

**2020**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**ADOPTION AMENDMENT BILL 2020**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

**Presented by  
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## ADOPTION AMENDMENT BILL 2020

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

### OVERVIEW OF THE BILL

The Adoption Amendment Bill 2020 has several purposes, to:

- a) change current provisions that are used by the Court when considering whether to dispense with the requirement for parental consent for an adoption;
- b) place the best interests of the child or young person at the centre of decision-making about dispensing with parental consent; and
- c) change the residency requirement that is currently set out in section 13 for adoption orders that relate to an adult prospective adoptee.

#### Dispensing with parental consent

In the ACT, an adoption should not occur unless informed and voluntary consent has been given by each parent and guardian of the child or young person. This principle protects the rights of children and their birth parents. It also reflects Australia's international obligations for children to maintain their family ties and to 'know their parents and, as far as possible, be cared for by them'. In limited circumstances, the Court has the power to dispense with this consent.

Dispensing with parental consent is a mechanism found in section 35 of the *Adoption Act 1993*, which allows the Court to determine that the consent of a parent or guardian is not required to proceed with a domestic adoption.

The Bill makes changes to dispensing with parental consent in domestic adoption to effect a shift from adult-centric grounds to a strong 'best interests' focus that places the child at the centre of decision-making. Specifically, the proposed amendments will reflect best practice to uphold the best interests of the child or young person as the paramount consideration in dispensing with consent decisions. The Bill does not relate to intercountry adoption.

The Bill maintains limited discretion for the Court to dispense with consent, with guidance regarding determining the child's best interests. It is intended that the Court's discretion to dispense with consent should remain limited in recognition of the fact that adoption is such a serious matter, with permanent consequences. The Bill is not aimed at making it easier or harder to dispense with consent. Instead, the amendments are aimed at providing the Court with more guidance about how to assess the best interests of a child or young person, and how to achieve a balance between the rights in play.

## Residency requirements for adult adoptions

The Bill amends residency requirements for adult adoptions to remove historic jurisdictional requirements that do not reflect the circumstances of adult adoptions.

The Bill requires that the person or at least one applicant must live in the ACT. This acknowledges that an adult prospective adoptee may not necessarily live in the same jurisdiction as the person who is seeking an adoption order.

The Bill also updates the original language in section 13, to more clearly convey a contemporary understanding of the ways in which the applicant is likely to have supported the prospective adoptee's growth and development.

## **CONSULTATION ON THE PROPOSED APPROACH**

The ACT Government's cross-directorate Domestic Adoptions Taskforce (the Taskforce) was established in mid-2016 to identify issues related to domestic adoption in the ACT. The Taskforce made six recommendations about the timely and appropriate completion of the adoption process. In 2017, the ACT Government agreed to implement all six recommendations developed by the Taskforce.

In November 2018, the Community Services Directorate (the Directorate) commenced consultation to explore the dispensing with parental consent provisions in the *Adoption Act 1993* (ACT) to respond to out of home care circumstances, as part of recommendation 3 from the Taskforce.

Extensive consultation on dispensing with parental consent was undertaken during 2019 through a discussion paper and targeted interviews. Children, young people, families, relevant organisations and professionals were invited to make written and verbal submissions to the Directorate on issues raised in the discussion paper between 19 December 2018 and 31 March 2019.

This first stage of consultation sought feedback from the community on experiences of dispensing with consent as part of the adoption process (including in child protection circumstances). The second stage of consultation took a targeted approach, which was informed by the analysis of issues that emerged during stage one. A third and final stage of consultation provided an opportunity for people who contributed in the first and/or second stages to consider the amendments included in the Bill. This allowed the Government to test and confirm the intent of the Bill with the people whose views informed its development.

Many people shared their views on the provisions that guide the Court when it makes decisions about dispensing with parental consent. Their feedback told us that the existing provisions focus on adults, not children. This means the Court may look at the behaviour of birth parents (rather than the needs or interests of children) or may revisit child protection matters.

There was strong agreement from the community that the provisions guiding decisions about dispensing with consent should prioritise the best interests of children and young people.

The consultation findings assisted the Directorate to identify changes to the existing grounds for dispensing with parental consent and determining the best interests of a child or young person, to better reflect contemporary practice and respond to out of home care (OOHC) circumstances.

Amendments relating to dispensing with consent fulfil the Government's commitment to implement recommendation 3 of the Domestic Adoptions Taskforce. This, followed by the completion of recommendation 6 (integrated birth certificates) in 2020, will complete all six recommendations that were agreed by Government in 2017.

