Child Protection and Other Legislation Amendment Bill 2020

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Leanne Linard, Minister for Children and Youth Justice and Minister for Multicultural Affairs make this statement of compatibility with respect to the Child Protection and Other Legislation Amendment Bill 2020 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

On 2 June 2020, Deputy State Coroner Bentley of the Coroners Court of Queensland, delivered her findings following the inquest into the death of 22-month-old Mason Jet Lee. The Queensland Government accepted all six recommendations of the Deputy State Coroner's report. The Government's response was tabled in the Legislative Assembly on 17 June 2020.

Recommendation 6(b) was that:

The Government consider whether the Adoption Act 2009 (Qld) 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.

In accepting recommendation 6, the Queensland Government noted it had, in 2018, introduced significant reforms to improve permanency outcomes for children involved in the child protection system by way of legislative amendments to the *Child Protection Act 1999* (CP Act). While the changes as a result of previous reforms to the CP Act have had positive results, it is acknowledged that more needs to be done to improve permanency outcomes and stability for children in care.

Amendments to the *Child Protection Act 1999*

The Bill amends the CP Act to:

- enhance the approach to permanency under the CP Act,
- clarify that adoption is an option for achieving permanency for children in care, as part of the suite of alternative long-term care options available, and
- clarify the importance of alternative permanency options for children subject to a child protection order granting long-term guardianship to the chief executive.

The Bill responds to recommendation 6(b) of the Deputy State Coroner's findings of inquest.

Permanency principles

Under the CP Act, adoption of a child in care is one mechanism for achieving permanency for a child. The CP Act sets a hierarchy of principles for deciding what action or order will best achieve permanency for a child. Under this hierarchy of principles, the first preference is for the child to be cared for by the child's family; the second preference is for the child to be cared for under the guardianship of a person who is a member of the child's family, other than a parent of the child, or another suitable person; and the third preference is for the child to be cared for under the guardianship of the chief executive. These permanency principles currently do not explicitly provide for consideration of adoption in the order of preferences. The amendments will fill this gap by providing that the third preference for achieving permanency for a child, who is not an Aboriginal or Torres Strait Islander child, is for the child to be adopted under the *Adoption Act 2009*, and as the last preference for a child who is an Aboriginal or Torres Strait Islander child.

Case plans (development and routine review)

The Bill also amends the CP Act to require 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' at least every two years after the order is made, to consider whether an application should be made to reunify the child with their family, or to substitute an alternative long-term order or action that better achieves permanency for the child.

Amendments to the *Adoption Act 2009*

The adoption of children via an intercountry adoption program is governed by the relevant state or territory adoption legislation and the Australian Government's *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC).

The Bill makes minor and technical amendments to the *Adoption Act 2009* (Adoption Act) to correct an issue preventing final adoption orders being made for a small number of children as a result of machinery of government changes and complexities with the Instrument of Delegation under the Australian Government's IGOC.

The provision will be limited to placements made during the period from the formation of the former Department of Child Safety, Youth and Women to when the delegation instrument was updated. The amendments are considered minor and technical in nature and will only affect the families of the children impacted.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights under the *Human Rights Act 2019* that are limited by the Bill are:

- Privacy and reputation (section 25 of *the Human Rights Act 2019)*
- Protection of families and children (section 26 of the *Human Rights Act 2019)*
- Cultural rights – generally (section 27 of the *Human Rights Act 2019)*

I have also considered the impact of the Bill on the right to recognition and equality before the law (section 15 of the *Human Rights Act 2019*) and the cultural rights of Aboriginal peoples

and Torres Strait Islander peoples (section 28 of the *Human Rights Act 2019*), however I do not consider that those rights are limited by the Bill for the following reasons:

Recognition and equality before the law (section 15 of the *Human Rights Act 2019*)

The right to recognition and equality before the law is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination.

Discrimination under the *Human Rights Act 2019* is broadly defined. It includes direct and indirect discrimination on the basis of the protected attributes under the *Anti-Discrimination Act 1991* but is not limited to only those attributes. The right to protection from discrimination may also include additional attributes such as language, property, employment status and others.

The right to equality before the law expressly recognises that measures taken for the purpose of assisting persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. It is considered that the amendments fall within this exception and therefore the right to recognition and equality before the law is not limited by the Bill.

