

# Child Protection and Other Legislation Amendment Bill 2020

## Submission

## August 2020



# Contents

Background.....	3
Principles for achieving permanency.....	4
Practice reforms .....	6
Aboriginal and Torres Strait Islander children.....	7
Unintended consequences of proposed list of preference.....	10
Caseloads and decision-making about permanency .....	12

## Acknowledgement

The Queensland Family and Child Commission acknowledges Aboriginal and Torres Strait Islander peoples as the Traditional Custodians of lands throughout Australia, and their connection to land and community. We pay our respect to them and their cultures, and to Elders past, present and emerging.

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## Background

The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Legal Affairs and Community Safety Committee regarding the Child Protection and Other Legislation Amendment Bill 2020 (the Bill).

The QFCC's purpose is to respect, advocate for and protect the rights, wellbeing and safety of Queensland's children and young people and to improve the services that support them.

While the QFCC understands the intention behind listing adoption as a discrete preferred option to achieve permanency, this will require considered implementation. In its existing form, the *Child Protection Act 1999* defines permanency as the relational and physical stability created by making sure a child has not only legal stability but also ongoing and trusting relationships with people in their lives (including extended family members) and stable living arrangements with connections to their community. Elevating adoption as a preference should not mean it is pursued without full consideration of a child's overall stability needs.

The QFCC welcomes that the Bill places adoption as the last preference for Aboriginal and Torres Strait Islander children. QFCC would seek further safeguards to make sure adoption is only considered for Aboriginal and Torres Strait Islander children in accordance with the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP), as defined in the *Child Protection Act 1999*, under the principle of self-determination.<sup>1</sup>

All stakeholders in the family support and child protection system, including children, their parents and communities, must be involved in the conversations generated by this Bill. The QFCC would seek sufficient public comment time to ensure full consideration is given to all the possible consequences of this Bill and because this is in the best interests of those children to whom it will apply.

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<sup>1</sup> *Child Protection Act*, s.5C.

## Principles for achieving permanency

### Recommendation

The QFCC recommends:

- legislative safeguards to ensure the paramount principle is considered in all decisions about a child. Such safeguards should include formal recognition of the concept of active efforts, to ensure decision-making that upholds the primacy of best interests and the active participation of young people
- ensuring that the concept of permanency as a goal includes balanced consideration of physical, relational and legal elements. If legal permanency becomes the predominant consideration, decisions are more likely to be influenced by the needs and priorities of the system, prospective adoptive parents or existing carers rather than those of children and young people
- that external stakeholders and experts be included in processes to guide development and oversee implementation of the legislation. For critical decisions regarding permanency planning for Aboriginal and Torres Strait Islander children independent, expert advice should be engaged at all points. Independent, expert advice should certainly be sought prior to and appropriately inform the Chief Executive's decision-making process for application of permanent care orders and adoption orders. This could potentially extend to courts seeking or requiring evidence of the engagement and opinion provided by independent, culturally informed experts, to ensure all decisions demonstrate adherence to the Aboriginal and Torres Strait Islander Child Placement Principle, optimally, to the standard of active efforts. **The QFCC should independently review and publicly report on the implementation of these procedural safeguards as part of its oversight role.**

The Bill has been developed to foreground the option of adoption for achieving permanency for a child in out-of-home care.<sup>2</sup> It follows recommendations from the Deputy Coroner in the *Findings of Inquest into the death of Mason Jet Lee* (the Inquest), released 2 June 2020,<sup>3</sup> and also reflects earlier recommendations made in *Taking responsibility: a roadmap for Queensland Child Protection*, the final report of the Queensland Child Protection Commission of Inquiry led by the Hon Tim Carmody QC (the Carmody report).<sup>4</sup>

Both the Inquest and the Carmody report recommended adoption be routinely considered for children in out-of-home care to provide for stability of placement and 'remove children from the system'. In practice, this may address issues with the existing system but to the detriment of a child. The safety and wellbeing of a child should be the primary consideration of any such amendment.

The provisions in the Bill elevate adoption as a discrete preferred option to secure permanency for a child. In practice each time a discrete option is added, it becomes less likely that a full consideration of a child's current and future needs, as per the paramount principle, will take place.