The Bill responds to community feedback about the guidance that the Court currently uses for this part of the adoption process. It was developed with careful consideration of evidence from Australian and international research literature. The proposed changes will not change the process for dispensing with parental consent, but instead focus on supporting the way the Court makes decisions about dispensing with consent.

## **CONSISTENCY WITH HUMAN RIGHTS**

The amendments in this Bill have been carefully considered in the context of the overarching objectives of the Adoption Act set out in section 4. Specific attention has been given to ensuring the best interests of the child or young person are the paramount consideration in the adoption of a child or young person, and balancing their rights and interests with those of parents or people with daily care responsibility.

The Bill also seeks to embody and express relevant international human rights standards for children and young people. For example, the amendments are supported by Article 3 of the *Convention on the Rights of the Child*.

### **Rights promoted**

#### *Right to the protection of children (11(2))*

The primary purpose of the Bill is to ensure decisions about dispensing with consent are made in the best interests of the child or young person being adopted, which is the paramount consideration. This supports and promotes the rights and protection of children in several ways.

The Bill makes changes so that the Court's discretion to dispense with consent under the *Adoption Act 1993* reflects contemporary out of home care circumstances and a modern understanding of community issues, such as disability and domestic violence. For example, the Bill requires consideration of the need to protect the child or young person from physical or psychological harm associated with exposure to abuse, neglect or family violence.

When an application is made to dispense with consent, the applicant identifies the grounds on which they rely. The Court will then assess the application against the proposed grounds, according to the circumstances of the child or young person being adopted.

The Bill streamlines the grounds for dispensing with consent to expressly include 'necessary in the best interests of the child'. This makes clear that the Court must make an assessment with reference to section 5 of the Adoption Act. This aligns with the way the Court has approached dispensing with consent applications in the absence of an express connection, and best protects children and young people who are being considered for adoption.

This change is particularly important in responding to the unique and challenging circumstances of some children and young people in out of home care where there is little possibility of restoration and they are in a safe and stable environment.

Another key change made by the Bill is ensuring the voice of the child or young person is heard in decisions made about them. Changes to section 5 are aimed at enhancing the participation of children and young people, by requiring the court to consider the views expressed by the child or young person about the decision. This is supported by other changes to section 5, including consideration of the child or young person's age, maturity, level of understanding and personal circumstances.

It is intended that these changes will encourage a more child-centred approach that enables children to participate in adoption proceedings in a meaningful and age-appropriate way.

## **Rights engaged**

### *Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities (s 27)*

In the ACT, adoption of Aboriginal and Torres Strait Islander children and young people in out of home care is not appropriate and is not supported. This policy position was jointly developed by diverse representatives from the Aboriginal and Torres Strait Islander community and aligns with the Aboriginal and Torres Strait Islander Child Placement Principle. It acknowledges the complexity in adoption practice and policy for the Aboriginal and Torres Strait Islander community due to historic forced adoption practices and the Stolen Generations.

This context is critical to understanding that any legislative change relating to permanency for children and young people, particularly children and young people in the out of home care system, is sensitive for the Aboriginal and Torres Strait Islander community.

The Bill seeks to enhance existing safeguards around adoption. While the Adoption Act does not currently prohibit the adoption of Aboriginal and Torres Strait Islander children and young people, it does require careful consideration of their need to stay connected to culture, traditions and family. For example, the Bill requires

consideration of the effects of a decision on the child or young person's cultural inheritance, personal identity and sense of belonging. The Adoption Act also requires consideration of alternatives to adoption, including Enduring Parental Responsibility where this may be appropriate.

Cultural and other rights are further protected by the requirement to consider a child or young person's cultural inheritance. The inclusion of cultural inheritance in guidance about best interests reflects a holistic understanding of child development and wellbeing. This aligns with the UN *Convention on the Rights of the Child* and is reflected in international research. It also reflects the importance of considering the cultural needs of a child or young person in any adoption matter.

'Cultural inheritance' appears with 'personal identity' and 'sense of belonging'. These complementary concepts guide the Court in considering the likely effect of a decision on the whole life of a child. In this context, cultural inheritance requires active efforts to preserve and support elements such as (but not limited to) language, tradition and connection to place/country – diverse aspects of one's culture that would ordinarily be 'inherited' by a child from their birth family as they develop.