Cultural rights – Aboriginal and Torres Strait Islander peoples (section 28 of the *Human Rights Act 2019*)

The *Human Rights Act 2019* 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. The core value underpinning the various cultural rights protected under section 28 of the *Human Rights Act 2019* is recognition and respect for the identity of Aboriginal peoples and Torres Strait Islander peoples, both as individuals and in common with their communities. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination, as reflected in the preamble to the *Human Rights Act 2019*.

Relevantly, the right recognises the right of Aboriginal peoples and Torres Strait Islander peoples to enjoy, maintain, control, protect and develop kinship ties. The Full Family Court of Australia has accepted that "*[Aboriginal] [c]hildren are born into a world of kin which is so vast they will probably be meeting new kin when they are old men and women. For an Aboriginal child, this network will become one of the two key ways in which their identity as a person is constructed. The other is through relations to country. Both are able to link the child to its ancestors and thus, by implication to its descendants*".[1] The harm caused by the loss of kinship ties for Aboriginal peoples and Torres Strait Islander peoples may include the loss of relations with kin who will perform a wide variety of roles associated with social relations, emotional and physical support, educative knowledge, economic interactions and spiritual training; the loss of knowledge which stems from those interactions; and ambiguities in or loss of identity with one's own kin and country which are essential to identity from an indigenous point of view.[2]

[1] *Re CP* (1997) 21 Fam LR 486.
[2] *Re CP* (1997) 21 Fam LR 486.

There is a long and difficult history and enduring impacts of former forced adoption policy and practice in Queensland and throughout Australia. There is a disproportionate representation of Aboriginal and Torres Strait Islander children involved in the child protection system, an enduring legacy of the Stolen Generations, and an imperative to achieve the positive outcome of keeping children in the system connected to family, community, culture and kin. Given the complexity associated with adoption from care, particularly for Aboriginal and Torres Strait Islander peoples, it is appropriate that consideration of adoption is the last preference for achieving permanency for an Aboriginal or Torres Strait Islander child.

The amendments acknowledge the ongoing impact of historical practices, the ongoing need for cultural safety for Aboriginal and Torres Strait Islander children, and the traumatic and controversial nature of adoption for Aboriginal and Torres Strait Islander children. Any consideration of adoption as the last preference for achieving permanency for an Aboriginal or Torres Strait Islander child will continue to be subject to the existing additional principles for Aboriginal and Torres Strait Islander children under the CP Act and the Adoption Act. The intention of this is to ensure that all existing protections and mechanisms under the CP Act and the Adoption Act for Aboriginal and Torres Strait Islander children will continue to apply (whilst at the same time, not removing including the availability of adoption as a permanency option under that existing framework).

On this basis, it is considered that the cultural rights of Aboriginal and Torres Strait Islander children will not be limited by the amendments.

Adoption being the last preference for achieving permanency for an Aboriginal or Torres Strait Islander child will also be subject to the additional principles for Aboriginal and Torres Strait Islander children in section 5C of the CP Act that embeds the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle. The Aboriginal and Torres Strait Islander Child Placement Principle includes recognition that a child has the right to be brought up within their own family and community; that Aboriginal peoples and Torres Strait Islander peoples have the right to participate in significant decisions under the CP Act about Aboriginal or Torres Strait Islander children; that, if a child is to be placed in care, the child has a right to be placed with a member of the child's family group; that a child and their parents and family members have a right to participate, and be enabled to participate, in an administrative or judicial process for making a significant decision about the child; and that a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person.

The Adoption Act includes an acknowledgement that: adoption is not part of Aboriginal tradition or Island custom and should be considered as a way of meeting a child's need for long term stable care only if there is not better available option; that it is in the best interests of an Aboriginal or Torres Strait Islander child to be cared for within an Aboriginal or Torres Strait Islander community, maintain contact with their community or language group, maintain connection to Aboriginal tradition or Island custom, and for the child's sense of Aboriginal or Torres Strait Islander identity to be preserved or enhanced; and the Childrens Court must have regard to the views of an appropriate Aboriginal or Torres Strait Islander person about the child and the Aboriginal tradition or Island custom of the child.

