Child Protection and Other Legislation Amendment Bill 2020

Explanatory Notes

Short title

The short title of the Bill is the Child Protection and Other Legislation Amendment Bill 2020.

Policy objectives and the reasons for them

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.

Section 79(9) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that the maximum period for which an order (similar to a child protection order) may allocate all aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption, is 24 months. The maximum period does not apply if the Court is satisfied that special circumstances warrant the allocation being for a longer period.

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*.

The *Child Protection Act 1999* was comprehensively reviewed from 2015-2017, including two stages of substantial public consultation. Priority amendments were progressed through the *Child Protection Reform Amendment Act 2017*, including significant reforms to improve permanency outcomes for children in care.

These reforms included new permanency principles, case planning requirements including early planning for permanency, a limit on the making of successive short-term child protection orders that extend beyond two years unless it is in the child best interests, and the introduction of a new child protection order – a permanent care order. Queensland's policy position is focused on promoting positive long-term outcomes for children in the child protection system through timely decision making and decisive action towards either reunification with family or alternative long-term care.

While the previous reforms to the *Child Protection Act 1999* have had positive results, it is

acknowledged that more needs to be done to improve permanency outcomes and stability for children in care.

The objectives of the Child Protection and Other Legislation Amendment Bill 2020 (the Bill) are to:

- enhance the approach to permanency under the *Child Protection Act 1999*;
- 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 and promote 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 Deputy State Coroner Bentley's findings of inquest.

The Bill also includes a technical amendment to the *Adoption Act 2009* to allow the chief executive of the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) to apply for final adoption orders for a small number of children from overseas.

Achievement of policy objectives

Permanency amendments to the *Child Protection Act 1999*

The Bill will achieve its objective of enhancing the approach to permanency under the *Child Protection Act 1999* and clarifying that adoption is an option for achieving permanency for children in care by providing adoption is the third preference in the order of priority for deciding whether an action or order best achieves permanency for a child, except for an Aboriginal or Torres Strait Islander child.

The *Child Protection Act 1999* is to be administered under the principles in Part 2, Division 1 of the Act, including section 5BA. Section 5BA of the *Child Protection Act 1999* sets out principles for achieving permanency for a child and that, for ensuring the wellbeing and best interests of a child, the action or order that should be preferred is one that best ensures the child experiences or has relational, physical and legal permanency. Legal permanency may include a long-term guardianship order, a permanent care order or an adoption order for a child.

Section 5BA(4) provides that for deciding whether an action or order best achieves permanency for a child, the following principles also apply, in order of priority: 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 (this could include a child protection order granting long-term guardianship of the child or permanent care order); and the third preference is for the child to be cared for under the guardianship of the chief executive (such as under a child protection order granting long-term guardianship to the chief executive).

Adoption is already available as a permanency option for a child who requires long-term care. Queensland's *Adoption Act 2009* allows an adoption order to be made for a child who is subject to a child protection order and it is another option to provide permanency for a child. However, in order to clarify this position, the Bill amends the principles in section 5BA(4) of the *Child Protection Act 1999* to provide that, for a child who is not an Aboriginal or Torres Strait

Islander child, the third preference for deciding if an action or order achieves permanency for a child is for the child to be adopted under the *Adoption Act 2009*.

To clarify the importance of stability and continuity for children in care, and implement the intent of the Deputy State Coroner's recommendation 6(b), the Bill also provides that after adoption, the next (or last) preference for a child who is not an Aboriginal or Torres Strait Islander child is for the child to be cared for under the guardianship of the chief executive.

Section 7 of the *Adoption Act 2009* provides that, because adoption (as provided for in that 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. Consistent with this safeguard, the Bill acknowledges the ongoing impact of historical practices and addresses the ongoing need for cultural safety for Aboriginal and Torres Strait Islander children by providing in section 5BA that, in the order of priority for achieving permanency for the child, if the child is an Aboriginal or Torres Strait Islander child, the last preference is for the child to be adopted under the *Adoption Act 2009*. This is also because adoption has the potential to infringe upon the unique cultural rights of Aboriginal and Torres Strait Islander peoples, including connection with families, communities and cultures.

The Bill does not change the first and second preferences for achieving permanency for children in care. The first preference will continue to be for the child to be cared for by the child's family; and the second preference will continue to be 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, or another suitable person. This second preference could be achieved through a long-term child protection order or other arrangement.

The Bill clarifies when, in the hierarchy of actions or orders for achieving permanency for a child, adoption may be considered as the preferred approach. Under section 5A of the *Child Protection Act 1999*, the main principle for administering the 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. Consistent with section 5A, the best option for achieving permanency for an individual child will always be based on their individual circumstances and needs.