Adoption is currently promoted in the *Child Protection Act 1999* as one option for achieving permanency planning for a child in out-of-home care. Section 5BA(2) of the *Child Protection Act 1999* provides:

<sup>2</sup> Child Protection and Other Legislation Amendment Bill 2020, explanatory notes.

<sup>3</sup> Coroners Court 2020, *Findings of Inquest: Inquest into the death of Mason Jet Lee*, [https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0009/651636/cif-lee-mj-20200602.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0009/651636/cif-lee-mj-20200602.pdf), accessed 29 July 2020, p. 109.

<sup>4</sup> Queensland Child Protection Commission of Inquiry 2013, *Taking responsibility: a roadmap for Queensland child protection*, <http://www.childprotectioninquiry.qld.gov.au/publications/index.html>, accessed 30 July 2020.



‘For ensuring the wellbeing and best interests of a child, the action or order that should be preferred, having regard to the principles mentioned in sections 5B and 5C, is the action or order that best ensures the child experiences or has—

- a) ongoing positive, trusting and nurturing relationships with persons of significance to the child, including the child’s parents, siblings, extended family members and carers; and
- b) stable living arrangements, with connections to the child’s community, that meet the child’s developmental, educational, emotional, health, intellectual and physical needs; and
- c) legal arrangements for the child’s care that provide the child with a sense of permanence and long-term stability, including, for example, a long-term guardianship order, a permanent care order or an adoption order for the child.<sup>5</sup>

These principles highlight that permanency goes beyond the legal stability to include relational and physical permanency. While providing for legal stability, adoption must be considered in the context of a child’s ongoing connections to the people and places that are significant to them. The impacts upon continuity of relationships and physical stability are critical considerations for the immediate and long-term safety and wellbeing of children. For example, an adoptive family may not wish or be able (at the time of adoption or subsequently) to support a child’s relationships with siblings and extended family members, or connection with the child’s community or culture.

Adoption needs to be seen in the wider understanding of children’s sense of stability and ongoing experiences. Its place in legislation should be considered in the context of meeting all three dimensions required to achieve a holistic positive outcome that protects a child’s safety, wellbeing and best interests now, and for the duration of the child’s life, not simply what suffices at a point in time.

Consistent with these aspects, the Bill should allow for wide consultation to identify opportunities to strengthen all aspects of permanency planning for children in out-of-home care.

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<sup>5</sup>*Child Protection Act 1999*, s.5BA (2)(a) and (b).

## Practice reforms

### Recommendation

The QFCC recommends:

- undertaking and evaluating practice reform to strengthen permanency outcomes for children in addition to any legislative changes
- that the QFCC should independently review and publicly report progress on the implementation of these practice reforms and the permanency outcomes achieved

Adoption is already offered as a means to achieve permanency in the *Child Protection Act 1999*. It is not clear how the current legislative framework for adoption has acted as a barrier to achieving permanency. It would be desirable for this to be investigated and understood in addition to any legislative change, as stronger policy and practice measures may be a better way to secure positive outcomes for children in out-of-home care.

In addition to the Bill, the Queensland Government has announced practical changes to encourage permanency outcomes for children in out-of-home care:

- establishment of a new, senior position in the Department of Child Safety Youth and Women (DCSYW) dedicated to overseeing improved permanency outcomes across the department
- case plan audits for all children in care under three years old to assess whether further permanency planning is required
- targeted work with current foster and kinship carers to assess permanency options for children who have been in their care for more than two years
- review of the implementation of permanency reforms to date, including the implementation of the ATSCPP.<sup>6</sup>

These practice changes should be implemented, reviewed and evaluated in parallel to the legislative amendments, to provide understanding of why adoption has not been a common occurrence for children in out-of-home care to date.

In addition to this work, consideration should be given to targeted work to actively revisit the identification and mapping of kin (familial and cultural connections of Aboriginal and Torres Strait Islander children) and planning for the provision of appropriate supports to members of the child's kinship structure. The aim of this work should be to secure permanency for a child or young person without compromising their connection to kin, country and culture.

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<sup>6</sup> Palaszczuk A & Farmer D 2020, *Adoption an option for children in long-term care*, media statement, <http://statements.qld.gov.au/Statement/2020/7/14/adoption-an-option-for-children-in-longterm-care>, accessed 29 July 2020.