It is also acknowledged that the effect of the amendments will be that different considerations apply for achieving permanency for Aboriginal and Torres Strait Islander children who are in care compared to non-Aboriginal and Torres Strait Islander children who are in care. However, this is consistent with the operation of the CP Act and Adoption Act already and is also consistent with the provision in the right to recognition and equality before the law (discussed above) which recognises that measures taken for the purpose of assisting persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Amendments to the *Child Protection Act 1999*

(a) the nature of the right

Privacy and reputation *(Section 25, Human Rights Act 2019)*

Section 25(a) of the *Human Rights Act 2019* provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The underlying value of the right to privacy is the 'protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.'[3] The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The United Nations Human Rights Council (UNHRC) has said that it refers to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others.[4]

The right to privacy extends to the protection of an individual's private life, and relevantly protects against interference with their family and home. The term 'family' recognises that families take many forms and 'family' encompasses various social and cultural groups in Queensland whose understanding of family may differ. The right to privacy is limited by the amendments to the extent that they interfere with families and may lead to ties between families being severed through the adoption process.

Protection of families and children *(Section 26, Human Rights Act 2019)*

The right to the protection of families and children recognises that families are the fundamental group unit of society and entitles families to protection by society and the State. The meaning of families under the *Human Rights Act 2019* is broad and, as noted above, recognises that families take many forms and that various social and cultural groups in Queensland have differing understandings of family.

The right also protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child's best interests. This protection of children recognises the special vulnerability of children, and the additional protections that children are owed by

[3] *Director of Housing v Sudi* (2010) 33 VAR 139, 145 (Bell J). See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 (Bell J).
[4] *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

the State. The right requires the State to ensure the survival and development of every child to the maximum extent possible, and to take into account the best interests of the child as an important consideration in all actions affecting a child.

The right to protection of families is limited by the amendments in so far as they may lead to the disruption of family units. The right to protection of children is limited if, in the future, adoption is pursued as the preferred option for achieving permanency for a child, but is not in the child's best interests.

It is acknowledged that there is a real tension when balancing the right to protection of families and children in relation to all parties to adoption – the biological parents, the adoptive parents, and the child. Each person is entitled to the protection of family and disrupting and severing legal ties to family is a serious decision. However, concepts of family differ. A birth parent's understanding of family, which includes their child, may not equate to that child's understanding of family, particularly in a circumstance (for example) where the child has been removed from the care of their biological parents at a very young age and placed into the care of carers who they have effectively known as their parents for their entire life. These considerations are highly individual and will depend entirely on the circumstances of the child who is in care. Justification will always be needed for any decision to place reasonable limits on these rights to achieve the best outcome for children and families. This requires consideration of the individual circumstances of the child or young person, having regard to their best interests.

Importantly, adoption is not necessarily inconsistent with the right to protection of families and children. The UNHRC has said that 'where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from [their] family when circumstances so require'.[5] The European Court of Human Rights has also reiterated that 'it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interest of the child'.[6] It is also relevant that the United Nations Convention on the Rights of the Child recognises that adoption is a means for appropriate protection of children in proper circumstances.[7]

Cultural rights – generally *(Section 27, Human Rights Act 2019)*

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. They affirm the right of all persons to enjoy their culture, to practise or declare their religion, and to use their language, either alone or in community with others who share their background. The right protects persons from being denied the right to enjoy their culture, to declare and practice a religion and to use their language.

[5] United Nations Human Rights Committee, General Comment No. 17.
[6] *Scozzari and Giunta v Italy* (13 July 2000, Applications No. 39221/98 and 41963/98); *Olsson v Sweden* (No. 1) (24 March 1988, Application No. 10465/83).
[7] Article 21 of the United Nations Convention on the Rights of the Child sets out the obligations on the State to ensure the best interests of the child shall be the paramount consideration in adoption and sets standards against which adoption practice is appropriately assessed.

The amendments may indirectly limit this right should they lead to increased use of adoption as a mechanism to achieve permanency for children in care, if a child is adopted into a family that does not share their cultural background.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments 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.

In 2015, the Senate Community Affairs References Inquiry into out-of-home care report noted evidence that 'stability was one of the most important aspects contributing to positive outcomes for children and young people in care.' It is important that children in care experience stable relationships, living arrangements and legal arrangements.

