



HEALTH, COMMUNITIES, DISABILITY SERVICES AND DOMESTIC AND FAMILY VIOLENCE PREVENTION COMMITTEE

Members present:

Mr AD Harper MP (Chair)
Mr MF McArdle MP
Mr MC Berkman MP
Mr MA Hunt MP
Mr BL O'Rourke MP
Ms JE Pease MP

Staff present:

Mr R Hansen (Committee Secretary)
Ms L Pretty (Inquiry Secretary)
Ms A Beem (Assistant Committee Secretary)

PUBLIC BRIEFING—INQUIRY INTO THE MERIBA OMASKER KAZIW KAZIPA (TORRES STRAIT ISLANDER TRADITIONAL CHILD REARING PRACTICE) BILL 2020

TRANSCRIPT OF PROCEEDINGS

MONDAY, 10 AUGUST 2020

Brisbane

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The committee met at 12.17 pm.

CHAIR: I now declare this public briefing of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee open. I start by acknowledging the traditional owners of the land on which we are meeting today. I am Aaron Harper, the chair of the committee and the member for Thuringowa. The other members of the committee with me are: Michael Berkman, the member for Maiwar; Marty Hunt, the member for Nicklin; Barry O'Rourke, the member for Rockhampton; Joan Pease, the member for Lytton; and Mark McArdle, the member for Caloundra and our deputy chair, who will be here shortly.

The purpose of today's briefing is to assist the committee with its inquiry into the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020. On 16 July 2020, Cynthia Lui, the member for Cook, introduced the bill to the Legislative Assembly. Ms Lui agreed that the House treat the bill as a government bill. This briefing is a formal proceeding of the parliament and is subject to the Legislative Assembly's standing rules and orders.

CHENG, Mr Tony, Director, Legal Policy, Department of Aboriginal and Torres Strait Islander Partnerships

KIDD, Mr Jason, Executive Director, Strategic Policy and Legislation, Department of Aboriginal and Torres Strait Islander Partnerships

PARTON, Ms Kathy, Deputy Director-General, Policy and Corporate Services, Department of Aboriginal and Torres Strait Islander Partnerships

CHAIR: Welcome. I invite you to make a brief opening statement, after which committee members will have some questions for you. You may have heard this morning's proceedings. We appreciate the department's written responses to submissions.

Ms Parton: Thank you, Chair and committee. I would also like to respectfully acknowledge the traditional owners of the land on which we meet today and pay my respects to elders past, present and emerging.

I understand from our DATSIP regional staff that the committee had a successful round of regional hearings and that you also had a valuable opportunity to hear from members of the community in the Torres Strait and on the mainland about the cultural practice and hear their views on legal recognition. In particular, I would like to again thank the Eminent Panel and the Kupai Omasker Working Party for their valuable contribution in advocating for legal recognition and actively engaging with us in the development of the bill. I would also like to acknowledge the authors of the now 17 submissions to the committee, including from members of the Torres Strait island community, interested parties and people who have been strong advocates for this change. I am pleased that a number of the submitters also had the opportunity to speak at the hearing this morning.

DATSIP has prepared a response to the submissions, as you noted, Chair, which has been provided to the committee. I note that there was one late submission that we received this morning, so we will provide a response if the committee wants us to.

CHAIR: Yes.

Ms Parton: Yes. I appreciate that many submitters have considered the complex legal and cultural matters that are dealt with in this bill. We have endeavoured to summarise the issues and respectfully address the matters that have been raised. I note that since our briefing on 22 July we have also provided to the committee our response to the questions on notice.

Following on from our last briefing and from some of the submissions received, it has become apparent that there is a lot of interest in how the bill would be operationalised—and that goes to some of those comments around keeping it simple and the community interaction with the bill. I would like to expand on this a bit more and provide the committee with some further information around the proposed implementation of the bill—in particular the application support office, which will play a key role in ensuring uptake and accessibility of the service for the Torres Strait Islander community.

The application support office and its proposed functions are not established through the bill, unlike the commissioner and the office of the commissioner. This may explain why there have been some issues raised in submissions about the support that would be available for applicants throughout the process. Providing practical support to applicants is really key to ensuring that the service is accessible to the community and that it is culturally appropriate. Applicants will require general assistance to navigate and understand the application process. This support will be essential to ensure community uptake, to provide referrals for legal advice and counselling services as required by applicants and to provide a culturally appropriate interface between the system for legal recognition and the cultural practice.

