

# Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020

## Explanatory Notes

### Short title

The short title of the Bill is the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020.

### Policy objectives and the reasons for them

The policy objectives of the Bill are to recognise Ailan Kastom child rearing practice, establish a process for applications to be made for the legal recognition of the practice and provide for a decision making process that will establish the legal effect of the practice.

Since time immemorial, Torres Strait Islander people have practised and continue to practise child rearing which involves sharing the responsibility of raising children with family and close friends with whom bonds of trust have already been established. The practice is an integral part of Torres Strait Islander community and family life, is strongly connected to wider aspects of customary law and is important to the sense of stability and social order of Torres Strait Islander society.

Under Torres Strait Islander traditional child rearing practice, the cultural (or receiving) parents assume all parental responsibilities for the child. Although the practice varies between the five island groups, generally, it is a private confidential family agreement that results in the child taking the surname of the cultural parents, and culturally having the same rights and entitlements as the birth children of the cultural parents, including the right of inheritance (under certain cultural protocols).

Torres Strait Islander traditional child rearing practice takes place in an intricate, extended family setting. Torres Strait Islander peoples' concept and understanding of 'family' is considerably broader than that of Western society. Under the practice, the child's birth parents are never lost to the child, as the child is usually placed with relatives somewhere in the family network, and continue to have a relationship with them (i.e. as an aunt, uncle or other family connection).

The Family Law Council in their 2004 report, *Recognition of Traditional Aboriginal and Torres Strait Islander child-rearing practices: Response to Recommendation 22: Pathways Report, Out of the Maze*, described the practice as: "...permanently transferring children from one family to another, with the children usually remaining within the extended family. The practice is by consent of the parties concerned and the child takes the name of the new family. The transfer occurs as the result of a verbal agreement and usually takes place within the extended family".

Legally recognising Torres Strait Islander Ailan Kastom is a historic step and the first legal framework of its kind in Australia. It acknowledges the importance of culture underpinning Torres Strait Islander family structures, community and social networks and aims to resolve the long-standing issues faced by Torres Strait Islander people whose legal identity does not reflect their cultural identity and lived experience.

## **Achievement of policy objectives**

To achieve its policy objectives, the Bill sets out a framework to give legal effect to Ailan Kastom child rearing practice. Seeking legal recognition under the framework is optional and is based on three key criteria:

- consent of the birth parents and cultural parents for legal recognition;
- suitability of cultural parents in that the practice as occurred has been verified by persons with knowledge and understanding of the practice specific to the family's community; and
- a decision for a cultural recognition order must be made for the wellbeing and best interests of the child.

The framework aims to reflect these criteria through a model that is readily accessible and sensitive to the private nature of the practice.

The Bill provides for a process for making an application for a cultural recognition order that will result in a permanent transfer of parentage from the birth parents to the cultural parents. The Bill also establishes a new statutory role of a commissioner to consider and decide these applications.

As the application process requires consent from the relevant parties, the Bill provides for issues in relation to the dispensation of consent to be dealt with by the Childrens Court. The court will also deal with applications for a discharge of the commissioner's cultural recognition order.

Where a cultural recognition order is made, the Bill dovetails with the *Births, Death and Marriages Registration Act 2003* to provide for the Registrar of Births, Deaths and Marriages to register the transfer of parentage in accordance with the order and issue a new birth certificate to reflect the order.

## **Alternative ways of achieving policy objectives**

There is no other way to achieve the policy objective than to establish a framework in legislation.

## **Estimated cost for government implementation**

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 (DATSIP) 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.

## **Consistency with fundamental legislative principles**

The Bill has been drafted with regard to the fundamental legislative principles (FLPs) as defined in section 4 of the *Legislative Standards Act 1992* (LSA). Particular clauses in the Bill which raise concerns in relation to FLPs are discussed below.

### **Sufficiently defining administrative power**

Under section 4(3)(a) (first limb) of the LSA, legislation should set out rights or obligations dependent on administrative power only if the power is sufficiently defined. Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision making in legislation without providing criteria for making the decision. The criteria should generally be express and relevant in the ordinary sense of the word.

The Bill provides for a commissioner to exercise administrative power to make, or decide not to make, a cultural recognition order. The effect of the order is that it transfers parentage from the birth parents to the cultural parents.

Part 4 of the Bill sets out the detailed requirements for making an application for a cultural recognition order. The Bill makes provision for two types of applications:

- a joint application by the birth parents and cultural parents in relation to a child; or
- an application made by an adult (who as a child was given under the cultural practice).

The eligibility criteria and the information required as part of the supporting statements is relevant to the two different types of application.

The Bill also expressly sets out the criteria for the commissioner's decision including linking this to the specific eligibility criteria and information requirements.

Clause 56 of the Bill provides that the commissioner must be satisfied:

- that each birth parent and cultural parent gave full, free and informed consent to the making of the application for the order
- that if the application contains a signed statement from an other carer - the other carer gave full, free and informed consent to the making of the application
- if the person the subject of the application for the order is a child - that the making of the order is for the wellbeing and in the best interests of the child
- that the transfer of parentage occurred in accordance with Ailan Kastom
- that each applicant was entitled to apply
- that the application includes the required documents and information

- that, subject to a court making an order dispensing with consent, each applicant has provided the required information or statement.

As the Bill expressly sets out the criteria for the commissioner's power to make, or decide not to make a cultural recognition order, and links this to the obligations placed on applicants, the Bill is considered to be consistent with the principle that administrative power should be sufficiently defined.

### **Administrative power subject to appropriate review**

Under section 4(3)(a) (second limb) of the LSA, legislation should set out rights and liberties, or obligations, dependent on administrative power only if the power is subject to appropriate review. Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision making in legislation without providing for a review process. It is noted that, ideally, review provisions should provide:

- the period within which a person may apply for review
- the way the application is made
- whether the reviewer may consider new material or hear the matter afresh
- that the principles of natural justice apply
- whether the reviewer may confirm the decision being reviewed, set aside the decision being reviewed and substitute another decision or set aside the decision being reviewed and refer the matter back to the original decision maker with appropriate directions
- an entitlement to written reasons of the reviewer.

The commissioner's administrative power transferring parentage is a serious decision that impacts on the parents and child or adult involved justifying the need for a review process. Clauses 60, 61 and 62 of the Bill set out a process for an internal review of the commissioner's decision and provide that:

- the parties to the application for a cultural recognition order may apply jointly in the approved form to the Minister for an internal review within 20 business days of receiving the statement of reasons for the decision – noting this time period may be extended by the Minister
- the review will be available in circumstances where the commissioner decides not to make a cultural recognition order
- on receiving an application, the Minister appoints an appropriately qualified Review Officer to consider the application and review the commissioner's decision
- the Review Officer must make a decision that either confirms the commissioner's decision or revokes the decision and make a cultural recognition order
- the Review Officer's decision must include a statement of reasons
- if the Review Officer revokes the commissioner's decision, the reviewed decision is taken to be a decision of the commissioner and the commissioner must give effect to the decision including notifying the Registrar of Births, Deaths and Marriages.

The Queensland Government Administrative Review Policy June 2018 indicates that where there are cases that significantly affect the rights of an individual, a decision may be subject to internal review and an external review process. The Bill does not provide for an external review mechanism as the internal review process is considered to be appropriate in the context of this legislative framework and the sensitivity of the cultural practice. The internal review process is an accessible and timely process for applicants that, to the extent possible, limits the

involvement of external parties in order to maintain the private and confidential nature of the practice. It is noted that the Bill does provide for court processes that may involve parties external to the application process where there are matters in dispute (e.g. relating to applications for the dispensation of consent or the discharge of a cultural recognition order). However, these matters are limited in scope and would generally not extend to consideration of the cultural practice, which is private and sensitive.

The internal review process provided in the Bill is considered to be consistent with the principle that administrative power should be subject to appropriate review.

It is also noted that administrative decisions proposed to be made, or required to be made, under the Bill may be open to judicial review. A person who is aggrieved by a decision may apply to the Supreme Court for a statutory order of review under the *Judicial Review Act 1991* including in relation to a decision or the conduct related to the making of the decision. Grounds for review could include, for example, that a breach of natural justice occurred, that the decision involved an error of law or that there was no evidence or other material to justify the making of the decision.

### **Consistency with natural justice**

Under section 4(3)(b) of the LSA, legislation should be consistent with the principles of natural justice in that it provides procedural fairness, a right to be heard and there is an unbiased decision maker.

The Bill appropriately provides for procedural fairness as:

- when considering an application, the commissioner must act in a way that is fair and reasonable, must maintain confidentiality and must comply with natural justice (clause 44)
- the criteria for making an application are clearly set out and link to the commissioner's decision making criteria (as referred to above)
- the commissioner may seek further information from applicants where required (clause 41)
- applicants are to confirm in signed statements that they are fully informed of the permanent legal implications of a cultural recognition order (clauses 35, 36 and 37)
- before deciding not to make a cultural recognition order, the commissioner must give the applicants a notice of intention, that sets out the proposed decision (including reasons for this proposed decision) and provide the applicants with an opportunity to give the commissioner further information that supports the making of an order (clauses 57 and 58)
- the commissioner is required to include a statement of reasons for a decision (clause 58).

The Bill provides for appropriate and reasonable avenues for applicants and other affected parties to be heard:

- as noted above, the Bill sets out an internal review process where the commissioner decides not to make a cultural recognition order
- the Bill provides that in limited circumstances the court may dispense with the service requirements where an applicant is seeking to dispense with the consent of a relevant parent e.g. where the court is satisfied there would be an unacceptable risk of harm to

the birth mother if the other party were made aware of the person's birth or the making of a cultural recognition order—although, these provisions have the effect of denying a party the opportunity to contest an application, they are reasonable in order to protect the interests of the child and the rights of parents to make decisions about the child's long-term care (clauses 49 and 51)

- the Bill sets out a process to apply to the court for the discharge of a dispensation order if a cultural recognition order has not been made e.g. if a birth parent's consent was dispensed with, the birth parent would have the right to apply to the court to discharge the dispensation order, and, if successful, the application could not proceed without his or her consent (clause 55)
- the Bill sets out a process to apply to the court for the discharge of a cultural recognition order—this allows a birth parent, cultural parent or an adult (who was given as a child), to apply to the court where there may have been false or misleading representations, fraud, undue influence, lack of informed consent, improper conduct or other exceptional circumstances—it also noted that the court may only hear the discharge order application in the absence of a party in limited circumstances (clauses 72 to 79)
- the Bill also provides for appropriate appeal provisions in relation to dispensation orders and discharge orders (clause 92 to 96).

In relation to the provision of an unbiased decision maker, it is noted that the Bill provides for the appointment of an appropriately qualified commissioner who is a Torres Strait Islander. In performing the role, there is potential for the commissioner to have direct or indirect interests that could conflict with the proper performance of the commissioner's functions and powers. To address this issue, the Bill:

- sets out a process for the commissioner to manage conflicts of interest, including for the commissioner to withdraw from considering an application where a conflict arises (clause 18)
- provides that the Minister may appoint an appropriately qualified person, other than the commissioner, to decide the application where this occurs (clause 19).

