SUBMISSION BY PAUL BAN ON BEHALF OF THE WORKING PARTY REGARDING THE ROAD TO LEGAL RECOGNITION OF TORRES STRAIT ISLANDER CHILD REARING PRACTICES – STRONGLY SUPPORTIVE.

INTRODUCTION

This submission is part of a document prepared by the Working Party for the Queensland Government in December 2013. It provided the background that led to the current Bill before Parliament. It should be noted that the term 'adoption' was used until the Bill was introduced because it was the closest term that described the Torres Strait Islander child rearing practice. However due to the confusion with the white meaning of adoption applying to infertility and the Stolen Children experience of Aboriginal children being adopted by white families, it is no longer used.

THE WORKING PARTY

The Working Party are a group of Torres Strait Islander community leaders, the majority of whom have tertiary qualifications, who initially identified themselves as having a commitment to pursuing legal recognition of customary adoption practice at the First Mainland Torres Strait Islander Conference in Brisbane in 1990. They were endorsed by delegates of that conference. One of the delegates was Eddie Mabo, whose own customary adoption status was the subject of inquiry in the lead up to the High Court Mabo decision in 1993. The Working Party has since been endorsed at every annual mainland conference leading to the mainland Torres Strait Islander conference that was held on Thursday Island in 1999. Their full title is 'Working Party Member of the Kupai Omasker Torres Strait Islander Child Rearing Practices'.

They are:

Steve Mam – Born at St Paul, Moa Island and who has lived in Brisbane working with the Aboriginal and Torres Strait Islander community for almost fifty years. He was founding member of the Aboriginal and Torres Strait Islander Community Health Service in Brisbane and a life member of the organisation, which was established in 1973. In the mid 1980s, Steve was the founder of IINA Torres Strait Islander Corporation (a Brisbane based organisation promoting national issues for Torres Strait Islanders) and has supported the Kupai Omasker (customary/traditional adoption project) since 1987. He is a member of the Queensland Aboriginal and Islander Health Centre Hall of Fame and has been a board member of the Aboriginal and Islander Legal Service and Child Care Agency for many years. Steve dedicates his work in this area to Aunty Rizah, whose personal negative experience with the non-legal recognition of customary adoption inspired him to seek justice for Torres Strait Islander children.

Steve passed away on the 27th of April 2016.

Bill Lowah – Born on Thursday Island and lived in Brisbane for the majority of his professional career. He has been prominent in social justice and community organisations for over thirty five years, specifically working in the areas of Indigenous health, housing and education. He was a

member of the Council for Aboriginal Reconciliation as a result of his work with the Royal Commission into Aboriginal Deaths in Custody, a member of the Indigenous Advisory Council to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and a member of the Anti-Discrimination Commission, Queensland.

Mc Rose Elu – Born Saibai Island and lives in Brisbane. McRose has a Bachelor of Arts (Anthropology and Political Science) from University of Queensland. In 1995 she received an Overseas Study Award to undertake research in traditional Hawaiian child rearing practices at the University of Hawaii. McRose has worked for the Queensland Government in Aboriginal and Torres Strait Islander Policy Development for many years, been an active member of the Torres Strait Islander Anglican Ministry focussing on women's issues and more recently Relationships Australia with a focus on Indigenous issues.

Ivy Trevallion – Born on Thursday Island and lives on Thursday Island. Ivy has a Bachelor of Social Work degree from the University of Queensland. Since 1988 she has worked in the area of child protection and youth justice in Queensland and received a scholarship to study Native American child rearing practices in the United States. More recently she has worked for the Queensland Health Department on Thursday Island regarding mental health issues of teenagers and in the general field of Indigenous health and well-being.

Francis Tapim – Born on Murray Island and lives in Townsville. Francis has a Bachelor of Social Work degree from James Cook University. He has been the CEO of Magani Malu Kes, an organisation that promotes Torres Strait Islander culture and assists Torres Strait Islander people in Townsville. Francis has been Chair of the Queensland Aboriginal and Torres Strait Islander Health Advisory Board and Chair of the National Secretariat of Torres Strait Islander Organisations Ltd.