Section 51V of the *Child Protection Act 1999* sets out the requirements in relation to the review of a case plan for a child who is subject to a child protection order granting long-term guardianship of the child. A review must happen at least every six months and under section 51X a report about the review must be prepared. The report must include the goal for best achieving permanency for the child, how that goal has been achieved or is yet to be achieved, and how the revised case plan gives priority to achieving permanency for the child. Section 51X also provides that for a child subject to a child protection order granting long-term guardianship to the chief executive, the report must state the progress made in planning for alternative long-term arrangements for the child.

The number and proportion of children in the child protection system subject to a long-term child protection order has increased substantially in recent years. However, this increase has largely been in child protection orders granting long-term guardianship of a child to the chief executive. This is the last priority for achieving permanency for a child in Queensland's existing permanency hierarchy.

The Bill will achieve its objective of clarifying the importance of and promoting alternative permanency options for children subject to a child protection order granting long-term guardianship to the chief executive by inserting new section 51VAA that requires the chief executive to review the case plan for a child two years after the long-term order was made. This review must consider whether permanency for the child would be best achieved by an alternative arrangement as provided for in section 5BA(4).

The Bill does not require that adoption be considered or expedited after two years of a child protection order granting guardianship to the chief executive being in place. Rather, the Bill requires the chief executive to review the case plan for the child to consider whether there is a better way of achieving permanency for the child. If adoption was identified as an option for a child as part of this review, the *Adoption Act 2009* would apply, including all of the protections and safeguards for Aboriginal and Torres Strait Islander children.

Amendments to the Adoption Act 2009

The Bill includes minor and technical amendments to the *Adoption Act 2009* to enable the chief executive to apply to the court for a final adoption order for a small number of children from overseas.

Section 199(1) enables the chief executive to apply to the Childrens Court for a final intercountry adoption order for a child when the child has been in the custody of the prospective adoptive parents for at least one year, in circumstances mentioned in section 198(1). Section 198(1)(c) provides that these circumstances include where the chief executive placed the child in the prospective adoptive parents' care.

The chief executive of DCYJMA is usually responsible for the placement of children in Queensland as part Australia's intercountry adoption program because of a delegation by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs under the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC). Following the 2017 Queensland election, machinery of government changes occurred forming the then Department of Child Safety, Youth and Women. The instrument of delegation under IGOC specifically referred to the previous Department of Communities, Child Safety and Disability Services. The delegations conferred on Queensland under the IGOC were unable to be exercised until a new delegation had been approved by the Minister for Immigration. Between 30 April 2018 and 1 July 2019, the Australian Government Department of Home Affairs placed a small number of children from overseas with their prospective adoptive parents in Queensland. The chief executive cannot apply for a final adoption order under section 199(1) for these children because the chief executive did not place the child in the custody of the prospective adoptive parents in accordance with section 198(1)(c).

The Bill amends section 198 of the *Adoption Act 2009* to provide section 198 applies where the Minister responsible for administering the IGOC has placed children in the custody of the prospective adoptive parents between 30 April 2018 and 1 July 2019. This will enable the chief executive to apply to the court for a final adoption order for the relevant children.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives of the Bill other than by legislative amendments.

Alongside the changes to the *Child Protection Act 1999*, it is also proposed to review implementation of the Queensland's current permanency framework to identify further opportunities to strengthen and improve practice within DCYJMA.

Estimated cost for government implementation

It is anticipated that there will be costs associated with operationalising amendments. Implementation costs associated with practice initiatives within DCYJMA will be met from existing resources.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

Legislation has sufficient regard to an individual's rights and liberties, including natural justice and proportional intervention (*Legislative Standards Act 1992*, section 4(2)).

Clause 8 of the Bill makes an amendment to provide that adoption is the third in the order of priority for achieving permanency for a child. This may have the potential to restrict the rights and liberties of the child, biological parents and siblings and extended family members. This is because an adoption order severs the legal relationship between the child and their birth parents, creating a new identity for the child (including a changed birth certificate). 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 and broader family group.

This is a potential departure from the principle that sufficient regard be given to an individual's rights and liberties, including natural justice and proportional intervention, in accordance with section 4(2) of the *Legislative Standards Act 1992*.

The amendment is necessary to promote the permanency needs of children who require long-term care, when reunification with family is not possible. Instability in a child's living and care arrangements is widely recognised as having negative long-term impacts. Adoption is an existing option for achieving permanency for a child who is subject to a child protection order and the Bill seeks to clarify this.

