have any resources'	'very scared'
'can't speak the language'	'inadequate support systems'
'feel intimidated'	'looking for help'
'pressured into signing things'	'needed housing'
'don't have that way of manipulating the system'	'scum of the earth'
'don't have a lot of self-confidence'	'hold everything against me'
'don't know about their rights'	'blamed for domestic violence'
'they're railroaded'	'misinformed'
	'pressured'

Positive elements of the Bill

1. Opportunity for review of a long-term guardianship order (proposed s 51VAA)

The Bill proposes that long-term guardianship orders be subject to a review within 2.5 years of commencement (cl 9). This is a positive reform. Long-term guardianship orders are sometimes imposed in situations where a parent did not have legal advice, did not have legal representation and did not fully understand the consequences of the order. Our research suggests that it is not uncommon for mothers to seek legal advice after a long-term guardianship order has been made, and the options for review at that stage are limited. Currently, in order to have a long-term guardianship order varied or revoked, a parent will need to satisfy the court that they have 'new evidence' (*Child Protection Act 1999* (Qld) s 65(3)) and in practice, that is a high threshold to meet. Providing an option for review of a long-term guardianship order should be considered a positive development.

2. The carer hierarchy (proposed s 5BA(4))

Another positive aspect of the Bill is the priority list of potential carers to be considered. It is absolutely appropriate that returning the child to their family be the first alternative that is considered. This is consistent with human rights – particularly the right to protection of the family unit and the right to protection of cultural rights of Aboriginal and Torres Strait Islander people to maintain kinship ties, cultural identity and language (*Human Rights Act 2019* (Qld) ss 26, 28). But also, research suggests that if it is possible to keep a child at home, that is what will result in the best outcome for the child.

The guiding principle under international law is the removal should be a last resort – because removal is a traumatic event itself. Also, there is no way of predicting how the placement will go, and whether the child (all things considered) would have been better off had they been left where they were. When a child is removed from their home, there is no legal requirement to show that the child is likely to be better off in the alternative home on offer (if any). The child's current living situation is not being pitted against a defined alternative. If the court makes a long-term guardianship order in favour of the chief executive, it will be up to the chief executive to determine where to place that child. Placements often do not succeed, and children often find themselves bounced from

placement to placement. Many children end up in residential care, which is well-known to be associated with criminalisation.

Further, keeping a child at home prevents the trauma to the parents, which can also be lifelong, and can have the effect of sending the parent's life down a very bleak trajectory. Even for parents who have complex needs, the best model of care proposed in the literature is therapeutic foster care, where the foster carer and the parent care for the child in partnership, so that the parent's parenting capacities can be enhanced by having extensive contact with their child. If a parent is separated from a child, it will be difficult to demonstrate they have the capacity to care for them.

Likewise, the second preference should be kinship care. Children benefit from the maintenance of family ties and the ongoing opportunities for contact with their parents that this may afford.

3. Aboriginal and Torres Strait Islander children – adoption should be the absolute last resort (proposed s 5BA(4)(c), (e))

The third positive aspect of the Bill is its preference for long-term guardianship over adoption for Aboriginal and Torres Strait Islander children. In our research, many participants have commented that the Stolen Generations continue to some extent, and this perception is supported by the statistical data. The Australian Institute of Health and Welfare reports that 1 in 18 Indigenous children are in out of home care in Australia, and 1 in 6 come to the attention of child safety services each year.

In our research, we have observed high levels of concern amongst lawyers and social service providers that Indigenous families feel completely disempowered and defeated in the context of Child Safety – they understandably assume that once Child Safety becomes involved, the child will be removed, and little can be done about it. The sense of despair and hopelessness is overwhelming, and the ongoing legacy of child removal continues to thwart any attempt to meet reconciliation goals in a broader sense.

These comments have been made by participants in our studies regarding Aboriginal mothers:

> 'They just want to get in there, get our children out… and then file it away.'
> 'They think that once child safety becomes involved, that's the end of it.'
> 'You can understand that sense of despair, given the history.'

Concerns regarding the Bill

1. Adoption is the *most* restrictive alternative (proposed s 5BA)

Considering adoption as the third possible option for non-Indigenous children, and the fourth possible option for Indigenous children, is an extremely drastic step. This is particularly so in view of the body of evidence which suggests that supporting children to stay at home, by enhancing the protective capacities of birth families, is the preferred option.

Adoption means that the legal ties are severed between the child and their birth family. Adoptive parents have '**all** the powers, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility.' The child no longer has a right to have contact with their birth family; there is no right to have the order reviewed. A parent will still be required to consent to an adoption, but consent can be dispensed with by the court under some circumstances.

Regardless, just as in the case of long-term guardianship orders, there is a risk that parents will consent to adoption without realising what the consequences are, without obtaining sufficient legal advice. Yet, the legal consequences here are much more profound, and they are practically irreversible.

Of course, the risk is that with a provision like this in the Act, many more adoptions will take place. Indeed, that is the stated aim of the Bill. Yet, for a young child, the consequences of a 'wrong' decision are life-long. Should we not make sure that we get it right rather than rushing into such a drastic legal option? And are we not forgetting the social costs that are incurred as a result of the trauma to mothers, who – as I said earlier – can find themselves in a state of utter hopelessness, despair and profound depression when they lose a child.