Dana Ober – born on Saibai Island and lives on Thursday Island. Dana has a Bachelor of Arts in Linguistics and Anthropology from ANU and has been involved in the higher education sector for most of his professional life.

Paul Ban is not a Torres Strait Islander but has previously worked for the Department of Children's Services 1977 to 1988, spending four years in the Cairns office. He has been working in private practice in Melbourne since 1995. Paul has a Bachelor of Social Work, Graduate Diploma in Aboriginal Studies, Master of Social Work, Master of Arts in Aboriginal Studies and a Master of Conflict Resolution. He has been a resource person to the Working Party since its inception in 1990 after the completion of his Master of Social Work thesis 'Traditional Adoption Practice of Torres Strait Islanders and Queensland Adoption Legislation' in 1989.

WHAT IS THE ISSUE?

The Working Party have been involved with seeking the legal recognition of customary adoption since 1990, five years after the Queensland Government withdrew the legal recognition it had always given as far back as records were kept in the Torres Strait. Since that decision, many thousands of Torres Strait Islander children who have been adopted under Island custom have not had a legal relationship with the adults who have raised them and who they consider are their parents.

Two extensive consultations in the Torres Strait and on mainland Queensland, one in 1993 and one in 2011/2012 have found that the custom is widespread and has continued despite the lack of legal recognition. While the Queensland Government has not prohibited the practice, which would have caused uproar, it has sidestepped the issue of legal recognition. As a result, children since 1985 who do not have a legal relationship with their parents have suffered emotional and psychological harm when they engage with administrative systems that require the production of a birth certificate. They are also subject to legal injustices in any situation where a legal entitlement flows from being recognised in law as the "child" of the adoptive parents – for example, in intestacy cases or where a compensation or insurance payout flows only to the legally recognised children of a deceased parent.

Torres Strait Islanders have consistently said in both consultations that they would like their customary adopted children to have new birth certificates issued and to have the same legal relationship as between biological parents and the children. They understand the implications of full legal recognition and cannot understand why it has been over thirty years and their practice is still not formally recognised. Their practice has different origins and intentions to western adoption and is not a custom practiced by Aboriginal Australians. There are no known records of Torres Strait Islander children being forcibly removed from their families, as with Aboriginal children, and adopted by European/Australian families.

HISTORY OF LEGAL RECOGNITION AND WITHDRAWAL OF LEGAL RECOGNITION

Prior to 1985 Torres Strait Islanders were able to have custom adoptions both formalised and legalised by the Queensland Government under adoption legislation used by all Queenslanders. The legalisation took place for administrative simplicity, with there being no attempt by the Government to understand and define the practice. Since the early Twentieth Century the Torres Strait was administered by the Department of Aboriginal and Islander Advancement, a bureaucracy who managed all the affairs of Aboriginals and Torres Strait Islanders throughout Queensland. It also had the responsibility for making social security payments until the late 1970s and 'rubber stamped' customary adoptions to simplify names for payments. (Ban 1989)

At regular intervals, the Department of Aboriginal and Islander Affairs simply submitted a list of Torres Strait Islander families to the Department of Children's Services, the department responsible for adoptions, for legal recognition under the relevant adoption legislation at the time. Following the introduction of social workers into the Department of Children Services in the 1970s, concerns were raised regarding whether 'the best interests' of Torres Strait Islander children were being met by 'rubber stamping' applications with no assessment being undertaken as to the suitability of the future caregivers. In addition there were concerns about the conditions under which consent was given by birth parents, as they simply had to complete a form and had no counselling.

As there was awareness that customary adoption differed from the definition of 'adoption' in legislation at the time, the Department of Children's Services in the late 1970s intended to commission a study in the Torres Strait of the needs of Torres Strait Islanders regarding legal recognition of customary adoption. It decided not to approve any further customary adoptions until it understood the difference between the two forms of practice. However the study did not take place and the Department of Aboriginal and Islander Affairs took the responsibility of 'rubber stamping' customary adoptions from the Department of Children's Services from 1981 to 1985 by

stating it was politically embarrassing for the Queensland Government to upset Island leaders by delaying their applications.