The Bill retains existing legislative safeguards in relation to achieving permanency for children in care and includes a number of additional safeguards. These include:

- the paramount principle for the administration of the *Child Protection Act 1999* that the safety, wellbeing and best interests of the child, both through childhood and for the rest of the child's life, are paramount (section 5A);
- the existing principles for the administration of the *Child Protection Act 1999* in section 5B, including principles supporting reunification and kinship care;
- continuing to provide in new section 5BA(4) that the first preference for achieving permanency is for the child to be cared for by the child's family;
- the definition of permanency for a child in section 5BA(2), which includes relational and physical permanency in addition to legal permanency;
- continuing to apply additional principles for Aboriginal and Torres Strait Islander children

in section 5C including the five elements of the Child Placement Principle and including a note to reference to them in new section 5BA(4);
- providing in new section 5BA(4) that if the child is an Aboriginal or Torres Strait Islander child—the last preference is for the child to be adopted under the *Adoption Act 2009*;
- the requirements for case planning for a child in Division 1, Part 3A of the *Child Protection Act 1999*;
- the requirements in section 59 of the matters a court must be satisfied of before making a child protection order for a child;
- that a relevant parent's consent to adoption may only be dispensed with in the circumstances set out in the *Adoption Act 2009*;
- the guiding principles of the *Adoption Act 2009* including that the process for a child's adoption should include considering the views of the child's parents and the child, having regard to the child's age and ability to understand; and
- the principle in section 7(1)(a) of *the Adoption Act 2009* that because adoption is not part of Aboriginal tradition or Island custom, adoption of an Aboriginal or Torres Strait Islander child should be considered only if there is no better available option.

Consultation

Targeted consultation was undertaken by the former DCSYW with key child protection, adoption, Aboriginal and Torres Strait Islander organisations and legal stakeholders regarding the policy proposals for amendments to the *Child Protection Act 1999*. The stakeholders consulted included:

- Aboriginal and Torres Strait Islander organisations: Queensland Aboriginal and Torres Strait Islander Child Protection Peak; Aboriginal and Torres Strait Islander Community Health Service Inc.; Queensland Indigenous Family Violence Legal Service Aboriginal Corporation; Kummara Association Inc.; Queensland First Children and Families Board; Palm Island Community Company; Kalwun Development Corporation Limited; Aboriginal and Torres Strait Islander Legal Services; Townsville Aboriginal and Islander Health Service; Kurbingui Youth Development Association; Queensland Aboriginal and Torres Strait Islander Health Council; Goolburri; Institute for Urban Indigenous Health; Mura Kosker Sorority Inc.; and Link Up.
- Child protection peak organisations: Queensland Family and Child Commission; Micah Projects; SNAICC; PeakCare Queensland; Queensland Foster and Kinship Care; and Act for Kids.
- Adoption stakeholders: Benevolent Society (Post Adoption Support Queensland); Association for Adoptees Inc.; Origins Queensland; Adopt Change/My Forever Family; and a local adoption support group.
- Legal stakeholders: Queensland Law Society; Bar Association of Queensland; Legal Aid Queensland; Aboriginal and Torres Strait Islander Legal Service; and the Queensland Human Rights Commission.

In relation to the minor and technical amendments to the *Adoption Act 2009*, consultation external to government has not been undertaken given the limited application and technical nature of the amendment. Consultation was undertaken with the Australian Government in relation to the placement issue, which informed the need for the amendments.

Consistency with legislation of other jurisdictions

Permanency amendments to the *Child Protection Act 1999*

The permanent placement principles in the New South Wales *Children and Young Persons (Care and Protection) Act 1998* provide that following the first preference to reunify a child with their parents, the next preference is for the child to be placed under the guardianship of a relative, kin or other suitable person. The third preference is for the child to be adopted (except for Aboriginal and Torres Strait Islander children). The last preference is for the child to be placed under the parental responsibility of the Minister (Child Safety). This aligns with the amendments to section 5BA of the *Child Protection Act 1999*.

Minor and technical amendments to the *Adoption Act 2009*

The adoption of children through an intercountry adoption program is governed by Commonwealth and relevant state or territory adoption legislation as well as the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. Under IGOC, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Minister for Immigration) may delegate any of his or her powers and functions in relation to non-citizen children to officers of the Department of Home Affairs and state and territory agencies under an Instrument of Delegation.

Other Australian states and territories take varying approaches to how their legislation provides for non-citizen children under the IGOC including who is responsible for their placement or guardianship; the role of the person in the chief executive officer position in relation to the making an application for a final adoption order; and the role of the prospective adoptive parents in the making of applications for final adoption orders. The Bill is not varying the intent of the Queensland legislation in relation to intercountry adoptions.

Notes on provisions

Part 1 – Preliminary

Clause 1 provides that the short title of the Act will be the *Child Protection and Other Legislation Amendment Act 2020*.

Clause 2 provides that the Part 3 of the Act will commence on a date to be fixed by proclamation. Parts 1 and 2 will commence on assent.

Part 2 – Amendment of *Adoption Act 2009*

Clause 3 provides that part 2 amends the *Adoption Act 2009*.

