SUBMISSION TO PARLIAMENTARY COMMITTEE ON MERIBA OMASKER KAZIW KAZIPA (TORRES STRAIT ISLANDER CHILD REARING PRACTICE) BILL 2020

Prepared by:

Dr Heron Loban with Zoe Rathus AM and Dr Kate van Doore, Griffith University

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

Submission to Parliamentary Committee

Introduction

We have prepared this submission to bring together the cultural understandings of the Torres Strait Islander author with the combined legal expertise of all authors. We congratulate this government for continuing to take the issue of Torres Strait Islander child rearing practices forward through the introduction of a Bill into the Queensland Parliament.

Support for Bill

We support the basic premise of the Bill – it is time for the legal recognition of Torres Strait Islander child rearing practices - the permanent giving of a child by the biological parents (or one parent where the other is not present in the child's life) to another couple or person in accordance with cultural traditions.

As noted by Cynthia Lui MP in the first reading speech of the Bill on 16 July 2020:

> If passed, the implementation of this very important legislative reform will resolve longstanding issues faced by Torres Strait Islanders whose legal identity does not currently reflect their cultural identity and lived experience. Legal recognition of the traditional child-rearing practice will allow Torres Strait Islander people to access fundamental human rights, for example, important identity documents, such as a birth certificate, which allow for easy access to government services such as financial support and school enrolment benefits that most Queenslanders take for granted.

Torres Strait Islanders who have been reared according to Torres Strait Islander child rearing practices experience a range of practical problems. These difficulties also impact on the broader well-being and emotional security of both the children and their cultural parents and on the communities in and from the Torres Strait more generally. The current situation is discriminatory and inequitable.

Ailan Kastom as the foundation

Our fundamental position is that Torres Strait Islander child rearing practices are cultural and that any legislative framework must value, recognise and respect this. Decisions regarding Torres Strait Islander child rearing practices have customarily rested with natural parents and cultural parents. Such decisions are made by these parents in consultation with affected family members and knowledgeable members of the community. Any legislative scheme should not interfere in these Ailan Kastom processes. If this were to occur it would no longer be a *recognition* of Torres Strait Islander child rearing practices according to Ailan Kastom, but the *creation* of a different (Western) process.

With this in mind, we raise several matters regarding the Bill.

Section 11(2) - Appointment of Commissioner

We note that section 11(2) states that the Commissioner will be appointed by the Governor in Council on recommendation of the Minister. To ensure the greatest likely success of the position of the Commissioner, this section would be strengthened by a legislative note recommending that community consultation form part of the appointment process. The key characteristics for the Commissioner must be cultural knowledge and community trust. Community consultation as part of the appointment process would ensure that the appointed Commissioner possesses these characteristics.

Functions of the Commissioner - Section 22

We commend the inclusion of both practical processes and a public awareness role for the Office. However, we note that some matters that may require attention from a practical perspective, particularly for the first Commissioner. There is the potential for a significant influx of applications in the initial years to formalise existing arrangements which may number in the hundreds or thousands. This will be coupled with a need for a community education and awareness campaign – again, particularly at the beginning. These realities underline the importance of ensuring the office of the Commissioner is appropriately resourced with staff with strong community connections and a range of skills.

Preliminary criteria for making application for cultural recognition order - Section 32

We have several concerns regarding ensuring this provision does not unduly limit potential applicants.

Section 32(1) requires that the person's birth was registered in Queensland, however there are Torres Strait Islanders whose births are registered in other Australian states or territories, or indeed, overseas. We concede that limiting the process to Queensland is unavoidable given jurisdictional issues. However, we recommend that, once the Bill has been passed, the Queensland Government should advocate for a national process to be developed to recognise Torres Strait Islander child rearing practices for Torres Strait Islander people whose births were not registered in Queensland.

Section 32(2)(b) requires that where an application is being made for a child, the applicants must be adults at the time of the application. We are concerned about the operation of this provision with respect to non-adult birth parents. First, the drafters may have contemplated that, where a/both birth parent(s) is/are not yet an adult, the cultural parents may apply for dispensation of consent of the birth parents under section 47. We do not believe this is a satisfactory mechanism as it would remove the ability of the birth parent(s) to participate in the legal recognition process, when they must have fully participated in the cultural process to be at the point of applying for legal recognition. As a child's parents, no matter their age, a decision that they are entitled to make is to engage in Torres Strait Islander child rearing practices. Thus, it is a contradiction to not enable them to participate in the state recognition process. As such, the imposition of such an age barrier for birth parents would result in discrimination.

In the *Adoption Act 2009* (Qld), we note that Division 4 provides a mechanism for non-adult birth parents to give consent. Although we do not believe that the same mechanism is culturally appropriate in the circumstances of Ailan Kastom, we suggest that a provision be

inserted into the Bill dealing with non-adult birth parents that allows for the Commissioner to exercise discretion.