Based on the matters outlined above, the Bill is considered to be consistent with the principles of natural justice.

### **Immunity from proceeding or prosecution**

Under section 4(3)(h) of the LSA, legislation should not confer immunity from proceeding or prosecution without adequate justification. Consistent with this principle, legal liability should be the same for administrative bodies, its officials and its entities as for private citizens. If protection is needed for persons administering Queensland legislation, the preferred provision provides immunity for actions done honestly and without negligence. In this case, if liability is removed from a person, it is usually declared to be shifted to the State.

The Bill provides that administrators (i.e. the commissioner and other officers working under the legislation) are not civilly liable for an act done or omission made, honestly and without negligence (clause 105). This provision is confined to acts or omissions that occur in the course of working under the legislation and is designed to allow administrators to undertake their statutory duties without fear of personal liability, other than in circumstance where there is dishonesty or negligence. It is therefore limited in scope and does not attach to acts done or omissions made which are reckless, unreasonable or excessive.

The Bill also provides that civil liability attaches to the State, instead of an administrator. This effectively preserves the rights of parties to take legal action noting that action may be brought against the State (clause 105).

It is considered reasonable to confer immunity from proceeding or prosecution on administrators under the Bill, noting that this is balanced by excluding matters relating to dishonesty and negligence and retaining the rights of parties to take legal action against the State.

### **Sufficient regard to Aboriginal tradition and Island custom**

Under section 4(3)(j) of the LSA, legislation should have sufficient regard to Aboriginal tradition and Island custom.

The purpose of the Bill is to enable Torres Strait Islander children who have been given under the cultural practice to participate fully in the political, economic, social and cultural life of Queensland. The Bill does this by providing for a mechanism that transfers the parentage of the child from the birth parents to the cultural parents – which is then reflected on the birth certificate (noting clause 66 that outlines the effect of a cultural recognition order on relationships). Having a birth certificate is an important requirement for the purposes of enrolling in school, obtaining a driver licence, obtaining a passport, opening a bank account or accessing inheritance.

The Bill will also not ‘interfere’ with the cultural practice, but provide a mechanism to legally recognise that the practice has occurred. For example, the Bill provides that when making a decision under the Bill, the decision maker must have regard to matters (in clause 6) that include:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and Ailan Kastom child rearing practice in particular
- the need to perform the powers and functions under this Act having regard to the sensitivity and cultural practices associated with the Ailan Kastom child rearing practice
- the legal and cultural benefits for the child if the cultural recognition order is made recognising the Ailan Kastom child rearing practice.

The Bill also provides that the commissioner is to be an appropriately qualified Torres Strait Islander. This will ensure that the implementation of the legislation, including matters such as guidelines and procedures, will be informed by an understanding and awareness of the cultural practice and be sensitive to the complexities involved with the relationships amongst the parties involved and the wider Torres Strait Islander community.

Based on the matters outlined above, the Bill is considered to have sufficient regard to Island custom and also goes further by providing a legislative framework that recognises and supports Torres Strait Islander cultural practices.

### **Appropriate delegation of legislative power**

Under section 4(4) of the LSA, whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

Under clauses 33, 59 and 77 of the Bill, a regulation can be made about:

- information to accompany an application for a cultural recognition order
- what a cultural recognition order must state; and
- the information to be included in a discharge order.

This approach may be considered to be inconsistent with the obligations under section 4(4) of the LSA. However, the regulation making power is justified as it allows for flexibility and provides that the administering department, in consultation with the Registry of Births, Deaths and Marriages for the purposes of orders, can administratively manage and monitor the content required for applications for a cultural recognition order, cultural recognition orders and discharge orders.

### **Consistency with rights and liberties – rights and liberties previously granted under legislation**

A change to legislation that adversely affects rights and liberties previously granted under legislation needs to be justified. Legislation may declare a right or liberty, or establish a framework of rules about a particular matter that gives rise to a right or liberty.

The *Right to Information Act 2009*, and previously the *Freedom of Information Act 1992*, provide for a long established scheme that enables members of the community to gain access to information held by public authorities. Any reduction of access requires justification.

The Bill provides for a restriction to the usual rights of access under the *Right to Information Act 2009* (clause 158). As Ailan Kastom child rearing practice is a private and confidential practice between the parties, the Bill provides that confidential information created and received under the Bill is exempt from release, other than in relation to an access application if it is only personal information of the applicant. The approach mirrors that provided for confidential information obtained by persons in the administration of the *Adoption Act 2009*.

The Bill also provides for two access to information processes for applicants for a cultural recognition order:

- to access information from the Registrar of Births, Deaths and Marriages (clause 64); and
- to access information from the commissioner (clause 103).

It is noted that the process under clause 103 is not available to children who are given under the cultural practice, and the process under clause 64 is only available when the child becomes an adult. This is considered justified as it is a matter for the cultural parents to discuss with the child given under the practice at a time that is appropriate for the family involved.

Although the Bill restricts previously granted rights of access to information under the *Right to Information Act 2009*, this approach is justified due to the importance of ensuring that Ailan Kastom child rearing practice is maintained as a private and confidential matter between the parties involved.

### **Consistency with rights and liberties – privacy and confidentiality**

The right to privacy and confidentiality has been identified as important to the consideration of whether legislation has sufficient regard to an individual's rights and liberties.

In relation to an application that involves a child, the Bill provides the commissioner with the discretion to request criminal history information about a cultural parent from the Police commissioner and to consider this information in the course of a decision whether or not to make a cultural recognition order. The Bill also provides for the commissioner to disclose this information in particular circumstances.

To ensure the cultural parents are fully informed of the process and to ensure the appropriate collection, use and handling of criminal history information, the Bill:

- requires the cultural parents to consent to both the commissioner requesting a copy of the criminal history and relying on information contained in the parent's criminal history to decide whether to make a cultural recognition order (clause 36)
- provides the commissioner with the discretion to request criminal history information from the Police Commissioner (clause 45)
- provides that if the commissioner requests and receives the criminal history information, that the commissioner notifies the relevant cultural parent who may provide a response concerning the information (clause 46)
- states that the commissioner may not disclose this information, other than if required as part of the notice of intention or the decision in relation to a cultural recognition order (clause 102) - this may include disclosure to individuals who are joint applicants seeking the order through the notice of intention or statement of reasons.

As applications under the Bill relating to a child are joint applications by the birth and cultural parents, it is possible that in the course of the commissioner's decision making, the commissioner may be required to disclose the criminal history information, relating to a cultural parent, to the other joint applicants (clause 102).

In addition, as the person's criminal history report reveals the convictions recorded against that person in respect of offences this would include spent convictions. Ordinarily, a conviction recedes into the past at the point that it becomes spent. The disclosure of information about spent convictions is generally objectionable on the basis that it infringes a person's rights given the desirability for rehabilitation of offenders.

Both the potential disclosure of criminal history to joint applicants, other than the relevant cultural parent, and the inclusion of spent convictions are significant breaches of privacy and confidentiality. Despite these breaches, the collection, use and disclosure of criminal history information (including convictions and spent convictions) under the Bill is considered justified as:

- the cultural parents are fully informed and provide their consent to the collection, use and potential disclosure of the criminal history information for the purposes of the application process
- the purpose of the criminal history provisions is to provide additional safeguards for children who are given under the cultural practice - this is a similar approach to existing legislation that provides for the legal transfer of parentage

- it is necessary to ensure the integrity of the commissioner's decision making and ensure sufficient information is available to the commissioner to enable them to make an informed decision
- the commissioner must make decisions in the wellbeing and best interests of a child who is the subject of an application under the Bill.

### **Consistency with rights and liberties – capacity to consent**

A further fundamental legislative principle is that legislation should not abrogate other rights, in the broadest sense of the word, from any source without sufficient justification.

The issue of capacity to consent is dealt with in the Bill and raises concerns with respect to this principle. The Bill provides that the court may dispense with consent in limited circumstances including where the Queensland Civil and Administrative Tribunal has made a declaration that the party does not have capacity to give the consent (clause 52).

The dispensation of a parent's consent significantly impacts on the parent's ordinary right to make decisions about arrangements for their child's future care and upbringing. However, there is a need to balance the wellbeing and best interests of the child with any right of the child's parents to make decisions about the child's long-term care.

Furthermore, the aim of the Bill is to work within the existing system that provides safeguards for addressing issues of capacity and how these impact on decision making e.g. clause 136 of the Bill amends the *Guardianship and Administration Act 2000* to provide that applying for, or consenting to an application for a cultural recognition order, or applying for a discharge order is a special personal matter under that Act and is subject to the same limitations and protections.

The Bill also sets out considerations to be taken into account by the commissioner, review officer, Minister and the court in relation to matters that may affect the rights and interests of an adult with impaired capacity, including the adult's right to participate in the decision making process and to be given the appropriate support to do so and the right to have their views, wishes and preferences sought and taken into account (clause 107).

Given the above considerations, and given the limits within which the court must exercise its power, the provision enabling the court to make an order dispensing with the need for a parent's consent is considered to be justified.

### **Appropriateness of penalties**

A fundamental legislative principle deals with the appropriateness of penalties including that:

- consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation
- legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence
- penalties within legislation should be consistent with each other.

Penalties are provided for in the Bill with respect to false and misleading information, confidential information and publishing identifying material.

The Bill provides for a maximum penalty of 100 penalty units for providing false or misleading information (clause 99). This is generally consistent with other legislation with equivalent offences, noting that penalty unit amounts differ, for example:

- *Health Ombudsman Act 2013* (Qld), section 264
- *Family Responsibilities Commission Act 2008* (Qld), sections 125 and 126
- *Births, Deaths and Marriages Registration Act 2003* (Qld), section 50
- *Adoption Act 2009* (Qld), section 305.

The Bill provides for a maximum penalty of 100 units or 2 years imprisonment for an administrator who discloses confidential information (clause 102). This is consistent with other legislation with equivalent offences, for example:

- *Adoption Act 2009* (Qld), section 314
- *Child Protection Act 1999* (Qld), section 187.

The Bill provides for a maximum penalty for an individual of 100 units or 2 years imprisonment and 1,000 penalty units for a corporation for publishing identifying material (clause 104). This is consistent with other legislation with equivalent offences, for example:

- *Adoption Act 2009* (Qld), section 315
- *Child Protection Act 1999* (Qld), sections 99ZG, 189 and 194
- *Surrogacy Act 2010* (Qld), section 53.

The penalties imposed under the Bill are considered appropriate as they are proportionate and relevant to the actions to which the consequences relate and are generally consistent with other similar legislation.

## Consultation

A panel of three Eminent Persons (the Honourable Alastair Nicholson AO RFD QC, Ms Ivy Trevallion, and Mr Charles Passi) supported DATSIP and Department of Child Safety, Youth and Women to consult with the Torres Strait Islander community and other stakeholders in November and December 2018. This was accompanied by the public release of a consultation paper entitled *Akuar Thoeridhay Kazi – for our children’s children*.