A political decision was made in 1985 to phase out the Department of Aboriginal and Islander Affairs and for it to give the responsibility of administering Indigenous Queenslanders to the various government departments with individual expertise, such as health, education and welfare. The Department of Children's Services assumed full responsibility for family and child welfare matters, including the legal recognition of customary adoptions. A decision was made to treat customary adoption applications in the same manner as applications by all other Queenslanders who wanted an adoption Order. It was decided that no further study would be carried out in the Torres Strait of the difference between customary adoption and 'adoption' as defined in legislation and that Torres Strait Islanders should be discouraged from applying for legal adoption. The policy position was that customary adoption falls outside the parameters of adoption legislation and should not be considered as 'adoptions.' (Ban 1989)

Following a thesis completed by Ban in 1989 on the issues for Torres Strait Islanders raised by the Queensland Government's position, a change of government after twenty one years of National Party rule led to the new Labor Government appearing to be receptive to consultation with Torres Strait Islanders over their desire to have their customary adoption practice legally recognised. A number of meetings with government and Torres Strait Islander conferences were held in the early 1990s, where the topic was on the agenda together with land rights and autonomy/self-government in the Torres Strait.

EXTENSIVE CONSULTATION REGARDING THE VIEWS OF TORRES STRAIT ISLANDERS - 1993

A consultancy was commissioned by the Queensland Government in 1993 and Torres Strait Islanders were interviewed together with attending community meetings at major towns on the coast of Queensland and six islands in the Torres Strait. A consistent theme throughout the consultation was that, due to lack of legal recognition of customary adoption, children were being raised in adoptive families and finding out inadvertently that their adoptive name was not the name on their birth certificate.

This caused stress to the children and to the adoptive parents, as under custom children are not told about their adoption until they are considered old enough to understand, which is often in their teenage years. Another theme was disputes over estates where the deceased did not leave a Will (common among Torres Strait Islanders), as those who were adopted through custom stated they had no legal right to challenge those who were biological offspring. The third major theme was that custom adoption was not legally recognised by the Court when disputes arose over the future care of a child who was the subject of an adoption.

The consultancy report contained recommendations regarding options for the Queensland Government to consider and was handed to the relevant Minister in 1994 at a Torres Strait Islander ceremonial gathering. Between 1994 and 1999 the Queensland Government relied on advice from the Department of Communities (a replacement for the Department of Aboriginal and Islander Affairs with only a policy function) regarding how to proceed with the matter. In 1997 a national conference on the legal recognition of customary adoption was funded by the Queensland Government and held in Townsville. Elected Torres Strait Islander representatives confirmed the

issues outlined in the 1994 Report and confirmed the authority of the Torres Strait Islander Working Party, which was established in 1990, to continue negotiations with the government. An outcome of that conference was another consultation by the Working Party in 1998 with Torres Strait Islanders in Queensland. Following a national conference and further consultation, various project officers worked on the government's response leading to a Discussion Paper by the newly named Department of Aboriginal and Torres Strait Islander Policy Development in October 1999.

The Discussion Paper recommended that a further 'full and proper' consultation take place with the Torres Strait Islander community over proposed ways in which customary adoption could be incorporated legally into existing adoption legislation. However after receiving advice from the Member for Cook (Cape York and Torres Strait Region) regarding his concerns about the custom, the Queensland Government made a decision not to continue with any more consultations. They stated in 1999 they would refer the matter to the Queensland Law Reform Commission so that customary adoption could be considered together with the legal recognition of other Indigenous customary practices. After repeated inquiries by the Working Party regarding the progress of the matter with the Law Reform Commission, in 2003 the Queensland Government admitted the matter had not been referred to the Commission due to funding disputes between the various government departments involved. The Queensland Government was reluctant to re-engage with Torres Strait Islanders on the issue any further and did not give any reasons other than it was a low priority.