Section 32(3) notes that an application can still be made for a child if a birth parent or cultural parent is deceased. Whilst this accommodates the passing of one parent, it does not accommodate a situation where both birth parents are deceased. Although this situation may be rare, there should be a provision for applications to be made where both birth parents are deceased where the cultural adoption has taken place, but the recognition has not.

Similarly, Section 32(6) also only contemplates the passing of one of the birth parents or cultural parents, but not both. This will be particularly pertinent for the potential influx of applications from people who were the subject of Torres Strait Islander child rearing practices many years ago and are seeking to have that recognised. In these instances, it is entirely possible that both birth parents and cultural parents may be deceased. This should be contemplated in the legislation.

The Nature and Details of the Ailan Kastom child rearing practices
- **Sections 35(1)(a); 36(1)(a); 38(a)**

Each of these provisions require the relevant party to provide the nature and details of the Ailan Kastom child rearing practice that has occurred. Ordinarily, details of this nature would not be written down nor the subject of disclosure to other persons. Only certain persons within the family or community will know of the details. Such disclosure seems contrary to the main purpose of the Bill as outlined in s4(a): 'to recognise Ailan Kastom child rearing practice'. Disclosure of the nature and details of the Ailan Kastom child rearing practice lacks the requisite 'sensitivity' referred to s6(2)(a)(ii). Such sensitivity would require that only those parties to the practice know the nature and details of the arrangement. This would demonstrate a respected acceptance of that arrangement - that as Torres Strait Islanders, the parents and affected family members will have made the arrangement in accordance with Ailan Kastom.

Traditionally and culturally there is no probing, questioning or interrogating of the arrangement – such behaviour would be inappropriate according to Ailan Kastom. In fact such questioning may cause serious offence or hurt because it insinuates a lack of trust in the decision-making abilities of parents and affected family and intrudes on otherwise well-established and well-accepted decision-making processes. We submit that the signed statements of both sets of parents and the informed person provide ample certainty as to the practice meeting Ailan Kastom requirements / rules. The further requirement for the particularised detail of the nature and Ailan Kastom requirements is unnecessarily intrusive and contrary to Ailan Kastom itself.

The signed statements as written confirmation by the informed persons is in accordance with Ailan Kastom and should be sufficient to satisfy administrative requirements in a consent-based process.

Circumstances of the telling of adoption (in adult cases)
- **Section 37**

The process set out in this section appears unnecessarily intrusive and not reflective of Ailan Kastom, specifically the importance of secrecy and confidentiality. As with the process

discussed above, the level of detail required in the signed statement of the adult the subject of Torres Strait Islander child rearing practice is invasive. As also noted above in respect of children, such information is not shared or disclosed beyond the parents, affected family and community as this is contrary to Ailan Kastom. There is no clear benefit or additional safeguard that this information could provide to the Commissioner as the decision-maker. It is an added layer of complexity that is unnecessary to meet the requirements of the 'wellbeing and best interests of the person' the subject of an application for a cultural recognition order in section 6(1).

Other carer

- **Sections 34(1)(d); 39; 56(b)**

We are concerned as to the place or role of the 'other carer'. In the literature that is available written by Torres Strait Islanders and non-Torres Strait Islanders, to our knowledge, Ailan Kastom *does not* involve, seek to involve, or require the consent of an 'other carer'.

We would hope that the Parliamentary Committee will seek and receive direct input from the community as part of their community consultations that provides clarity around the place and role of an 'other carer' in the context of Ailan Kastom, Torres Strait Islander child rearing practices and this Bill.

Additional information sought that appears of an administrative nature but inappropriate / confusing / misguided / drafting error

- **Sections 36(d)**

This section appears worded in a way that is not intended. That is, as presently written, it seeks the child's current address and the length of time they have resided at that address. However, it would seem that the intent of the provision is to obtain information about the period of time that the child has lived with the cultural parents which may have been for a longer period than at that one (current) address.

- **Section 46(3)**

This section could be amended to allow the written notice to be discretionary, applying only to those cases where the Commissioner is relying on the criminal history report as a reason not to approve the application.

Dispensation of consent

- **Division 3**

The dispensation of consent provisions outline that where birth parents', or cultural parents', consent is not able to be obtained, the applicant must apply to the court for an order dispensing with the need for consent of the party. However, as previously noted, this places a burden on applicants whose birth and cultural parents may be deceased. There should be a provision that acknowledges the situation of both birth parents and/or cultural parents being deceased. It may on occasion be utilised by a child (where birth parents are deceased), but is most likely to be utilised by an adult (whose birth parents and cultural parents are deceased), seeking to have the Torres Strait Islander child rearing practice recognised. Rather than a court process, we recommend the provision of death certificates to the Commissioner, with the Commissioner able to determine that consent of that party is not required, should suffice.

Giving of evidence by a child
- **Section 89**

We question the appropriateness of this section. If there is a dispute about the practice it is usually resolved in the community.

We would hope that the Parliamentary Committee will seek and receive direct input from the community as part of their community consultations that provides clarity around the place and role of a child giving evidence in the context of Ailan Kastom, Torres Strait Islander child rearing practices and this Bill.

