Meriba Omasker Kaziw Kazipa (Torres Strait Islander Child Rearing Practice) Bill

Submission to Queensland Parliamentary Committee

The Hon Alastair Nicholson AO RFD QC

31 July 2020

I write this submission in support of the Bill, which I regards as an excellent advance in the protection and nurture of Torres Strait Islander children and their families and a landmark in the recognition of Indigenous Customary Law. I have, as the Committee will be aware, been involved with consultations on the Bill as one of three Eminent Persons appointed by the Queensland Government, the others being Auntie Ivy Trevallion and Uncle Charles Passi.

I would like to commence by paying a tribute to both of them for their hard work and knowledge of Island culture, which proved to be an invaluable contribution during these consultations. I have known Auntie Ivy since I first visited the Torres Strait Islands in 1993 and have greatly admired her work since then and her great contribution in succeeding the late Uncle Steve Mam as Chair of the Torres Strait Islander Working Party supporting the recognition of Torres Strait Islander child rearing practices. I have known Uncle Charles Passi only since he was appointed an Eminent Person, but I am aware of the great work that he has done in that capacity and in representing the views and culture of the Eastern Islands of the Torres Strait and particularly Mer Island.

I would also like to commend the work of DATSIP and its staff, which gave us enormous guidance and assistance during these consultations. In particular I would like to thank Jason Kidd, Tony Cheng, Angela Ruska, Emma King and Ashleigh Schoch, for their great help to me.

I would also like to acknowledge the contribution of Her Honour Judge Josephine Willis of the Federal Circuit Court in Cairns. Her Honour, when she was counsel, appeared before me in many cases involving Torres Strait Islanders and was of great assistance to the Family Court of Australia's contribution to the recognition of their traditional child rearing practices.

So far as this consultation was concerned, she freely made the Court premises and Court Staff in Cairns available to assist in our consultations and also participated herself in bringing the legal profession to the Court to discuss the issues. She was later involved in legal discussions with DATSIP concerning the Bill and made an invaluable contribution to the Bill itself in my absence due to illness in February–March 2020 at a critical period.

It is not my purpose in this submission to canvass the 2018-19 consultations, which have been adequately reported on to the Committee already, but rather to discuss my role and that of others in what went before.

It is perhaps worth making a brief mention of the history of how the Torres Strait islands became part of Queensland and later, Australia, as was described in the leading Australian case of Mabo v Queensland no 2. I do so because it brings to mind the relatively short time since the Islands became part of Queensland and the fact that if this Bill is passed, The Queensland Parliament will have given recognition to a much older concept of Islander customary law, as did the High Court of Australia in that famous case.

> ***"10. Ultimately, the proposal to extend the maritime boundaries of Queensland to include the Murray and Darnley Islands was adopted by the Colonial Office and, on 10 October 1878 at Westminster, Queen Victoria passed Letters Patent "for the rectification of the Maritime Boundary of the Colony of Queensland, and for***

the annexation to that Colony of (certain) Islands lying in Torres Straits, and between Australia and New Guinea". The Murray Islands lay within the maritime boundary mentioned in the Letters Patent.

11. The Letters Patent authorized the Governor of Queensland by Proclamation -

"to declare that, from and after a day to be therein mentioned, the said Islands shall be annexed to and form part of Our said Colony. Provided always that Our said Governor issues no such Proclamation as aforesaid until the
Legislature of Our said Colony of Queensland shall have passed a law providing that the said Islands shall, on the day aforesaid, become part of Our said Colony, and subject
to the laws in force therein. Provided also that the application of the said laws to the said Islands may be modified either by such Proclamation as aforesaid, or by any law or laws to be from time to time passed by the Legislature of Our said Colony for the government of the said Islands so annexed."