Decisions made under the Adoption Act must consider the likely effect of the decision on the child's, or young person's, relationship with significant people, including their birth parents, other family and carers. It also requires consideration of alternatives to adoption, including whether the child or young person may be able to remain in stable and permanent care through another mechanism, such as Enduring Parental Responsibility.

## **Rights limited**

*Right to the protection of family (s 11(1))*

Nature of the right and the limitation (s 28 (a) and (c))

The Bill engages and limits the right to the protection of family because it seeks to change the way the Court considers dispensing with consent. Dispensing with consent is a difficult, complex and sensitive process that is impacted by the circumstances of each child or young person, the circumstances of each parent or guardian and the directions of the ACT Supreme Court.

Legitimate purpose

'Family' has a broad meaning that recognises the many different types of families that live in the ACT, who are all entitled to protection. The Bill seeks to encompass this broad meaning of family to ensure that all affected parties have the opportunity to genuinely participate in the process of dispensing with consent.

Permanency and stability are important to protect vulnerable children and help them live a healthy, happy life. Making the dispensing with consent process more transparent and less adversarial is critical for everyone involved.

### Rational connection between the limitation and the purpose (s28(d))

The changes are designed to give better guidance to the Court on what to consider when making this serious decision about a child's future. The changes require the court to take into account key considerations about a child's best interests, such as the views of the child, the importance of attachment and permanency, and the benefit of maintaining meaningful relationships with significant people in their life, including birth parents and siblings.

Changes to section 35 also clearly articulate that the court may only dispense with the consent of individuals with disability where the person is not able to make a fully informed decision in relation to the consent, despite receiving adequate and appropriate support to make the decision to the best of their ability.

### Proportionality

While these measures engage and limit the right to the protection of family, the Bill enhances protections to ensure any decision is made in the best interests of the child or young person. The Bill places necessary safeguards to ensure consideration of the child's whole life, including their cultural heritage, family connection and sense of belonging.

To support the broad meaning of family and acknowledge the role of everyone involved in a child's life, amendments to section 5 introduce express consideration of all the different people involved in the child's life, including carers, birth parents, siblings, other relatives and significant people. It is intended that this change will encourage greater participation by all parties, including the child or young person being adopted.

The changes also include an explicit requirement to provide extra support for birth parents who may need it to make an informed decision on consent. This may include practices such as supported decision-making, where a relative, trusted person or support service assists a person through a decision-making process where their capacity is impaired due to age, disability, acquired brain injury or mental illness. This measure protects the family unit, ensures the best interests of the child or young person are upheld and protects the rights of people with disability.

It must be acknowledged that dispensing with consent will always limit the right to family because if an application is successful, it has the effect of permanently severing the legal connection between a child and their birth family. The changes in this Bill seek to circumscribe this limitation by supporting a child-focused and best interests approach to dispensing with consent.

## Adoption Amendment Bill 2020

### *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004*, I have examined the **Adoption Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA  
Attorney-General



## CLAUSE NOTES

### Clause 1 Name of Act

This is a technical clause that sets out the name of the Act as the *Adoption Amendment Act 2020*.

### Clause 2 Commencement

This clause states that the Act will commence on 1 September 2020.

### Clause 3 Legislation amended

This clause provides that the Act amends the *Adoption Act 1993*.

### Clause 4 Section 5

This clause makes changes to the considerations to be taken into account when forming a view about the best interests of a child or young person. To remove doubt, the considerations in section 5(2) are not listed in order of importance. Each consideration will be given weight by the Court according to the circumstances.

The proposed changes to section 5 reflect a more contemporary and nuanced understanding of child wellbeing. For example, this section will ask the Court to consider the cultural inheritance, personal identity and sense of belonging of the child or young person. These additions will make the guidance in section 5 more comprehensive and ensure the Court takes into account each consideration when determining the best interests of the child, when making a decision about dispensing with consent.

The considerations in section 5, which are supported by best practice research, will be considered by the Court when forming a view about the best interests of a child or young person. The changes to section 5 were informed by the following domains that reflect best practice research:

- a) **Child's needs** – considers 'best interests' regarding the needs and care of the child in a wide sense, encompassing their cultural, physical, emotional, intellectual and educational needs.
- b) **Child's participation** – considers the child's views, opinions, wishes, feelings or meanings in decisions about their life. Where possible and appropriate, the Court should seek an independent and holistic assessment of the perspectives of the child or young person to support its consideration of this domain.
- c) **Child's identity** – considers the child's individuality in terms of cultural inheritance or other aspects that are important to their identity, such as knowing who they are and feeling like they belong.