Given that legal recognition will be a new initiative, there will also be a need for extensive community engagement to support awareness and understanding of the legal framework and the application process. It is therefore proposed to establish an application support office, which will be initially established by DATSIP to deliver the service to the community and applicants and to undertake community engagement and awareness. The office is proposed to be located in Cairns, with at least one outposted staff member in the Torres Strait. As I mentioned at the last briefing, DATSIP already has a small office located on Thursday Island which provides for some opportunities for co-location and support.

The range of functions of the new office includes providing information to people considering making an application for legal recognition, providing information to potential applicants so they understand the requirements of a properly made application, providing referrals to legal and other supports, and undertaking communication and engagement activities to promote awareness and understanding of the legal recognition process.

CHAIR: Would that person best be a Torres Strait Islander who understands the traditional practices? How would you go about appointing someone to that office?

Ms Parton: We anticipate that we would write a role description for that and that would definitely include a very high level of cultural understanding of the cultural practices of the Torres Strait. The office would also have access to the broader resources of DATSIP to assist with the activities, so it would not just be out on its own.

The office may have a role in providing support to a person seeking access to documents confirming their biological parentage and other prerecognition information. The intent of this is to help mitigate potential risk to the mental health and wellbeing of a person and their family when a person's biological parentage is disclosed inappropriately and without cultural authority. That was an issue raised by a number of submitters.

It is proposed that the new birth certificates created for Torres Strait Islander people following legal recognition will not contain a notation that there is a previous birth certificate. This will also assist in reducing the risk of accidental disclosures. This approach is in line with the cultural practice as Aunty Ivy Trevallion described at our last briefing.

CHAIR: It was raised time and time again that when children look at their birth certificates their biological parents' names are listed, and it was expressed that that should not happen. They have grown up understanding that their receiving parents are their parents. That goes to my question that you may have heard earlier about how we can amend the Births, Deaths and Marriages Registration Act to do something in that space for the receiving parents. That is what we heard face to face time and time again. They did not want to see their biological parents' names on the birth certificate. There might be medical circumstances where there might need to be some consideration. I am not sure what we do in that space. I am seeking your opinion.

Mr Kidd: Once they have gone through the process—a cultural recognition order made—Births, Deaths and Marriages will actually close down that prior birth certificate and issue a new birth certificate with the name of the cultural parents on it only. That would get around that concern. We note that issues around access to medical information and decisions have been raised. In short, this is about formal recognition of a process that has already occurred in the community and has been occurring for generations. Generally speaking, the families will know each other very well—the child is still within that larger family and community group. Those sorts of issues can still be shared and exchanged. In terms of documentation, the birth certificate will get around that issue.

CHAIR: Thank you. I apologise for interrupting.

Ms Parton: That is fine. I am happy for you to ask questions as I go through. I was just going to touch briefly on some other areas of implementation that were raised by submitters. One was training. Training will be provided for relevant officers involved in the newly established model—

including the application support office staff, the commissioner, their support staff and the legal advisers—to understand the community engagement, the development of the bill and the intention of the process.

In terms of legal support, there will be support for independent legal advice and legal representation if required to the biological and cultural parents during the application process to ensure all parties are fully informed about the long-term implications of legal recognition and the transfer of parentage and to provide informed consent to the application being made—so legal support will be provided.

In terms of interpreter support, we have recognised that it is very important that any meetings between the commissioner and applicants are accessible for clients. Based on data collected as part of the census in 2016, 47 per cent of people located in the Torres Strait local government area spoke a language other than English at home, with the vast majority speaking an Australian Indigenous language. We have recognised that that support is essential and that the intention is to provide that through the application support process to make sure there is a culturally appropriate approach.

In terms of the registrar of births, deaths and marriages, once an order is made, the registrar will receive the original order from the decision-maker and register the transfer of parentage. This touches on the point that you have spoken about where the original birth registration would then become a closed record with a new record created for the child reflective of their cultural parents as their legal parents and any new name for the child as specified in the order. There would be no notation indicating a previous birth certificate.