SURROGACY INQUIRY 2008 AND ADOPTION LEGISLATION REFORM 2009

In July 2008 the Working Party were invited by the Research Director of the Queensland Investigation into Altruistic Surrogacy Committee to make a submission regarding the relevance of their customary adoption practice to the purpose of the inquiry. This had been the only opportunity for dialogue between Torres Strait Islanders and the Queensland Government since 1999. Although the terms of reference (Issues Paper May 2008) stated the inquiry was investigating the decriminalising of altruistic surrogacy and seeking advice as to the role the Queensland Government should play (legally) in regulating such arrangements, among other things, the committee were open to understanding surrogacy from a cross cultural perspective.

While all of the other submissions and presentations were from Anglo-European Australians, the Torres Strait Islander presentation highlighted some of the similarities between customary adoption, where a child is often promised to an extended family member during pregnancy, and surrogacy, where two parties make a private and non-commercial arrangement for one party to bear the pregnancy and give birth to a child of part or all biological origin from the other party. The Torres Strait Islander presentation was reported in the Melbourne Age (1/7/08) and stated, 'Committee head Linda Lavarch (former Queensland Attorney-General) said clinics, church groups, the Kupai Omasker Torres Strait Islander Working Group, former Chief Justice of the Family Court and infertile couples would speak at the Hearing.'

Despite the Committee showing interest in the Torres Strait Islander practice, in their final report (October 2008) they stated in Recommendation 6 that their custom was outside their terms of reference as it is distinct from altruistic surrogacy and therefore it was not appropriate to consider it in the context of the Government's response to the Committee's report. A member of the Committee, the Member for Barron River in North Queensland, stated in parliament (Hansard 27/11/08) following the release of the report 'the committee would like to see the consideration of

the legal status of Torres Strait Islander adoptions squarely placed on the policy agenda. The practice is seen as important in strengthening extended family and continues in spite of prohibition under surrogacy or adoption law. The committee noted that the Torres Strait Islander traditional practice does not neatly fit with Western notions of adoption and surrogacy.'

The report made three recommendations surrounding traditional child rearing practices;

- *Recommendation 6: Further examination of Traditional Torres Strait Islander 'adoptions'* – The committee recommends that the Queensland Government considers options for the recognition of traditional Torres Strait Islander 'adoptions'

- *Recommendation 25: Developing options for recognising traditional Torres Strait Islander 'adoptions'* – The committee recommends that, in developing options for the legal recognition of traditional Torres Strait Islander 'adoptions', the Queensland Government;
    - considers options in consultation with the Torres Strait Islander community, having an appreciation of parenting roles, extended family and child rearing practices in Torres Strait Islander culture
    - considers options which protect the existing legal right of the birth mother/parents not to relinquish the child and promote the rights of the child to information on his/her genetic parentage
    - considers the relevance of the model proposed for the transfer of legal parentage in altruistic surrogacy in the wider community along with lessons from the operation of the Family Law Court Kupai Omasker parenting orders
    - ensures that the model is accessible to Torres Strait Islanders throughout the State, and
    - develops a culturally appropriate community education program to support the implementation of such a provision.
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- *Recommendation 26: Telling and Traditional Practice* – The committee recommends that the Queensland Government provides an opportunity for further dialogue with the Torres Strait Islander community on the issues of telling a child about their status and the child's right to information about their identity. This dialogue should encourage and support community based research and engagement activities in conjunction with the evidence base used by the Department of Child Safety. It should seek to foster discussion with the community and with government on this issue.

In 2009 the Queensland Government passed an Adoption Bill, after reviewing their 1965 legislation, which stated in Section 7 (1) (a) 'because adoption (as provided for in this 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.' It has as a Note 'Island custom includes customary child rearing practice that is similar to adoption in so far as parental responsibility for a child is permanently transferred to someone other than the child's parents. This practice is sometimes referred to as either 'customary adoption' or 'traditional adoption.' Consequently although the Bill acknowledged that Torres Strait Islanders have their own customary adoption practice, for the purposes of the new legislation it fell outside the definition of adoption as outlined in the Bill.