Consultation meetings were held with over 350 Queenslanders in over 30 locations including Thursday Island, Badu Island, Mer Island, Bamaga, Cairns, Townsville, Mackay, Caboolture, Goodna, Brisbane City and Carindale. Stakeholders included members of the Torres Strait Islander community, representatives from non-government organisations, the legal sector and State and Commonwealth government agencies.

In February 2020, targeted consultation on an exposure draft of the Bill was conducted with Eminent Persons and Kupai Omasker Working Party members. Departmental representatives from DATSIP, Department of Justice and Attorney-General and Department of Child Safety, Youth and Women were also present. All stakeholders were supportive of the proposed framework for the Bill.

Following extensive consultation with the Eminent Persons and Kupai Omasker Working Party, it was recommended that the Bill be named ‘Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020’. The words ‘Meriba Omasker Kaziw Kazipa’ are language terms from the Eastern islands and top Western islands, and are

translated as ‘For our children’s children’, which is synonymous in Torres Strait Islander communities with the cultural practice. This is the first instance in Queensland where a piece of legislation incorporates Indigenous language as part of its title.

## **Consistency with legislation of other jurisdictions**

The Bill is the first of its kind and is not uniform to legislation of the Commonwealth or another state. Queensland is the only Australian jurisdiction to have legislation to legally recognise Ailan Kastom child rearing practice.

## Notes on provisions

### Preamble

The Preamble sets out the Parliament of Queensland's recognition of the importance and significance of Ailan Kastom for Torres Strait Islanders and, in particular, Ailan Kastom child rearing practice. The Preamble also states that the Parliament of Queensland recognises that it is necessary that the laws of Queensland protect the rights, interests and responsibilities of Torres Strait Islanders who are affected by Ailan Kastom child rearing practice.

### Part 1 Preliminary

*Clause 1* states that, when enacted, the Bill will be cited as the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020.

*Clause 2* states that the Bill will commence on a day to be fixed by proclamation.

*Clause 3* provides that the Bill will bind all persons including the State, and as far as the legislative power of the Parliament permits, the Commonwealth and the other States. The clause also provides that the State, Commonwealth or another State cannot be prosecuted for an offence committed under the Bill.

*Clause 4* provides that the main purpose of the Bill is to recognise Ailan Kastom child rearing practice and establish a process for making applications for, and decisions about, the legal recognition of the practice.

*Clause 5* states that the purpose of the Bill will be achieved by providing for the appointment of a commissioner to consider and decide applications for cultural recognition orders.

*Clause 6* sets out the main principle for administering the Bill.

Subclause (1) provides that any decision made under the Bill must be for the wellbeing and best interests of the person who is the subject of an application for a cultural recognition order.

Subclause (2) sets out additional matters to inform the decision maker when applying the main principle. Subclause (2)(a) provides that in deciding what is for the wellbeing and best interests of a child who is the subject of an application for a cultural recognition order, the decision maker must have regard to the following matters:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and, in particular, Ailan Kastom child rearing practice
- the need to perform the powers and functions under the Bill having regard to the sensitivity and cultural practices associated with Ailan Kastom child rearing practice
- the legal and cultural benefits for a child who is the subject of a cultural recognition order
- recognition of the birth parents' assessment of the suitability of the cultural parents
- that decisions are to be made in a fair, timely and consistent manner
- any other matter directly related to the child's wellbeing and best interests.

Subclause (2)(b) provides that in deciding what is for the wellbeing and best interests of an adult who is the subject of an application for a cultural recognition order, the decision maker must have regard to the following:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and, in particular, Ailan Kastom child rearing practice
- the need to perform the powers and functions under the Bill having regard to the sensitivity and cultural practices associated with the Ailan Kastom child rearing practice
- that decisions are to be made in a fair, timely and consistent manner; and
- the legal and cultural benefits for the adult if the cultural recognition order is made recognising Ailan Kastom child rearing practice.

## Part 2 Interpretation

*Clause 7* states that the definitions of particular words used in this Bill are included in the dictionary in Schedule 1.

*Clause 8* defines *Ailan Kastom child rearing practice* which is a key term used throughout the Bill that is relevant to the main purpose and principle, applicant eligibility, statements by the applicants, statements by informed persons including whether the person has knowledge of Ailan Kastom child rearing practice, considerations by the commissioner, the content of a cultural recognition order and confidential information.

*Clause 9* defines *birth parent* which is a key term used throughout the Bill that is relevant to main principle, Ailan Kastom child rearing practice, applicant eligibility, statements by the applicants, statements by informed persons, dispensation of consent, considerations by the commissioner, the content of a cultural recognition order, the effect of a cultural recognition order on relationships, the discharge of a cultural recognition order, court hearings, publishing identifying material, relationships with other laws and for the purposes of amendments to other legislation.

*Clause 10* defines *cultural parent* which is a key term used throughout the Bill that is relevant to the main principle, Ailan Kastom child rearing practice, applicant eligibility, statements by the applicants, statements by informed persons, criminal history reports, dispensation of consent, considerations by the commissioner, the content of a cultural recognition order, the effect of a cultural recognition order on relationships, the discharge of a cultural recognition order, court hearings, publishing identifying material, relationships with other laws and for the purposes of amendments to other legislation.

## **Part 3 Commissioner and office of commissioner**

### **Division 1 Commissioner**

#### **Subdivision 1 Appointment**

*Clause 11* establishes the role of the commissioner (Meriba Omasker Kaziw Kazipa) and that the commissioner is to be appointed by the Governor in Council on the recommendation of the responsible Minister. The clause also provides that the responsible Minister may recommend a person for appointment only if the person is a Torres Strait Islander and the responsible Minister is satisfied that the person is appropriately qualified.

Appropriately qualified is defined under the *Acts Interpretation Act 1954* (Qld) to mean having the qualifications, experience or standing appropriate to perform the functions of the office.

*Clause 12* provides that the commissioner is appointed under the Bill and not under the *Public Service Act 2008*.

*Clause 13* states that the commissioner will hold office for the term stated in the commissioner's instrument of appointment. The clause also states that the appointment must not be more than 3 years and that the commissioner may be reappointed.

*Clause 14* provides that the commissioner's remuneration and allowances, and terms and conditions of the commissioner's office are decided by the Governor in Council.

*Clause 15* provides that if a public service officer is appointed as the commissioner, the person will keep all rights accrued or accruing to the person as a public service officer as if service as the commissioner were a continuation of service as a public service officer. Further, at the end of the person's service as the commissioner, the person's service as the commissioner is taken to be service of a like nature in the public service.

*Clause 16* provides that the responsible Minister may approve a leave of absence for the commissioner and may appoint an acting commissioner during the commissioner's leave of absence.

*Clause 17* provides that the commissioner may resign by giving a signed notice to the responsible Minister and the resignation takes effect on the day the notice is given, or a later day if stated in the notice.

*Clause 18* sets out the process the commissioner must follow to manage conflict of interests.

Subclause (1) provides that if the commissioner can not independently consider and decide a particular application for a cultural recognition order, the commissioner must give the responsible Minister a disclosure notice which identifies the relevant application, sets out the reasons why the commissioner is not able to independently consider and decide the application and states that the commissioner will not participate in the process leading to a decision for the application.

Subclause (2) provides that the commissioner must give a disclosure notice to the responsible Minister if the commissioner becomes aware of a direct or indirect interest the commissioner has in the application and the interest could conflict with the proper performance of the commissioner's functions and powers.

Subclause (3) defines *interest* to include a familial interest or a financial interest.

*Clause 19* sets out the process after the responsible Minister receives a disclosure notice under clause 18.

Subclauses (1) and (2) provide that as soon as practicable after the responsible Minister receives a disclosure notice from the commissioner, the responsible Minister must appoint an appropriately qualified person (the appointed person), other than the commissioner, to decide the application.

Subclause (3) provides that the appointed person must consider and decide the application under Part 5 and give a statement of reasons for the decision to each party to the application and the commissioner.

Subclause (4) provides that the appointed person's decision is taken to be a decision of the commissioner and takes effect as if the decision were the commissioner's decision.

*Clause 20* sets out the matters relevant to a vacancy in the office of the commissioner.

Subclause (1) provides that the office of the commissioner becomes vacant if the commissioner resigns, is convicted of an indictable offence or is removed from office by the Governor in Council.

Subclause (2) provides that if the commissioner is suspended by the responsible Minister under subclause (5), the office will be vacant during the period of suspension.

Subclause (3) provides that the Governor in Council may, at any time, remove the commissioner from office on the recommendation of the responsible Minister.

Subclause (4) provides that the responsible Minister may recommend the removal of the commissioner if the responsible Minister is satisfied that the commissioner is guilty of misconduct, is incapable of performing the functions or exercising the powers of the office or has neglected the functions or powers of the office or performed or exercised the functions or powers incompetently.

Subclause (5) provides that the responsible Minister may suspend the commissioner for up to 60 days by signed notice to the commissioner if there is an allegation of misconduct against the commissioner or the responsible Minister is satisfied a matter has arisen in relation to the commissioner that may be grounds for removal.

*Clause 21* provides that the responsible Minister may appoint an appropriately qualified acting commissioner for up to 6 months if there is a vacancy in the office of the commissioner, if the commissioner is absent for any reason or if the commissioner is unable to perform the functions of the office.

## **Subdivision 2 Functions and powers**

*Clause 22* sets out the commissioner's functions which are to independently consider and decide each application for a cultural recognition order, to ensure the proper, efficient and effective performance of the office, to provide advice or make recommendations to the responsible Minister about the operation of the Bill and the office, to promote public awareness of the commissioner's functions and the office, to advise the Registrar of Births, Deaths and Marriages of each cultural recognition order made by the commissioner and any other function that is conferred on the commissioner under this Bill or another Act.

*Clause 23* states that the commissioner must, in performing the commissioner's functions, act in accordance with the main principle of the Bill.

*Clause 24* states that the commissioner has the power to do all things necessary or convenient to perform the commissioner's functions.

*Clause 25* states that the commissioner is not subject to direction by any person about the way the commissioner performs the commissioner's functions or exercises the commissioner's powers.

## **Division 2 Office of the commissioner**

*Clause 26* provides for the establishment of the office of the commissioner (Meriba Omasker Kaziw Kazipa) to assist the commissioner to perform the commissioner's functions.

*Clause 27* states that the commissioner controls the office of the commissioner.

*Clause 28* states that the officers of the office of the commissioner are appointed under the *Public Service Act 2008*.

*Clause 29* states that an officer of the office of the commissioner is not subject to direction by any person, other than from within the office, about the way the commissioner's functions or powers are performed or exercised.

*Clause 30* provides for the staffing arrangements and administrative support of the office of the commissioner.

Subclause (1) provides that the commissioner may ask the chief executive of the department responsible for administering the Bill to give or make available administrative support services and facilities the office of the commissioner requires in order to perform its functions effectively.

Subclause (2) provides that the commissioner may arrange with the chief executive for the services of officers or employees of the department to be made available to the commissioner.

Subclause (3) provides that an officer or employee made available by the chief executive continues to be an officer or employee of the department, continues to be employed or engaged by the department on the same terms and conditions and is, for the period of service, taken to be an officer of the office of the commissioner.