The operational review of the model, which I spoke about last time I was in front of the committee, will be within the first two years once the model has had an opportunity to operate. It will provide an opportunity to review the operations and determine the actual demand. I note that a few concerns were expressed about demand. It has been difficult, as I acknowledged last time, to estimate the demand because the figures that we have to go back to are when the practice was recognised under the Adoption Act. The two-year review gives us a good opportunity to have a look at the demand that has come about to make sure that we have the right measure of resourcing in place to meet that. There have been a number of assumptions—I acknowledge that—but we really did not have full data.

As the committee will appreciate, while we have undertaken some work to estimate the costs of implementation, we do have further budgetary details that will be subject to government consideration as part of the budget process. With the committee's permission, I would like to hand over to Jason Kidd, who is going to respond to a couple of the other issues raised in the submissions.

Mr Kidd: I would also like to acknowledge the traditional owners of the land we are meeting on around the state and pay my respects to elders past and present. As Kathy mentioned, I want to take a couple of moments of your time to speak to the submissions. Firstly, we want to thank and acknowledge everyone who put in a submission. We are very pleased to note that the overwhelming majority of the submissions were supportive of the bill. We thank everyone for taking that time. It was encouraging for us to see that, whilst there were some issues raised and some suggestions made, we are essentially on the right track and the bill was well received.

There were 16 submissions, and we note that a 17th was received this morning. We will obviously go through that in close detail as well. We have sent through a table of responses which we hope sets out our initial thinking in terms of the feedback received in the submissions. The broad categories that are in the table, as you will have noted, are points where people have offered support and points where those submitting just needed points to be noted. There were some clarification matters around intent. There are some issues that relate to implementation, and Kathy has gone through some of the key implementation mechanisms which we think address a lot of those issues. There are some matters that are outside the scope of the bill or the policy intent of the bill, as you will see from our response.

There are some other matters that we have identified that will be better to look at once we have more information as part of the two-year review, once things have been implemented and we see how they have played out. Then there are a number of matters that we will consider further in terms of briefing the minister on possible changes to the bill. We are happy to take them on board and look at them further. We have noted which matters they are in the table. We note that some of the other issues we are considering are of a technical nature and will require us to engage with some of our key partner agencies, in particular the Department of Justice and Attorney-General and, to a lesser extent, the department of child safety. We had explored some of those matters with them recently in the development of the bill, but we will go back to test our understanding based on the submissions.

We note, in summary, that the bill is the first of its kind in Australia, so it is fairly unique. There will be some matters for us to adjust at this point and then some matters to look at closely as part of the review in two years time, and also, as Kathy mentioned, looking at the data in terms of the numbers. We are happy to address any particular questions the committee might have.

CHAIR: I go back to the Torres Shire Council submission, which you may or may not have read. I note that the department is using the term ‘cultural parents’, but the council is saying that that could actually be offensive, that these receiving parents are their parents and that they will teach them the culture. I draw your attention to their particular interpretation of that. I think that is actually quite relevant. We had a face-to-face with them as well. They also asked how this bill affects other acts. There is the Community Services Act 1984—and you might take these ones on notice. Also how does the Reconciliation Action Plan interact with the bill? Could we get a response from the department on that?

My question is around the eligibility for Torres Strait Islanders born outside of Queensland. The Griffith University, submission 15, recommended 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 where births were not registered in Queensland. Has the department considered that recommendation? Do you have a view on how such advocacy by the Queensland government in the national process can occur?

Mr Kidd: I am happy to respond to the last question first. We certainly examined interstate applicability as we were preparing the bill. We sought advice in relation to those matters. As you can imagine, there is a number of complex constitutional and legal considerations that we took into account. Given some of those complexities, we certainly landed on a point where we were limiting eligibility to births registered in Queensland. Obviously we were happy that we were able to open up the model to the situation where parents are not necessarily living in Queensland. We were able to get advice that we could do that legally.

There were some legal issues raised in relation to births that are registrable in other states and therefore clearly fall within the jurisdiction of other states. In short, it is an issue that we are happy to review at the two-year mark. We think for unique legislation of this kind there may be some issues that arise as we implement it, including legal considerations that advocates raise. Once the model is up and running and we see how it works for those births registrable in Queensland, we will have a better position to be able to go and talk to interstate colleagues. That is not to say we will not start those conversations much earlier than that.

CHAIR: We went back to the question of the birth certificates and the registration process, and one will be closed in order for the new certificate to be issued. Once that is closed, will the family be able to access that on application or will the child be able to access it after they turn 18 and/or for medical purposes?

