Sent: Saturday, 7 June 2008 5:23 PM
To: Surrogacy Committee
Cc: Alastair Nicholson
Subject: Torres Strait Islander submission

Dear Sir/Madam,

I am writing a brief submission on behalf of the Torres Strait Islander working group selected by the Torres Strait Islander community to seek legal recognition of their child rearing practices from the Queensland government. I am a consultant working in private practice who has been used as an advisor and advocate by the working group for almost twenty years and my Curriculum Vitae is attached. I am not a Torres Strait Islander.

With regards the terms of reference for the Parliamentary Select Committee investigating altruistic surrogacy, the Torres Strait Islander community are very interested in this opportunity to have the Queensland government legally recognise their own form of altrusitc surrogacy. They support the decriminalisation of altruistic surrogacy, as they have always practised their child rearing custom since before white contact and have maintained that custom to the present day.

The attached article descibes some aspects if their child rearing practice and the problems they have had with the Queensland government over the past twenty years is obatining legal recognition. One the major stumbling blocks has been for the government to view the custom as a form of 'adoption', which has led to inaction as the custom does not fit any of the crtiteria of western adoption practice.

The review of whether the participants involved in altrusitc surrogacy ought to have legal rights should incorporate the Torres Strait Islander custom, as virtually every Torres Strait Islander family is affected by this custom in some way. Wheras altruistic surrogacy is practiced by a minority of the total Australian population, it is widespread and commonly practiced in the Torres Strait Islander community to distribute the care of children and to create postive bonds of reciprocity and obligation between the adult parties. The right of a Torres Strait Islander child to know about their identity is a topic that has been discussed at many Torres Strait Islander national conferences, where the legal recognition of this custom has been a long-standing agenda item.

The Torres Strait Islander community welcome the opportunity to have the Queensland government not only decriminalise their custom but have legislation passed that strengthens their family practices.

Your sincerely,

Paul Ban BSW Grad Dip Ab Stud MSW MA

Consultant to the Kupai Omasker Torres Strait Islander Working Group

THE RIGHT OF TORRES STRAIT ISLANDER CHILDREN TO BE RAISED WITHIN THE CUSTOMS AND TRADITIONS OF THEIR SOCIETY

Paul Ban

Introduction

Torres Strait Islander children have the right to be raised within the customs and traditions of their society. However there is currently a threat of uncertainty to that right created by the Queensland government in not having Torres Strait Islander child rearing practices legally recognised. The child rearing practice in question involves a transfer of the raising of a child from one party to another, which has similarities with the western term 'adoption' but also has fundamental differences. The custom has a great deal in common with the western term 'altruistic surrogacy.'

'Adoption' practice in kinship-based societies

'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.

Adoption in western society

The history of western adoption prior to the industrial revolution was that is was widespread and an integral part of the extended family system However since the break-up of the extended family following the industrial revolution, the nuclear family gained greater importance with a subsequent pressure on relationships. Poor families suffered the most, with children being removed from impoverished backgrounds and placed in institutions. The adoption of children was considered preferable to institutional care and long term fostering, as it was less expensive and provided the child and carers with legal security. Benet (1976:17) states 'if adoption is to exist in a society where possession, ownership and materialism hold sway, it must be absolutely total and watertight.' Whereas once parental responsibilities toward a child were shared by the extended family prior to the industrial revolution, parental rights became the prerogative of the adoptive parents to the exclusion of the birth parents. Winkler et al (1988:16) state that the major rationale for the introduction of British, American and Australian adoption laws from the 1890's to the 1920's was to recognise adoption as a legitimate social practice and to regulate it in order to prevent excesses and ambiguities.

