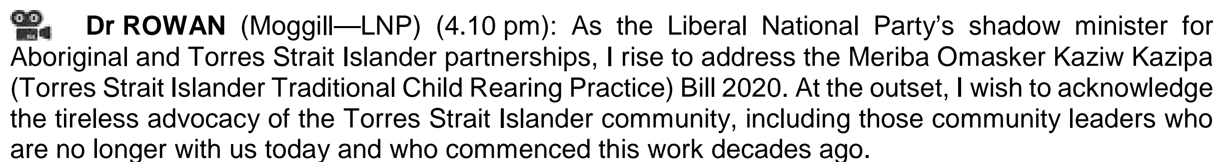
Speech By

Dr Christian Rowan

MEMBER FOR MOGGILL

Record of Proceedings, 8 September 2020

MERIBA OMASKER KAZIW KAZIPA (TORRES STRAIT ISLANDER TRADITIONAL CHILD REARING PRACTICE) BILL



Dr ROWAN (Moggill—LNP) (4.10 pm): As the Liberal National Party's shadow minister for Aboriginal and Torres Strait Islander partnerships, I rise to address the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020. At the outset, I wish to acknowledge the tireless advocacy of the Torres Strait Islander community, including those community leaders who are no longer with us today and who commenced this work decades ago.

I can confirm that the Liberal National Party will not be opposing this legislation. That being said, there are a number of important matters and sensitive issues that need to be brought to the attention of the House which may potentially have a detrimental effect on the intent of this legislation and its practical operation. I will be expanding further on these issues shortly.

On 16 July 2020, the member for Cook, Cynthia Lui MP, introduced the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill into the Queensland parliament. As a parliamentarian, I wish to acknowledge the importance of this legislation to the member for Cook—Queensland's first Torres Strait Islander member of parliament—particularly when introducing this legislation to the Queensland parliament and the significance of today's legislative debate for Queensland's Torres Strait Islander communities and First Nation peoples.

Upon its introduction, this legislation was then referred to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee for its detailed consideration and examination. The parliamentary committee tabled its report to the Queensland parliament on 28 August 2020, with five recommendations in addition to its first recommendation that the bill be passed.

Of these recommendations, recommendation 2 is that the Department of Aboriginal and Torres Strait Islander Partnerships prioritise the implementation of education programs that are culturally appropriate, independent and supportive and that independent counselling and support be made available to people who may experience trauma as a result of this process. Recommendation 3 is that the Department of Aboriginal and Torres Strait Islander Partnerships establish the offices for the Office of the Commissioner in both Cairns and Thursday Island in facilities separate to departmental offices.

Recommendations 4 and 5 suggest amending clause 124 of the bill to further amend section 44 of the Births, Deaths and Marriages Registration Act 2003 in order to explicitly instruct the registrar to remove the names of the birth parents from the new birth certificate, as well as ensure that the registrar may give requested information relating to a closed entry for a person who is the subject of the traditional recognition order and while still a child only with the consent of one or more of the cultural parents and/or guardian.

Finally, recommendation 6 of the report proposes amending section 45 of the bill to ensure the destruction of any criminal history information received by the commissioner under that section occurs as soon as practicable after the information is no longer needed for the purpose for which it was requested, similar to other relevant Queensland acts.

I would like to acknowledge and thank the parliamentary committee for its considered assessment of this legislation and its consultation which saw the parliamentary committee also visit and engage with Torres Strait Islander community representatives in Townsville, Cairns, Bamaga, Thursday Island and Saibai Island during what was a very tight schedule.

As well as acknowledging the work of the LNP's member for Nicklin, Marty Hunt MP, and other elected representatives of the committee, I would also like to make a special mention of and acknowledge the work and contribution of the deputy chair, the Liberal National Party's member for Caloundra, Mark McArdle MP. In this, the final sitting week of the 56th Parliament, I wish to thank the member for Caloundra not only for his invaluable contribution to the current Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee but also for his more than 16 years of service to this parliament including ministerial, shadow ministerial and committee roles, not to mention his service to his constituents of Caloundra. I wish Mark, his wife, Judy, and his entire family all the best for the future.

Throughout its consultation and in addition to its regional public and private briefings, the committee received 19 submissions from various individuals and organisations including the Queensland Family and Child Commission, the Queensland Indigenous Family Violence Legal Service, the Aboriginal and Torres Strait Islander Legal Service, the Queensland Human Rights Commission, Adoptee Rights Australia, the Queensland Law Society, the Torres Shire Council and the Torres Strait Island Regional Council, the Torres Strait Regional Authority, as well as from the former chief justice of the Family Court of Australia Alastair Nicholson AO RFD QC and Her Honour Judge Josephine Willis AM of the Federal Circuit Court of Australia.

In thanking all who contributed to the consultation and consideration of this legislation, I would like to also acknowledge that throughout this process, and given the culturally significant nature of what is being legislated for, for a number of submitters the process of sharing their own stories and lived experiences was deeply personal and at times confronting. On behalf of the Liberal National Party opposition, I wish to thank all of those who took the time to share their own stories.