Mr Kidd: There is a two-step process of applying via the commissioner which we think provides an appropriate safeguard mechanism that can then provide advice to Births, Deaths and Marriages for the provision of the closed birth certificate in certain situations. That applies to the applicants and to the child, who may now be an adult—and obviously an adult applicant is a different scenario. There is that capacity and we just tried to build in that two-step process so that the commissioner, who will have been aware of the earlier thinking, is involved in that.

CHAIR: I have a comment only, but it was impressed upon us from many community members—and I am sure the rest of the committee will attest to this—that the commissioner must be of Torres Strait Islander heritage, understanding the distinct cultures that exist in the eastern, western and central islands. That was reinforced every time. They must come from the community to understand the community. That was one of the comments I recall. I will open up to questions from other members.

Mr HUNT: I note your comments around legal representation, ensuring the rights of the parents et cetera. Under part 2, division 3 of the Adoption Act, there are certain obligations on the chief executive to provide information to parents and to provide counselling to parents. I cannot find a legislated obligation in this bill. Is there one? Does the act provide for that, without trying to complicate it; we keep talking about keeping it simple. These provisions are in the Adoption Act, to ensure the birth parents are making informed decisions and are provided with support—and you spoke about that; they would be provided with that support. However, I cannot find it legislated like it is here. Is that not part of the bill?

Mr Kidd: Certainly the process is that both legal and other supports are required as well as funded legal advice; we have worked them up in terms of the budget. Are you asking whether the requirement to offer legal advice is legislated?

Mr HUNT: Yes, that is right. Under the Adoption Act, the chief executive is required to provide counselling and to provide a document that outlines a lot of information. I just do not see a similar protection in this bill. It can be part of policies and procedures, but it is not legislated as far as I can see. Has any thought been given to that?

Mr Kidd: I might confirm the details on that. The essential thinking in the lead-up to the bill was that we were always trying to find the balance between overcomplicating the process and keeping it as streamlined as possible, and we certainly have views strongly in both camps. One of the areas is this area. We provide for a process of filling out the application whereby parties have to tick that they have been offered that opportunity to get advice, and they may or may not take up that opportunity. We basically provide that as part of the administrative process rather than requiring it in legislation.

Mr HUNT: The other question I have goes back to the criminal history. In division 2, proposed section 45 of the bill, subsection (2) states that the commissioner—that is the appointed commissioner—may ask the Police Commissioner for a written report about the criminal history. In answer to previous questions to the department it was disclosed that if they did not consent to the criminal history the application would fail at that point. However, the commissioner has the discretion to then decide whether or not to apply. How can we ensure that that is conducted fairly and that favouritism is not shown to one family over another? The requirement is that you consent to it, but the commissioner makes the decision whether or not to do it.

Ms Parton: This was a difficult issue to balance—that protection with the application process and making sure it was culturally appropriate. We proposed to make procedural guidelines for the commissioner around the use of criminal history checks and the application of those. In order that the commissioner does not have to go back, people applying would be asked if they would consent to a criminal history check as part of the process. That may not necessarily happen; the criminal history check would be at the discretion of the commissioner.

Mr HUNT: My question again is: how can we ensure that that decision is made in a fair and equitable manner?

Mr Kidd: To back up Kathy, we have determined that a number of procedural guidelines will need to be developed to guide decision-making around the commissioner process. One of our goals was to try to maintain an appropriate level of discretion for the commissioner, particularly in order to ensure that this is not overly interventionist government action but that the cultural considerations have some discretion. This was one of those matters. Certainly criminal history was on a spectrum from being required for everyone through to not going there at all. We feel like the bill found the appropriate balance by making sure that was a discretionary process; it was there, but it was not required in all instances. That was another example of trying to find that balance between not overly intervening in the practice and ensuring there are appropriate safeguards.

Ms PEASE: I would like to go back to what the member for Nicklin was talking about with regard to offering the parents, both the giving and the receiving parents, opportunities to have counselling, guidance or representation before the process actually takes place. From my understanding of the act—not this act but the act of giving and receiving—it has already taken place. Going through this paperwork is just formalising and making it legal in the eyes of Queensland white man's law. Is that correct?

Ms Parton: The intention of the bill is to legally recognise a decision that has already been made between the parents and the family groups. They would always have made that decision before they put in an application to have it recognised.

Ms PEASE: The potential of offering advice beforehand is pointless because it has already happened?

