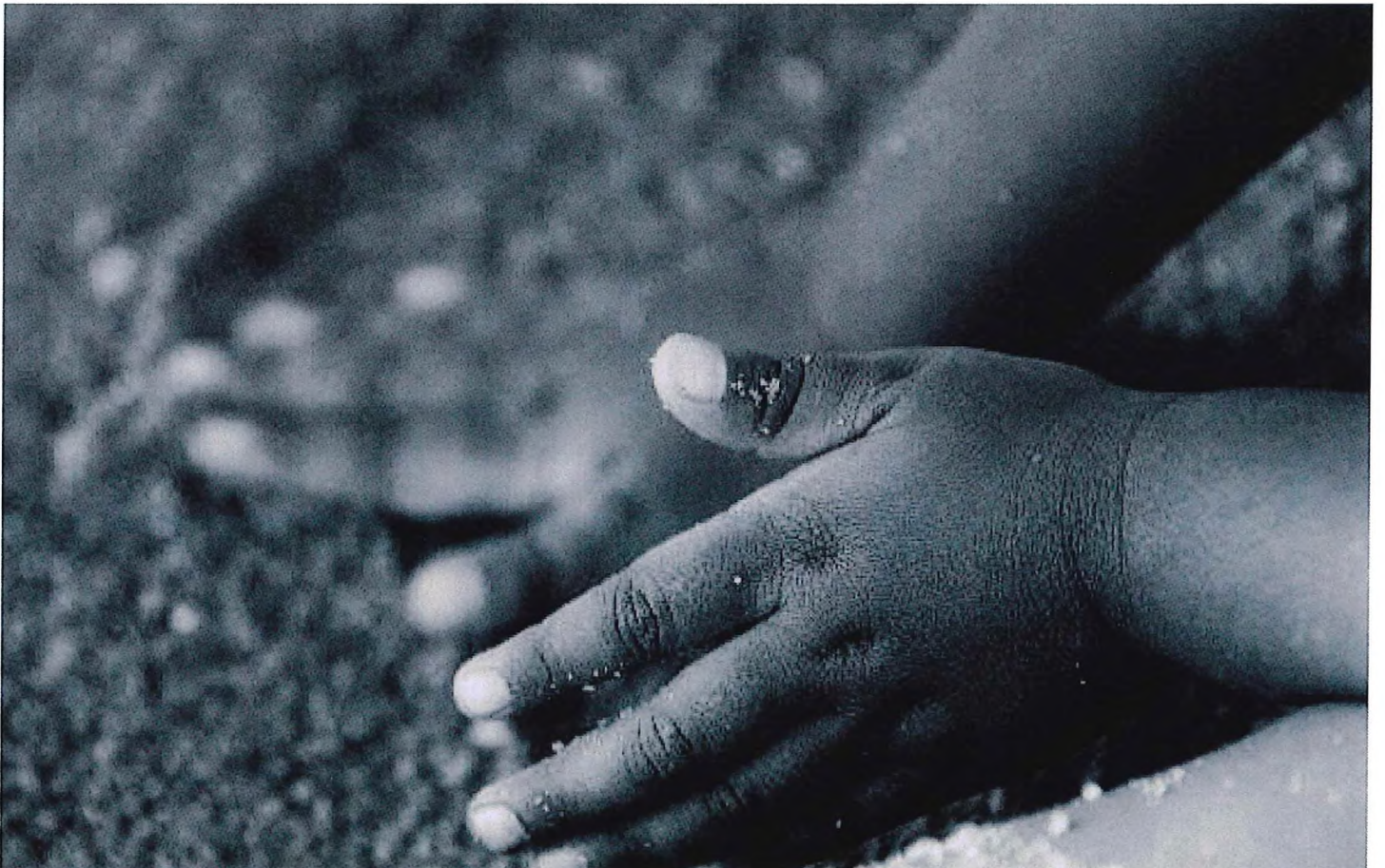


**2023 Review of the *Meriba Omasker  
Kaziw Kazipa (Torres Strait Islander  
Traditional Child Rearing Practice)  
Act 2020***