*Clause 31* states that the office of the commissioner is not a statutory body for the purposes of the *Financial Accountability Act 2009* or the *Statutory Bodies Financial Arrangements Act 1982*.

## **Part 4 Applications for cultural recognition orders**

### **Division 1 Eligibility and criteria**

*Clause 32* sets out the preliminary criteria for making an application for a cultural recognition order.

Subclause (1) sets out the general requirements for an application for a cultural recognition order stating that it may be made only if:

- at least 1 birth parent is a Torres Strait Islander
- the person's birth was registered in Queensland; and
- 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.

The framework acknowledges that spousal arrangements may change. This is reflected in the third criteria in subclause (1).

Subclause (2) sets out the further requirements for an application for a cultural recognition order (in relation to a child at the time the application is made), stating that the application may only be made:

- by each of the child's birth parents and cultural parents
- if each applicant is an adult; and
- 30 days, or more, after the child's birth is registered.

Subclause (3) states that, for subclause (2), the application for a cultural recognition order can still be made if a birth parent or cultural parent is deceased or at the time the person's parentage was transferred in accordance with Ailan Kastom child rearing practice there was only 1 cultural parent.

Subclause (4) clarifies that for subclause (3), if a birth parent or cultural parent is deceased, the application for a cultural recognition order can only be made if at least 1 birth parent and 1 cultural parent are applicants. 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.

In relation to subclauses (2), (3) and (4), the applicants for a cultural recognition order (in relation to a child) could be:

- 2 living birth parents and 2 living cultural parents
- 1 living birth parent and 1 living cultural parent
- 1 living birth parent and 2 living cultural parents
- 2 living birth parents and 1 living cultural parent.

Subclause (5) sets out the further requirements for an application for a cultural recognition order made by an adult (who was given as a child under the cultural practice), stating that the application may only be made by the person.

Subclause (6) states that, for subclause (5), an application for a cultural recognition order can still be made if one birth parent or cultural parent is deceased at the time of application, or if at the time the person's parentage was transferred in accordance with Ailan Kastom child rearing practice there was only 1 cultural parent.

This clause does not exclude interstate residents (within Australia) from making an application, provided the other criteria are met.

*Clause 33* sets out the mandatory requirements for making an application for a cultural recognition order.

Subclause (1)(a) provides that the application must be made in the approved form.

Subclause (1)(b) provides that if the person the subject of an application is a child, the application must be accompanied by:

- a certified copy of the child's birth certificate
- if applicable a copy of:
  - a final adoption order made in relation to the child under part 9 of the *Adoption Act 2009*
  - an order made in relation to the child under the *Family Law Act 1975 (Cwlth)*
  - an order made in relation to the child under the *Child Protection Act 1999*
- the statements or information required under the Bill; and
- any other document or information prescribed by regulation.

Subclause (1)(c) provides that if the person the subject of an application is an adult, the application must be accompanied by:

- a certified copy of the person's birth certificate; and
- the statements or information required under this Bill.

Subclause (2) states that the commissioner must make a record of each application.

## **Division 2 Documents and signed statements**

*Clause 34* sets out the documents and information that must be included when making an application for a cultural recognition order.

Subclause (1) provides that if the application is in relation to a child, the application must include:

- a signed statement from each birth parent and each cultural parent addressing the matters outlined in the Bill
- a signed statement from 2 informed persons, each separately nominated by the birth parents and cultural parents, addressing the matters outlined in the Bill; and
- if applicable, a signed statement from a person defined in the Bill as an other carer, addressing the matters outlined in the Bill.

Subclause (2) provides that the application may be accompanied by any other document or information that may assist the commissioner.

Subclause (3) provides that if the person the subject of the application is an adult, the application must include:

- a signed statement from the adult addressing the matters outlined in the Bill
- a signed statement from each birth parent and each cultural parent addressing the matters outlined in the Bill; and
- a signed statement from 2 informed persons, each separately nominated by the birth parents and cultural parents addressing the matters outlined in the Bill.

Subclause (4) provides that the application may be accompanied by any other document or information that may assist the commissioner.

*Clause 35* sets out the matters to be addressed in a signed statement by a birth parent.

Subclause (1) states that the birth parent's statement must address the following:

- the nature and details of the Ailan Kastom child rearing practice that occurred
- that the parental rights and obligations for the child were transferred under Ailan Kastom from the birth parents to the cultural parents
- the reasons that the birth parent considers a cultural recognition order will be in the best interests of the child
- whether the birth parent knows the child is aware that the Ailan Kastom child rearing practice occurred
- that the birth parent is not aware of any matter that might be detrimental to the child's wellbeing and interests
- the name and address of a person both birth parents nominate as the informed person for the application
- that the birth parent consents to the making of inquiries of and the exchange of information with the informed person, for the purpose of helping the commissioner decide whether to make a cultural recognition order
- that the birth parent gives their informed consent to the application being made.

Subclause (2) provides that the birth parent's statement in relation to the best interests of the child may also include information about:

- the nature of any relationship between the birth parent and the child
- details of any financial support the birth parent may provide for the child
- details of any involvement the birth parent has in any decisions about the child.

*Clause 36* sets out the matters to be addressed in a signed statement by a cultural parent.

Subclause (1) states that the cultural parent's statement must address the following:

- the nature and details of the Ailan Kastom child rearing practice that occurred
- that the parental rights and obligations for the child were transferred under Ailan Kastom from the birth parents to the cultural parents
- the reasons the cultural parent considers a cultural recognition order will be in the best interests of the child
- the child's current address and the period of time the child has lived at the address
- the name and address of a person both cultural parents nominate as the informed person for the application

- that the cultural parent consents to the making of inquiries of and the exchange of information with the informed person, for the purpose of helping the commissioner decide whether to make a cultural recognition order
- whether the cultural parent knows the child is aware that the Ailan Kastom child rearing practice occurred
- whether the birth parent is aware of any matter which might be detrimental to the child's wellbeing and interests
- that the cultural parent consents to the commissioner requesting a copy of the cultural parent's criminal history and consents to the commissioner relying on information contained in the cultural parent's criminal history to decide whether to make a cultural recognition order – this could include the possible disclosure of the information to joint applicants in notices of intention and statement of reasons
- that the cultural parent gives their informed consent to the application being made.

Subclause (2) provides that the cultural parent's statement in relation to the best interests of the child may also include information about:

- the nature of any relationship between the birth parent and the child
- the nature of any relationship between the cultural parent and the child
- details of the child's current living arrangements
- details of the financial support the cultural parent provides for the child
- details of how decisions are made in relation to the child.

*Clause 37* sets out the matters to be addressed in a signed statement by an adult who was subject to the Ailan Kastom child rearing practice. The clause states that the statement must address the following:

- how the person was made aware that they were the subject of the Ailan Kastom child rearing practice
- what information the person was provided with about the Ailan Kastom child rearing practice
- the nature of the relationship the person has with their cultural parents
- the nature of any relationship the person has with their birth parents
- that the person consents to the making of inquiries of and the exchange of information with the person's birth parents, cultural parents and the informed person, for the purpose of helping the commissioner decide whether to make a cultural recognition order
- that the person gives their informed consent to the application being made.

*Clause 38* sets out the matters to be addressed in a signed statement by an informed person. The clause states that the statement must address the following:

- the person's understanding of the Ailan Kastom child rearing practice that occurred in relation to the application
- whether the Ailan Kastom child rearing practice occurred in accordance with Ailan Kastom
- the informed person's relationship, if any, to the birth parents, the cultural parents and the person who is the subject of the application.

*Clause 39* sets out the matters to be addressed in a signed statement by an 'other carer', if applicable. The clause states that the statement is to address the following:

- the other carer's relationship to the child

- that the other carer gives their informed consent to the application being made
- the reasons the other carer considers a cultural recognition order will be in the best interests of the child.

As an example, if a parenting order confers parental responsibility for a child under the *Family Law Act 1975* (Cwlth) to a relative of a birth parent, the informed consent from this relative (the *other carer* under the Bill) is required. Also, a copy of the parenting order is to be included with the application.

## **Part 5 Cultural recognition orders**

### **Division 1 Applications for cultural recognition order**

*Clause 40* states that the commissioner must deal with an application for a cultural recognition order by considering and deciding the application under this part.

*Clause 41* sets out the process for the commissioner to request additional information from the applicant.

Subclause (1) provides that if the commissioner reasonably requires further information or a document to decide whether to make a cultural recognition order, the commissioner may ask an applicant for further information or a document by giving a notice to the applicant.

Subclause (2) sets out the requirements of the notice under subclause (1). The notice must provide the applicant with at least 30 business days to give the information or document to the commissioner, state that the applicant may request an extension from the commissioner and may require the requested further information or document to be verified by statutory declaration.

Subclause (3) allows the commissioner to extend the period within which the applicant has to provide the requested further information or document on the commissioner's own initiative or if the applicant makes a request under subclause (2).

Subclause (4) provides that the commissioner may decide whether to make a cultural recognition order even if the applicant does not provide the requested further information or document.

*Clause 42* sets out the process for the applicant to withdraw their application for a cultural recognition order.

Subclause (1) provides that an applicant for a cultural recognition order may withdraw their application by providing the commissioner with written notice of the withdrawal.

Subclause (2) provides that the application ends when the commissioner receives this notice.

Subclause (3) provides that as soon as practicable after the commissioner receives this notice, the commissioner must give notice to the applicant and all other parties to the application that the application is withdrawn.

*Clause 43* states that each applicant for a cultural recognition order must participate in the commissioner's consideration of the application in good faith.

*Clause 44* sets out the procedure for the commissioner's consideration of an application for a cultural recognition order.

Subclause (1) provides that the commissioner must consider the application for a cultural recognition order in accordance with guidelines made by the commissioner under this Bill.

Subclause (2) provides that when considering the application, the commissioner must act in a way that is fair and reasonable, maintain confidentiality and comply with natural justice. The commissioner may also have regard to any matter the commissioner considers relevant to the application and make inquiries the commissioner considers appropriate.

## **Division 2 Information to assist commissioner**

*Clause 45* provides the commissioner with the discretion to ask the police commissioner for a written report about a cultural parent's criminal history for the purposes of deciding an application for a cultural recognition order.

Subclause (1) states that this clause applies if the person the subject of the application for a cultural recognition order is a child.

Subclause (2) provides the commissioner with the discretion to ask the police commissioner for a written report about a cultural parent's criminal history that includes a brief description of the circumstances of a conviction mentioned in the criminal history.

Subclauses (3) and (4) provide that the police commissioner must comply with the request for a written report about a cultural parent's criminal history, but only in relation to information in the police commissioner's possession or to which the police commissioner has access.

*Clause 46* sets out the process for the commissioner to deal with a criminal history report.

Subclause (1) provides that this clause applies if the commissioner receives a report about a cultural parent's criminal history.

Subclause (2) requires the commissioner to give written notice to the cultural parent as soon as practicable after receiving the report.