Ms Parton: I think the intention is to ensure there is full understanding of and consent to the full legal implications of a transfer of parentage. That is the intent.

Mr Kidd: It is about advice around the legal recognition of that practice that has occurred.

Ms PEASE: That is fine. My next question goes to that legal support, and you talked about offering that support to both the receiving and the giving parents. How will that be funded?

Ms Parton: We have built that in, as I have said, to our modelling around budgets.

Ms PEASE: Will that legal support come through your department or will it be going to the Indigenous legal—

Ms Parton: The funding would be through our department. Our department certainly would be offering the legal advice, yes.

Mr Kidd: The Department of Justice and Attorney-General usually manages those sorts of funding arrangements. We will be working with them as our key partner here in terms of whether it is an MOU or otherwise to make sure the appropriate legal advice is provided. It will be through DJAG, essentially, that that is usually administered, but we have some work to do around exactly how that will work here.

Ms PEASE: I would just like to try and understand that a bit better. That is something that has been raised. You talked about offering legal support. Is your department offering it, or is it being offered through DJAG?

Mr Kidd: Usually DJAG would manage the funding to Legal Aid or—

Ms PEASE: No, I am not talking about the funding; I am talking about the service. You mentioned that you would be giving legal support.

Mr Kidd: Sorry, no, it will not be the department providing legal support. It would be external advocacy funded through the departments.

Ms PEASE: Funded through your department?

Mr Kidd: Those details have not been finally settled exactly in terms of the flow of the funding. I am just saying that normally DJAG would manage those sorts of funding arrangements through Legal Aid or ATSILS. We have to work that through with them in terms of behind the scenes how that will work, but certainly it will not be the departments giving the legal advice.

CHAIR: Before I move to the member for Maiwar, I am just reading again the submission from the Torres Shire Council. In the second paragraph they mention the words ‘time immemorial’ and they raise the concern that that is a British term. I think what they are saying is: could we find alternative language? It does appear in the preamble of the bill at page 10 but it does not have cultural meaning; it is a legal term. Can the department consider that and maybe provide something going forward?

Ms Parton: We certainly will. We will consider that submission in detail. As I said, we just received it as we were walking out the door, but we will consider it and provide a response. I note that language is very important, and that is something that has come up throughout this process as well.

CHAIR: That has been reflected to us. Thank you so much for that.

Mr Kidd: We did consult on an exposure draft of the bill with the Kupai Omasker Working Party, including detailed conversations around the principles and the preamble, so there has certainly been that level of engagement, but we are happy to review that in light of the submissions.

Mr BERKMAN: Thanks again for joining us. You have already answered some questions about access to information, but I want to drill down into that a bit more. There are two provisions of the bill—clause 64 and clause 103—that deal with access through the registry of births, deaths and marriages and the commissioner respectively. I am just not entirely clear what will be available through which of those entities. Clause 64 refers to source documents as defined in the Births, Deaths and Marriages Registration Act. What is a source document? If you could clarify that it would be appreciated, because I do not know what will move from the commissioner to Births, Deaths and Marriages. Is it just the recognition order or is it the supporting material and the application as well? There are quite different provisions and requirements around the process and what must or may be provided under that clause and clause 103.

Mr Kidd: I might ask my colleague Tony to answer that question because it is more technical in nature.

Mr Cheng: I am happy to clarify how those provisions are intended to work. Clause 64 relates to documentation that a person may want to obtain from BDMR. Before they can go straight to BDMR they need to go through clause 64 to get the commission’s authorisation, and then with the authorisation they can then go to BDMR and say, ‘May I please access my birth related records?’ Clause 103 is separate and it is all to do with materials in relation to the application. The application has been lodged and stored away, and years down the track if somebody would like to access a copy then they go through clause 103 to the commissioner to access those records.

Mr BERKMAN: The commissioner obviously holds the full suite of materials involved in the application. It is quite clear that the commissioner has that experience, the cultural perspective and the capacity to distinguish what may appropriately be disclosed or not. I really do want to clarify the process. Yes, it is a two-step process that includes the commissioner under clause 64 as well, but what ends up with BDMR? I guess that is the nub of the question.

Mr Cheng: They will have a piece of paper which we will sort out through implementation. The applicant for the cultural adoption process can take that piece of paper to BDMR, which has the

commissioner's authorisation, and, as with the authorisation, BDMR will be able to release closed records that they can then access.

