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Office of the President

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Our ref: LP

Committee Secretary
Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Parliament House
George Street
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 feedback on the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 (**the Bill**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been prepared with the assistance of members with relevant expertise on these issues.

Introduction

Our members have emphasised to us that Torres Strait Islander child rearing practices are incredibly private and confidential matters. The Bill seeks to address some of the legal and practical issues which impact Torres Strait Islander children and families by proposing a framework for the legal recognition of practices which have existed for thousands of years.

Whilst we are supportive of the development of law around this custom, the Bill in its current form is inadequate to meet the needs of Torres Strait Islander peoples and must be the subject of further community consultation and amendment. There is a real risk, in our view that if the Bill progresses without adequate consultation nor consideration of the matters outlined below, it would create more barriers and issues for Torres Strait Islander people.

It is critical that the department consult with Torres Strait Islander peoples and communities and provide sufficient time and resources for the Bill to be considered and commented upon. Specifically, there is a need for further community consultations including with people who have been traditionally adopted to understand the issues and barriers they face and what they have experienced and also, how the legislation will work practically.

We encourage not only sufficient time for consideration but also the allocation of appropriate resources to support extensive consultation with Torres Strait Islander communities. Ensuring that the laws which impact Indigenous peoples are informed by Indigenous voices is a fundamental Indigenous Right recognised at State and International law.

In addition to the broad general concerns outlined above, we have a number of concerns with the specific drafting of provisions in the Bill as well as the potential unintended consequences. Further consultation is essential.

Our comments in relation to the Bill are provided below.

Torres Strait Islander cultural considerations

Cultural restrictions on open discussion about traditional child rearing practices outside of the family may affect uptake of the opportunities provided by the Bill.

Whilst the central objective of the Bill is one which the Society supports, we are concerned that the Bill attempts to legislate on matters outside of the objective in some aspects and overlooks crucial elements such as language and definitions. We are concerned that as drafted, it homogenizes Ailan Kastom (Island Custom).

The Bill highlights the need for adequate consultation with Torres Strait Islanders so that correct language and translations are included. The language used in the Bill is critical as it may impact the uptake of the legislation by Torres Strait Islander peoples. The Bill should reflect regional variances as informed by the communities. It is important to emphasise that language and terminology throughout the Bill should be inclusive of all cluster groups. Ensuring that all languages are reflected may, for example, mean some terms or concepts need to be defined in more than one language.

We recommend that the Bill appropriately reflect that the Torres Strait region has three distinct languages: Kala Lagau Ya, Kala Kawa Ya and Meriam. It should also acknowledge that the island clusters have their own terminology for child rearing. Our inquiries indicate that Torres Strait Kriol (Torres Strait Pidgin/creole), where the word Ailan Kastom transpires from, is a universal dialect used throughout the Torres Strait which came about as a new form of language between Torres Strait Islanders and other cultures and nationalities including Pacific Islanders, Chinese, Malaysians, Japanese and Europeans. It was English broken into shorter phrases and pronunciations. The child rearing practices have been around for thousands of years, therefore it is essential to accurately acknowledge respective terminology for each language group.

The definitions section should be expanded. Language should be defined in the Bill and specifically reflected throughout the Bill and in the explanatory material.

Indigenous Human Rights

In progressing this legislation, it would be beneficial and important that its development and the drafting be reflective of and considered alongside the:

- *Human Rights Act 2019* (Qld); and
- the international human rights instruments including the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on the Rights of the Child. These should be considered alongside the Bill.

Natural Justice and Access to Justice

The development of good law which has sufficient regard to the rights and liberties of individuals, also requires consideration of the principles of natural justice. QLS also supports laws which provide access to justice for all members of Society. In this context, we raise the following concerns:

1. The Bill does not make explicit allowances for people who do not speak English well nor does it consider the various languages spoken in the Torres Strait Islands.