- d) **Permanency** – considers continuity and sense of belonging, acknowledging the importance of permanency and stability in emotional and/or physical living conditions and the upbringing of the child.
- e) **Preservation of family** – considers the child’s relationships with people who form part of the child’s family, including birth parents, carers, siblings and other significant people in the child’s life. This domain acknowledges the benefit to the child of having a meaningful relationship with their birth parents, where this is safe for the child.
- f) **Child’s safety** – considers the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
- g) **Other factors** – considers the unique individual characteristics of the child, including their age when they came into care, and the time they have spent away from birth parents and in a stable care situation.

The changes to section 5 reflect contemporary best practice and align with relevant legislation. The changes incorporate key domains of ‘best interests’ for the Court to consider when determining whether to dispense with consent.

#### **Clause 5      Section 10**

This clause updates and modernises the requirements for the adoption of a person aged 18 years and over, to clarify that an adoption order may be made if the applicant/s were in a care-giving relationship with the person to be adopted, and the person had received physical, emotional, intellectual and education support from the applicant/s.

This clause also clarifies that the person and at least one of the applicants must be residents of the ACT.

#### **Clause 6      Dispensing with consent Section 35 (1) and (2)**

This clause remakes section 35 to streamline and update the considerations that the court makes in order to dispense with consent of a person to the adoption of a child or young person, effecting a clear shift from the previous adult-centric approach to one that is strongly child-focused.

The Bill enables the Court to dispense with a person’s consent if:

- the person cannot be identified or found;
- the person is unable to make an informed decision, even with extra support – this is a safeguard to protect the rights of parents with disability or mental health issues; or
- it is necessary to support the best interests of the child or young person, in line with section 5.

The previous provisions in section 35(1) focused on demonstrating deficiencies in birth parents' behaviour and/or re-prosecuting child protection matters. This established an adversarial adoption process, making it more difficult for birth and adoptive parents to jointly uphold the child's best interests by maintaining positive relationships and supporting ongoing contact beyond the adoption.

This clause supports a shift from the current adversarial approach to a strong 'best interests' focus that places the child at the centre of decision-making. This reflects contemporary best practice and aligns with Section 5 of the Act, which establishes the paramountcy of the best interests of the child or young person.

Previous section 35(1)(a) is retained as section 35(1)(a)(i). This provision allows an adoption process to continue without the consent of a parent if they cannot be located or identified following 'reasonable inquiry' (to an extent that satisfies the Court). This ground for dispensing with consent is common to all Australian jurisdictions but is seldom used in the ACT.

New section 35(1)(a)(ii) also allows the court to dispense with consent if the person's identity cannot be established.

Section 35(1)(b) has been revised, as it did not support a human rights approach to birth parents' capacity to provide informed consent. The Court has previously noted its discomfort with the incompatibility between 35(1)(b) and a contemporary understanding of disability and mental health. This view was supported by several submissions during community consultation.

New section 35(1)(b) now outlines that the court may dispense with the requirement for consent if the person is not able to make a fully informed decision, despite receiving adequate and appropriate support to make the decision to the best of their ability.

'Adequate and appropriate support' can include the practice of supported decision making, for example, when one person gives another person as much support as they need to be involved in the decisions that are important to them. Section 35(1)(b) strengthens the rights of birth parents with mental illness or disability to participate in the adoption process, while ensuring the best interests of children are paramount.

Finally, new section 35(1)(c) states that dispensing with consent may also occur when it is necessary in the best interests of the child or young person, creating a clear link to the key domains outlined in section 5. To avoid doubt, a note has been inserted cross-referencing section 35 to section 5.

This aligns with existing practice in the child protection system and the Court, as section 8 of the *Children and Young People Act 2008* establishes a similar expectation that in making decisions under the Act in relation to a child or young person, 'the decision-maker must regard the best interests of the child or young person as the paramount consideration'.

The clause also remakes section 35(2A), to clarify that when the director-general makes an assessment about the best interests of the child and young person, this must be provided to the court as a written report. For clarity, the director-general's assessment of the best interests of the child or young person must take into account the considerations of section 5(2).

**Clause 7      Names of adopted child or young person**  
**Section 45 (4) note**

This is a technical change to the note to reference 'section 5 and section 6'.