**December 2023**



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## Glossary

Term	Definition
ATSILS	Aboriginal and Torres Strait Islander Legal Service
CCQ	Childrens Court of Queensland
Child Safety	means the Department of Children, Youth Justice and Multicultural Affairs.
Commissioner	means the person appointed as Commissioner (Meriba Omasker Kaziw Kazipa) under section 11 of the MOKK Act.
Court	means the Children's Court of Queensland or the Court of Appeal with the powers under section 96 of the MOKK Act, as the case may be.
CRO	Cultural Recognition Order
Department	means the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts.
Explanatory Notes	means the Explanatory Notes to the <i>Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020</i> .
FCFCOA	Federal Circuit and Family Court of Australia
Financial Overview	means the draft Financial Overview drafted by Malu Pty Ltd (engaged by Tagai Management Consultants) received by Jaramer Legal on 21 November 2023.
Guidelines	means the Guidelines in relation to the <i>Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020</i> made by the Commissioner dated September 2021.
Intervention with Parental Agreement	in accordance with the <i>Child Protection Act 1999</i> means an agreement between the parents of a child and Child Safety in circumstances where: (a) no assessment order is in force granting custody of the child to the chief executive of Child Safety and the chief executive reasonably suspects that the child is in need of protection and satisfied as to the necessity to provide protection to the child while an investigation is carried out; or (b) no child protection order is in force granting custody or guardianship of the child to another person and the chief executive of Child Safety is satisfied that the child is in need of protection and ongoing help under the <i>Child Protection Act 1999</i> .
Issues Register	means the issues register as described in Part 1 – Overview, 1 About this review.
LAQ	Legal Aid Queensland
Minister	means the Minister for Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts
MOIMS	Meriba Omasker Information Management System
MOKK Act	means the <i>Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020</i> .
Program Support Office	Meriba Omasker Kaziw Kazipa Program Support Office
Office	means the Office of the Commissioner (Meriba Omasker Kaziw Kazipa) as established under section 26 of the MOKK Act.

Program Support Office	means the Meriba Omasker Kaziw Kazipa Program Support Office.
QIFVLS	Queensland Indigenous Family Violence Legal Service
Registrar	means the Registrar-General of Births, Deaths and Marriages as appointed under section 34 of the <i>Births, Deaths and Marriages Registration Act 2003</i> (Qld).
Regulation	means the <i>Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Regulation 2021</i> .
Report	means this report as described in Part 1 – Overview, 1 About this review.
Review	means this legislative review as set out in Part 1 – Overview, 1 About this review.
State	means the Queensland Government.

## Executive Summary

The main purpose of this Review of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020 (MOKK Act)* is to assist the Minister in her review of the operation and efficacy of the MOKK Act, which is required to be conducted within 2 years after the MOKK Act's commencement. Following this Review, the Minister must table in the Legislative Assembly a report on the outcome of the Review as soon as practicable after the Review is completed. That said, this Review process is scheduled for completion by December 2023.

The MOKK Act came into force on 1 July 2021, and the acceptance of cultural recognition order applications officially commenced in September 2021. Hence, the MOKK Act is still in its early stages of implementation, and we envisage that this Review will provide an appropriate indicator for the operation and efficacy of the MOKK Act, during this time.

The main purpose of the MOKK Act is 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.

To achieve its purpose, the MOKK Act sets out a framework to give legal effect to Ailan Kastom child rearing practice. Achieving legal recognition under the MOKK Act is based on three key criteria:

- (a) consent of the birth parents and cultural parents for legal recognition;
- (b) 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
- (c) a decision for a cultural recognition order must be made for the wellbeing and best interests of the child.

The MOKK Act seeks to achieve the above criteria through a model that is readily accessible and sensitive to the private nature of the practice. The outcome is a cultural recognition order that will result in a permanent transfer of parentage from the birth parents to the cultural parents under the laws of Queensland. The MOKK Act also establishes a new statutory role of a Commissioner to consider and decide these applications.

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

On 8 September 2020, in a speech by Cynthia Lui MP (Member for Cook), it was expressed that:

*The legal recognition of this ancient Torres Strait Islander practice is an important step forward in the Queensland government's journey to a reframed relationship with First Nation peoples. It acknowledges the strength of Torres Strait Islander culture and promotes the right of Torres Strait Islanders to enjoy, maintain, control, protect and develop their kinship ties under the Human Rights Act 2019 while still ensuring the protection of children and in their best interests.*

Tagai Management Consultants was engaged by the Department to conduct the review of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* in accordance with the Terms of Reference.

To ensure Torres Strait Islander cultural appropriate delivery Tagai Management Consultants created a project team consisting of Indigenous businesses owned by Torres Strait Islander business owners with traditional connection to the Torres Strait.

Although the MOKK Act appears to be working well in achieving its purpose, this Review has identified room for enhancing and improving aspects of the MOKK Act. Generally, recommendations under this Review refer to:

- (a) the operation and the status of the Office and the Commissioner's jurisdiction;

- (b) providing greater integrity and efficacy of certain processes;
- (c) the appropriateness of court processes and costs;
- (d) definitions to provide greater certainty;
- (e) conscious consideration of the various Ailan Kastom child rearing practices into the MOKK Act and office service delivery;
- (f) the role and responsibilities of the Meriba Omasker Kaziw Kazipa Advisory group;
- (g) the importance of maturing key performance indicators and evidence based data;
- (h) how the MOKK Act applies to individuals including deceased persons; and
- (i) how the MOKK Act integrates with and applies other legislative instruments.

