



Child Protection and Other Legislation Amendment Bill 2020

Submission
to
Queensland Parliament
Legal Affairs and Community Safety Committee

3 August 2020

Introduction

1. Thank you for the opportunity to make a submission on the Child Protection and Other Legislation Amendment Bill 2020 (**the Bill**).
2. The Queensland Human Rights Commission (**the Commission**) has functions under the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld) (**HR Act**) to promote an understanding and discussion of human rights in Queensland, and to provide information and education about human rights.
3. The purpose of this submission is to draw the Committee's attention to the key human rights implications of the Bill and make recommendations that enhance the promotion and protection of human rights in Queensland.

Background

4. Following a comprehensive period of review from 2015-2017, in 2018 the Queensland Government introduced significant reforms to improve permanency outcomes for children involved in the child protection system. These recent reforms included the insertion of principles for achieving permanency, greater emphasis on permanency goals in case planning, and the introduction of Permanent Care Orders (**PCOs**).
5. PCOs are made by order of the Children's Court. PCOs have the goal of ensuring that a child has a secure and permanent home, but without replacing the parents of the child. Adoption, conversely, has the potential to permanently sever relationships with parents, siblings, extended family, community and culture.
6. Unlike adoption, a PCO does not sever the legal relationship with the child's biological parents or change the child's legal identity. The guardian appointed under the PCO takes on responsibility for most aspects of parenting, but the biological parents and extended family remain in contact unless there are serious concerns that would not allow this to occur in the best interests of the child.
7. On 2 June 2020, Deputy State Coroner Bentley made six recommendations following the inquest into the death of Mason Jet Lee. The Queensland Government accepted all recommendations, including a recommendation that:

The government consider whether the Adoption Act 2009 should similarly reflect the 2018 amendments to the Adoption Act 2000 (NSW), expecting

*children to be permanently placed through out of home adoptions within 24 months of entering the department's care.*¹

8. In short, the effect of the proposed changes to the child protection legislation is to provide that adoption is third in the order of priority for achieving permanency for a child, after placement of the child with their parents or with a guardian who is a member of the child's family or another suitable person, save for Aboriginal and Torres Strait Islander children for whom it will remain the last resort.
9. According to the Statement of Compatibility, the purpose of this amendment is 'to increase genuine and routine consideration of adoption as an available option for, and to increase its use to, provide permanency for children in out-of-home care when it is appropriate'.²
10. The Bill also requires the Chief Executive to review the case plan of a child who is subject to a child protection order granting long-term guardianship to the Chief Executive two years after the order is made, to consider alternative long-term orders to better achieve permanency.

Summary

11. With respect to the reforms in relation to adoption, the Commission contends, in summary, that:
 - a. Following a long period of reform, the further proposed changes to the *Child Protection Act 1999 (CP Act)* are unnecessary, or at the least are premature.
 - b. There is an insufficient evidence base to justify the changes, particularly as the impact of the changes that commenced in 2018 has yet to be evaluated in a meaningful way.
 - c. Key differences between the legislative framework in New South Wales and Queensland have not been acknowledged in the Government's considerations of the Deputy Coroner's recommendations.
 - d. Fulsome consideration of the *Adoption Act 2009 (Adoption Act)* is necessary prior to making amendments to the CP Act. The appropriate time for this would be during the review by the Minister in 2021 as required by the Adoption Act in section 327.

¹ Queensland Courts (2020), *Inquest into the death of Mason Jet Lee* at para 953.

² Statement of Compatibility, *Child Protection and Other Legislation Amendment Bill 2020*, p. 6.

Relevant human rights

12. Several human rights under the HR Act are engaged by the Bill, and most notably:
- The right to recognition and equality before the law³;
 - The protection of families as the fundamental group unit of society⁴;
 - The rights of the child to special protection, in their best interests;⁵
 - The right not to have one's family unlawfully or arbitrarily interfered with;⁶
 - Cultural rights generally⁷ and cultural rights specific to Aboriginal peoples and Torres Strait Islander peoples.⁸