SECOND EXTENSIVE CONSULTATION REGARDING THE VIEWS OF TORRES STRAIT ISLANDERS 2011/2012

Following repeated Working Party requests throughout the majority of the first decade of the twenty first century to re-open the issue of legal recognition of Torres Strait Islander customary adoption, the Queensland government approved a second extensive consultation in the Torres Strait and on the mainland of Queensland in 2010. Concerns were being expressed by politicians and public servants throughout that decade that the issues raised in the 1993 consultation might be 'out of date' and that the customary practice might have been modified to such an extent that a different response is needed. The second consultation was undertaken by Queensland government employees with expertise in the relevant areas and included the former Chief Justice of the Family Court of Australia, the Honourable Alastair Nicholson. It occurred in the Torres Strait mid 2011 and on the mainland mid to late 2012.

The Working Party was informed of the outcome of that consultation in October 2013, where the draft report was made available to members of the group and comments sought. There was a remarkable similarity in the outcomes of the two consultancies conducted twenty years apart regarding issues concerning the lack of legal recognition of customary adoption practice. It was noted that although Torres Strait Islanders have been influenced by western concepts of child rearing through television and interaction with the mainland, the practice is integral to Torres Strait Islander cultural identity and will continue despite lack of legal recognition. However participants still wanted legal recognition, particularly in the form of a new birth certificate that reflected the permanently changed status of the child from being part of the birth, or giving family, to being part of the receiving, or customary adoptive family.

The Working Party endorsed this finding and endorsed the community members' comments that the practice is in the best interests of the child. In particular the Working Party supported the concerns of those interviewed that there is an implication by those outside the cultural practice that the giving of children to extended family according to custom is not in their best interests and has to be safeguarded by those who do not understand the practice. Working party members who have tertiary qualifications in anthropology and linguistics emphasised the difficulty for Torres Strait Islanders in translating English words such as 'giving a child', 'receiving a child', 'relinquishment', 'best interests of a child', 'informed consent' and 'suitability of the receiving parent.' While these terms are widely understood by professionals in the field of adoption and child welfare, Torres Strait Islanders have language terms that reflect principles of reciprocity and obligation between parties and a notion that children's best interests are imbedded within the interests of the society as a whole. Consequently it is difficult to consider what is in an individual child's best interests without understanding the context of the arrangement.

A particular area of misunderstanding is the notion of confidentiality of the custom, which has led to English interpretations with words such as 'secrecy' and 'taboo', which have negative connotations and misrepresent the intention of the practice. The Working Party support the use of the word 'love' when talking about why the practice takes place and how it operates. They are particularly concerned about the social and emotional harm that has occurred to Torres Strait Islander children since 1985, thirty five years ago, when the Queensland Government stopped legal recognition of customary adoption in the mistaken belief that there might be something about the custom they did not understand that is not in the best interest of children.

An important finding from the second extensive consultation was that there was no mention of young Torres Strait Islander women being pressured to 'relinquish' their babies to 'middle class' Torres Strait Islander families. This 'concern' was raised by the Member for Cook under a previous Labor government and was not found to be the case. It is erroneous to apply the framework of western adoption to a customary practice that is based on strengthening community ties through distributing the responsibility of raising children. The Working Party believe the Queensland Government has a responsibility to look after everyone in the State and further believe that there should be a proper legal relationship acknowledged between the thousands of Torres Strait Islander children currently adopted under custom and the people they consider to be their parents.

CONCLUSION

This current Bill 2020 provides Torres Strait Islanders with the legal security to their cultural family practice that they have been seeking for the past thirty five years. It has been a long time coming and will be ground-breaking legislation, as it legitimates the cultural family practice of one of Australia's two Indigenous peoples.

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