Clause 4 amends section 152(2)(a) of the *Adoption Act 2009* to replace the words "responsible Minister under" with the phrase "Minister responsible for administering". This is a technical drafting correction.

Clause 5 amends section 198(1) of the *Adoption Act 2009* to replace the words "responsible Minister under" with the phrase "Minister responsible for administering".

This clause also amends section 198(1) to insert a new subsection (d) providing for the section to apply while a child is in the custody of the prospective adoptive parents because the Minister responsible for administering the *Immigration (Guardianship of Children) Act 1946* (Cwlth) (IGOC), as the child's guardian under that Act, placed the child in their custody between 30 April 2018 and 1 July 2019.

This provides for the situation where the Minister responsible for administering the IGOC placed a child in the custody of their prospective adoptive parents between 30 April 2018 and 1 July 2019, rather than the chief executive placing the child. This means that the chief executive will be able to apply for a final adoption order for a child under section 199(2) where the Minister responsible for administering the IGOC placed the child in the custody of their prospective adoptive parents during that period.

Clause 6 amends section 312(2)(d) of the *Adoption Act 2009* to replace the words "responsible Minister under" with the phrase "Minister responsible for administering".

Part 3 – Amendment of *Child Protection Act 1999*

Clause 7 provides that part 3 amends the *Child Protection Act 1999*.

Clause 8 replaces current section 5BA(4) with a new section 5BA(4).

The new section adjusts the principles that apply in the administration of the *Child Protection Act 1999*, in order of priority, for deciding whether an action or order best achieves permanency for a child. Existing subsections (a) and (b) are retained. Subsection (a) provides the first preference is for the child to be cared for by the child's family; and subsection (b) provides 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. This retains the existing position in current section 5BA(4) of the *Child Protection Act 1999*.

New subsection (c) provides that if the child is not an Aboriginal or Torres Strait Islander child, the next preference is for the child to be adopted under the *Adoption Act 2009*. This clarifies that adoption is another option to provide permanency for a child and should be considered preferable for achieving permanency to the child being cared for under the guardianship of the chief executive.

New subsection (d) provides the next preference is for the child to be cared for under the guardianship of the chief executive. This means that, for a child who is not an Aboriginal or Torres Strait Islander child, being subject to a child protection order granting long-term guardianship to the chief executive is the last priority for achieving permanency. This largely reflects the position in current section 5BA(4).

New subsection (e) provides the last preference for an Aboriginal or Torres Strait Islander child is for the child to be adopted. This is consistent with section 7 of the *Adoption Act 2009* recognises that adoption would rarely be an appropriate permanency option for these children.

Clause 8 also includes a note under new section 5BA(4) to highlight the additional principles that apply for administering the *Child Protection Act 1999* in relation to Aboriginal and Torres Strait Islander children, including the Child Placement Principle. A note is also included to reference the principles for administering the *Adoption Act 2009* (sections 6 and 7 of the *Adoption Act 2009*), which include additional principles for Aboriginal and Torres Strait Islander children.

Clause 9 inserts a new section 51VAA to require a particular review of a case plan where a child is subject to a child protection order granting long-term guardianship to the chief executive. Subsection (2) provides that if a long-term guardianship order was made by the court before the commencement of the provision, at least one review of the case plan, which must already occur under existing section 51V, must comply with new subsection (4). This review must occur within two and a half years of the provision commencing.

Subsection (3) provides that if a long-term guardianship order to the chief executive was made after the commencement of the provision and has been in force for two years, the case plan for the child must be reviewed under section 51V within a period of six months. The review must comply with new subsection (4).

Subsection (4) requires a review under subsection (2) or (3) to consider whether permanency for the child would be best achieved by an alternative arrangement mentioned in new sections 5BA(4)(a) to (c). This means that the review of the case plan for the child should consider if permanency would be best achieved by, in the order of priority, the child being reunified and cared for by their family; a long-term guardianship order being made to a member of the child's family or another suitable person; or the child being adopted (but only if the child is not an Aboriginal or Torres Strait Islander child).

Clause 9 also inserts a note under subsection (4) to make it clear that the principles for deciding whether an action or order best achieves permanency for a child and the additional principles that apply in relation to Aboriginal and Torres Strait Islander children would also apply to a review conducted in line with new section 51VAA.

Subsection (5) provides that new section 51VAA does not limit section 51V. This means that whether permanency for the child would be best achieved by an alternative arrangement mentioned in new section 5BA(4)(a), (b) or (c) could be considered as part of a review already

required at least every six months under current section 51V, regardless of how long the order has been in force.

Clause 10 amends current section 51X and inserts a new subsection (g) to require the report about a review of a case plan, where new section 51VAA applies, to include the review's findings in relation to whether permanency for the child would be best achieved by an alternative arrangement mentioned in new section 5BA(4)(a), (b) or (c).