## Aboriginal and Torres Strait Islander children

### Recommendation

The QFCC recommends:

- safeguards to make sure all decisions about Aboriginal and Torres Strait Islander children are made in accordance with the Aboriginal and Torres Strait Islander Child Protection Principle, to the standard of active efforts, under the principle of self-determination and QFCC oversight of the effectiveness of these safeguards
- strengthening safeguards in the *Adoption Act 2009* to make sure adoption decisions for Aboriginal and Torres Strait Islander children are made with the participation of Aboriginal and Torres Strait Islander communities, under the principle of self-determination

The QFCC acknowledges the Bill places adoption as the last preference for Aboriginal and Torres Strait Islander children however still sees the need for safeguards to ensure decisions reflect full consideration of a child or young person's current and future needs.

The Bill proposes introducing a note under s.5BA stating, 'see also section 5C for the additional principles that apply for administering this Act in relation to Aboriginal and Torres Strait Islander children, including the child placement principles'. The QFCC would seek further safeguards to make sure adoption is only considered for Aboriginal and Torres Strait Islander children in accordance with the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP), as defined in the *Child Protection Act 1999*, under the principle of self-determination.

Any provision to consider adoption as a preference, even if the last preference, to achieve permanency for an Aboriginal or Torres Strait Islander child, establishes the possibility the child protection system could consider adoption against the wishes of parents, the wider community and most importantly those of the child or young person. Such consideration may not give sufficient regard to the long-term impacts of this decision upon a child's identity, cultural continuity and connections to kin and country. This would also be at odds with the principle of self-determination and could further erode the trust Aboriginal and Torres Strait Islander communities have in the child protection system.

Recent permanency reforms in New South Wales have led to at least one circumstance where an Aboriginal child has been adopted without the consent of the parents, through a contested process, decided by the Supreme Court of New South Wales.<sup>7</sup> It has not been made clear whether the adoptive parents were Aboriginal.<sup>8</sup>

There are also concerns about the likely perception that the Bill proposes two separate systems, one for Aboriginal and Torres Strait Islander children and one for non-Indigenous children. This may lead to a community view that there are differing standards between the two cohorts and may increase the complexity of a system

<sup>7</sup> New South Wales Legislative Council 2019, *Budget Estimates – Portfolio Committee No. 5 – Legal Affairs*, <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2229/Transcript%20-%20204%20September%2019%20-%20CORRECTED%20-%20PC%205%20-%20Families%20Communities%20and%20Disability%20Services%20-%20Ward.pdf>, accessed 28 July 2020.

<sup>8</sup> New South Wales Legislative Council 2019, *Question on Notice – Budget Estimates Transcript pg 55*, <https://www.parliament.nsw.gov.au/lcdocs/other/12632/Answers%20to%20questions%20on%20notice%20-%20PC%205%20-%20Families,%20Communities%20and%20Disability%20Services%20-%20Ward%20-%20received%20-%20September%202019.pdf>, accessed 28 July 2020.



that needs to respond in a timely way to challenging circumstances. To be clear, the QFCC asserts that all children are entitled to be safe. The safeguards that exist and those proposed do not dilute this expectation. Safeguards are not intended to establish a double standard or second set of rules for First Nations children and young people but to provide requisite protections from the legacy of racist policies, practices and attitudes that still influence and characterise contemporary structures and systems, particularly statutory systems such as child protection and youth justice.

Aboriginal people and Torres Strait Islander people have experienced a long history of systemic racism in child protection systems, most notably in the forced adoptions of the Stolen Generations. It is important that contemporary law, policy and practice are designed to build on the strengths of Aboriginal and Torres Strait Islander families and communities to raise children with strong connections to family and culture.

The most recent reform to the *Child Protection Act 1999* expanded provisions to include five elements of the ATSI CPP. This change was a significant step forward in furthering legal recognition and protection of Aboriginal and Torres Strait Islander children's connections to family, community, culture and country. The five elements are:

- the *prevention principle*, that a child has the right to be brought up within the child's own family and community
- the *partnership principle*, that Aboriginal or Torres Strait Islander persons have the right to participate in significant decisions about Aboriginal or Torres Strait Islander children
- the *placement principle*, 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
- the *participation principle*, that a child and the child's 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
- the *connection principle*, 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.<sup>9</sup>

In practice, adoption outside of the child's kinship structure cannot guarantee a child's connection to family, community and culture.

