TORRES SHIRE COUNCIL

To lead, provide & facilitate a sustainable, safe & culturally vibrant community

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Committee Secretary

Health, Communities, Disability Services and

Domestic and Family Violence Prevention Committee

Parliament House

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Re: Meriba Omasker Kaziw Kazipa Bill

1. Introduction and Preamble

Torres Shire Council (hereafter referred to as Council) presents the following preliminary submission regarding the Meriba Omasker Kaziw Kazipa Bill (hereafter referred to as the Bill), currently subject to both public submissions and subsequent public and private community consultations; Council encourages the Committee to consult widely across the Torres Strait with communities from all islands. Council acknowledges the significance of the Bill and the complexities surrounding it. Council approaches this submission from three (3) perspectives – as a representative of Torres Strait Islander communities within our Shire; and (2) as a local government with experience in the industrial regulation of leave types to reflect customary adoption practices; and (3) as Mayor and Councillors experienced as the first identifying person under the *Torres Strait Fisheries Act 1984* (discussed later in the submission). Council notes that data referred to by (we believe) the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) at the public hearing on 22nd July 2020 (the audio dropped out during the introductions on *Parliament TV*) and referred to later in this submission, includes the year 1985 as a baseline. This year marks the inception of the Torres Strait Treaty and precedes the landmark Mabo v Queensland (no 2) [1992] HCA 23: (1992) 175 CLR 1. Beyond these milestones, Council is uncertain as to how and why 1985 has been chosen as the baseline year.

Council notes that in the Preamble to the Bill, it states "Ailan Kastom child rearing practice has been practised in the Torres Strait since time immemorial". As this is a Bill emanating out of British law, the term "immemorial" does not have its cultural meaning but rather the legal term: a time beyond legal memory fixed as the beginning of the reign of Richard 1 in 1189 but modified in common law. Archaeologists working in the Torres Strait have found evidence of human settlement dating back at least 2,500 years. The term in the Preamble does not mean *pastaim*.

The Preamble refers to "The recognition of Ailan Kastom child rearing practice ensures that a child who has been raised in accordance with the practice will benefit by having their legal identity reflect their cultural identity". Those in our communities who were either children who experienced "traditional adoption" or parents (biological and adoptive) do not describe a static and singular practice of childrearing. They describe different practices that changed over time, and to suggest otherwise is both ahistorical and inaccurate.

Torres Strait Islander adoption and child rearing practices were never static. They developed and changed over time in response to prevailing conditions. They have been and are differently characterised throughout the Torres Strait. **Above and beyond any other attribute, they are/were private.** The Committee is encouraged to have regard to these truths.

2. Terminology

Council has concern with some Terminology used in the Bill. For example, clauses 8 and 10 use the term "cultural parent". This term is alien and potentially offensive to those who were/are part of traditional adoption practices. Ailan Kastom means that adoptive parents are the parents not "cultural parents". This Bill employs a non-traditional term and supplants it onto Islander customs/practices. The term "Torres Strait islander" is not defined and yet much deliberative and decision making revolves around whether the person is a "Torres Strait Islander" in particular clause 32 eligibility criteria. In the Notes to the Bill there is reference to the term "adult" but not in Schedule 1, the Bill's dictionary. The meaning of "informed consent" is defined and yet "uninformed" consent is not and had it this would assist in the interpretation and qualification of clause 49 (4) (c) and (d), wherein dispensation of consent is enshrined.

3. Contested Will/Estate

Council notes that the proposed new Section 41DA of the *Births Deaths and Marriages Registration Act 2003* is to be inserted via clause 123 of the Bill, allowing a transfer of parentage effective by a cultural recognition order to be registered and for the person's birth entry to be closed. Some current birth certificates include the names of both the biological parent and an

adoptive parent. Some feedback on this part of the Bill relates to difficulties that this clause may cause with a contested estate involving the passing of a biological parent (such as the biological father of child who has been traditionally adopted). This issue will be discussed further by members of our communities during the hearings to be conducted in the Shire.