Criminal history information disclosure
- **Section 102**

During the consultations there was discussion about whether or not cultural parents should have to provide consent to criminal history checks. We argue that this is an unnecessary intrusion into a cultural practice and that the community members entrusted with confirming the adoption will have the relevant knowledge to determine the suitability of the proposed cultural parents.

However, if requiring such documentation seems to be a necessary pre-requisite to the passage of the Bill, then it is important that it only involve the parties supplying checks which can be easily obtained and that there is no assessment process imposed by the Commissioner. If the criminal history checks were to remain in the Bill, then consideration should be given to amending section 102. It is not obvious that criminal history checks held as records as part of the application process cannot be accessed by a person other than the owner of the criminal history or the Commissioner as decision-maker.

Sections 64; 103

We are concerned that the current sections regarding access to information (section 64 and section 103) are not clear in their meaning. It is difficult to understand precisely what access to information is available and how this Bill interacts with the *Births, Deaths and Marriages Registration Act 2003* (Qld). In terms of what access to information should be enabled - Parliament should be guided by community consultation - but the relevant sections require clearer drafting so that people affected by this legislation can understand what their rights of access to information are.

What happens to anyone who does not formalise?

No matter what legal changes follow this parliamentary consultation, there will be Torres Strait Islanders who will not engage with any formal process. Therefore, we submit that any reform also consider how to bring about recognition of Torres Strait Islander child rearing practices when they occur outside of the formal framework. In other words, this legislation should not become the only way that Torres Strait Islander child rearing practices can be recognised. And, the fact that this process has not been undertaken must not be proof that someone is not a 'child' of their cultural parents. Deciding to formalise the adoption must be a voluntary process.

This issue is likely to arise in situations of inheritance or other circumstances where a 'child' or 'parent' may be expected to have special rights or responsibilities such as enduring powers of attorney and advanced health directives. We submit that Torres Strait Islanders who are the subject of non-formalised Torres Strait Islander child rearing practices should be at liberty to bring legal actions as children of cultural parents. Perhaps this would be achieved by amending the definition of 'child' in relevant legislation to include people who are the subject of Torres Strait Islander child rearing practices under Ailan Kastom. If there were a dispute this would have to be resolved by a court and evidence regarding this.

Conclusion

We want to emphasise that the introduction of the Bill into Queensland's Parliament is an important step towards the legal recognition of Torres Strait Islander child rearing practices. As such we look forward to the successful passage of the Bill through Parliament to enable children (and those who are now adults) raised according to Torres Strait Islander child rearing practices to obtain the legal recognition and equality they deserve. We acknowledge that there will be an opportunity to review the legislation's operation, in full, two-years' post-enactment. However, we would encourage the Committee to consider the above amendments which could greatly enhance its uptake and accessibility to Torres Strait Islanders from its commencement.

Dr Heron Loban, Zoe Rathus AM, Dr Kate van Doore, Griffith University*

Email contact: [redacted]
Postal address: [redacted]

*This submission is made solely on behalf of the authors only. Its contents and the views expressed in it are and remain those of the authors.

Dr Heron Loban is a Torres Strait Islander woman with family connections to Mabuiag and Boigu. Dr Loban is an academic, former lawyer and expert in Indigenous law and justice issues. As a lawyer she practiced in commercial law, native title law and criminal law. Dr Loban has held a number of key positions in community-based, not-for-profit companies including as a Director of Desert Knowledge Australia. She is currently a Director of the Australian Communications Consumer Action Network Ltd and an academic based at Griffith University.

Zoe Rathus AM is a senior lecturer at the Griffith University Law School. She has published and presented widely on women and the law, particularly the family law system and the impact of family violence on women and children. Zoe commenced in private practice in 1981 and was coordinator of the Women's Legal Service between 1989 and 2004. She has been a vocal advocate for legal system reform for nearly 40 years. Zoe is currently Chairperson of the Immigrant Women's Support Service and a member of the Queensland Law Society Domestic Violence Committee. Zoe was awarded an Order of Australia in 2011 for her services to women, the law, Indigenous peoples and education.

Dr Kathryn (Kate) E. van Doore is an international child rights lawyer and an academic at Griffith Law School, Australia. Her research principally concerns the intersections of child rights and children without parental care. Kate is an internationally recognised expert on orphanage trafficking and was awarded the Anti-Slavery Australia Freedom Award in 2017. She was appointed an inaugural member of the Australian Government Modern Slavery Expert Advisory Group in 2020. Kate is a Senior Fellow at the Centre for Children, Law & Ethics, Cumberland Law School, Samford University, USA, and is co-chair of ReThink Orphanages Australia. She also sits on the Advisory Board for the International Bar Association's Presidential Taskforce on the Refugee Crisis: A Child Rights Response to Child Migration and Migrant Children at Risk. Kate is a co-founder and Board Director of Forget Me Not Australia, an international non-governmental organization focused on child protection and family reunification for children residing outside of parental care.