   The *Child Protection Act* 1999 (**CPA**), for example, contains explicit provisions regarding translators in court proceedings so that the Court must ensure that parties to a proceeding understand the nature, purpose and legal implications of the proceeding and of any order or ruling made by the Court. In contrast to the CPA, the requirements of the Bill for written statements in sections 35 and 36 do not adequately account for difficulties for parties in communicating in English (particularly where English can be a 2nd or 3rd language), nor the need for translators to assist in these processes.

   Section 86 of the Bill mirrors to some extent section 106(1) of the CPA. A provision analagous to section 106(2) might also be of assistance as an addition to the current section 86:

   > *"(2)If the child, parent of a child or other party to a proceeding has a difficulty communicating in English or a disability that prevents him or her from understanding or taking part in the proceeding, the Childrens Court must not hear the proceeding without an interpreter to translate things said in the proceeding or a person to facilitate his or her taking part in the proceeding."*

   Consideration might also be given as to whether a section analogous to section 109 of the *CPA* would be beneficial:

   > ***"109 Legal representation of child's parents***
   >
   > *If, in a proceeding on an application for an order for a child, a parent of the child appears in the Childrens Court but is not represented by a lawyer, the court may continue with the proceeding only if it is satisfied the parent has had reasonable opportunity to obtain legal representation."*

2. There are other elements of the CPA which may be of assistance in the Bill's framework:

- Section 87 of the Bill refers to "Expert help" in a proceeding. QLS considers this should be more specific by defining "special knowledge" or "special skill". The drafting should also require the expert to declare conflicts of interest.

- Section 90(1)(b) of the Bill states that the court may hear submissions from "*anyone else the court considers is able to inform it on any matter relevant to the proceeding*". This is very broad and should properly take into account cultural considerations and any conflicts which may exist. Any matter which requires expert assistance to the Court should be informed by Indigenous voices.

  In this regard, the CPA has previously provided for 'recognized entities' and now 'independent Aboriginal or Torres Strait Islander entities', so that Aboriginal or Torres Strait Islander persons may speak to the cultural appropriateness of child protection decisions. It is important that there be an Indigenous voice or input to these matters, to provide appropriate expertise and specific community knowledge. There may be a need for an analogous entity in this context, to ensure that the court has readily available access to appropriate experts.

- Section 5C of the CPA sets out "Additional principles for Aboriginal or Torres Strait Islander children" which should also be considered. This provision enunciates key principles for administering that Act in relation to Aboriginal and Torres Strait Islander children including the right to self-determination and that the long term effect of a decision on the child's identity and connection with the child's family and community must be taken into account. The 2017 amendments to the CPA also expanded section 5C to include the Aboriginal and Torres Strait Islander Child Placement Principles in the legislation: prevention, partnership, placement, participation and connection. These underlying principles may be beneficial to have regard to in the context of this Bill.

  The CPA contains a number of provisions protecting the child's right to have their views and wishes considered (see, for example, the role of the Separate representative in QCAT proceedings and the right of appearance of the public guardian at hearing). These concepts may be beneficial in this Bill. We support section 107 of the Bill with respect to decisions and persons with impaired capacity.

3. Section 88 of the Bill relates to right of appearance and representation.

   It would be prudent to provide for a right to appear by phone or video link in order to alleviate remoteness issues. We note the courts and legal profession's response to the COVID-19 pandemic with respect to advances in the use of this technology, including the broader acceptance of video and telephone appearances. We would encourage this to continue as it will assist in overcoming some of the barriers.

   Other limitations which must be taken into account include geographical location issues and limited access to legal representation. For example, whilst the circuit court conducts visits to the region, there are only two legal services, ATSILS and Legal Aid Queensland (**LAQ**). ATSILS has an office on Thursday Island which is not physically or financially accessible for outer island clients. Legal Aid is based in Cairns and a lawyer from LAQ travels for circuit court. To get access to Legal Aid, clients need to

file an application, lodge it electronically and await the completion of the process. They cannot physically attend the LAQ office to lodge their application unless they fly to Cairns. These further issues adversely affect access to legal representation in the Torres Strait.