The major characteristics of western adoption since that time have been

- The total severance of ties, legal and otherwise, between the adopted child and the birth parents
- The establishment of a legal relationship between the adoptive parents and adopted child as though the child were born to the adoptive family
- The maintenance of 'closed' adoption bound by confidentiality and secrecy. This has changed over the past twenty years, with limited forms of 'open' adoption now taking place
- That adoption reflected society's intolerance to illegitimacy and maintained a social stratification in which relinquishing parents were made to feel themselves on the lower stratum of society – over the past twenty years this attitude has been slowly changing due to different perceptions both of the role of women and illegitimacy

Anthropological definitions of adoption

Goody (1971:342) provides a definition of adoption as being when "the complete set of available parental role elements is transferred from natal to 'pro-parents'" while Carrol (1970:6) defines it as 'any customary and optional procedure for taking as one's own a child of other parents.' Levy (1970:83) describes the cultural differences between western and Pacific Island kinship-based societies: 'Polynesian and Micronesian adoption is relatively frequent, public, casual and involves only partial transfer of the adopted child to the new family. Western adoption is relatively infrequent, private, formal and involves an almost complete transfer.'

Australia's Indigenous minority – Torres Strait Islanders

Torres Strait Islanders are Melanesian and part of the Pacific Islander group of kinship-based societies, together with Micronesians and Polynesians. They are Australia's Indigenous minority, number approximately 40,000 with most of the population living on the mainland of Queensland. Of the 6,000 or so who live in the Torres Strait, between the tip of Cape York in Queensland and Papua New Guinea, approximately half live on Thursday Island and the remainder live on the 14 outer islands in the Strait. Due to their relative isolation, following European contact initially by explorers and later by the London Missionary Society in 1871, Torres Strait Islanders remained in their homeland until after World War Two and their culture and traditions were left reasonably intact. Although most Torres Strait Islanders have chosen to live on the mainland, they retain a strong connection to their homeland and also retain family traditions and customs.

'Adoption' practice of Torres Strait Islanders

'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 (Ban 1993:16)

- 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 it's 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

Desire for legal recognition

As Torres Strait Islanders engage with government institutions and their regulations by virtue of being Australian citizens, they have encountered problems trying to retain this custom. Because their child rearing practice is not legally recognised by the Queensland and Commonwealth governments, they have no legal security and consequently no recourse when a dispute arises over the care of an 'adopted' child. This is particularly the case when parties live some distance from each other and cannot utilize traditional methods of conflict resolution. In addition they would prefer the 'adopted' child has a new birth certificate reflecting the change in care arrangements and also prefer that 'adopted' children be treated the same as natural children under the laws of intestacy, as at present they have no legal status when an 'adoptive' parent dies without a will.

Despite representations by Torres Strait Islanders to the Queensland government since 1990 for legal recognition of their child rearing practice, their concerns have been acknowledged but largely ignored. This has been due to the government's inability to move beyond it's own history and understanding of adoption to appreciate another cultural perspective. The Queensland government's negative responses have shown it is limited by it's own western framework of adoption in failing to understand and legally support the child rearing practices of Torres Strait Islanders. Consequently Torres Strait Islander children have been left to cope with the uncertainty of being raised within a custom that has no legal validity in the country in which they live.

 The term 'altruistic surrogacy' is not used by Torres Strait Islanders, but more closely resembles their traditional 'adoption' practice than western concepts of adoption. It would strengthen the fabric of Torres Strait Islander family life to have their custom legally recognised by the Queensland government by considering it as a form of altruistic surrogacy.

References

BAN P (1989) *Traditional Adoption Practice of Torres Strait Islanders and Queensland Adoption Legislation* Master of Social Work thesis University of Melbourne
BAN P (1993) Torres Strait Islander Family Life *Family Matters* Australian Institute of Family Studies No. 35 August
BENET M K (1976) *The Politics of Adoption* New York The Free Press
CARROLL V (1976) Introduction: What Does Adoption Mean? *Adoption in Eastern Oceania* Carroll V (ed) Honolulu University of Hawaii
GOODY E N (1971) Forms of Pro-Parenthood: The Sharing and Substitution of Parental Roles *Kinship: Selected Readings* Middlesex Penguin
LEVY R I (1970) Tahitian Adoption as a Psychological Message *Adoption in Eastern Oceania* Carroll V (ed) Honolulu University of Hawaii
WINKLER R BROWN D VAN KEPPEL M BLANCHARD A (1988) *Clinical Practice in Adoption* New York Pergamon