Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

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Mr Aaron Harper MP
Chair
Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Parliament House
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BRISBANE QLD 4000

By email:

health@parliament.qld.gov.au

31st July 2020

RE: MERIBA OMASKER KAZIW KAZIPA (TORRES STRAIT ISLANDER TRADITIONAL CHILD REARING PRACTICE) BILL 2020

Dear Mr Harper,

We welcome and appreciate the opportunity to make a submission in relation to the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020.*

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education,

and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

The ground breaking nature of the Bill

The Bill is the first of its kind and on the passage of this Bill, Queensland will become the only Australian jurisdiction to have legislation to legally recognise *Ailan Kastom* child rearing practices. We welcome the introduction of the bill as it addresses the many complex legal difficulties faced by those raised by customary parents. The passage of this bill will allow for the regaining of legal status and agency for those previously left in a legal limbo.

We note that the legislation only applies to births in Queensland and expect in future that other jurisdictions will create machinery to assist Torres Strait Islanders who were born outside of Queensland and raised by customary parents in accordance with *Ailan Kastom* to achieve similar recognition.

The arrival of this bill was foreshadowed in the Family Court in 2012. As noted by Watts J in *Beck v Whitby* [2012] FamCA 129 at [75]:

> *The Federal Government has power to amend the Family Law Act to enable a court to declare persons in the positions of the Applicants in this case as parents. Alternatively, the States have power to amend State legislation to allow full recognition of traditional Torres Strait Islander child rearing practices. Maybe one day the law will be changed.*

This day has arrived.

The need for this Bill encompasses all ages from the very young to the very old

The current lack of formal recognition of traditional adoptions and child rearing practices has raised a number of legal issues for our Torres Strait Islander clients, mostly to do with civil and family law. The issues arising out of traditional adoption are the most prevalent issues that our lawyers address for clients, especially our Thursday Island and Bamaga offices. The present legal solutions available to our clients are only partial solutions, and are costly and time-consuming to achieve. There is presently considerable and unnecessary inequity and disadvantage visited upon those whose family arrangements arise from traditional adoption, and that disadvantage is widespread through the community.

The receiving parent has faced significant practical and legal hurdles to organise medical treatment and to enrol the child at school, as well as accessing parental leave and child support or benefit payments to care for the child. The receiving parent also had significant obstacles for interstate registration of Birth Certificates and obtaining passports and visas for the child. Similarly, the child has experienced a number of hurdles affecting their ability to obtain identification in their name, to obtain licences and permits in their name, to succeed upon intestacy, and to have a status to care for and make arrangements for an elderly parent.

As can be seen from that list, lack of legal recognition of traditional child rearing practices had impacted almost every aspect of the lives of the traditionally adopted.

The Legal Model Chosen for the Reforms

We support the model for recognition as outlined in the Bill, that is affording recognition to the customary adoption coupled with requiring the consent of the giving parent(s). The additional requirement of consent of the giving parents means that birth parents can wait until they reach the age of majority before making any final decisions.

From our experience of assisting clients of Torres Strait Islander descent, most of the legal problems arising for the traditionally adopted children and the receiving parents could be traced back to the lack of a Birth Certificate. We therefore welcome the changes which now allow the amendment of the Birth Certificate to record the receiving parents as parents of the child, and the status of the child as a child of the parents. We also welcome the explicit

provisions of section 66 and also section 67 which remove any doubt in relation to the status of the child and the receiving parents.

A comment on traditional adoption and the Best Interests of the Child

We are aware that there is natural concern to ensure the best interests of the child are met. The Best Interests of the Child is an international standard expressed in the United Nations *Convention on the Rights of the Child*. Article 3 of the UN *Convention on the Rights of the Child* requires member states to observe the "best interests of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies." It is recognised that the best interests of the child include both long-term concerns and short-term concerns and they include the consideration of the child's physical and emotional wellbeing and their health, financial, educational, moral, cultural and religious interests.

Being an international standard, the Best Interests of the Child are not confined to just the family structures of nuclear families but also encompass the many and varied family structures present in the member states of the United Nations system. The hazard, as has been noted by Canadian practitioners working in the area of traditional adoption is that assumptions and generalizations of "what is in the best interest of the child" from a nuclear family do not necessarily translate to what is in the best interests of the child with respect to collective family rearing practices.[1]

This was noted in the General Comments of the United Nations Committee on the Rights of the Child in 2009,[2]

> *However, the term "children" implies that the right to have their best interests duly considered applies to children not only as individuals, but also in general or as a group. Accordingly, States have the obligation to assess and take as a primary consideration the best interests of children as a group or in general in all actions concerning them.*

[1] See for example Ontario Centre of Excellence for Child and Youth Mental Health, *Evidence In-Sight request summary: Culturally appropriate adoption practices for First Nations children and Youth*, (2014) available at http://www.excellenceforchildandyouth.ca/. See also the discussion in the report from the Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC Report 31, available at https://www.alrc.gov.au/publications/report-31.