We therefore suggest that these barriers be considered in developing some flexibility in the legislative framework for these processes. There is also a need to ensure that legal services are appropriately resourced to provide culturally appropriate assistance and advice on these matters. In this regard we refer to the Explanatory Notes which state that the cost of implementing the new legislation will (and in our view must) include legal support and interpreter costs for the birth parents and cultural parents to ensure all the parties are informed about the long-term implications of the process.

Specific aspects of the Bill

We make the following comments in relation to specific provisions of the Bill:

Part 4 Application for cultural recognition orders

Division 1 Eligibility and criteria

1. Section 32(1)(b) Person's birth must be registered in Queensland. Torres Strait Islanders are less likely to have their birth registered, when compared to the non-Indigenous population.[1] The benefit of this framework may be impeded for those people whose birth has not been registered or has been registered in another State or Territory. We recommend that consideration be given to an alternative approach if a person's birth has not been registered. For those whose births has been registered in another State or Territory, consideration might be given to how there can be a process of mutual recognition.

2. Section 32(2)(b) effectively restricts eligibility where any of the birth parents or cultural parents are not adults (i.e. under 18, as defined in the *Acts Interpretation Act* 1954). We query if this could present issues for some families, such as where a child is born to 17-year-old birth parent(s) and older family members are seeking to be the cultural parent. Consideration might be given to including some discretion for the Commissioner to accept an application where one or more of the applicants is not an adult.

Division 2 Documents and signed statements

3. The gathering of particular documents and information including the statements required by sections 35 and 36 (Birth parent's statement and cultural parent's statement) is onerous. Given that discussion around this practice is taboo, it may be particularly difficult for families to comply with the requirements to submit these statements. These practices are not openly spoken about. There may also be barriers

[1] See Chapter 3 of 'The Indigenous birth registration report', Queensland Ombudsman:https://www.ombudsman.qld.gov.au/ArticleDocuments/514/The%20Indigenous%20birth%20registration%20report.pdf.aspx.

for single parents who wish to go through this process, but the other biological parent may not know about or be agreeable to this but is required to provide a statement.

Similar concerns arise with the requirements for signed statements from an 'informed person' in section 38. This adds extra levels of complexity because of the need to involve another party in the process of gathering particular documents and information. Pursuant to section 56, the order cannot be granted without these statements, unless a court order (a dispensation order) has been made under section 52 (which is in itself onerous).

4. Adults making applications where parent(s) are deceased:

   Section 32(4) states that an application for an adult can only be made with statements from birth and cultural parents. This can be dispensed with by court order under section 53. It should be possible to allow an application to be made without those statements and without a dispensation order where the applicant can produce death certificates for a person or persons who would ordinarily be required to provide under those sections. The process of having to go to Court to declare someone has died may raise cultural sensitivities and we question the appropriateness of this criteria when the fact of the death could be dealt with in a simple way, on the papers so that the process does not add to family trauma.

5. Sections 32(5) and (6) outline a process for applications, made by an adult, where a birth parent or cultural parent is deceased. However, these sections do not clearly set out the process for the adult where both birth parents and all cultural parents are deceased. The Explanatory Notes indicate that "As the framework is a consent model, it is not possible for an application to be made if both birth parents or both cultural parents are deceased". If this is the intent of the section, the drafting should be clear that the application is not available in these circumstances.

Part 5 Cultural recognition orders

Division 2 Information to assist commissioner

6. Sections 45 and 46 appear to give the commissioner power to seek information about cultural parent's criminal histories. Where the application is for a Cultural Recognition Order about an adult, we query the need for the commissioner to obtain the cultural parents' criminal histories.

   Whilst we acknowledge the purpose of this power, we are concerned about how this process would interact with the CPA. These powers should perhaps be limited to applications involving children, and perhaps also limited to classes of offences that have a bearing on the person's capacity to care for the child.

7. Section 51(1)(a): Hearing of application in absence of relevant parent.

   This should require that an affidavit of service on the relevant parent be filed as part of the application.