The Queensland Legislature passed the requisite law (The Queensland Coast Islands Act of 1879) and, on 21 July 1879 at Brisbane, the Governor of Queensland by Proclamation declared -

"that from and after the first day of August, in the year of our Lord one thousand eight hundred and seventy-nine, the Islands described in the Schedule (which followed the Letters Patent and the Act) shall be annexed to and become
part of the Colony of Queensland, and shall be and

become
subject to the laws in force therein."[i]

Prior to World War 2, Islanders were forbidden from settling on the Australian mainland and could not even move from island to island without a permit from Queensland Government officials. This, while constituting an unfortunate example of the way Indigenous people were treated at that time, became something of an unintended benefit, in that it meant that they were spared the large scale dislocation from family and traditional lands that was suffered by so many of the mainland Indigenous people.

Following World War 2 they became free to move and an estimated 45,000 now live on the mainland, mainly in the State of Queensland but also in other parts of Australia. They maintain close contact with the home islands however and frequently return for cultural events and continue to practice island culture, including customary adoption. They are the smallest distinct Indigenous group in Australia and have accordingly had difficulty achieving the same degree of recognition accorded to mainland Indigenous people.

My first association with the issue of recognition of traditional child raising arrangements in the Torres Strait was in 1993, when as Chief Justice of the Family Court of Australia, I accepted an invitation from the late Uncle Steve Mam to visit the Torres Strait in company with him and some other members of the Working Party, which he then chaired.

That Working Party was appointed at the first Torres Strait Islander Conference in Brisbane in 1990 to represent them in their quest for legal recognition of their customary practices of child rearing. They were since endorsed at every annual mainland conference including the last one held on Thursday Island in 1999

The purpose of my visit was to examine ways in which the Family Court of Australia might be able to assist Islanders to gain some recognition of their traditional child rearing arrangements. As Chief Justice, I had taken considerable interest in exploring ways in which the Court might become more relevant to Australia's First Peoples and my own family background living in PNG made me very conscious of the Torres Strait Islander people.

Steve Mam was an impressive and charismatic man who had a deep dedication to the cause of legal recognition, and it is a matter of great regret that he did not live to see this legislation introduced into the Parliament.

Prior to my visit I read the previous material prepared by Mr Paul Ban, a member of the Working Party who had made a study of what was then called traditional or customary adoption in 1989-90, which strongly supported legal recognition of the practice.

He later took part in an extensive consultation with Torres Strait Islanders in 1993 and found that there was extensive support for legalisation of the practice amongst them

Paul has provided a useful description of what was then called "traditional or customary adoption" amongst Torres Strait islanders. He describes it as follows:

> ***"Adoption' is a widespread practice that involves all Torres Strait Islander extended families in some way, either as direct participants or as kin to 'adopted' children. 'Adoption' takes place between relatives and close friends where bonds of trust have already been established. Some of the reasons for the widespread nature of 'adoption' include*** [ii]
>
> - ***To maintain the family bloodline by adopting (usually) a male child from a relative. This is linked to the inheritance of traditional land in the islands.***

- ***To keep the family name by adopting a male child from a relative or close friend into the family.***
- ***To give a family who cannot have a child due to infertility the joy of raising a child. A married couple may give a child to either a single person or another couple. 'Relinquishment' is not restricted to single parents.***
- ***To strengthen alliances and bonds between the two families concerned.***
- ***To distribute boys and girls more evenly between families who may only have children of one sex.***
- ***To replace a child who had been adopted out to another family – this may occur within extended families.***
- ***To replace a child into the family once a woman has left home so that the grandparents would still have someone to care for.***

The underlying principle of Torres Strait Islander 'adoption' is that giving birth to a child is not necessarily a reason to be raising the child. The issue of who rears the child is dependent on a number of social factors, such as those listed, and is a matter of individual consideration by the families involved. Children are never lost to the family of origin, as they have usually been placed with relatives somewhere in the family network.

The main characteristics of Torres Strait Islander 'adoption' are (Ban 1989:38).