As articulated by the member for Cook in her introductory speech, the overarching purpose of this legislation is to provide legal recognition of 'an ancient, sacred and enduring child-rearing practice' and one which is 'an integral part of Torres Strait Islander cultural fabric'. Further, it is a practice that 'sits on the foundations of Torres Strait Islander culture and cultural decision-making process in Torres Strait Islander community and family life'.

Notwithstanding the cultural and historical significance of this legislation, this legislation is also historic in that, in a first for any jurisdiction in Australia, it is seeking to formally legislate within our Westminster system for a traditional Torres Strait Islander custom and practice. Such is the significance of this legislative milestone that it is therefore crucial that the Palaszczuk state Labor government legislates with the utmost care and responsibility whilst maintaining fidelity to our democratic processes and institutions.

In examining the greater detail of this legislation, and as per the explanatory notes, the objectives of this bill are to: firstly, recognise island custom child-rearing practice; secondly, establish a process for applications to be made for the legal recognition of the practice; and, thirdly, provide for a decision-making process that will establish the legal effect of the practice.

Accordingly, this bill seeks to make a number of consequential amendments to existing legislation including amending the Adoption Act 2009 to set out additional principles for the administering of that act in relation to an Aboriginal and Torres Strait Islander person; multiple amendments to the Births, Deaths and Marriages Registration Act 2003 including a new subsection to be inserted, subsection 13A, setting out a process for obtaining information held in a register and kept by the registrar; amendments to the Criminal Code including an amendment to the definition of 'parent' to include cultural parents under a cultural recognition order as being parents in relation to the criminal offence of child stealing; as well as a number of amendments to the following acts: the Domestic and Family Violence Protection Act 2012, the Domicile Act 1981, the Evidence Act 1977, the Guardianship and Administration Act 2000, the Industrial Relations Act 2016, the Integrity Act 2009, the Payroll Tax Act 1971, the Powers of Attorney Act 1998, the Public Service Act 2008 and, finally, the Right to Information Act 2009.

In attempting to legislate for a centuries old, traditional customary Torres Strait Islander practice—from 'lore' to 'law' as it has been termed—it is worth examining the background to this traditional child-rearing practice, known as 'ailan kastom', and the modern-day difficulties that have been encountered. To quote directly from report No. 40 of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee—

> The notion of the extended family is integral to Torres Strait Islander culture. A broad view is held about who is included in family and the role played by this extended family, particularly in relation to child rearing 'for transmitting traditional values and skills and other cultural practices, and for ensuring continuity of moral precepts and behaviour'.

This custom or practice involves the shared responsibility of raising children and supports the permanent transfer of parentage for a child from the biological parents to the cultural parents in accordance with island custom. It bears repeating, as per the committee's report, that this practice takes place under a consent based verbal agreement that usually occurs within an extend family and that, whilst the child remains with the extended family, the child takes the name of the new family.

Whilst the practice of traditional adoption has been taking place within Torres Strait island communities for generations, such a practice has not been recognised as a legal transfer of parentage under either Queensland or Australian case law or legislation. Accordingly, the absence of legal recognition of this practice has ultimately resulted in significant legal issues and complications across three key areas, including birth certificates. Adoptive parents and their traditionally adopted children are currently not able to obtain a birth certificate that reflects traditional adoption arrangements. This then has flow-on practical issues when a birth certificate needs to be produced for proof of identity and other legal documentary requirements. Issues have also arisen with succession law and disputes over estates, with complications stemming from whether a traditionally adopted child is legally the issue or child of a deceased person and where that person has not made a will. The third identified complication arises when birth parents challenge the custody of traditional parents. As the committee report expanded upon, there have been various court cases detailing the challenges encountered by either adoptive parents or their traditionally adopted children in having their status recognised.

In seeking to formally legislate this cultural practice and create a legally recognised transfer of parentage, this bill importantly proposes the establishment of a new commissioner and relevant offices. I note that the commissioner will be 'an appropriately qualified senior Torres Strait Islander person with a deep understanding and knowledge of traditional child rearing practice'. Accordingly, as per clauses 22 to 25 of the bill, the functions and powers of the new commissioner will be to: independently consider and decide applications made under the bill; manage the effective and efficient operation of the commissioner's office; promote community awareness and understanding; advise the Registrar of Births, Deaths and Marriages of each cultural recognition order; and advise and report to the minister on matters in relation to the administration of the legislation.

Whilst I note the strong support, as stated by many, for the commissioner to be a Torres Strait Islander, I do wish to note the concerns shared regarding not only the inadequacy of community education and understanding of the commissioner's role and function but also the geographic location of the office of the commissioner. Upon hearing the varied views of many, specifically with regard to the most suitable location of the office of the commissioner—with locations suggested from Cairns through to Brisbane—the committee ultimately stated in recommendation 3—

To uphold the independence of the Commissioner, the committee recommends that the Department of Aboriginal and Torres Strait Islander Partnerships establish the offices for the Office of the Commissioner, in both Cairns and Thursday Island, in facilities separate to departmental offices.

I note the minister's advice that the department will be taking this into further consideration.

