



Our reference: BNE3417079

31 July 2020

Committee Secretary
Health, Communities, Disability Services
and Domestic and Family Violence Prevention Committee
Parliament House
BRISBANE QLD 4000

By email: health@parliament.qld.gov.au

Dear Committee

Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020

Thank you for the opportunity to provide written comment on the above Bill, following our appearance at the Committee's public hearing on 22 July.

This is significant legislation as the first Bill introduced since the passage of the *Human Rights Act 2019* ('HR Act') that seeks to enshrine Torres Strait cultural practice into Queensland law, and may be the first Bill of its kind in Australia. Section 28 of the HR Act protects the rights of Aboriginal peoples and Torres Strait peoples to traditional knowledge, spiritual practices, language, kinship ties, their relationship with land and resources, and protection of the environment.

The Preamble to the HR Act particularly recognises that human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom. The purpose of the Bill is also consistent with the United Nations Declaration on the Rights of Indigenous Peoples, which establishes a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous peoples.

While the Bill seeks to uphold these important cultural rights, due consideration must also be given to restrictions on other rights, as human rights are not generally absolute. The impact on the right to protection of family and children under section 26 is particularly significant.

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Subject to our suggested minor changes, it appears the Government has provided sufficient justification for these limitations in the Statement of Compatibility. This conclusion is based on the significant consultation the Department of Aboriginal and Torres Strait Islander Partnerships ('DATSIP') has reported undertaking to date. There appears, at least at the outset, to be broad support from the Torres Strait Islander community. However, that assessment may change if Torres Strait Islander people were to report significant concerns to the Committee about the Bill, particularly given the primary justification for the limitations on rights is to recognise this cultural practice in law. The Commission welcomes the Committee's commitment to visit the Torres Strait to hear first-hand from the local community about their views of the Bill.

Given the significance of this legislation, the Commission supports the inclusion in clause 111 of a review of the legislation after two years.

Limitations on Human Rights

In order for a Bill to be compatible with human rights, any limitations on rights must be demonstrably justified under section 13 of the HR Act. The primary justification for these limitations appears to be to uphold Torres Strait Islander cultural practice in law and clarify the legal status of that practice for the children involved.

The most significant limitations on human rights in the Bill are as follows:

- Many provisions in the Bill have an impact on family relationships, by formally recognising, altering, creating and dissolving family relationships, including relationships between a child and their birth parents, and between a child and their cultural parents (right to equality (section 15), protection of families and children (section 26), right to privacy and reputation (section 25)).
- Dispensing with consent of a relevant parent in certain circumstances (right to equality (section 15), protection of families and children (section 26), right to privacy and reputation (section 25)).
- The requirement for adoptive parents to consent to a criminal history check being provided to the Meriba Omasker Kaziw Kazipa Commissioner, which includes spent convictions (right to equality (section 15), right to privacy and reputation (section 25)).
- A child may not gain access to information about the cultural adoption until they turn 18 (right to equality (section 15), freedom of expression (section 21) protection of families and children (section 26)).
- Consent may be dispensed with when a person does not have the capacity to consent (right to equality (section 15), right to privacy and reputation (section 25) protection of families and children (section 26)).

These limitations on rights are offset by important safeguards including:

- This is an 'opt-in' model seeking to provide a voluntary system for legal recognition of a cultural practice.
- A cultural recognition order must be made for the wellbeing, and in the best interests, of the child.
- Consent may only be dispensed with by a court in limited circumstances.
- A cultural recognition order may be discharged through an application to a court.

- In exercising its jurisdiction or powers under the Bill, a court must regard the wellbeing and best interests of a child as paramount.
- The decision of the Meriba Omasker Kaziw Kazipa Commissioner is subject to review.

The Commission suggests minor amendments to three other safeguards included in the Bill.

Decision-Making Support

Important protections are provided in clause 107 for adults with impaired decision-making capacity who may be affected by decisions made under the Bill. These decisions include applications considered by the Commissioner and dispensation of consent or discharge of orders made by a court. The decision-maker must take into account the adult's right to participate, to the greatest extent practicable, in the decision making process. The adult must be given the support and access to information necessary to enable the adult to make a decision as part of that process. In addition, the decision-maker must ensure that, to the greatest extent practicable, the adult's views, wishes and preferences are sought and taken into account before making the decision.

This approach is consistent with the General Principles of the current *Guardianship and Administration Act 2000*. However, the *Guardianship and Administration and Other Legislation Amendment Act 2019*, which has yet to come into force, amends these principles. New General Principle 8 better protects the right to equality by requiring that support is given to an adult to communicate decisions, and that a person must not be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with support and access to information necessary to make and communicate the decision. To remain consistent with contemporary approaches to decision-making support, we suggest that clause 107 be amended to include these additional safeguards in new General Principle 8.

Requiring applications for cultural adoption orders to be made in writing.

As discussed in our appearance before the Committee on 22 July, I have concerns about the requirements for applications to the Meriba Omasker Kaziw Kazipa Commissioner to be made in writing. While I appreciate that the seriousness of these applications require a written record, in the Commission's experience, applying an inflexible written application process can be a barrier to Indigenous people asserting their rights. During the public briefing, DATSIP suggested that its officers could provide assistance to applicants in making written applications. Depending on the nature of that assistance, that may create privacy concerns for the applicants involved.

An alternative approach would be for the Commissioner to provide assistance for applicants, rather than DATSIP. A similar model applies under section 67(2) of the HR Act, which requires the Human Rights Commissioner to consider providing assistance to a complainant in making a complaint:

If the commissioner is satisfied the complainant needs help to put the complaint in writing, the commissioner must give reasonable help to the complainant to put the complaint in writing.

Criminal History check process

An important safeguard in the Bill is that before considering a criminal history report, the Meriba Omasker Kaziw Kazipa Commissioner must provide a cultural parent with an opportunity to give the commissioner information or documents about any information contained in the report.

The Commission agrees that the criminal history report is an important safeguard for protecting children and that this process provides natural justice to the cultural parent. However, an approach that is less restrictive of the cultural parent's rights would limit the Commissioner's consideration to 'relevant' matters included in the criminal history report. This could be included in the matters to be considered in the initial application, or a ground to change the decision under the internal review process in Part 5 Division 6.

Conclusion

The Commission supports the purpose and content of this Bill, subject to our proposed minor amendments and further feedback from the Torres Strait Islander community.

Yours sincerely



Scott McDougall
Commissioner