Proportionate limitation on rights

13. The HR Act provides for when human rights may be reasonably limited, subject to the proportionality test in section 13. Any limitation must be for an important purpose, rationally connected to the achievement of that purpose, and the least restrictive way of achieving that purpose. The HR Act complements the existing child protection framework. For example, the Children's Court may only make an order if it is unlikely to be achieved by 'less intrusive terms'.⁹
14. Insufficient evidence has been presented to demonstrate why these amendments are needed to achieve the stated purpose, particularly in view of the significant limitations adoption can impose on the rights of children and families outlined in more detail below.
15. Certainly there appears to be evidence that significant numbers of young people are subject to child protection orders granted to the Chief Executive, although numbers of long-term orders granted to the Chief Executive do not seem to be publicly available. While the number of children on orders has increased by around 1000, those placed with a

³ *Human Rights Act 2019* (Qld) s 15

⁴ *Human Rights Act 2019* (Qld) s 26(1)

⁵ *Human Rights Act 2019* (Qld) s 26(2)

⁶ *Human Rights Act 2019* (Qld) s 25

⁷ *Human Rights Act 2019* (Qld) s 27

⁸ *Human Rights Act 2019* (Qld) s 28

⁹ *Child Protection Act 1999* (Qld) s 59

relative or other suitable person has remained fairly stable, at around 25% over the past 5 years.¹⁰

16. However, not enough time has passed since the latest reforms commenced in October 2018 to evaluate the impact and effectiveness of the introduction of permanency principles, emphasis on case planning and the option of PCOs in providing stable, permanent care options for children.
17. The permanency principle at section 5BA (2)(c) already expressly refers to adoption as an option for achieving permanency and long-term stability. It is unclear how the further inclusion of adoption at section 5BA (4), amongst a list of priorities regarding with whom a child should be placed, would achieve a different outcome.
18. When considering less restrictive options that achieve stability for a child compared with the out of home adoption of a child, the Commission suggests that focus on early intervention to prevent removals to out-of-home care in the first instance needs to remain a key priority, along with the increased use of kinship care, particularly for Aboriginal and Torres Strait Islander children as required by the Child Placement Principles.¹¹
19. The Commission notes that there has been no improvement in the last 5 years with respect to the number of Aboriginal and Torres Strait Islander children being placed with kin, which may be continuing to present a barrier to permanency and stability for these children.¹²

Protection of families and children

Protection of families

20. In section 26, the HR Act recognises that families and children must be afforded special protection by the state.
21. There is no single definition of the family under international human rights law. However, the Committee on Economic, Social and Cultural Rights has stated that the concept must be understood 'in a wide sense' and 'in

¹⁰ Department of Child Safety, Youth and Women, *Child Protection Orders* (Web Page) <<https://www.csyw.qld.gov.au/child-family/our-performance/summary-statistics/child-protection-orders>>

¹¹ Section 5C *Child Protection Act 1999* (Qld)

¹² Department of Child Safety, Youth and Women, *Placement of Aboriginal and Torres Strait Islander Children* <<https://www.csyw.qld.gov.au/child-family/our-performance/representation-aboriginal-torres-strait-islander-children/placement-aboriginal-torres-strait-islander-children>>

accordance with appropriate local usage'.¹³ The concept of a family includes the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with the rights and the best interest of children.¹⁴

22. While adoptive parents can undoubtedly become family, on the other hand adoption has the potential to permanently disrupt the rights of a child to have a relationship with their biological family members. As explained in the Explanatory Notes to this Bill, the legal consequence of adoption is that:

*There is no legal recourse for biological parents, siblings or extended family members if adoptive parents decide the adopted child will no longer have an ongoing relationship with their siblings or broader family group.*¹⁵

23. The Commission accepts that the legislative framework should provide a range of options and appropriate discretion to ensure decisions are made in the best interests of the child. This is consistent with the rights of the child to special protection as protected in the HR Act.¹⁶ As each case is different, the Commission understands there needs to be flexibility in how permanency is achieved based on the needs and views of the particular child.
24. However, adoption is a drastic step with permanent legal, social and emotional consequences for families and children. For a child it can cause trauma by severing connections with family, community and culture, sometimes over a lifetime. According to the Department of Child Safety, Youth and Women's information for parents considering adoption, birth parents who give up their child for adoption can experience strong emotions including 'fear, shock, anger, shame or denial' in the short term and 'uncertainty and regret' in the long term.¹⁷
25. In 2012, members of the Queensland Parliament including the now Premier of Queensland apologized for Queensland's dark history of forced adoptions, a practice which caused great pain and suffering for many

¹³ Committee on Economic, Social and Cultural Rights, *General comment No. 4*, para. 6; *General comment No. 5*, para. 30.