8. Section 58(2): Statement of reasons must be given to all applicants.

   There are potential privacy issues if the reason for declining relates solely to one of the parties. For example, the decision might be based on the criminal history of a cultural

parent about which the birth parent was unaware. There may need to be some discretion as to redaction and considering what information needs to be disclosed, particularly where for example the birth parents have separated, do not agree or their statements conflict.

There is also a need to carefully balance the handling and disclosure of personal information, particularly if a criminal history includes old minor convictions, with transparency in providing Statements of reasons which comply with section 27B, Content of statement of reasons for decision in the *Acts Interpretation Act* 1954. The requirement to give a Statement of reasons, combined with a potential inability to disclose some of the reasons for the decision, might create a difficult situation for the Commissioner. Therefore, we suggest that there may be a need to reconsider the drafting in the Bill to have regard to:

a) how the information should be handled in compliance with the *Information Privacy Act* 2009.

b) A way to ensure that the statement is accurate but does not unnecessarily provide all of the personal information which an applicant may not want shared with a co-applicant such as their criminal history.

We note for example the limitation on certain disclosure set out in proposed section 64 (3) which could provide a mechanism for personal information to be protected. Although the statement of reasons must identify the evidence that the decision maker refers to, perhaps this reference could be by way of referring to particular "restricted information".

Part 6 Registration of cultural recognition orders

64 Entitlement to certificate, information relating to particular entries

9. Section 64(3): We understand that parents traditionally may choose the right time to tell children about their birth parentage. This section appears to allow for certain information not to be disclosed on application, although it is not clear whether a decision of the parents not to inform the child about his or her birth parentage would meet the threshold of unreasonable harm to a person's interests. If it was intended to capture this, we suggest that it would be better to explicitly refer to parents' decisions about disclosure of parentage so that there is recognition that parents make the decision as to when it is appropriate to tell the child in line with the child's best interest.

Part 7 Effect of cultural recognition orders

10. Section 66 Effect on relationships

    We are concerned about the extent to which the Bill should comment on this at all. We understand that these practices are agreed between the biological parents and the cultural parents and again are not discussed openly. We are concerned that this section may have a legal effect which is inconsistent with cultural practices and query the need for this aspect to be legislated in this way.

11. Section 106 'Relationship with Adoption Act 2009 and other laws' provides that a cultural recognition order about a child has effect as if the order was a final adoption

order made under the *Adoption Act 2009*. We query the extent to which Part 7 "Effect of cultural recognition orders" is necessary.

12. On a practical level, we are concerned that the intent of section 67(1) regarding devolutions of property may not always be realised because executors or administrators may not know that that the deceased's children included a person who became the deceased's child under a cultural recognition order. While the register of births, deaths and marriages will hold information about cultural recognition orders, death certificates are not cross-checked by the registrar and depend on information provided by the informant, which may not be complete or accurate. Both in relation to this Bill and more generally, it would be useful if the registrar of births, deaths and marriages cross-checked the information in death certificates as a matter of course to ensure that all relevant children are identified.

13. The provisions of the Bill deal with rights in relation to one child. We query whether it should also consider situations where multiple children might be the subject of customary adoption. For example, where two children born to one parent have both been the subject of customary adoption to the same cultural parents.

Part 8 Discharge of cultural recognition order

14. Section 73(1)(b): Grounds for discharge.

This subsection refers to the circumstances under which a relevant party may apply to the court for an order discharging the cultural recognition order on grounds including where "there are other exceptional circumstances that warrant the discharge". There is no guidance about the kinds of "exceptional circumstances" which are envisaged by this ground. This leaves the decision open to judicial discretion. Rather than merely relying on "exceptional circumstances", it may be of assistance to articulate what might be considered as exceptional circumstances.

Part 9 Court proceedings

Division 2 Constitution of court and procedural provisions

85 Court's paramount consideration

15. Section 84 states that the Court's paramount consideration is the wellbeing and best interests of the child. We support this position and note that it mirrors section 6(1), in considering the wellbeing and best interests of the person for whom the order is being made.