In my remaining time I wish to briefly elaborate further on some of the issues and concerns that have been identified throughout this process. The first such issue pertains to community concerns regarding the complexity of the proposed process. As articulated in the statement of reservation by the members for Caloundra and Nicklin, despite the bill's best intentions—and indeed, the general intent of the bill being supported by Torres Strait Islander communities—by attempting to legislate for, and legally recognise the Torres Strait Islander traditional adoption practice within the Westminster framework, invariably concerns have been raised that the process has become overly complicated. Indeed, concerns were raised that the process has become complicated to the point where it may in fact deter Torres Strait Islanders from engaging with the legal process altogether. As Judge Josephine Willis AM shared with parliamentary committee member Marty Hunt MP—

The fear, I think, is that people will be put off by its complexity and say, 'Oh, we still can't do it.' Really, the complexities have been a big part. If I may say with respect, you are astute to see that the complexities could derail it.

To that end, I again note the parliamentary committee's second recommendation that the Department of Aboriginal and Torres Strait Islander Partnerships prioritise the implementation of education programs that are culturally appropriate, independent and supportive, in addition to the department also exploring opportunities for the provision of independent counselling and support to be made available to those who may experience trauma as a result of their integration with the legal recognition process. This is a sensible recommendation to be enacted. If the government truly wishes to deliver on its commitment to these communities and provide this new legal framework and recognition, then I would certainly encourage it to consider this.

In what is a somewhat related issue to this, I also wish to raise concerns regarding the time frames around the introduction, committee inquiry and reporting on this bill. Whilst acknowledging that legal recognition of island custom has been effectively worked on by, and advocated for, various

eminent persons and committees for the better part of three decades, it is unfortunate that some felt this legislation has been effectively rushed. Such sentiments were expressed by community members throughout the committee hearings, many of whom were disappointed there was not sufficient time for the community to fully digest or even discuss the legislation. Unfortunately, we have seen legislation being rushed throughout this term of parliament, and it appears that this has occurred once again with respect to this legislation. It is particularly the case when it comes to this legislation, which is extremely important for Torres Strait Islander communities.

The Liberal National Party also wishes to place on record concerns regarding the 'best interests of the child' principle as outlined in part 1, clause 6 of the bill. Specifically, and as identified in the statement of reservation, in listing matters which must be considered the bill states in subsection (vi) that the commissioner or decision-maker is obliged to take into consideration 'any other matter that is directly related to the child's wellbeing and best interests'. The Liberal National Party believes that such a consideration could in fact go against the intent of the legislation by risking a significant number of other considerations currently under Queensland and federal law. Accordingly, despite espousing the attempted removal of many of the constraints previously in place to have cultural adoption legally recognised, this could have the opposite effect and impose further hurdles and potential and additional negative consequences.

Briefly, can I also bring to the attention of the House inconsistencies around the provision of a criminal history check to be sought by the proposed commissioner. Despite the requirement for a criminal history check being at the discretion of the commissioner, applicants must still provide their consent to such a check regardless of whether it is utilised or not. As submitted to the committee, there are genuine concerns that there may be a reluctance by community members to consent to such a check or even engage with this process altogether due to a possibly misguided assumption that any historical offence may be an excluding offence. With insufficient clarification offered around the application of criminal history checks, the Liberal National Party believes that further investigation is warranted into explicitly identifying disqualifying offences so as to ensure the community—and, importantly, the commissioner—is clear on what must be taken into consideration.

Finally, I would like to note the estimated costs for the implementation of this whole framework. The explanatory notes state that the costs of implementing the new legislation will involve: providing for a full-time commissioner to make decisions under the legislation; establishing an office to support the work of the commissioner; establishing an office within the Department of Aboriginal and Torres Strait Islander Partnerships to provide support to applicants; resource costs for the Registrar of Births, Deaths and Marriages, including in relation to providing new birth certificates; legal support and interpreter costs for the birth parents and cultural parents to ensure all parties are informed about the long-term implications of the process; promoting community awareness and education of the new model; and the impact on court resources in relation to any dispensation applications, discharge applications or judicial review applications.

Ultimately, such costs have not been quantified or provided at this stage by the Palaszczuk state Labor government. Queenslanders throughout this process have remained in the dark on the total cost of this framework. This is even before the costs of the committee's recommendations are also taken into consideration. Therefore, it would be only prudent and appropriate for the Palaszczuk state Labor government to provide to the House its estimated cost for the establishment and resourcing of this new framework.

In concluding my contribution today, I will say that, whilst the Liberal National Party will be supporting the passage of this legislation, there remain aspects and unaddressed concerns which could ultimately and adversely impact the intent of the legislation as well as the community's engagement with this proposed process. That is why the Liberal National Party believes a review of this legislation and the framework that has been put in place would be advisable after two years so as to address any issues that arise or are encountered.

I again thank all members of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee for their examination of the legislation. I acknowledge the support provided by the committee secretariat as well as all organisations and stakeholders which submitted to the inquiry. I have also noted the amendments that have been circulated and authorised by the Minister for Aboriginal and Torres Strait Islander Partnerships, and I understand the rationale for why they have been circulated. In conclusion, I commend this bill to the House.