¹⁴ Committee on the Rights of the Child, *General comment No. 7*, para. 15.

¹⁵ Explanatory Notes, Explanatory Notes, *Child Protection and Other Legislation Amendment Bill 2020*, p. 4.

¹⁶ Section 26(2) *Human Rights Act 2019* (Qld)

¹⁷ Department of Child Safety Youth and Women, *Are you considering adoption for your child? Prescribed information for a parent considering adoption for their child* (PDF) at page 13 <https://www.qld.gov.au/__data/assets/pdf_file/0028/54397/info-for-parents-considering-adoption.pdf>

Queenslanders.¹⁸ While adoption now in almost all cases occurs with consent of birth parents, the government should proceed with serious caution before facilitating an increase in adoptions. It must be acknowledged that matters of consent are complex in light of significant power imbalances between birth parents and decision-makers with respect to adoption.

26. Critically, when recommending that Queensland follow the same course as New South Wales, the Deputy Coroner did not acknowledge the important differences between the adoption legislation in New South Wales and Queensland. As highlighted by the Director-General of the Department of Child Safety, Youth and Women, in the recent public briefing into the Bill, while reform in Queensland has been focused on creating stability by limiting the number of short-term orders, the recent reform agenda in New South Wales was focused on requiring permanent options to be considered within 2 years.¹⁹
27. Importantly, PCOs or an equivalent option are not available in New South Wales. In fact, adoptions in New South Wales may more closely reflect PCOs in Queensland in the sense that adopted children in New South Wales are encouraged to maintain a connection with their birth family and cultural heritage.
28. Both New South Wales and Queensland adoption regimes encourage 'open' adoption through the use of adoption plans. While adoption plans are now mandatory in Queensland for when a child protection order is or has been in force, or for Aboriginal and Torres Strait Islander children²⁰, such plans are not legally enforceable in Queensland. In New South Wales, adoption plans can be varied and enforced through the Supreme Court.²¹ This provides certainty to the child and biological parents that contact and information exchange will continue throughout childhood and reflects an important safeguard of the rights of the family and child.
29. The issue of ongoing contact may be compounded in circumstances where the biological parent faces social disadvantage, for example, due to disability, cultural and linguistic diversity, or socioeconomic status, engaging the right to equality before the law and non-discrimination.²²

¹⁸ Queensland Government, *Apology for past forced adoption practices* (Web Page) <<https://www.qld.gov.au/community/caring-child/adoption/post-adoption-support-services/apology-past-forced-adoption>>

¹⁹ Evidence to the Legal Affairs and Community Safety Committee, Brisbane, 27 July 2020, page 4, Deidre Mulkerin.

<<https://www.parliament.qld.gov.au/documents/committees/LACSC/2020/CPOLAB2020/trns-pb-27Jul2020.pdf>>

²⁰ *Child Protection Act 1999* (Qld) ss 165-173

²¹ *Adoption Act 2000* (NSW) part 4.

²² *Human Rights Act 2019* (Qld) section 15.

Such people may face significant barriers to continuing contact and information exchange where the adoptive parent is the decision-maker and the adoption plan is unenforceable.

30. A further safeguard in Queensland might be to amend the Adoption Act to ensure that adoption plans are enforceable. However, the Commission recommends that no changes take place in the short term until a fulsome review of the adoption legislation is undertaken in 2021.

Children's views

31. An important aspect of the rights and best interests of the child is the child's right to be heard. The United Nations Committee on the Rights of the Child recommends that state parties introduce mechanisms to ensure that children are able to express their views and that those views be given due weight in accordance with age and maturity, including in relation to child protection matters.²³
32. The Commission notes that there is an existing framework to consider the views of a child under both the CP Act²⁴ and Adoption Act²⁵, reflecting the child's right to express their views to courts and tribunals. Section 59 of the CP Act requires that the Children's Court consider the children's wishes or views prior to making a child protection order. Section 179 of the Adoption Act requires the court to also give consideration to the child's views.
33. While the Children's Court is certainly required to consider the child's views, the weight given to those views is not clearly expressed. The Commission recommends that in the course of reviewing the Adoption Act that further consideration is given to whether the rights of the child to be heard are sufficiently safeguarded in the current legislative regime.