For some children in care, achieving permanency through adoption is the most suitable option. While other permanency options do provide stability, adoption is the most enduring legal arrangement for children. Where an adoption arrangement is in the child's best interests, it is expected that the child will experience the relational, physical and legal aspects of permanency.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The amendments will each, on their own and when considered in combination, elevate considerations of adoption at appropriate junctures of the child protection continuum. Elevating these considerations in the various decision-making processes that relate to the management of children in care will mean that adoption is more routinely considered as an available option and increase the use of adoption to provide permanency for children in care where appropriate.

Limiting the right to protection of families and children (in respect of the biological family), and the right to privacy and cultural rights, when adoption is in a child's best interests, will also promote the right to protection of families and children (for the child and adoptive family) and better outcomes for the child. In circumstances when reunification of a child with their biological family is not possible, and when instability in a child's living and care arrangements has long-term negative impacts on the child, the permanency and other benefits provided by adoption lead to these better outcomes.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

The amendments do not dictate mandatory adoption outcomes for children in care in any circumstance. Rather, the amendments clarify and emphasise the importance of considering the appropriateness and availability of adoption for children who require long-term out-of-home care. Importantly, this approach ensures that the preferences for the child to be cared for either by the child's family or under the guardianship of a person who is a member of the child's family (other than a parent of the child) or another suitable person, remain paramount and are to be prioritised over adoption. For example, the amendments would provide for less restrictive

options, such as long-term guardianship orders to other suitable persons and permanent care orders to be considered as mechanisms to achieve the second preference, ahead of considering adoption as the third preference (for a child who is not an Aboriginal child or Torres Strait Islander child) for achieving permanency for the child.

It is acknowledged that there is extensive evidence to suggest that families who receive adequate support when needed are far more likely to be able to safely care for their children. Resourcing issues may mean that inadequate support is provided to biological families. In that context, it may be difficult to assert that there are no less restrictive reasonably available options to achieve permanency for children in care where it may be the least restrictive alternative to ensure appropriate support is provided to all families who require it with the view to keeping families together.

However, there are unfortunately situations where reunification is not possible (even with appropriate supports) and permanent out-of-home care is required. It is in those circumstances where promoting the consideration of adoption – which provides certainty and stability for children – among other permanency options, such as permanent care orders, is important to ensure permanency decisions are made that are in the best interests of the individual child. Providing for adoption to be considered among other permanency options is the least restrictive option to achieve the purpose of permanency for children in care, as it provides for arrangements to be made in accordance with the best interests of each individual child.

While the amendments limit a number of rights, including the protection of families and children in relation to the child's biological family, achieving permanency through adoption for children in care will also promote this right for the adoptive family of the child, as well as for the child where the adoption is in the best interests of the child.

Decisions regarding permanency and adoption must be made in accordance with existing safeguards in the CP Act and Adoption Act. For example, any decisions must be in the best interests of the child, consistent with the main principle for administering the CP Act: that the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount. Additional safeguards also apply to the amendments, for example, decision-makers must consider permanency options in order, ensuring that adoption is only considered after more preferential outcomes are deemed unsuitable.

In addition to the 'best interests' paramount principle, decisions concerning Aboriginal and Torres Strait Islander children must be made in a way that upholds the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle at section 5C of the CP Act. The position of adoption in the hierarchy of care is also the last option for Aboriginal and Torres Strait Islander children. This recognises the particular vulnerabilities of Aboriginal and Torres Strait Islander children to losing their culture and/or having ties severed with family, kin and community.

While the amendments clarify and emphasise the importance of considering the appropriateness and availability of adoption for children who require long-term out-of-home care, they do not override existing protections and safeguards in the Adoption Act, such as requirements for parental consent for adoption (unless dispensed by the court). The Adoption Act also operates under the principle that 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.

(e) the balance between the importance of the purpose of the amendment, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The operation of the amendments will emphasise and elevate adoption being considered as an option at various points in the child protection continuum, but still maintain the existing prioritisation of actions and orders that are consistent with family reunification. The human rights considerations will be unique for each individual case and what is in the best interests of individual children will be considered on a case-by-case basis in relation to any adoption or other option for achieving permanency. On balance, the importance of providing permanency to a child in care through increased genuine consideration of adoption is considered to outweigh the negative effect on the rights to protection of family and children, privacy, and cultural rights.

(f) any other relevant factors

Nil.