- ***It provides a sense of stability to the social order and is seen as having a useful social function***
- ***It is characterised by the notions of reciprocity and obligation between the families involved***
- ***It generally occurs within the wider network of the extended family and carries with it the intention of permanency***
- ***It occurs frequently but can have an element of instability and fragility sometimes leading to its dissolution***
- ***The arrangements for the care of the child are usually made between the birth parent (s) and the receiving parent(s) during the course of the pregnancy."***[iii]

The use of the terms 'customary' or 'traditional' adoption

One of the problems about discussing this issue has been the use of the word **"adoption"**, which does not adequately describe these customary practices. It does however tend to obfuscate and confuse the discussion because once customary adoption is correlated with statutory adoption, various misconceptions arise. In particular recognition of the customary practice tends to attract the current modern criticism of statutory adoption, which sometimes leaves legislators unwilling to deal with it.

[iv] The following assessment by Paul Ban, is apt:

> ***"'Adoption' was the term used by anthropologists when trying to understand and define aspects of the child rearing practices of people from kinship-based societies. Although the term proved useful in helping westerners***

make sense of the transfer of children amongst extended family and close friends on a long-term basis, it has also become a stumbling block when government services have tried to understand and regulate the practice."[v]

Customary adoption is now described in the Bill as traditional child rearing practices.

Similar Practices in other Countries

There are remarkable similarities between the Torres Strait Islander practice in PNG, a number of Pacific Islands, Canada, and that of the Torres Strait Islanders. In PNG it has long been recognised as the equivalent to adoption[1] and it has received various degrees of legal recognition in some of the Canadian Provinces and in particular Nunavut.

One notable difference with the Torres Strait Islander approach is that of keeping the adoption secret from the child involved until maturity. However, the fact of the adoption is not secret as between the family group and in that sense is open. Again, however this practice is also changing, not least because official requirements for parental consent are likely to make the child aware of his/her parentage at an earlier stage. This problem is addressed in the Bill and should be somewhat obviated by it.

The Role of the Family Court of Australia

Following my visit to the Torres Strait in 1993 I set about having discussions with my judicial colleagues and the Court's staff as to whether there was a way that we could alleviate the problems of non- recognition of the traditional child rearing practice.

[1] PNG Adoption of Children Act Part VI SS 53 and 54

As a result of those discussions, I issued a Practice Direction enabling applications to be made to the Court for parenting orders by receiving parents of children pursuant to the practice and providing procedural directions for doing so.

While it was quite clear under the Family Law Act that the court could make such orders, it could not make orders otherwise altering the status of such children. No alterations could be made to birth certificates and the biological parents remained the legal parents of the children. Only they could give consent to the obtaining of passports, medical treatment etc. Their rights of inheritance of land ay with the biological parents.

This gave rise to a number of areas of serious inconvenience of which the Committee is no doubt aware. It did mean however that the biological parents could not interfere with the fact that the care and control of the children lay with the receiving parents.

It remained necessary before making an order that the Court be satisfied that it was in the best interests of the children to do so and that a genuine traditional arrangement to transfer the children had been made. It was also necessary for the Court to be satisfied that the biological parents had consented to the transfer of children to the receiving parents

By 1999 I was able to report to the Annual Judges Meeting of the Family Court as follows:

> ***The practice has been given no legal recognition under Australian law, which is of great concern to Torres Strait Islanders and carries with it practical difficulties in relation to inheritance, proof of identity and the need for children to obtain parental consent to certain activities and decisions. In recent years, following discussions between Torres Strait Island Elders and representatives of the Court, the Family Court of Australia has facilitated the making of residence orders and orders conferring***

sole parental responsibility upon the couple or person receiving the child pursuant to these traditional arrangements, and I have issued Practice Directions to assist this process.

A residence order does not amount to an adoption order and can of course be subsequently revoked or varied in appropriate cases. It does, however, have the advantage of recording such arrangements and obviating some of the practical difficulties involved in non recognition of the practice by conferring parental responsibility upon the receiving parents.

The court has now made some hundreds of such orders. Features are that they are made with the consent of all relevant parties that can be ascertained; before such orders are made a report is prepared by a Court Counsellor with the assistance of an Indigenous Court family consultant; and the Judge hearing the matter normally sits with one or more Elders as assessors to ensure that what is being recognised is a traditional adoption."