Impact on Aboriginal peoples and Torres Strait Islander peoples

34. As acknowledged in the Statement of Compatibility for this Bill, the HR Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples, and explicitly protects their distinct cultural rights as Australia's first people.

²³ Committee on the Rights of the Child, *General Comment No. 12*.

<<https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>>

²⁴ ss 5E, 99U-V,

²⁵ ss 179, 307K-L

35. The cultural rights of Aboriginal peoples and Torres Strait Islander peoples protected in the HR Act are engaged and potentially limited by the Bill, and in particular the right to enjoy, maintain, protect and develop kinship ties.²⁶ These specific cultural rights are particularly significant because of the continuing disproportionate representation of Aboriginal and Torres Strait Islander children in the child protection system in Queensland, and the past forced adoption practices during the Stolen Generation.
36. The Bill appropriately ensures that adoption remains the last resort for children of Aboriginal or Torres Strait Islander descent, bringing it into line with the approach of section 10A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). This also ensures consistency with existing provisions of the *Adoption Act 1999* (Qld), in particular section 7, which recognises that adoption is generally inappropriate for Indigenous children and states that adoption should occur only when there is ‘no better option’.
37. While a different hierarchy of placement order for Indigenous children may engage the right to equality before the law²⁷, the Commission suggests this would be a proportionate response to meet the legitimate purpose of preventing harm to Aboriginal and Torres Strait Islander families and children in the context of the inter-generational trauma caused by the Stolen Generation. The Commission submits that this would be a special measure under section 15(5) of the HR Act and a welfare measure for the purpose of the section 104 of the *Anti-Discrimination Act 1991*, and furthers human rights compatibility when compared with the alternative of the same placement hierarchy for both Indigenous and non-Indigenous children.
38. Although for the reasons described above, the Commission does not support the amendments overall, it is acknowledged that this approach is preferable to the alternative of placing adoptions at third priority for Indigenous children.
39. The Commission notes that a further appropriate safeguard is that all decisions recommending adoption be pursued as an option for an Aboriginal or Torres Strait Islander child in care will be personally reviewed by the Director-General and this responsibility will not be delegated.²⁸ This

²⁶ *Human Rights Act 2019* (Qld) s 28 and in particular s 28(2)(c).

²⁷ *Human Rights Act 2019* (Qld) s 15.

²⁸ Queensland Government, *Media Statement – Adoption an option for children in long-term care* (Web Page) <<http://statements.qld.gov.au/Statement/2020/7/14/adoption-an-option-for-children-in-longterm-care>>

has been referred to as a 'practice change to be implemented operationally'.²⁹

40. The Commission notes however, that this practice change is not reflected in the legislative amendments and as a mere policy position could be eroded in future. For this reason the Commission recommends that this practice change be embedded in legislation by way of amendment to section 320 of the Adoption Act to limit what decisions may be delegated by the Chief Executive.

Conclusion

41. In summary, the Commission is of the view that the amendments are not based on evidence that they will achieve the stated purpose, are premature in light of the forthcoming review of adoption legislation, and do not sufficiently safeguard the rights of the child and birth family.

42. On this basis the Commission makes the following recommendations:

Recommendation 1: Delay amendments until the *Adoption Act 2009 (Qld)* is reviewed in 2021.

Recommendation 2: On review of the *Adoption Act 2009 (Qld)*, the government consider a framework for:

- Mandatory and enforceable adoption plans to safeguard the rights of the child and birth family.
- Ensuring that due weight is given to the child's views based on their age and maturity.

Recommendation 3: On review of the *Adoption Act 2009 (Qld)*, consider a an amendment to section 320 to require that the decision to recommend an Aboriginal or Torres Strait Islander child for adoption is not delegated by the Chief Executive.

²⁹ Evidence to the Legal Affairs and Community Safety Committee, Brisbane, 27 July 2020, page 3, Deidre Mulkerin.
<<https://www.parliament.qld.gov.au/documents/committees/LACSC/2020/CPOLAB2020/trns-pb-27Jul2020.pdf>>