4. Lore v Law (Regulation of Customary Lore and Customary Practices)

Council expresses a grave concern that what has occurred in the creation of this Bill is that customary practices that are differently characterised across the Torres Strait have been approached as though they were identical or the same. It fails to recognise that adoption practices have changed over generations. **In attempting to address documentation of birth regarding customary adoption practices (i.e. a registration process), what has occurred is a non-indigenous regulation of a customary lore.** This point is further elaborated later in the submission.

During the public hearing of the 22nd July 2020, we believe it was a DATSIP representative (note earlier advice regarding sound on the broadcast) asserted that the practice involves approximately 250 births a year. Where is the evidence to support this assertion? The experience of affected persons differs in the past as well. Some existing birth certificates have both birth parent and adoptive parents' names, and some do not. What is missed is that traditional adoption practices in the past were as much to do with preservation of families and culture as it was to do with maintaining kinship structures and systems in the face of the later realities, the equivalent of an apartheid system. At the very least, our communities are entitled to see the evidence, including how many were consulted in the preparation of the Bill; from what islands did they come; where were they consulted; when were they consulted. Where is the data identifying the prevalence of Meriba Omasker Kaziw Kazipa today to support the Bill?

5. Criminal History Check

Council is concerned that some aspects of the Bill have not been thought through. For example, despite the Statement of Compatibility suggesting that the Commissioner has discretion to seek criminal history information, advice given at the public hearing on 22 July 2020 was that there is a requirement to complete a form that will include a requirement that the relevant party ticks the box regarding criminal history check. The advice given was "If they do not tick the box, the application fails to proceed". Thus, discretion becomes mandatory if this approach is adopted. This requirement entirely ignores the history of and reasons for the over-representation of first nations peoples' "offending" and incarceration in this country (the worst in the developed world).

As of September 2019, Aboriginal and Torres Strait Islander prisoners represented 28% of the total adult prisoner population, while accounting for 3.3% of the general population. Furthermore, members of our community whose adoption experiences involved great care, thought and attention find this requirement to be improper, especially as it is not proportionate to the purpose for which it applies (to formalise a birth registration). In the traditional adoption practices, great care is given to the ongoing care of the child (its singular purpose). Thus, family and domestic violence and paedophilia are factors considered by parents in their decision-making. This is certainly where there is a grave risk of the state apparatus intruding into the private familial/kinship practices of Torres Strait Islanders.

6. Complexities around the Commissioner and the process

Council is concerned about the practical role and function of the Commissioner, referred to in clauses 11 and 20 and Division 4 and 5. During the public hearing on July 22 2020, it was suggested that the "secretariat" function for the Commissioner would be in the various offices of DATSIP and that the Commissioner would be based in Cairns. In determining the workload for the Commissioner, it was suggested that 1 in 4 persons have been involved in the child adoption/rearing practices and that of the 250 newborn children, 30% or appx 75 births would be subject to the application. It was suggested that since 1985 there have been 2,300 adoptions and that 215 are expected to be addressed in the first year of operation of the Commissioner. How did the Department arrive at these figures?

Council believes that without a shadow of a doubt, Division 4 and some aspects of Division 5 will create significant challenges for the Commissioner and the parties involved. There is ambiguity around those circumstances where "informed consent" is required and where it is not. Clause 56 requires that, subject to any dispensation order, each birth parent and cultural parent "gave full, free and informed consent to the making of the application for the order". However, a court is required to make a dispensation order – not the Commissioner and under clause 49 (4) (c) and (d) it permits the court to dispense with the requirement to serve a copy of the application in circumstances where the birth mother may be (for example) 17 years and the birth father 19 years (hence the mother is not an adult); or if the person for a cultural recognition order is made aware of the person's birth or the application of the cultural recognition order places the birth mother at an "unacceptable" risk. The qualified term *"unacceptable" risk* is not supported because, by implication, it suggests that there is a level of acceptable risk, a view which is itself unacceptable.