Further, there will be less oversight of children who are adopted than children who are on long-term orders. Indeed, again, that may well be the purpose of the Bill. But at what cost? As noted above, there is no guarantee that by removing a child, we are necessarily placing them in a more stable or safe environment. There is always a chance that we are placing them in another risky environment – as recent case law (see for example *RE and RL v Department of Child Safety, Youth and Women* [2020] QCAT 151), and reports of incidents where harm has been caused to children in out of home care (see for example the NSW case of William Tyrrell), would confirm.

2. The timeline (proposed s 51VAA(2))

These reviews of long-term guardianship orders are to occur two to 2.5 years into the order. However, in the life of a child protection matter, that is a very short period of time. This is particularly so for long-term guardianship orders, where little or no effort may be made by the department to ensure that contact between the child and their birth family occurs.

Even when a short-term order is imposed (maximum two years duration) it is not uncommon for parents to spend two years fighting for a reunification plan – and certainly it is a rare situation where a reunification plan is well and truly being implemented by the end of a two year order. When it comes to maintaining contact with a child after removal, there are so many variables that the parent has no control over. Contact visits (if allowed for) often get cancelled, and the goal-posts keep shifting so more and more tasks are required to be done by parents so they can progress through a reunification plan. Further, the smallest set back in the life of a parent can have huge ramifications for any reunification plan on foot; for example, if a mother loses her housing because she no longer has care of her children, she will need to regain access to appropriate housing before a child will be permitted to visit her at home. Add to that the need to exit a violent relationship, obtain

mental health treatment (in the context of profound depression at the loss of the child). There is most often no quick fix.

Just because a parent is not ready to regain care of their child in two years does not mean they will not be ready in three years, or four. Especially if there is some commitment on the part of child safety to make them ready – by providing support where it is needed.

Instead, it is my belief that legislation should require the chief executive to demonstrate to the court that reasonable steps have been taken to support parents to regain care of their child before an order can be made in the first place.

In the context of this particular Bill, it is my recommendation that a provision be added that requires the chief executive to take reasonable steps within the first two years of a long-term guardianship order to:

1. ensure that contact continues between the child and their birth family, where this is safe and appropriate; and
2. ensure that support is provided to birth families to enhance their capacity to protect the child, so that regaining care of the child after two years is a reasonably practicable alternative.

A hierarchy of carers that places the birth family first is disingenuous if no steps have been taken to make this possible. A provision of this nature would address the concerns of magistrates who may only impose a long-term order 'reluctantly' because they see no hope of supports being offered.

In *Department of Child Safety v SJ and MB* [2009] QChCM 1, the magistrate 'reluctantly' and 'with a great deal of sadness' imposed a long-term guardianship order in respect of the children, saying:

> 'I cannot order any support. As we have looked at in section 61 of the Act, I can make a variety of orders, but once I make a final order, what support is offered is up to the Department…
>
> 'If I could give the assistance to you, madam, I would, and I would give your children back. I can't give you that assistance, I can't order anybody to give you that assistance.'
>
> 'It would be nice if I could somehow order that various levels of support were given to the mother… I accept that the mother and father love these children dearly and have done enormous things over the last three years from their point of view to show how much they love the children and to get them back, the reality is that they need support and the support is not available.'

3. Child's views and wishes

There is no mention of child's views and wishes in this Bill. There are a few provisions of the *Child Protection Act 1999* (Qld) that direct that the views and wishes of the child be taken into account in decision-making (see for example, sections 51ZB(1)(a), 59(1)(d), 65B(2), 99N(3), 99P(4), 99Q(6)). Yet, research suggests that children's involvement in child protection decisions concerning them remains extremely limited, even in cases where the child is a teenager and would be considered Gillick competent. The Create Foundation consistently reports that older children do have views regarding where they are placed, who

with, and for how long. Their views and wishes should be respected to the extent that they have decision-making capacity.

It is important to note that older children often abscond from their placements to go home. This can be a path to criminalisation, because police are often called. International research indicates that the more contact a child has with the criminal law system, the more likely they are to end up under youth justice supervision, so it is important that contact between vulnerable children and police be minimised.

It is my recommendation that a provision be added to this Bill that requires the chief executive to ascertain the child's views and wishes, and give proper consideration to them when undertaking a review.

In short, it is my view that the focus of this Bill is misplaced. Permanency is something that children reportedly desire, so this is an important goal. But we need to ensure that the right kind of permanency is secured for the child. The kind of permanency that will improve their life chances, and their wellbeing, that will allow them to maintain their identities and that respects their views and wishes within the decision-making process.

Relevant research results are reported in the following publications:

- Tamara Walsh, 'From child protection to youth justice: Legal responses to the plight of "cross-over kids"' (2019) 46(1) University of Western Australia Law Review 90.
- Tamara Walsh, 'Balancing rights in child protection law' (2017) 31(4) Australian Journal of Family Law 47.
- Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child protection interventions and indigenous people' (2013) 21(1) International Journal of Children's Rights 59.
- Tamara Walsh and Heather Douglas, 'Lawyers' views of decision-making in child protection matters: The tension between adversarialism and collaborative approaches' (2012) 38(2) Monash University Law Review 181.
- Tamara Walsh and Heather Douglas, 'Lawyers, advocacy and child protection' (2011) 35(2) Melbourne University Law Review 620.
- Heather Douglas and Tamara Walsh, 'Mothers, domestic violence and child protection' (2010) 16(5) Violence Against Women 489.
- Heather Douglas and Tamara Walsh, 'Mothers and the child protection system' (2009) 23(2) International Journal of Law, Policy and the Family 211.
- Tamara Walsh and Heather Douglas, 'Legal responses to child protection, poverty and homelessness' (2009) 31(2) Journal of Social Welfare and Family Law 133.