[2] United Nations Committee on the Rights of the Child, General Comment No 14, para 23 (2009)

This is particularly evident for all implementation measures. The Committee underlines that the child's best interests is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights."

For Torres Strait Islander children decisions therefore have to consider not their just their physical safety but their cultural safety including maintenance of their cultural identity and connection, recognising that decisions made in the present have long lasting impacts into the future.

It should be recognised that central to the practice of Torres Strait Islander traditional adoption is the consideration of how best the child may be raised and the appropriate receiving parents to raise the child.

Consent – Temporary arrangements prior to attainment of majority by the giving parent

We support that full legal recognition should only occur after the baby is born and only after the full and informed consent of the giving and receiving parents can be obtained; in other words, after all have attained the age of majority.

We appreciate some traditional adoptions do occur within the Torres Strait Islander community when the giving parent is under 18 or arrangements are made while the child is in utero. We understand that in custom if the giving parent is under the age of 18 and is unable to rear the child the maternal grandmother or in the absence of the maternal grandmother, an immediate family member may speak on the parent's behalf and initiate discussions about arrangements for the child with the final decision however not being made without the consent of the parent.

The implication of this for underage parents, is that the traditional adoption would occur and be in place for a few years (for example two years if the parents are sixteen years old) until the parents gain majority and are able to engage in the formal consent process. In those circumstances it would be preferable to have some temporary level of recognition of this arrangement before full legal recognition, for example to enable the receiving parents to authorise medical treatment or receive payments for the child among other things.

Failing that, where medical treatment is concerned, unless the giving parents continue to sign the relevant consent forms, it would be necessary for the receiving parents to obtain Family Law Court Parenting Orders in order to be able to authorise medical treatment for the child.

Consent - Dispensation with consent by a birth parent by the Court

There are a number of circumstances where it is not desirable or practical to obtain the consent of the other the birth parent, such as where the giving mother is unsure of the identify of or cannot locate the biological father of the child, and where relevant, all attempts to locate the father have been made and documented, or else where the safety of the mother is endangered. We support Section 52 and the accompanying provisions in Part 5 Division 3 of the Act that the requirement for consent may be dispensed with by the exercise of discretion by the Court.

Consent – Broadening the Consent Process to Reflect Traditional Arrangements on Separation or Death of the Primary Receiving Parent

in a traditional adoption scenario when a child is given to a specific person such as a brother, sister, aunt, or uncle of a giving parent ('the primary receiving parent'), if that person is in a relationship and subsequently separates from their partner, under the law as it now stands, the child may end up going into the care of that person's partner or spouse rather than remaining with the primary receiving parent. Anecdotally we are aware of instances where third parties have obtained "live with" orders for the child resulting in understandable distress to the giving parent, family and primary receiving parent.

That is to be contrasted with what we understand is the way that custom operates within some communities. The custom is that, in the event of a separation, the giving parents' family discusses where the child would go, for example both parties would nominate whom the child should go to, such as having the child revert to the giving parent or immediate family.

Section 32 makes it a precondition that one parent is a Torres Strait Islander in order that an application can be made for a recognition order. As the provisions now stand, following recognition of the traditional adoption under custom, the traditional rules dealing with death or separation of the receiving parent no longer have any operation. Thus for example for a receiving couple where one partner is a Torres Strait Islander and therefore the primary

receiving parent and the other partner is not a Torres Strait Islander, potentially on separation or death, the care of the child could pass solely to the non-indigenous parent.

In our view it is important to incorporate these traditional arrangements with the parties agreeing at the time of formal consent to the adoption how the care of the child should be addressed in the event of separation, death or incapacity of the primary receiving parent. One solution would be to broaden the consent process to encourage great specificity by the giving and receiving parents in setting out clearly the living arrangements they want for the child, which would reduce the likelihood of future disputes arising and recourse to the family law courts for Parenting Orders to resolve those disputes with its attendant risk of culturally unsafe scenarios for the child.

Recognition of the Rules of Ailan Kastom and a single cultural parent

It is not clear from the wording of Part 4 as to whether the Bill as presently drafted allows for a single cultural parent to make an application for a cultural recognition order. The obvious example would be the widowed mother raising her teenage children who receives a baby from a teenage pregnancy and effectively raises her grandchild as her own or a person who is single at the time of receiving the child The complex set of rules surrounding *Ailan Kastom* take into account the parenting capacity of the receiving cultural parent. Part of the cultural parent's statement made under section 36 (1) must include that the cultural adoption was done in accordance with *Ailan Kastom* and why a cultural recognition order would be in the best interests of the child. In our view, this would offer sufficient safeguards for a child being culturally adopted by a single parent.