Part 10 Confidentiality and access to information

102 Confidentiality of Information

16. Section 102(3)(b) expressly permits that a commissioner may disclose information that is contained in a person's criminal history if the disclosure is made in the notice of intention (that is, where the commissioner is considering not making a cultural recognition order) or if the disclosure is made in a statement of reasons given under section 58(2)(a). We query the need for this disclosure when a commissioner has already determined to make a cultural recognition order. Disclosure of personal

information should be limited to where there is a decision not to make a cultural recognition order on this basis.

In disclosing personal information, the commissioner should also have regard to the Information Privacy Principles with respect to use and disclosure. In order to strike this balance, we suggest that 'restricted information' under section 103(5) should perhaps be amended to include criminal history report under section 45, the written notice under section 46(2) and any submissions under section 46(3).

The Role of the Commissioner

QLS makes the following comments in relation to the role of the Commissioner:

1. Appointment of a Commissioner under section 14

   We support the limit to the term of appointment (to 3 years) but suggest that there should be a maximum term of appointment (see, for example, *Ombudsman Act* 2001, where the Ombudsman appointed may be appointed for a maximum of 10 years). Particularly in light of section 13(3) which provides that a commissioner may be reappointed.

2. Section 18 relates to Disclosure of conflict of interests

   We agree that these are appropriate particularly in explicitly calling out familial relationship in section 18(3). However, we query whether section 18 and 19 should be in Part 5 Cultural recognition orders (see, for example, section 40 which states that the commissioner must deal with an application for a cultural recognition order by considering and deciding the application under this part (being Part 5)). As part of that decision making, any conflicts of interest should also be considered.

3. Sections 25 and 29

   We support the approach that the Commissioner and officers are not subject to direction about the way the commissioner's functions or powers under the Act are performed or exercised to ensure independence.

4. We query if the Commissioner should have the ability in certain circumstances, such as where a conflict arises, to delegate powers to other Torres Strait Islander officers. This might broaden the potential pool of people eligible to be Commissioner, (which is already narrowed because the Commissioner is required to be a Torres Strait Islander). For example, this would allow for the appointment of a Commissioner skilled in particular functions under proposed section 22, while allowing the Commissioner to delegate certain decision-making powers to appropriately qualified officers.

   We also suggest that consideration might be given to having Co-Commissioners and whether gender diversity in these 2 roles may also be appropriate.

5. Section 41 relates to when the Commissioner may request additional information. Subsection (4) states that "The Commissioner may decide whether to make a cultural recognition order regardless of whether the applicant gives the further information or document requested." It would seem more appropriate that the commissioner *may* make the decision after the conclusion of the reasonable period in subsection (2)(a) and after any extension under subsection (3).

Interaction with other legislation

We refer again to proposed section 66(1)(d) and (e) regarding the Effect of cultural recognition orders. These provisions state that on the making of a cultural recognition order:

(i) the person stops being a child of the birth parents; and

(ii) a birth parent stops being a parent of the person.

The CPA typically defines 'parent' to include mother, father or person with guardianship or custody including under another Act. Where a Cultural Recognition Order has been granted, we query how this interacts with the definition of parent under the CPA. For example, is the cultural parent the 'mother' or 'father' under the CPA or are they 'a person with custody under another Act'? Do the birth parents retain any rights under the CPA?

We also raise a general issue regarding the permanency of the arrangement. For example, where issues arise with the cultural parent (e.g. death or incapacity, or other issues affecting their ability or right to care for the child) would the birth parents be recognised as having a closer or at least distinct relationship to the child in comparison to other members of the community? There needs to be clarity about the rights of birth and cultural parents in these circumstances, particularly where the ability to discharge an order can only be appealed in the Court of Appeal.

These kinds of issues require further consideration and consultation particularly in determining new placement arrangements for a child where these unforeseen circumstances arise.

Consequential amendments will be required to the *Succession Act 1981* to reference children the subject of cultural recognition orders where relevant, similar to the references to adopted children.

Further consultation is required

QLS strongly recommends that further consultation occur with Torres Strait Islander peoples on the Bill. This is critical to address the drafting and other issues outlined above and to ensure that the legal framework is able to be accessed and utilised in practice.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

Luke Murphy
President