Amendment to the *Adoption Act 2009*

(a) the nature of the right

Right to privacy *(Section 25, Human Rights Act 2019)*

The nature and scope of the right to privacy is discussed above.

In the context of the amendment to the Adoption Act, the right to privacy is limited by the amendments to the extent that they interfere with family by finalising the adoption process for certain children and severing family ties.

Protection of families and children *(Section 26, Human Rights Act 2019)*

The nature and scope of the right to the protection of families and children is discussed above.

The amendment may limit this right by enabling the finalisation of adoption for a small number of children. By its nature, adoption has the potential to limit the protection of families and children by interfering with the family unit. The amendment may also limit the protection of children if, in the future, an adoption approved under the amendment is not in the child's best interests.

As is noted above, there is a tension when balancing the right to protection of families and children in relation to all parties to intercountry adoption, particularly in a circumstance (for example) where the child has been removed from the care of their biological parents and country of birth, and placed with their prospective adoptive parents in Queensland. These considerations are highly individual and will depend entirely on the circumstances of the child who is adopted. Justification will always be needed for any decision to place reasonable limits

on these rights to achieve the best outcome for children and families. This requires consideration of the individual circumstances of the child or young person, having regard to their best interests.

The United Nations *Convention on the Rights of the Child* recognises that adoption is a means for appropriate protection of children in proper circumstances, and the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* recognises that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.

Cultural rights – generally *(Section 27, Human Rights Act 2019)*

The nature and scope of the right to culture is discussed above.

As the amendment enables an application for a final adoption order to be made for children who were not born in Australia, it is likely that the children may be adopted to parents that do not share their cultural background, and the cultural rights of the child may be limited.

(b) the nature of the purpose of the limitation to be imposed by the amendment if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendment is to enable the intercountry adoption process to be finalised for a small number of children who were placed with prospective adoptive parents in Queensland between 30 April 2018 and 1 July 2019.

Intercountry adoption provides permanent legal families for children from overseas when an appropriate adoptive family cannot be found in the country of origin. Intercountry adoption practices in Queensland comply with the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*.

While it has been considered that possible familial and cultural rights may be limited due to the nature of intercountry adoption and the change in an adopted child's family, language, culture, traditions, etc., this amendment can also be considered to protect and promote several human rights. For example, the amendment can allow for the affected children to apply for Australian citizenship, which will promote their right to freedom of movement as Australian citizens, and thereby access to full protection under Australian law.

The amendment will also promote recognition and equality before the law. The affected children will be allowed full recognition as a part of their adoptive family unit through registration for a Queensland Birth Certificate, acknowledging their adoptive parents as their legal parents the option to legally change their names and share a family name.

The amendment is essential for the finalisation of the adoption process for the affected children, which will allow for the adoptive families to apply for a Queensland Birth Certificate, a conferral of Australian citizenship or an Australian passport for the children. This will allow the children, upon reaching 18 years of age, the right to take part in public life and the conduct of public affairs, including the right to vote and be elected and to have access, on general terms of equality, to the public service and to public office.

The purpose of the amendment is consistent with a free and democratic society, as it will enable these children and their prospective adoptive parents to have the same rights as other children who have been placed from overseas with prospective adoptive parents in Queensland.

(c) the relationship between the limitation to be imposed by the amendment if enacted, and its purpose, including whether the limitation helps to achieve the purpose

It is considered that there is a direct and rational relationship between the potential limitations on rights arising from the amendment and the identified purposes of the amendment as the amendment is essential for the finalisation of the adoption process for a small number of children.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendment

The amendment is considered the least restrictive reasonably available way to achieve the identified purpose. The amendment is necessary as there are no reasonable alternatives which would enable the relevant applications for final adoption orders to be made.

(e) the balance between the importance of the purpose of the amendment, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, having regard to the extent of the potential limitations on the rights of persons involved with the intercountry adoption proceedings, it is considered that the importance of ensuring the relevant applications for final adoption orders can be made outweighs the limitations on human rights that may result from the amendment. This is especially so when the promotion of the rights of a child subject to a finalised adoption order is taken into account.

(f) any other relevant factors

Nil.

Conclusion

I consider that the Child Protection and Other Legislation Amendment Bill 2020 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

Leanne Linard MP
Minister for Children and Youth Justice
and Minister for Multicultural Affairs