Further, the court process for adoption does not provide for the participation of Aboriginal and Torres Strait Islander communities in decisions. Independent expert and cultural advice should be sought in such cases to ensure all decisions made reflect the active efforts principle and implement all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle.

Any reforms to the *Child Placement Act 1999* introducing adoption as a preference of any kind for Aboriginal and Torres Strait Islander children should consider how the adoption process can be redesigned to give full and proper effect to the ATSI CPP.

The process must meaningfully engage Aboriginal and Torres Strait Islander communities and be designed in true partnership with community stakeholders to achieve self-determination.

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<sup>9</sup> *Child Protection Act*, s.5C.



At present, section 7 of the *Adoption Act 2009* include additional principles concerning Aboriginal and Torres Strait Islander persons. These state:

- adoption should only be considered if there is no better available option
- the views of an appropriate Aboriginal or Torres Strait Islander person must be considered
- the department must try to conduct proceedings involving an Aboriginal or Torres Strait Islander person in a way and in a place that is appropriate to Aboriginal tradition or Island custom.<sup>10</sup>

While these principles are valid, they are not all enforceable actions. If adoption is to be considered as a preferred option to achieve permanency for Aboriginal and Torres Strait Islander children, these principles should be strengthened with practical measures in place to make sure decisions are led and supported by the children's communities.

Ultimately, adoption of Aboriginal and Torres Strait Islander children should only be considered where the children's family and community support it, with free, prior and informed consent. This could include circumstances in which the adoptive parents are connected to that child's family and community and the adoption can take place in a culturally safe way.

The recently introduced Meriba Omasker Kaziw Kazipa (Torres Strait Islander Child Rearing Practice) Bill 2020, which provides a legal framework for recognising cultural adoptions taking place under Ailan Kastom, was developed in partnership with Torres Strait Islander peoples through a long process of community engagement. This process should serve as a model for long-term engagement with community to determine whether and how adoption could be implemented in the best interests of Aboriginal and Torres Strait Islander children in out-of-home care.

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<sup>10</sup> *Adoption Act 2009*, s.7.

## Unintended consequences of proposed list of preference

### Recommendation

The QFCC recommends:

- including the voice of the child in all decisions made about permanency
- considering the wider potential consequences of adoption proceedings when making decisions to achieve permanency for a child, particularly where the parents do not consent to adoption
- appropriate education made available for magistrates, especially for matters involving dispensation of consent for parents.

The Bill's provisions also raise complex issues for non-Indigenous children. The proposed preference option list oversimplifies the complex issues involved when a parent chooses adoption for their child. Making it necessary for the child protection system to consider adoption as a preferred option to achieve permanency may remove the discretion of the parent to make this decision when they are ready, in a child's best interests.

It may also encourage Child Safety to seek contested adoptions where the parents do not provide consent, with complex consequences for the children and their family. This may lead to situations where Child Safety applies to the court to expedite adoption processes without giving parents the opportunity to be in charge of the decision to place their child with an adoptive family.

Placing adoption as a preference to achieve permanency for a child could lead to an increase in applications for dispensation of parental consent, to allow adoptions against the wishes of parents.

Under s.39(e)(i)(ii) of the *Adoption Act 2009*, the court may dispense with the need for a parent's consent if the court is satisfied the relevant parent is not willing and able to protect the child from harm and is unreasonably withholding consent to the adoption or refusing to engage with the chief executive on this matter. There may need to be further guidance on what is considered reasonable in this circumstance.

The *Adoption Act 2009* also provides for dispensation of consent if, following an assessment, the parent is found to lack the capacity to consent.<sup>11</sup> The consequences of this are particularly concerning in circumstances where the parent of a child is not legally an adult. This could also have consequences for parents with impaired capacity who may, through this process, lose all contact and connection with their children.