Mr BERKMAN: Closed records being the original birth certificate?

Mr Cheng: Yes.

Mr BERKMAN: Will BDMR also have any of the additional material that is held by the commissioner, or will it just be that cultural recognition order that goes to BDMR?

Mr Cheng: It is just that cultural recognition order. All of the other information they can access through clause 103, which is the package from beginning to end.

Ms Parton: All of the statements from the parents and the other people who form part of the application would not go to Births, Deaths and Marriages, yes.

Mr BERKMAN: That is great. If I can move on, I want to ask some questions about non-adult parents. You may have heard these issues come up in relation to non-adult birth parents with some of the other witnesses this morning. Having only really had a chance to look at the department's response this morning, it feels to me—with the greatest of respect—that the department's response is kind of dismissive of even the possibility of non-adult parents being covered by this scheme. Quite clearly, from the evidence we heard in the regions, that is a part of cultural practice but it is very clearly excluded from the bill. Why is that the case? What mechanisms could be used to ensure the bill better reflects actual cultural practice?

Mr Kidd: I think again—and without sounding like I am being repetitive—that was one of those scenarios where it was about finding the right balance between appropriate safeguards for legal recognition and all of the consequences that come with that and interfering in the cultural practice. If the cultural practice allows for that—as you rightly point out, it does—that can continue in the communities, but this is about whether or not there is legal recognition of that practice. In that instance, it was seen as an appropriate safeguard to ensure it involved adults. It is just a mechanism. Given the ramifications of legal recognition and everything that comes with that, including succession laws and otherwise, one of the appropriate safeguards was to ensure it was adults. It does not change the fact that the community can continue to practise that.

Mr BERKMAN: The concern I have is that that creates a gap, a separate class of kids of cultural child-rearing practice. Simply because of the shape of the bill, this cohort of kids is not going to be able to overcome the barriers the bill sets out. Accepting that the idea of safeguarding is one that is important to make the bill acceptable to the broader community and one that will pass, I think that is an issue of real concern. I do not know if there is much more to ask other than to put on the record my concern.

One other issue that came up quite a bit throughout the hearings was the suggestion that it would be challenging for a single commissioner to adequately perform the role given the diversity of cultural practice they would have to engage with. We heard other views that said, 'No, this is fine. The commissioner's job is to deal with a single, discrete set of problems generated by western law.' I am curious to know whether that was an issue considered in detail by the department in putting the bill together. What were the views you heard?

Ms Parton: We certainly did acknowledge those cultural differences that the commissioner needs to be aware of and the different ways in which the practice can work within the Torres Strait. It is the department's view that, given the way we have structured the application process with the statements from the birth parents, the cultural parents and those people with knowledge of the cultural practice, that information would be enough to give the commissioner a good understanding of the particular cultural context for that specific instance so they would be able to take it through the legal framework. That is where we landed but acknowledging that having a Torres Strait Islander as the commissioner was really an essential part of the system.

Mr Kidd: The informed person role we hoped would help to navigate some of those different cultural complexities without having to implement a more complex system in terms of the actual decision-maker.

Mr BERKMAN: It appears to me to be a fairly robust mechanism to deal with that diversity of practice. Does the department have a view on whether there will be particular supports provided to the different island groups or island communities so that the informed person is easily accessible by applicants and can provide the most useful support possible through the application process?

Ms Parton: During our consultation we did hear that the informed person would usually be someone within the family group who has a good understanding of the cultural practice in the context

of that particular family or that particular cultural group. It would not just be one informed person per island or per group; it would need to be someone who was fairly senior and who had that cultural authority within the family to provide that context.

CHAIR: On Saibai we heard that all of those island communities have their own elected elders, and I think the bill as drafted talks to the discretion the commissioner can use to get advice from those communities. I think that kind of answered my question. Some people said there should be one commissioner for the eastern islands and one commissioner for the western islands. The final day of hearings really put it into context: there is one Torres Strait and the commissioner should be able to engage with those particular representatives from their communities. I think that is part of the bill. That was certainly my interpretation. Are there any further questions?

Mr BERKMAN: I feel like there is more I would like to drill down to, but I will leave it.

CHAIR: I will go to the deputy chair.