Subclause (3) provides that the written notice must contain a copy of the report on the cultural parent's criminal history, state that the cultural parent has 30 business days after receiving the written notice to give the commissioner information or documents about any information in the report and that the cultural parent may request an extension to provide the commissioner with the information or documents.

Subclause (4) provides that if the cultural parent requests an extension under subclause (3), the commissioner may grant this request by giving notice to the cultural parent.

### **Division 3 Dispensing with a person's consent**

*Clause 47* provides that this division applies if an applicant for a cultural recognition order is not able to make the application for the order with the consent of a birth parent, a cultural parent or, if applicable, the child's other carer.

*Clause 48* provides that an applicant for a cultural recognition order may apply to the Childrens Court for an order to dispense with the need for the consent of a stated party setting out the grounds on which the application is made.

*Clause 49* provides for the process following the filing of an application for an order dispensing with the need for the consent of a stated party.

Subclause (1) states that the applicant for the order must serve a copy of the application on the stated party, each other party who is an applicant for the cultural recognition order and the commissioner.

Subclauses (2) and (3) state that the served copy must include the location, date and time of the hearing and state that the application may be heard and decided even though the stated party does not appear in court.

Subclause (4) states that the court may dispense with the requirement for service on the stated party if the court is satisfied of any of the following:

- the applicant can not establish the identity of the stated party after making all reasonable enquiries
- the applicant can not locate the stated party after making all reasonable enquiries
- the conception of the person the subject of the application for a cultural recognition order was a result of an offence committed by the stated party
- there would be an unacceptable risk of harm to the birth mother of the person the subject of the application for a cultural recognition order if the stated party were made aware of the birth or the application for a cultural recognition order; or
- there are other special circumstances for dispensing with the requirement to serve a copy of the application.

*Clause 50* provides that if a stated party is served with a copy of a dispensation application the stated party is a respondent to the proceedings.

*Clause 51* provides that the Childrens Court may hear and decide a dispensation application in the absence of the stated party only if:

- the stated party has been given reasonable notice of the hearing and failed to attend or continue to attend the hearing; or
- the Childrens Court dispenses with the requirement to serve a copy of the dispensation application on the stated party under this division.

The clause also states that the above does not limit the court's jurisdiction to exclude a person from a proceeding.

*Clause 52* provides the Childrens Court with the power to make an order dispensing with the consent of a stated party.

Subclause (1) provides that the Childrens Court may make an order to dispense with the consent of a stated party if:

- the Childrens Court is satisfied of a matter stated in clause 49(4)(a) to (d)
- QCAT or a court or tribunal of another jurisdiction has made a declaration, order or other direction that the stated party does not have capacity to give consent (refer to section 146 of the *Guardianship and Administration Act 2000*); or
- the Childrens Court is satisfied of other special circumstances for giving the dispensation.

Subclause (2) provides that if the subject of the application for a cultural recognition order is a child and the stated party under the application for dispensation is, or is believed to be, the birth parent, the Childrens Court must not give the dispensation:

- within 30 days after notice of the application is given to the stated party; or
- if the Childrens Court has reason to believe there is a current application under section 10 of the *Status of Children Act 1978* by the stated party or another person, or a current application for a parenting order under the *Family Law Act 1975* (Cwlth) by the stated party.

*Clause 53* states that the applicant for a dispensation order must give the commissioner a copy of the dispensation order made by the Childrens Court.

*Clause 54* provides that if the commissioner is given a copy of the dispensation order, the commissioner must continue to consider and decide the application for a cultural recognition order without the need for the consent of the stated party.

#### **Division 4 Discharge of dispensation order**

*Clause 55* provides the process for a party to apply to the Childrens Court to discharge a dispensation order.

Subclause (1) states that the clause applies if the Childrens Court makes a dispensation order and a copy of the application for the dispensation order was not served on a stated party.

Subclause (2) provides that a party may apply to the Childrens Court to discharge the dispensation order.

Subclause (3) provides that the applicant must serve a copy of the application for discharge of the dispensation order on each other person who was a party to the proceeding for the dispensation order.

Subclause (4) provides that the Childrens Court may discharge the dispensation order if a cultural recognition order has not yet been made and the Childrens Court is satisfied a ground on which the dispensation order was made under clause 52 does not apply.

#### **Division 5 Deciding whether to make cultural recognition orders**

*Clause 56* provides that, subject to any dispensation order, before the commissioner decides to make a cultural recognition order, the commissioner must be satisfied that:

- each birth parent and cultural parent gave full, free and informed consent to the making of the application for the order
- if the application contains a signed statement from an other carer - the other carer gave full, free and informed consent to the making of the application
- if the subject of the application for the order is a child, the making of the order is for the wellbeing and in the best interests of the child
- the transfer of parentage occurred in accordance with Ailan Kastom child rearing practice
- each applicant has met the eligibility criteria to apply
- the application includes the required documents and information; and
- each applicant has provided the required information or statement.

*Clause 57* sets out a process if the commissioner is considering not making a cultural recognition order.

Subclause (1) provides that the commissioner must give a notice of intention to each party to the application that states:

- the reasons the commissioner is considering not making the order
- that an applicant may give the commissioner additional or new information or documents that support the making of a cultural recognition order within 30 business day after receiving the notice of intention; and
- the applicant may request an extension from the commissioner, to provide a response.

Subclause (2) provides that the commissioner may grant a request for extension from the applicant by giving notice to the applicant.

*Clause 58* sets out what the commissioner must do after the commissioner considers the information or documents in an application for a cultural recognition order, and additional or new information or documents received through the notice of intention process.

Subclause (1) provides that the commissioner must decide to make or not make a cultural recognition order.

Subclause (2) provides that if the person the subject of the application for the cultural recognition order is a child the commissioner must give each party to the application a statement of reasons for the decision and a copy of the order (if made).

Subclause (3) provides that if the applicant is an adult who is the subject of the application for the cultural recognition order, the commissioner must also give the statement of reasons for the decision and the copy of the order (if made) to the applicant's cultural parents and birth parents.

*Clause 59* sets out that a cultural recognition order must state:

- the order is made under this Bill in recognition of Ailan Kastom
- the person's name
- the name of each of the person's birth parents and cultural parents
- the person's parentage is transferred from the birth parents to the cultural parents
- the date of the decision
- any other information prescribed by regulation.

## **Division 6 Internal review**

*Clause 60* sets out the requirements for an internal review.

Subclause (1) provides that if the commissioner decides not to make a cultural recognition order, the parties to the application for the order may apply to the responsible Minister for a review of the decision.

Subclause (2) states that the application for internal review must be in the approved form and be made jointly by the parties within 20 business days after the statement of reasons was given to the parties.

Subclause (3) provides discretion to the responsible Minister to extend the time for making an internal review application.

*Clause 61* sets out how an internal review is to be conducted.

Subclause (1) states that within 20 days after the responsible Minister receives an application for internal review, the responsible Minister must appoint a review officer (other than the commissioner) to review the commissioner's decision.

Subclause (2) provides that the responsible Minister may make this appointment if satisfied the review officer is appropriately qualified.

Subclause (3) provides that the review officer must:

- consider the application and review the commissioner's decision
- make a reviewed decision which either confirms the commissioner's decision or revokes the commissioner's decision and makes a cultural recognition order; and
- give a statement of reasons for the reviewed decision to the parties and commissioner.

*Clause 62* provides that if the review officer revokes the commissioner's decision and makes a cultural recognition order, the reviewed decision is taken to be a decision of the commissioner, and the commissioner must give effect to the decision as if no application for internal review had been made.

## **Part 6 Registration of cultural recognition orders**

*Clause 63* states that as soon as practical after a cultural recognition order is made, the commissioner must give a copy of the cultural recognition order to the Registrar of Births, Deaths and Marriages.

*Clause 64* sets out a process for access to information from the Registrar of Births, Deaths and Marriages.

Subclause (1) provides that the clause applies to each of the following persons:

- a person who was an applicant for a cultural recognition order (or the person's guardian) and the cultural recognition order was made by the commissioner
- an adult who was the subject of a cultural recognition order (or the adult's guardian).

Subclause (2) provides that on request by the person, the commissioner must give the person authorisation to obtain a certificate, information, a source document or a copy of the cultural recognition order kept by the Registrar of Births, Deaths and Marriages, in accordance with this clause.

Subclause (3) allows the commissioner to limit the access if satisfied the access would be an unreasonable invasion of a person's privacy or unreasonably harm a person's interests.

Subclause (4) allows the person to then apply under section 44 of the *Births, Deaths and Marriages Registration Act 2003*, with the authorisation from the commissioner, for the requested information allowed under the authorisation.

Subclause (5) provides that the registrar must grant the application if it relates to an entry about the cultural recognition order in the register of births and the cultural recognition register.

Subclause (6) provides that a certificate or copy of source document given under this clause and relating to a closed entry must be endorsed 'Not to be used for official purposes'.

Subclause (7) sets out the definitions of *certificate*, *cultural recognition register*, *closed entry* and *source document* for the purposes of this clause.

## **Part 7 Effect of cultural recognition orders**

*Clause 65* states that this part applies if the commissioner makes a cultural recognition order.

*Clause 66* sets out the effect on relationships on the making of a cultural recognition order.

Subclause (1) states the effect of a cultural recognition order about a person and provides that:

- the person's parentage is transferred from the birth parents to the cultural parents
- the person becomes the child of the cultural parents
- the cultural parents become the parents of the person
- the person is no longer a child of the birth parents; and
- a birth parent is no longer the parent of the person.

Subclause (2) states that other relationships are determined in accordance with subclause (1).

Subclause (3) provides that, despite the cultural recognition order being made, a former relationship continues in addition to other relationships created by the order, for the purpose of a law relating to a sexual offence for which relationships are relevant. An example of such an offence is the offence of incest.

*Clause 67* sets out the effect of a cultural recognition order on the disposal of property.

Subclause (1) states that the effect of a cultural recognition order about a person applies in relation to the dispositions of property (whether by will or otherwise), and the devolutions of property in relation to circumstances where a person dies without a will.

Subclause (2) states that the making of a cultural recognition order does not affect the operation of a will or other instrument that distinguishes between a person about whom a cultural recognition order has been made and a person about whom a cultural recognition order has not been made.

*Clause 68* provides for the public trustee to make inquiries if the beneficiary is unable to be located.

Subclause (1) applies if—

- under a will made after the commencement, the testator makes a disposition of property to a person—
  - who is described as a child of the testator or another person; and
  - whose parentage was transferred to another person as a result of a cultural recognition order; and
- the personal representative of the testator is unable to determine the name and address of the person who is the subject of the cultural recognition order.

Subclause (2) requires the personal representative to give the public trustee a copy of the will and a notice stating that the personal representative is unable to determine the name and address of the person who is the subject of the cultural recognition order.

Subclause (3) provides that on receipt of the copy of the will and notice, the public trustee must take steps to determine the name and address of the person who is the subject of the cultural recognition order, and if the person has died, the date of death of the person by asking for this information from the commissioner and the Registrar of Births, Deaths and Marriages.

Subclause (4) states that the commissioner must provide the name and address of the person who is the subject of the cultural recognition order to the public trustee upon receipt of the request, despite any other Act or law.