In every decision, the voice of the child must be included in the process. Children must be provided with their right, under article 12 of the United Nations *Convention on the Rights of the Child*, to participate in decisions made about them.<sup>12</sup> Separate independent support should be required to make sure the child's best interests are considered at the start of the adoption conversation, as ultimately adoption results in the cutting of all legal ties for the child with their birth family.

Under the *Adoption Act 2009*, the court may provide separate legal representation for a child in adoption proceedings. There are certain circumstances in which the court must consider whether to provide separate legal representation, however there are no circumstances in which the court is required to decide in favour of

<sup>11</sup> *Adoption Act 2009*, ss. 28, 29, 39(1)(b).

<sup>12</sup> United Nations Office of the High Commissioner for Human Rights 1989, *Convention on the Rights of the Child*, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, accessed 30 July 2020.



representation.<sup>13</sup> This could be strengthened to make sure the child is separately represented in all adoption proceedings, as a safeguard to make sure the child's best interests remain paramount before the court.

The adoption process can include the development of adoption plans that seek to maintain a child's connection with their birth family however these have significant limitations. Under the *Adoption Act 2009*, adoption plans can include any element relating to the adopted child's wellbeing or best interests, including matters such as:

- a commitment to tell and help the child understand the circumstances of the adoption
- measures to maintain, preserve and develop cultural contact, connection and identity for Aboriginal and Torres Strait Islander children and children of a particular ethnic or other cultural background.<sup>14</sup>

However, adoption plans are not enforceable. They do not limit the primary responsibility of the adoptive parents for the child's upbringing and do not entitle anyone else to interfere.<sup>15</sup> As such, adoption plans do not provide adequate safeguards to make sure the rights and holistic stability needs of children, including Aboriginal and Torres Strait Islander children, will be upheld.

If Child Safety pursues adoption through a need to meet the priority preferences, this may risk the relationships and living arrangements a child has with their current carer. A situation may evolve where a long-term carer is prepared to provide continuing care for a child, however does not wish to seek an adoption or guardianship. In this circumstance a Child Safety Officer, following the proposed order of preference, may decide it is necessary to seek adoption to a new family rather than allow the child to remain in an existing stable placement.

Alternatively, if a long-term carer wishes to adopt a child in their care, there will be no guarantee that carer will ultimately be selected as a child's adoptive parent. This is merely an option available under the *Adoption Act 2009*.<sup>16</sup>

Where adoption is pursued through court processes, appropriate education will need to be available for magistrates, particularly for matters involving dispensation of consent for parents.

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<sup>13</sup> *Adoption Act 2009*, s.235.

<sup>14</sup> *Adoption Act 2009*, s.165.

<sup>15</sup> *Adoption Act 2009*, s.168.

<sup>16</sup> *Adoption Act 2009*, s.89, Part 6 and Part 7.

## Caseloads and decision-making about permanency

### Recommendation

The QFCC recommends:

- efforts to make sure legislation, policy and practice drive a culture where decisions are made in the best interests of children, not in the interests of the child protection system
- safeguards to make sure adoption is not used to expedite removal of children from the system
- requiring courts to provide separate representation for children in adoption proceedings
- safeguards to make sure there will be no targets for adoption, and to make sure any reporting focuses on stable outcomes for children rather than solely numbers of children adopted.

It is widely recognised that over recent years Child Safety has made significant reforms to reduce caseloads for individual staff members. As of September 2019, caseloads were reported at fewer than 18 cases per full-time equivalent Child Safety Officer for the eighth quarter in a row.

However, the Inquest found ‘the failures which led to Mason’s death were the result of overworked, under-resourced and inexperienced staff which is the result of an increased demand for services, i.e. an ever increasing number of children requiring protection’.<sup>17</sup>

To work through the complex circumstances surrounding a child in need of protection requires time, experienced staff, robust processes and appropriate resources. If staff continue to be overburdened, decisions with permanent impact may be made without the necessary consideration.

Adoption is a decision with lifelong implications for a child. Once implemented, it cuts all legal ties for the child with their birth family and there is no ongoing supervision of the suitability of the adoptive family situation. It is important to make sure the resources of government are used to fully scrutinise such a decision before it is made.