One feature of traditional child rearing arrangements when considered by the Court at that time was that they had usually already taken place, sometimes years before. This will no doubt continue to be the case under the new Bill until the backlog has caught up which may well take years. However, to my mind there is no doubt that there will be a considerable demand for it, given my experience of the Court and the two consultations in which I have been involved.

I sat as a judge on the relevant islands to hear literally hundreds of these applications. It was the normal practice to appoint at least two local Islander elders to sit with the judge as assessors, to

ensure that what was being presented to the court was a traditional adoption in accordance with local custom. This I believe, was a valuable practice, not only symbolically but as a real check on the *bona fides* of the application

We also required police reports to be obtained and a report from a court counsellor as to the suitability of each arrangement. The court also employed Indigenous family consultants, including a well-respected Torres Strait Islander woman, who assisted with each application.

My abiding memory of these Island visits was the warmth and pleasure of the respective communities that we had come to them to deal with these applications. There was never any dispute about whether an order should be made and both me and my colleagues thus found these hearings some of the most satisfying and enjoyable experiences of our time on the Bench.

The proceedings usually ended with a morning tea or lunch provided by the Islanders and warm and friendly discussion.

Our presence and availability in the Torres Strait inevitably did lead to some contested family law cases of the usual type. The only time that I can remember that the traditional practice led to contested litigation was in circumstances where there was a dispute as to whether the child in question had in fact been given pursuant to the usual practice or whether the receiving couple had simply agreed to look after the child for a limited period.

By the late 1990's it appeared that the Queensland Government was prepared to accept the need for a legislative solution to recognise customary adoption to the point that legislation was prepared and was about to be introduced. Then without explanation it was withdrawn, and nothing happened thereafter for a number of years.

As I understand it, the then Member for Cook expressed reservations upon the basis that the system might be abused. I

should say that over all of these cases that my fellow judges and I heard and the consultations, I never saw or heard of any such abuse. Further, the 2011-12 consultations and the most recent ones found no concerns that that young Torres Strait Island women were being pressured to 'relinquish' their babies to 'middle class' Torres Strait Island families, as had been suggested by the then Member for Cook

Subsequently in 2008, submissions were made by the Working Party to a Queensland Government Parliamentary Select Committee on Surrogacy which were also supported by Paul Ban and me for legislative recognition of the practice. Those submissions were made at the invitation of the Committee.

Eventually the Committee, while recommending that voluntary surrogacy arrangements no longer be a crime in Queensland, did not consider that the issue of legalisation of the traditional practice was within its terms of reference. It did however make three recommendations surrounding traditional child rearing practices, namely recommendations 6, 25 and 26.

These recommendations in substance were, that the Government should consider options for the recognition of traditional Torres Strait Island 'Adoptions' (R.6); that in developing them the Government consider the options in consultation with the Torres Strait Island Community (R25); that the Government should provide an opportunity for dialogue with the Torres Strait Island community on the issue of telling a child about their status and the child's right to information about their identity (R26)

Ms Linda Lavarch, who chaired that Committee, later made a number of helpful suggestions in private discussion with me as to how we could further the matter.

In 2010, Paul Ban and I, with the approval of the Working Party, had a meeting with the then responsible Minister and local

member, who we urged to reopen the issue and institute further action.

While not being opposed to doing so, she expressed concern that given the passage of time since the 1993 consultation, a further consultation should be held to confirm that the people still supported legislative action.

I was subsequently asked to participate in such a consultation along with two senior public servants, Ms Carmel Ybarlucea and Mr Shane Bevis.

These consultations were held in the Torres Strait Islands in 2011 and on the mainland in Queensland in 2012. There was a remarkable similarity in the outcome of the two consultancies conducted 20 years apart and the later consultations conducted in 2018-19 regarding the continued desire for legal recognition of the traditional practice.