Mr McARDLE: Thank you very much for being here today. I want to take up the issue of the term 'other carer' that was raised by the university in clause 34(1)(d). If I recall correctly, when we were in Townsville the situation was described where a lady who had had two children had a third child, but the third child was being cared for by that mother's mother, who lived in the same household. She had a fairly forthright role in caring for the child. That child then went to, shall we say, the mother's sister, who had no children. They defined her as an 'other carer'; that is, somebody who does have a role in the child's day-to-day life.

When we look at schedule 1 of the bill, the other carer is defined more in the sense of somebody who is given a right or an obligation under an act of parliament, whether it be federal, state or elsewhere. I am just concerned as to how 'other carer' applies in circumstances when clearly there has been an issue that has been before a court already, say the Family Law Court, and a parenting order has been made in favour of in this example—the grandmother. We are asking her to sign an application consenting to a cultural order being made even though there has been a Family Court order made.

My second point is: what is the impact of the consent form signed by the other carer in relation to the order that had been earlier made under either state or federal jurisdiction? Is that a de facto waiver of the right, because this court cannot waive that right? It does not have the jurisdictional authority to upset a Family Court order, to begin with. Can you give me an example where that would apply under your definition, and is that application signed by the carer, and what is the legal impact in relation to that application on the existing state or Federal Circuit Court order? You can take the question on notice.

Mr Kidd: We might take that on notice for a detailed response. As an initial broad response, we have tried to craft the bill and the role of the other carer—and it is referenced in the schedule to other pieces of legislation—to respect, as this bill does, that it is operating in the context of those other pieces of legislation, whether it be the family law system or otherwise, given that other carers who have roles under those different jurisdictional arrangements have a say in the process so there is that respect for that role. That is what we were hoping to achieve without trying to interfere in any way in those other arrangements—to make sure that people who had some designated responsibility for day-to-day decision-making around the children have a say in the process.

Mr McARDLE: Are they giving up that right? Is the state tribunal giving up that right by agreeing to this application? That is what I do not know—the interface between the two going forward. Could you take that on notice to give a detailed response?

Mr Kidd: We may need to get some advice on that and come back.

Mr BERKMAN: From the perspective of the giving parent, there is very often a blanket refusal to engage with the child and with the cultural parents, not out of anything more than respect for the receiving family. The cultural protocol is really strong. The cultural parents are the parents so the cultural protocol requires that distancing. In that context, if there is no scope for a non-adult parent to engage with this process and get the recognition orders up-front, it creates a very real possibility or even a likelihood within some practices that that child will not have the opportunity to make an application later. Do you think that is adequately dealt with by the provisions that allow for consent? Will that require court orders to bypass the requirement for consent? How else does the bill deal with that?

Ms Parton: A way that we would hope to deal with that would be not through the bill but through the engagement and explanation of the process, explaining the benefits and getting a full understanding of promoting the process and how you go about it and the fact that it is not disrespectful to engage in this legal recognition process because it does have benefits.

Mr Kidd: The only other thing is that there is a real variation in those sorts of arrangements that you are describing. We have been trying to be very careful, again, to not impose any assumptions or intervene in those sorts of family discussions. They will have happened. There will be a mutual agreement of some sort. Then it is a process that this process requires consent from adults involved, noting that once the child is an adult obviously they are able to apply as an adult as well. There is that mechanism later on. In respect of those other arrangements, I do not think it would be appropriate for the bill to be interfering too much in those familial arrangements that have already been agreed to.

Mr BERKMAN: If I am right, the provision to apply to bypass consent requirements does not apply in the case of any birth parent under 18. Is that right?

Mr Kidd: The process does not apply to a birth parent under 18, if I am understanding you correctly. Obviously there is that process of getting dispensation for consent. If you meet those initial eligibility requirements, including in relation to the age, there is then that mechanism that can kick in around dispensation of consent in various circumstances.

Mr BERKMAN: It is a blanket exclusion of any birth parent under the age of 18?

Ms Parton: Until they become an adult, yes.

Mr BERKMAN: We are relying on there being future engagement for that child to be able to get a recognition order for the receiving parents.

CHAIR: If there are no other questions from members, I will end with a quote from Judge Willis: 'The Torres Strait Islander people have been crying out for legal recognition for years.' We are almost there. I thank the department for their time and for their responses. Could we have answers to questions taken on notice back by 17 August? I now declare this public briefing closed.

The committee adjourned at 1.06 pm.