The specific legislative change proposed in the Bill may have the unintended consequence of reducing the level of scrutiny required to make a fully informed decision in favour of adoption for a child. The proposed list assumes adoption will be a preference for all children who come into the child protection system. This assumption could lead to situations in which adoption is recommended even when it is not in the best interests of a particular child.

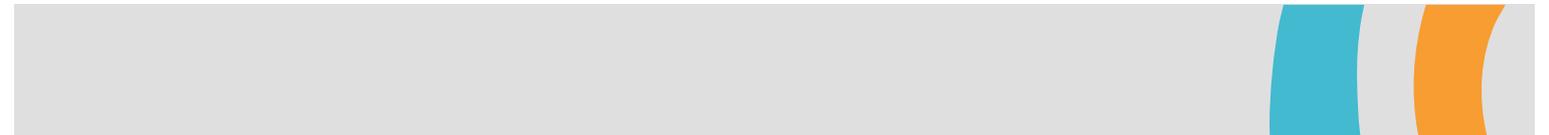
### The risk of targets

At present, Child Safety reports on the performance of the child protection system are focused on numbers rather than outcomes. In seeking to raise adoption as a preference above other actions, this Bill has the potential to reinforce that approach. This would see the effectiveness of adoption measured by the number of children legally adopted, rather than by determining the qualitative, long-term outcomes that all permanency planning decisions have made on a child’s ongoing protection, care and wellbeing.

There is also a risk that such a reporting environment could create official or unofficial targets for adoption, which could lead to decisions being made that are not in a child’s best interests.

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<sup>17</sup> Coroners Court 2020, *Findings of Inquest: Inquest into the death of Mason Jet Lee*, [https://www.courts.qld.gov.au/data/assets/pdf\\_file/0009/651636/cif-lee-mj-20200602.pdf](https://www.courts.qld.gov.au/data/assets/pdf_file/0009/651636/cif-lee-mj-20200602.pdf), accessed 29 July 2020, p. 109.



The potential for this seems to be recognised by the recommendation of the Inquest, accepted by the Queensland Government, that Child Safety report every six months to the Coroners Court of Queensland the number of children adopted and the details of those matters for the next five years.<sup>18</sup>

The Queensland Government has also announced it will begin quarterly reporting on the status of permanency planning for children in care, including the numbers of permanent care orders or other long-term orders.<sup>19</sup>

The Inquest considers in detail the opportunity to use adoption to reduce the number of children receiving services in the child protection system. It states:

as was fully explored and accepted by the Carmody Inquiry, adoption is a method of removing children from the system. Further it recognises the child's rights to be protected above those of the parents who are unwilling and/or unable to appropriately care for those children.<sup>20</sup>

Children have complex needs for stability in their relationships, community and culture. There are no guarantees that 'removing' children from the child protection system through adoption will protect their safety, wellbeing or best interests.

If adoption is routinely pursued due to a belief that a lower reported number of children in care is a good outcome in itself, the child protection system may adopt official or unofficial targets for adoption that do not adequately consider each individual child's complex circumstances.

The Bill provides for children under the long-term guardianship of the chief executive to have case reviews within two and a half years to consider whether permanency would best be achieved by an alternative arrangement, noting adoption as one preferred option. This could also lead to undue pressure to pursue adoption to provide legal stability and 'remove' the child from the child protection system within short timeframes, even where adoption may not be the best option to provide overall relational stability for that child.

Overall, we must always make sure we are acting in the interests of a child, not in the interests of a system.

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<sup>18</sup> Coroners Court 2020, *Findings of Inquest: Inquest into the death of Mason Jet Lee*, [https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0009/651636/cif-lee-mj-20200602.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0009/651636/cif-lee-mj-20200602.pdf), accessed 29 July 2020, p. 110.

<sup>19</sup> Palaszczuk A & Farmer D 2020, *Adoption an option for children in long-term care*, media statement, <http://statements.qld.gov.au/Statement/2020/7/14/adoption-an-option-for-children-in-longterm-care>, accessed 29 July 2020.

<sup>20</sup> Coroners Court 2020, *Findings of Inquest: Inquest into the death of Mason Jet Lee*, [https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0009/651636/cif-lee-mj-20200602.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0009/651636/cif-lee-mj-20200602.pdf), accessed 29 July 2020, p. 106.