In relation to the 2011 -12 consultations, it was noted in the submission of the Working Party to the then Minister that although Torres Strait Islanders have been influenced by western concepts of child rearing through television, and interaction with the mainland, the practice remains integral to Torres Strait cultural identity and will continue whether or not it has legal recognition. However participants still want 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 receiving family.

Events Following the 2011-12 Consultations

By the time that the report of the 2011-12 consultations had been tendered and the Working Party's submission was made, there had been a change of Government and a new Minister.

Although no opposition to the recommendations was expressed nothing further happened prior to the election of the present Government in 2015.

Thereafter, following representations made by Auntie Ivy Trevallion to Minister Fentiman, a conference was convened in Cairns on 16 November 2016 involving the Working Party, DATSIP officials, Minister Pitt, Minister Fentiman, The Directors General of DCCSDS and DATSIP and others including Paul Ban and me. This was a successful conference which examined possible approaches to legalisation and set the pattern for what subsequently occurred.

Prior to the 2017 election the Government adopted as a formal policy the legalisation of Torres Strait Child Rearing practices.

On 11 May 2018, the three Eminent Persons, including me were appointed by the Government and planning for community consultations commenced.

Our first meeting was held at DATSIP's offices in Brisbane on 12 June 2018 and involved representatives of the Departments of Premier and Cabinet, Justice and Attorney General, Child Safety Youth and Women as well as DATSIP and a further meeting on 28 June 2018. At these meetings, the various issues associated with legalisation were discussed and the community consultations were planned to commence in August 2018.

Some delay occurred in engaging the various communities for participation in these discussions which eventually commenced on Thursday Island in November 2018. Thereafter, discussions continued both on the mainland and on various Torres Strait Islands and in Brisbane through the first part of 2019.

Significant meetings were held in all locations. Because of time factors, there were some consultations attended by only one or two of the Eminent Persons. In both Cairns and Brisbane

meetings were also held with interested members of the legal profession and local officials.

The findings as to the community desire for legalisation remained much the same as in the earlier consultations. Because of the confidential nature of some of the consultations, private consultations were also held with the people who wished to do so.

Many of these consultations were extremely moving and involved difficulties their lack of legal status made for many people who had been given in accordance with the practice in relation to issues such as care for elderly parents, estate and inheritance issues and many others.

Interestingly, many expressed gratitude for the earlier initiatives of the Family Court, but all were of the view that full legal recognition was to be preferred.

The only real concern expressed was about the possibility that the proceedings might be expensive and excessively legalised, requiring travel and legal representation.

Following the conclusion of the consultations, much time was spent discussing legal issues with Department and other interested parties.

Considerable attention was paid to whether a court proceeding was required or whether the formal recognition of the fact that the procedure had occurred could be made administratively.

Many of those consulted pointed out that people would continue to use the traditional method of child raising whether or not it was legalised, as they had done in the past. Their preference was for a simple and culturally appropriate system of administrative recognition.

Given my experience of legal solutions, I am strongly of the view that they are correct and the system envisaged by the Bill of an administrative system of recognition of traditional child caring

arrangements by a Commissioner of Torres Strait background is much to be preferred.

Conclusion

For all of the above reasons I commend the Bill as the best solution to the problems of legal recognition of the traditional practice of child rearing in the Torres Strait.

Alastair Nicholson

[i] Mabo and Others v. Queensland (No. 2) [1992] HCA 23; (1992) 175 CLR 1
F.C. 92/014 Per Brennan J. His Honour's judgement contains a detailed account of the events that led up to this annexation and the relevant events that followed it so far as the governing of the islands was concerned.
[ii] Ban P (1989) *Traditional Adoption Practice of Torres Strait Islanders and Queensland Adoption Legislation* Master of Social Work thesis University of Melbourne
[iii] Ban P ibid submission to Queensland Government etc at 3-4
[iv] http://www.aihw.gov.au/publications/cws/aa04-05/aa04-05.pdf
[v] Ban P "The Right of Torres Strait Islander Children to be raised within the customs and traditions of their Society." Submission to Queensland Government Joint Select Committee on Surrogacy 2008