Definition of Ailan Kastom

It is noted that whilst the meaning of 'Ailan Kastom child rearing practice' is set out, Ailan Kastom itself is not defined which we take is intended given the great diversity in traditional practices across the islands. As to whether this would pose any difficulty in the implementation of the proposed system remains to be seen.

The Commissioner's powers and applicant cultural parents

Section 22a states the Commissioner's functions include independently considering and deciding each application for a cultural recognition order. The Commissioner is obliged to act

in accordance with the main principle of the Act in performing such functions (section 23), with the main principal as set out at section 6 being the best interests and well-being of the subject of an application for a cultural recognition order subject to the provisions of set out at section 6 (2). Notwithstanding the provision for 'recognising the birth parents' assessment of the suitability of the cultural parents' therein there is concern with regard to the powers of the Commissioner to review the cultural parent or parents' criminal records given the absence of types of considerations to be applied, that such could turn into a vetting system which might result in a child being removed or separated from a cultural parent for reasons of historic and low level offending.

Expertise - Appropriate Qualifications of the Commissioner (s11), Appointed Person (s19), and Acting Commissioner (s21), Review Officer (s61)

Sections 11, 19, 21 and 61 all refer to appointments where the Minister is satisfied that the person is appropriately qualified. Torres Strait Islanders are divided linguistically into several language groups, with Meriam Mir spoken in the Eastern Torres Strait, Kala Lagaw Ya spoken in the Central and Western Torres Strait, and a dialect of Kala Lagaw Ya called Kalaw Kawaw Ya spoken in the top Western communities of Saibai, Boigu and Dauan, and Kriol is spoken broadly. There is a great deal of diversity in traditional practices across the islands. We would invite greater definition by regulation after consultation with the affected groups how the Minister would be satisfied by the appropriateness of the qualifications of the appointments especially with regard to substantial cultural knowledge of the complex cultural rules surrounding the practices of traditional child rearing.

Expertise - Section 87 Expert help

Section 87 (1) provides for the appointment of a person with special knowledge or a special skill to help the court. Under Section 87 (2) The Court may act to appoint such a person under its own initiative or on the application of a party to the proceeding.

The use of single experts by Courts is not without its critics, the most obvious being that where there is room for genuine differences of opinion on matters of importance to the controversy at hand. Although the consent of all parties to the appointment of an expert is ideal, differences of opinion could arise. When there is a basis for challenging an expert witness then there should also be a mechanism under which the credentials of such an expert may be

challenged by a party to the proceedings. There should also be a power for the Court to appoint another expert on its own initiative or on application by a party to appoint another expert if there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the issue; or the other expert knows of matters, not known by the first expert, that are or may be material to deciding the issue; or there are other special circumstances.

Costs of Proceedings and Access to Court Transcript

On a more practical note, the process is a very document-heavy process. It is not clear from the Bill as drafted whether parties are required to pay filing fees and expenses at the initial stages or upon the commencement of court proceedings. Given the remoteness of most of the applicants and the amount of documentation that they will need to muster and the fundamental impact that proceedings have upon them, and the heavy expense of paying any fees or expenses including paying for a court transcript any legal fees if lawyers are involved, is bound to place a heavy financial burden on the parties possibly resulting in the parties not engaging in the process. We would ask that no fees or expenses be sought from the parties and that access to the relevant court transcripts be made available for free.

The Discharge Order and Appeal Provisions – Delay due to Cultural Reasons

We support the provisions which allow for a Discharge Order and an appeals process. We note the practical incorporation of the court rules in section 82. We would ask that where a party has to explain delay to the Court (for example, the child's biological father who was not a party at the time the custom was recognised) that the test for what constitutes satisfactory reasons for the delay should be broad enough to encompass cultural reasons for the delay.

Cultural Safety and Access to Court Records

Section 98 (access to court records) provides that the Court may refuse to give access to all or part of the record of proceedings. While the reasons are not limited under section 98(3), the two grounds for objecting to release are very limited and the provision seems to favour release. In our view it should also contain a ground that release is not in the best interests of the child. It is a common practice that a child raised under cultural adoption is not told of that fact until they are old enough to understand.

CONCLUSION

We thank you for the opportunity to provide feedback on this very important Bill and commend it to the Committee.

Yours faithfully,

Shane Duffy
Chief Executive Officer