There may be a number of unintended consequences in the application of S32. For example, clause 32 (1) b) requires that "at the time the person's parentage is transferred in accordance with Ailan Kastom child rearing practice, at least 1 cultural parent is a Torres Strait Islander". How does this work if the mother is non-indigenous and the father is a Torres Strait Islander who has arranged with his parents (both of whom are "Torres Strait Islanders") to adopt the child given that he was not prepared to care for the child, for whatever reason, after the baby's birth? The Bill only requires that one biological parent and one "cultural" parent is a Torres Strait Islander and he and his parents may nominate the "informed person" (see clauses 34. 35, 36). How will the mother's rights be protected? What overlap is there with the *Family Law Act 1975* (Cth) apropos recourse? What happens if because of domestic or family violence, the biological parent colludes with relatives (of which they are unaware) to take the child using the provisions of this proposed legislation as part of his controlling behaviour that characterises the violence? Whilst it was said at the Public Hearing of 22 July 2020 that there will be a review of the legislation after two (2) years of its application, Council is concerned that there may be a risk of harm being caused during the intervening period if the Bill's current procedural architecture is enacted. Council is concerned that the processes set out in the Bill are prescriptively bureaucratic and will lead to arbitrated outcomes rather than agreement.

Council is concerned that the state has set up a Torres Strait Islander may appear to be placed in a role as a determiner of child placement, as a white protector did in apartheid Queensland and the Torres Strait.

7. Possible Approach

Council is at a loss to know why this burdensome, complex process, open to interpretation and arbitral powers was needed in the first place? At its essence what is being sought is a means by which traditional adoption may be registered on a birth certificate and hence also be reflected on other documents. Why could not the *Births, Deaths and Marriages Registration Act 2003* be amended to reflect the simple process currently employed under the Torres *Strait Fisheries Act 1984*? Traditional inhabitants are eligible through authorities granted under the Act that are not available to, or have limited availability to, people who are not traditional inhabitants, including access to fisheries that are reserved exclusively for traditional inhabitants. The identifying person must complete the "Traditional Inhabitant Identification Form" verifying that they have ensured the applicant meets ALL of the criteria described and applying to a "traditional inhabitant".

The first identifying person must be either a Torres Strait Islander who lives in the Protected Zone or adjacent coastal area of Australia and is an Australian citizen who maintains traditional customary associations with the area in relation to subsistence or livelihood or social, cultural or religious activities; or an Aboriginal traditional inhabitant of the Torres Strait or the northern peninsula area as defined under the Torres Strait Treaty and who is a resident of that area. The identifying person may also request the applicant to supply a family tree, and/or evidence to support the applicant's claim. This is a remarkably simple process. It does not require the creation of a Commissioner or associated bureaucracy (secretariat). There are no hearings and it does not require a court arbitral power in the processing of the application. Applying this model to the registration of births associated with Meriba Omasker Kaziw Kazipa, would mean that an identifying person ensures that the form is correctly completed and sent locally to the Births, Deaths and Marriages Registry.

8. Industrial Relations

Utilising the current provisions of the *Industrial Relations Act 2016*, Council negotiated a certified agreement that incorporates "traditional adoption" in the terms of personal leave; provides discretion for paid or unpaid cultural leave and expands cultural leave to include "the communities of the Torres Strait, including the Treaty Villages and those above the 11th degree parallel". There is provision for leave to other parts of Australia. The inclusion of the proposed parental leave clauses is supported and would, absent the amendments, be practised by Council, in any event.

9. Conclusion

Council has raised a number of concerns regarding the Bill as expressed by various members of the community. No doubt they will have other concerns not documented in this submission and hence Council very much supports these community members, impacted by the Bill or who are/have been part of traditional adoptions, appearing before the Committee in both a private and public capacity. They look forward to the opportunity to be consulted.

On behalf of Council, I submit this response to the Queensland Parliament, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee Meriba Omasker Kaziw Kazipa Bill.

Yours faithfully,

Dalassa Yorkston
CHIEF EXECUTIVE OFFICER - TORRES SHIRE COUNCIL