Subclause (5) states that the Registrar of Births, Deaths and Marriages may provide held records to the public trustee irrespective of the provisions under section 44 of the *Births, Deaths and Marriages Registration Act 2003*, which set out the standard process for obtaining information from the registrar.

Subclause (6) provides that if the public trustee has taken the required steps under subclause (3), the public trustee is to provide a notice to the personal representative stating that the public trustee has been able to determine the person's name, address or the death of the person. However, to the extent that this specific information is unable to be determined, the public trustee's notice to the personal representative must state what details the public trustee has been unable to determine.

*Clause 69* sets out matters relating to where the public trustee is the trustee following the public trustee's involvement to locate a person under this Part.

Subclause (1) provides that this clause applies if—

- under a will made after the commencement, the testator makes a disposition of property to a person—
  - who is described as being a child of the testator or of another person
  - whose parentage was transferred to another person or persons; and

- the personal representative of the testator is given a notice from the public trustee under this Part.

Subclause (2) provides that the public trustee is a trustee for the person on trusts stated in, or arising under, the will.

Subclause (3) provides if the personal representative transfers property to the public trustee for the person, the personal representative is taken to have transferred the property to that person.

However, subclause (4) provides that this does not apply if the person has either died before the testator or for another reason is not entitled to anything under the will.

Subclause (5) provides that where the public trustee gives the personal representative a notice that the person has disclaimed property to which the person was entitled to under the will, the notice is, for the purpose of administering the estate, sufficient evidence that the person has disclaimed the property.

*Clause 70* provides for the public trustee's fees for their involvement.

Subclause (1) allows the public trustee to charge fees for taking steps or acting as a trustee under this Bill.

Subclause (2) provides that the personal representative of the testator must pay the public trustee out of the testator's estate any fees charged by the public trustee, or any costs or fees incurred by the public trustee under this Bill.

*Clause 71* provides for the transfer or distribution of property by the trustee.

Subclause (1) provides that subject to this clause, a trustee may transfer or distribute property to a person who appears entitled to it without finding out whether the person's entitlement is affected by a cultural recognition order.

Subclause (2) provides that a trustee who transfers or distributes property under subclause (1) is not liable to a person claiming directly or indirectly because of an order unless the trustee has notice of the claim before the property is transferred or distributed.

Subclause (3) states that this clause does not affect a person's right to follow property into the hands of a person, other than a purchaser for value, who has received it.

Subclause (4) defines *trustee* for the purposes of this clause.

## **Part 8 Discharge of cultural recognition order**

*Clause 72* defines a *relevant party* for the purposes of this part to mean:

- for a cultural recognition order about a child—
  - a birth parent of the child; or
  - a cultural parent of the child
- for a cultural recognition order about an adult—
  - the adult

- a birth parent of the adult; or
- a cultural parent of the adult.

*Clause 73* sets out the grounds for the discharge of a cultural recognition order.

Subclause (1) provides that a relevant party for a cultural recognition order may apply to the Childrens Court for an order to discharge a cultural recognition order.

The relevant party will be able to apply to the Childrens Court to discharge the cultural recognition order, if the cultural recognition order was made:

- because of a false or misleading document or representation
- because a person acted fraudulently or used undue influence on another person
- because a person did not provide full, free and informed consent
- on some other improper basis; or
- if there are other exceptional circumstances that exist that warrant the discharge.

Subclause (2) defines *undue influence* for the purposes of this clause.

*Clause 74* sets out the requirements and process for making an application for a discharge order.

Subclause (1) provides that the application must be made to the Childrens Court and subclause (2) requires that the application state the grounds on which it is made.

Subclause (3) states that after filing the application, the applicant must serve a copy on the commissioner, and each relevant party who was required to consent to the application for the cultural recognition order.

Subclause (4) states that the service copy of the application must state where and when the application is to be heard.

Subclause (5) states the Childrens Court may dispense with the requirement to serve a copy of the application if the Childrens Court is satisfied that the relevant person cannot be located after making all reasonable enquiries or the relevant person is deceased.

*Clause 75* provides that a person, other than the commissioner, who is served with a copy of an application for a discharge order is a respondent in the proceeding.

*Clause 76* sets out the circumstances where the Childrens Court may hear an application in the absence of a party.

Subclause (1) provides that the Childrens Court may hear and decide the application for a discharge order, where the person the subject of the cultural recognition order is an adult, only if the adult or their lawyer appears in the proceeding. Where the cultural recognition order relates to a child, the Childrens Court may hear and decide the application for a discharge order if the child's birth parents and cultural parents appear in the proceeding (unless their absence is allowed under this clause or lawfully excluded by the court).

Subclause (2) provides that the Childrens Court may hear and decide the application in the absence of a relevant party only if the relevant party has been given reasonable notice of the hearing and failed to attend or continue to attend the hearing, or the Childrens Court dispenses with the requirement to serve a copy of the application on the relevant party under this part.

Subclause (3) provides that this does not limit the Childrens Court's jurisdiction to exclude a person from a proceeding.

*Clause 77* provides that the Childrens Court may make a discharge order.

Subclause (1) provides that a discharge order may be made only if the Childrens Court is satisfied of a prescribed ground under this part for making the application.

Subclause (2) provides that if an application for a discharge order is about a child who was subject to a cultural recognition order, the Childrens Court may only make a discharge order if it considers it is in the child's wellbeing and best interests to do so.

Subclause (3) sets out the information that must be contained in a discharge order.

Subclause (4) provides that if the Childrens Court makes a discharge order, it may also make any other order it considers appropriate and in the interests of justice and, where it involves a child, to protect the wellbeing and best interests of the child.

Subclause (5) provides that the other order may be about any matter relating to the wellbeing or best interests of the person, and sets out some examples.

*Clause 78* sets out the effect of a discharge order.

Subclause (1) provides that on the making of an order discharging a cultural recognition order, the rights, privileges, duties, liabilities and relationships of the person and each relevant party to the application for the cultural recognition order, are the same as if the cultural recognition order had not been made.

Subclause (2) provides that the making of a discharge order does not affect anything lawfully done, or the consequences of anything lawfully done, while the cultural recognition order was in force or a right, privilege or liability acquired, accrued or incurred while the cultural recognition order was in force.

Subclause (3) provides that for the purpose of applying a law relating to a sexual offence where a familial relationship is relevant, after the discharge order is made the person is taken to have the familial relationships that resulted from the making of the cultural recognition order as well as the familial relationships that result from the making of the discharge order.

*Clause 79* states that as soon as practicable after a discharge order is made, the applicant for the discharge order must give a certified copy of the order to the Registrar of Births, Deaths and Marriages and the commissioner.

## **Part 9 Court proceedings**

### **Division 1 Preliminary**

*Clause 80* states that this part applies to a proceeding under this Bill.

### **Division 2 Constitution of court and procedural provisions**

*Clause 81* states that when exercising its jurisdiction under this Bill, a court must be constituted by a Childrens Court judge.

*Clause 82* sets out the court rules that apply in relation to proceedings under this Bill.

Subclause (1) provides the *Uniform Civil Procedure Rules 1999* apply in relation to proceedings as if the proceedings were proceedings in the District Court.

Subclause (2) provides that the *Uniform Civil Procedure Rules 1999* do not apply for a matter in relation to a proceeding in the Childrens Court that is provided for under rules of the Childrens Court made under the *Childrens Court Act 1992*.

*Clause 83* provides that a regulation made under the *Supreme Court of Queensland Act 1991* will apply to fees received and dealt with in the courts in relation to proceedings in the Childrens Court, as if the proceedings were proceedings in the District Court.

*Clause 84* provides that in exercising its jurisdiction or powers under this Bill, the Childrens Court must regard the wellbeing and best interests of a child as paramount.

*Clause 85* sets out matters relating to the rules of evidence in a proceeding in the Childrens Court.

Subclause (1) provides that in a proceeding, the Childrens Court is not bound by the rules of evidence and may inform itself in any way it thinks appropriate.

Subclause (2) provides that the Childrens Court need only be satisfied of a matter on the balance of probabilities.

*Clause 86* states that the Childrens Court must as far as practicable, ensure the parties to a proceeding understand the nature, purpose and legal implications of the proceeding and of any order or ruling made by the court.

*Clause 87* sets out matters relating to court appointed experts.

Subclause (1) provides that the Childrens Court may appoint a person with special knowledge or a special skill to help the court.

Subclause (2) provides that the Childrens Court may act on its own initiative or on the application of a party to the proceeding when making such an appointment.

*Clause 88* sets out matters relating to the right of appearance and representation in a court proceeding.

Subclause (1) allows a party to a proceeding to appear in person or be represented by a lawyer.

Subclause (2) provides that if a party cannot appear in person in a proceeding, another person appointed in writing by the party may, with leave of the Childrens Court, represent the party in the proceeding.

*Clause 89* sets out matters relating to evidence in a court proceeding that is given by a child.

Subclause (1) provides that in a proceeding, a child may only be called to give evidence with the leave of the court.

Subclause (2) provides that the Childrens Court may grant leave only if the child is at least 12 years of age, is represented by a lawyer, and the child agrees to give evidence.

Subclause (3) provides that if the child gives evidence, the child may be cross-examined only with leave of the Childrens Court.

*Clause 90* provides that the Childrens Court may hear submissions from persons who are not parties to the proceeding.

Subclause (1) states that the court may hear submissions from a member of the family of the child to whom the proceeding relates and anyone else the Childrens Court considers is able to inform it on any matter relevant to the proceeding.

Subclause (2) states that a submission may be made by a person's lawyer.

*Clause 91* states that each party to a proceeding must pay their own costs of the proceeding.

### **Division 3 Appeals**

*Clause 92* states that a party may appeal to the appellate court against a decision on an application if:

- the party was an applicant for a dispensation order and the dispensation order was not made
- the party is a stated party and a dispensation order has been made about the party; or
- the party was an applicant for a discharge order and the discharge order was not made.

*Clause 93* sets out how to start an appeal.

Subclause (1) provides that the appeal is started by filing a notice of appeal with the registrar of the appellate court.

Subclause (2) provides that the appellant must serve a copy of the notice of appeal on:

- where the appellant is appealing against a Childrens Court’s decision not to make an order dispensing with a stated party’s consent or appealing against a Childrens Court’s decision not to make an order discharging a cultural recognition order—on each person entitled to appeal against the decision; or
- where the appellant is appealing against a Childrens Court’s decision to grant an order dispensing with the stated person’s consent—on the person who applied for the dispensation order.

Subclause (3) provides that the notice of appeal must be filed within 28 days after the decision is made.

Subclause (4) provides that the court may at any time extend the period for filing the notice of appeal.

Subclause (5) provides that the notice of appeal must fully state the grounds of the appeal and the facts relied on.

*Clause 94* sets out matters relating to a stay of a decision.

Subclause (1) provides that the appellate court may stay a decision appealed against to secure the effectiveness of the appeal.

Subclause (2) provides that a stay may be given on conditions, operates for a period fixed by the court, and may be revoked or amended by the court.

Subclause (3) provides that the period of the stay is not to extend past the time when the appellant court decides the appeal.

Subclause (4) provides that the starting of an appeal against a decision affects the decision, or the carrying out of the decision, only if the decision is stayed.

*Clause 95* states that an appeal must be decided on the evidence and proceedings before the court.

*Clause 96* sets out the powers of the appellate court. In deciding an appeal, the appellate court may:

- confirm the decision appealed against
- vary the decision appealed against
- set aside the decision appealed against and substitute another decision; or
- set aside the decision appealed against and remit the matter to the court that made the decision.

## **Division 4 General**

*Clause 97* sets out matters relating to who may attend a court hearing under this division.

Subclause (1) provides that this clause applies to a hearing in the Childrens Court or the appellate court of a proceeding under this Bill.

Subclause (2) provides that the hearing for a proceeding is not open to the public. This is to protect the privacy and confidentiality of the parties involved in the cultural practice.

Subclause (3) provides that despite section 20 of the *Childrens Court Act 1992*, a court must exclude from the room in which the court is sitting a person who is not—

- a child to whom the proceeding relates
- an adult who is the subject of a cultural recognition order relevant to the proceeding
- an appellant
- a respondent
- if the proceeding relates to a child who is the subject of a cultural recognition order:
  - the child's birth parent
  - the child's cultural parent; or
  - the child's other carer
- the commissioner
- a lawyer of a party to the proceeding or of a person mentioned in paragraphs (a) to (e)(iii); or
- a witness giving evidence.

Subclause (4) provides that the Childrens Court or the appellate court may permit a person who is not mentioned in subclause (3) to be present during the hearing if the court is satisfied it is in the interests of justice to do so.

*Clause 98* sets out the matters relating to access to a record of proceedings in the Childrens Court or the appellate court.

Subclause (1) provides that a person may not have access to a record of proceedings in the Childrens Court or the appellate court unless the court, on application by an applicant for the order or the commissioner, has given approval to the access.

Subclause (2) provides that the Childrens Court or the appellate court may give access to all or part of the record of proceedings.

Subclause (3) provides that without limiting the reasons for which a court may refuse to give a person access, the court may refuse access if the person has not produced to the registrar or another appropriate officer of the court, proof of the person's identity or if the person has not complied with a requirement of the court under any law or rule of practice relating to inspection of and release of information generally from its record of proceedings.

Subclause (4) defines *record of proceedings* for the purposes of this clause.

## **Division 5 Offences and legal proceedings**

*Clause 99* states that it is an offence for a person to provide information under the Bill to the commissioner that the person knows is false or misleading in a material particular and provides for a maximum penalty of 100 penalty units.

*Clause 100* sets out matters relating to offences.

Subclause (1) provides that a proceeding for an offence is to be heard and decided summarily.

Subclause (2) provides that a proceeding for the offence must start within whichever is longer of the following:

- 1 year after the alleged commission of the offence
- 6 months after the complainant becomes aware of the offence, but within 2 years after the alleged commission of the offence.

## **Part 10 Confidentiality and access to information**

*Clause 101* defines *confidential information* for this Part to mean the following information:

- personal information (as defined under the *Information Privacy Act 2009*)
- information that a person knows is of a secret or sacred nature according to Ailan Kastom child rearing practice; and
- does not include information that is lawfully available to the public.

*Clause 102* sets out the obligations for an administrator in relation to confidential information.

Subclause (1) provides that an administrator must not directly or indirectly disclose confidential information that has become known to the administrator in the course of performing the administrator's functions under the Bill to another person, unless the disclosure is permitted under this clause. This clause also provides a maximum penalty of 100 units or 2 years imprisonment for the unauthorised disclosure of confidential information.

Subclause (2) provides that an administrator is permitted to disclose confidential information (other than information that the administrator knows is information of a secret or sacred nature) to another person:

- under this Bill
- if the disclosure is required or permitted by law
- if the person to whom the information relates consents to the disclosure; or
- if the disclosure is in a form that does not identify the person to whom the information relates.

Subclause (3) provides that the commissioner may disclose information in a person's criminal history if the disclosure is made in:

- a notice of intention; or
- a statement of reasons given under clause 58(2)(a).

The offence in clause 102 applies to information disclosed by an administrator. An administrator cannot commit an offence under this clause for disclosing information that is secret or sacred unless they 'knew' that the confidential information was of a secret or sacred nature.

*Clause 103* sets out a process for access to restricted information from the commissioner.

Subclause (1) states that an applicant for a cultural recognition order may apply to the commissioner for a copy of restricted information and that the application must be in writing.

Subclause (2) provides that in deciding whether or not to grant the application, the commissioner must have regard to the need to protect a person's privacy and to safeguard a person from harm.

Subclause (3) provides that in granting the application, the commissioner may grant full or partial access to the restricted information.

Subclause (4) states that the commissioner must give the applicant written notice of their decision to grant or refuse the application and include a statement of reasons for the decision.

Subclause (5) defines *restricted information* for the purposes of this clause.

*Clause 104* sets out the requirements in relation to the publishing of identifying material.

Subclause (1) provides that this clause applies to confidential information or other information that identifies or is likely to identify a person as:

- a party, or relative of a party, to an application for a cultural recognition order or a discharge order
- a party, or relative of a party, to a court proceeding relating to an application for a discharge order; or
- a person whose consent to an application for a cultural recognition order is or was required.

Subclause (2) states that a person must not publish identifying material unless written consent to the publication has been given by each identified person. Where the identified person is a child who is the subject of an application for a cultural recognition order or the subject of a cultural recognition order, the written consent to the publication is required from the child's birth parents and cultural parents. Where the identified person is an adult, the written consent to the publication is required from the adult. Subclause (2) also provides a maximum penalty for publishing identifying material of 100 units or 2 years imprisonment for an individual or 1,000 penalty units for a corporation.

Subclause (3) defines *identified person* and *publish* for the purposes of this clause.

Although this clause makes it an offence to unlawfully publish identifying material (including publication by an applicant or child), the offence is necessary in order to protect the privacy and anonymity of those persons whose information is included as part of a joint application under the Bill.

## **Part 11 Civil liability**

*Clause 105* sets out matters relating to the civil liability of an administrator.

Subclause (1) states that an administrator is not civilly liable for an act done, or omission made, honestly and without negligence under the Bill.

Subclause (2) provides that the liability attaching to the administrator, attaches to the State instead.

Subclause (3) states that this clause does not apply to an administrator if the administrator is a State employee within the meaning of the *Public Service Act 2008*, section 26B(4).

## Part 12 Miscellaneous

*Clause 106* sets out the relationship of this Bill with the *Adoption Act 2009* and other laws.

Subclause (1) 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*.

Subclause (2) states that for any law the cultural recognition order takes effect as if a child who is the subject of a cultural recognition order was a child adopted under the *Adoption Act 2009*, a cultural parent named in the cultural recognition order was an adoptive parent named in a final adoption order and a birth parent named in the cultural recognition order was a birth parent named in a final adoption order.

Subclause (3) defines *adoptive parent* and *final adoption order* for the purposes of this clause.

*Clause 107* sets out the requirements for a decision maker when making a decision that affects the rights and interests of a person with impaired capacity.

Subclause (1) provides that this clause applies if a decision maker is making a decision under part 5, 8, 9 or 10 of the Bill where the decision may affect the rights and interests of an adult with impaired capacity.

Subclause (2) states that the decision maker must, to the greatest extent practicable, take into account the adult's right to participate in the decision making process and that the adult must be given the support and access to information necessary to enable the adult to make a decision as part of, or participate in, the decision making process.

Subclause (3) provides that the decision maker must, to the greatest extent practicable, seek and take into account the adult's views, wishes and preferences before making the decision.

Subclause (4) states that the adult's view, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.

Subclause (5) defines *capacity* and *impaired capacity* for the purposes of this clause.

*Clause 108* provides that the commissioner may make guidelines.

Subclause (1) provides that the commissioner may make guidelines for matters within the scope of this Bill to assist with compliance with this Bill.

Subclause (2) provides that the guidelines must be consistent with this Bill, and sets out examples of what the guidelines may be about.

Subclause (3) states that the guidelines must be published on the department's website.

Subclause (4) defines *department's website*.

*Clause 109* provides that the commissioner may approve forms for use under the Bill.

Subclause (1) states that the commissioner may approve forms for use under the Bill.

Subclause (2) provides that the approved form may require information set out in the form to be verified by a signed statement.

*Clause 110* sets out the annual reporting requirements for the office of the commissioner.

Subclause (1) provides that the commissioner must give the responsible Minister a report as soon as practicable after the end of the financial year but no later than 31 October. The report must include:

- a review of the operation of the office
- proposals for improving the operation, and forecasts of the workload, of the office; and
- information required by the responsible Minister in relation to the performance of the commissioner's functions or exercise of the commissioner's powers under this Bill.

Subclause (2) provides that the report must not contain confidential information or any other information which identifies or is likely to identify:

- a child who was the subject of an application for a cultural recognition order
- an applicant for a cultural recognition order; or
- a person, other than a person who has applied for a cultural recognition order, who was required to give a statement for an application for a cultural recognition order.

Subclause (3) provides that the responsible Minister must table a copy of the report in Parliament within 14 days after receiving the report.

*Clause 111* provides for the review of the Bill and of the operations of the office of the commissioner.

Subclause (1) states that the responsible Minister must review the operation and efficacy of the Bill within 2 years after its commencement.

Subclause (2) provides that after completion of the review the responsible Minister must table a report on the outcomes of the review in Parliament as soon as practicable after the review is completed.

*Clause 112* provides for the making of regulations under this Bill.

Subclause (1) states that the Governor in Council may make regulations under the Bill.

Subclause (2) provides that a regulation may prescribe fees payable under the Bill and provide for a maximum penalty of 20 penalty units for the contravention of a regulation.

## **Part 13 Amendment of Acts**

### **Division 1 Amendment of this Act**

*Clause 113* states that this division amends this Bill.

*Clause 114* amends the long title of this Bill to remove the references to amendments of other Acts.

## **Division 2 Amendment of Adoption Act 2009**

*Clause 115* states that this division amends the *Adoption Act 2009*.

*Clause 116* provides a replacement for the note under section 7(1)(a) of the *Adoption Act 2009* which sets out additional principles for the administering of that Act in relation to an Aboriginal and Torres Strait Islander person. The amendment references the Bill and its purpose.

## **Division 3 Amendment of Births, Deaths and Marriages Registration Act 2003**

*Clause 117* states that this division amends the *Births, Deaths and Marriages Registration Act 2003*.

*Clause 118* amends section 3(a) of the *Births, Deaths and Marriages Registration Act 2003* to recognise an additional objective of the Act as the collection and maintenance of information kept in registers about changes of parentage made under cultural recognition orders.

*Clause 119* amends section 10A(2)(c) of the *Births, Deaths and Marriages Registration Act 2003* to re-define *relevant event* for a child to include a change in parentage as a result of a cultural recognition order. This amendment applies the existing requirements for the registration of parentage details under section 10A(1) to the registration of cultural recognition orders.

*Clause 120* amends section 14(1) of the *Births, Deaths and Marriages Registration Act 2003* to provide that the registration of a change of parentage under a cultural recognition order is a 'relevant event' (along with the registration of a birth, adoption under the *Adoption Act 2009* and a change of parentage under the *Surrogacy Act 2010*) that can be re-registered in certain circumstances.

*Clause 121* amends section 15(5) of the *Births, Deaths and Marriages Registration Act 2003* to provide that changes to a person's name under a cultural recognition order or the discharge of a cultural recognition order are not dealt with under the change of name provisions under Part 3 but under sections 41DA and 41DB of the Act.

*Clause 122* amends section 41 of the *Births, Deaths and Marriages Registration Act 2003* which provides for the registering of events other than adoptions or changes in parentage in register. The amendment prescribes that a cultural recognition order or the discharge of a cultural recognition order is also an event to which section 41 does not apply, given the requirement for the registration of these events are covered by separate provisions in the Act (new sections 41DA and 41DB).

*Clause 123* inserts new sections 41DA and 41DB into Part 7 of the *Births, Deaths and Marriages Registration Act 2003*. These new sections set out the requirements for the registration of a cultural recognition order and amending registers following a discharge of cultural recognition order. Each section sets out the eligibility and the process for the Registrar of Birth, Deaths and Marriages to register changes of parentage under these orders, including the process for closing existing entries in the birth and cultural recognition registers relating to the person subject to the order. These additional sections also provide definitions for the terms under the *Births, Deaths and Marriages Registration Act 2003*.

*Clause 124* inserts a new subsection 13A in section 44 of the *Births, Deaths and Marriages Registration Act 2003* which sets out a process for obtaining information held in a register and kept by the Registrar of Births, Deaths and Marriages. New subsection 13A ensures that information relating to a closed entry which was closed as a result of the registration of a cultural recognition order is given only to a person authorised under this Bill or an officer of, or person acting for, a law enforcement body.

*Clause 125* provides an additional definition and amends two existing definitions under Schedule 2 of the *Births, Deaths and Marriages Registration Act 2003* which sets out the Dictionary of definitions for the Act. The amendment:

- provides the definition for *cultural recognition order* as cited under this Bill
- incorporates a change of parentage under a cultural recognition order into the existing definition for a *registrable event*; and
- incorporates ‘the cultural recognition register’ into the existing definition of *relevant child register*.

## **Division 4 Amendment of Criminal Code**

*Clause 126* states that this division amends the *Criminal Code*.

*Clause 127* amends section 222 (Incest) of the *Criminal Code*. The amendment sets out, a person’s carnal knowledge with another that is of a relation prescribed under section 222 of the *Criminal Code* is applicable to both relationships that existed before and after the making of a cultural recognition order, regardless of whether the order has been discharged. This clause also amends section 222 of the *Criminal Code* to clarify that a reference to an adoptive relationship includes a relationship that came into existence as a result of an adoption order, regardless of whether the order has been discharged. This makes it clear that an adoptive relationship is captured by section 222 of the *Criminal Code*, regardless of whether the adoption order is subsequently discharged. This is a technical amendment and not a change in policy, as the *Adoption Act 2009* already provides for the effect of discharging an adoption order on sexual offences.

*Clause 128* amends the definition of *parent* in section 363(3) of the *Criminal Code*, including cultural parents under a cultural recognition order as being parents in relation to the criminal offence of child-stealing.

## **Division 5 Amendment of Domestic and Family Violence Protection Act 2012**

*Clause 129* states that this division amends the *Domestic and Family Violence Protection Act 2012*.

*Clause 130* amends the definition of *spousal relationship*.

Subclause (1) removes the example provided under section 15(2)(b).

Subclause (2) inserts a definition of *former parent* in section 15 to include a birth parent who stops being a parent following the making of a cultural recognition order and a birth parent who stops being a parent under section 39(2)(b) of the *Surrogacy Act 2010*.

## **Division 6 Amendment of Domicile Act 1981**

*Clause 131* states that this division amends the *Domicile Act 1981*.

*Clause 132* amends section 8 of the *Domicile Act 1981* to clarify the domicile of children the subject of a cultural recognition order or the discharge of a cultural recognition order. The amendments also clarify that references to an adoption under section 8 do not include a child who is the subject of a cultural recognition order.

## **Division 7 Amendment of Evidence Act 1977**

*Clause 133* states that this division amends the *Evidence Act 1977*.

*Clause 134* amends the definitions in section 21AC of the *Evidence Act 1977*.

Subclause (1) inserts a definition of *cultural recognition order* as defined under this Bill.

Subclause (2) amends the definition of *prescribed relationship* to include a relationship under a cultural recognition order.

## **Division 8 Amendment of Guardianship and Administration Act 2000**

*Clause 135* states that this division amends the *Guardianship and Administration Act 2000*.

*Clause 136* amends Schedule 2, Part 2, Item 3 of the *Guardianship and Administration Act 2000* which defines a *special personal matter*. The amendment provides that a special personal matter also includes a matter relating to consenting to, or applying for, an application for a cultural recognition order or applying for a discharge of a cultural recognition order under this Bill. A guardian cannot be appointed by the Queensland Civil and Administrative Tribunal under the *Guardianship and Administration Act 2000* for a special personal matter. Other examples of special personal matters under the *Guardianship and Administration Act 2000* are the making or revoking of a will or consenting to the making or discharge of an order under the *Surrogacy Act 2010*.

## **Division 9 Amendment of Industrial Relations Act 2016**

*Clause 137* states that this division amends the *Industrial Relations Act 2016*.

*Clause 138* amends section 56 to include cultural parent leave for an employee who is a cultural parent under a cultural recognition order.

*Clause 139* amends the definitions under section 57.

Subclause (1) includes definitions under section 57 for *cultural parent*, *cultural parent leave*, *cultural recognition order*, *intended cultural parent*, *long cultural parent leave* and *short cultural parent leave*.

Subclause (2) includes a definition of *child* for cultural parent leave.

Subclause (3) amends the definition of *long parental leave* under section 57 to include long cultural parent leave.

Subclause (4) amends the definition of *short parental leave* under section 57 to include short cultural parent leave.

*Clause 140* inserts a new section 61A to provide that an employee who is a cultural parent under a cultural recognition order with an entitlement to short cultural parent leave and long cultural parent leave.

The new section 61A also provides that an employee who is a cultural parent under a cultural recognition order may take up to 8 weeks short cultural parent leave and up to 52 weeks long cultural parent leave. Long cultural parent leave may not be broken. The new section 61A further specifies that short cultural parent leave may be taken as one continuous period of up to 8 weeks leave or for broken periods of up to 8 weeks provided the minimum period of leave taken is 2 weeks.

*Clause 141* amends section 62(1) to provide that parental leave must not be extended beyond 52 weeks after the child's parentage was transferred to the employee under a cultural recognition order. This clause also amends section 62(1) to provide that the limit applies unless an extension is granted, providing the extension does not extend the cultural parent leave to beyond 104 weeks after the child parentage was transferred to an employee under a cultural recognition order.

*Clause 142* inserts a new section 66A to establish notice requirements that apply to an employee who wishes to take cultural parent leave.

*Clause 143* amends section 71(1) to provide that on becoming aware that an employee is a cultural parent who is applying for a cultural recognition order, the employer must provide the employee with advice on the employee's parental leave entitlements and notice obligations.

*Clause 144* amends section 78 to provide for the automatic cancellation of cultural parent leave in certain circumstances.

Subclause (1) amends section 78(1) to provide that cultural parental leave applied for but not started is automatically cancelled if a cultural recognition order transferring the parentage of a child to the employee is not made.

Subclause (2) amends section 78(2) to provide that if while an employee is on cultural parent leave a cultural recognition order transferring the parentage of a child to the employee is discharged, the employee is entitled to resume work at a time nominated by the employer.

*Clause 145* amends section 80(1)(c) to provide that an employee on cultural parent leave may return to work for a 'keeping in touch day'.

*Clause 146* inserts a new section 87A which entitles an employee applying for a cultural recognition order to take up to 2 days unpaid leave, to prepare material and give the commissioner information associated with an application for a cultural recognition order.

*Clause 147* amends section 91.

Subclause (1) amends section 91(1) to provide that an employee must not dismiss an employee where the employee is a cultural parent who has applied for a cultural recognition order or where the child who is the subject of a cultural recognition order has started residing with the employee under the order.

Subclause (2) amends section 91(1)(ca) and (d) to renumber as (d) and (e).

*Clause 148* amends the definitions in the dictionary in Schedule 5 to include definitions for *cultural parent*, *cultural parent leave*, *cultural recognition order*, *long cultural parent leave* and *short cultural parent leave*.

## **Division 10 Amendment of Integrity Act 2009**

*Clause 149* states that this division amends the *Integrity Act 2009*.

*Clause 150* amends Schedule 1 of the *Integrity Act 2009* to include the commissioner as a statutory officer holder for the purposes of section 72C of the *Integrity Act 2009*. This amendment will provide that the commissioner is required to give the integrity commissioner and the responsible Minister a declaration of interests.

## **Division 11 Amendment of Payroll Tax Act 1971**

*Clause 151* states that this division amends the *Payroll Tax Act 1971*.

*Clause 152* amends section 14A of the *Payroll Tax Act 1971* to also provide an exemption from payroll tax in respect of paid cultural parent leave.

Amendments under subclauses (1) and (2) provide that wages paid to an employee during cultural parent leave are exempt from payroll tax, similar to adoption leave.

Amendments under subclauses (3), (4), and (5) provide that it is immaterial whether the cultural parent leave is taken either before or after the cultural recognition order is made and is limited to 14 weeks of leave for each made order. An employer wishing to claim an exemption for paid cultural parent leave must obtain certain records and keep them for a period of at least 5 years, as required by the *Taxation Administration Act 2001*.

Subclause (6) inserts the definitions of *cultural parent*, *cultural parent leave* and *cultural recognition order*.

## **Division 12 Amendment of Powers of Attorney Act 1998**

*Clause 153* states that this division amends the *Powers of Attorney Act 1998*.

*Clause 154* amends Schedule 2, Part 2, Item 3 of the *Powers of Attorney Act 1998* which defines a *special personal matter*. The amendment provides that a special personal matter also includes a matter relating to consenting to, or applying for, an application for a cultural recognition order or applying for a discharge of a cultural recognition order under this Bill.

### **Division 13 Amendment of Public Service Act 2008**

*Clause 155* states that this division amends the *Public Service Act 2006*.

*Clause 156* amends Schedule 1 of the *Public Service Act 2006* to include the office of the commissioner as a public service office.

### **Division 14 Amendment of Right to Information Act 2009**

*Clause 157* states that this division amends the *Right to Information Act 2009*.

*Clause 158* inserts an exemption under Schedule 3 of the *Right to Information Act 2009*, which sets out exempt information - types of information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest. The amendment provides that confidential information under the Bill is exempt information, unless in relation to an access application, if it is only personal information of the applicant.

### **Schedule 1 Dictionary**

Schedule 1 defines particular words used in the Bill.