In the recent 2022 – 2023 Annual Report for the Office of the Commissioner - Meriba Omasker Kaziw Kazipa, Aunty Ivy Trevallion, who is a member and President of the Kupai Omasker Working Party had expressed some concerns in relation to the MOKK Act:

*Over two years has passed since the Act's adoption and whilst I finally see some Torres Strait Islander families benefiting from the legislation, I also see many other families and their children not, because they are presently not eligible. These families and their child should not miss out on obtaining legal recognition of their Ailan Kastom. If the legislation is not meeting the needs of these families, then it must change - Western laws must accommodate Torres Strait Islander laws, not the other way around.*

It is hoped that this Review and proposed Recommendations will assist in enhancing and strengthening the operation and efficacy of the MOKK Act, ensuring it achieves its stated purpose and further alleviating the concerns of the various stakeholders engaged for the purpose of this Review, including those views expressed by Aunty Ivy, above.

### **Acknowledgements**

Tagai Management Consultants acknowledges that Aboriginal and Torres Strait Islander people are the first storytellers of this land and traditional owners of country on which we now live and work. we recognise their continuing connection to lands, waters, communities and cultures. we pay our respects to Aboriginal and Torres Strait Islander cultures, and to elders past and present.

Tagai Management Consultants thanks members of the community as well as organisations and government agencies who have provided data and other information for use in this review.

We would particularly like to thank the commissioner Meriba Omasker Kaziw Kazipa, MOKK advisory group, Program Support Office staff, Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts regional directors and staff, key partner organisations (QIFVLS, LAQ, and ATSILS), FCFOA, CCQ and Aboriginal and Torres Strait Islander people and organisations, who generously shared their stories and insights for the review purposes.

## 1 List of Recommendations

No.	Recommendations
<b>Torres Strait Islander Culture and Practice (Stakeholder Consultation)</b>	
1.	Translate the Meriba Omasker Kaziw Kazipa Act and the administration documents into English, Yumplatok, Meriam Mir and Kala Lagaw Ya which are the four main languages spoken by Torres Strait Islander peoples'.
2.	The MOKK Act should capture individual child-rearing practices of each Torres Strait Islander tribe/clan group.
<b>Administration (Stakeholder Consultation)</b>	
3.	Review the CRO application cost structure and associated criteria.
4.	Explore creating additional Commissioner positions to mitigate service continuity risks (e.g. illness, leave, etc) and provide adequate statewide service coverage.
5.	Continue to track the additional services provided to the community by the Program Support Office.
6.	Simplify the legislation to include simpler forms and format.
7.	Review the Cultural Support Officer cultural competency training package to ensure it captures the various Ailan Kastom Child Rearing Practice protocols.
8.	Review current community education strategy.
9.	Assist families in the process of acknowledgement and entering name of cultural parents, not their biological parents.
10.	Review the Meriba Omasker Information Management System (MOIMS) in order to create improved data integrity and ensure its fit for purpose.
11.	Increase engagement and promotion with the community and families to provide more information regarding the legislation and the services.
12.	Create initiatives for elders to share cultural knowledge that supports the MOKK Act legislation.
13.	Review the Program Support Office staff training, human resources, systems, process review in order to further mature the strategic and operational functions of the Program Support Office.
14.	Explore employing more CSOs to be situated in Southeast Queensland and Central Queensland to ensure adequate statewide service coverage.
15.	Increase in staff and funding for outreach and communication portals.
16.	Program Support Office staff to be trained properly in cultural norms and understand the sensitivity of the process when engaging or providing information/information sessions to the community or families.
17.	Formalise partnership arrangements with suitable organisations who can provide other avenues of support and entry into the system (e.g., CJG's community legal centres, etc.)
18.	Program Support Office to not use jargon – e.g., Program Support Office staff when providing information to families and communities.
19.	The Program Support Office becomes a separate function under the direction of the Commissioner in accordance with the MOKK Act.
<b>Legislation (Stakeholder Consultation)</b>	
20.	Better processes for dispensations for consent.
21.	Review the CRO forms in order to create a simplified version that is user friendly.
22.	Consideration of the different Torres Strait Islander traditional adoption practices and laws across the tribal groups.

No.	Recommendations
23.	For the legislation to be inclusive of all age groups, not just for children.
24.	Include a cultural framework on how the MOKK Act links to other cultural laws.
25.	Ensure that the child's story is recorded and kept as part of the birth certificate process.
26.	Consideration of the different Torres Strait Islander traditional adoption practices and laws across the tribal groups
27.	For the legislation to be inclusive of all age groups, not just for children
28.	Include a cultural framework on how the MOKK Act links to other cultural laws
<b>Meriba Omasker Kaziw Kazipa Advisory Group</b>	
29.	Review the Meriba Omasker Kaziw Kazipa Advisory Group terms of reference, roles/responsibilities and structure.
30.	Explore establishing the Meriba Omasker Kaziw Kazipa Advisory Group as a formal cultural administration support function to the Office of the Commissioner Meriba Omasker Kaziw Kazipa.
<b>Legislative Review</b>	
31.	<p>It is recommended that a requirement be included in the MOKK Act for the recruitment and vetting of candidates for the role of Commissioner to ensure they have the necessary level of knowledge and understanding of:</p> <ol style="list-style-type: none"> <li>the Ailan Kastom child rearing practice, as generally applicable under Torres Strait Islander customary law; and/or</li> <li>the Ailan Kastom child rearing practice, as applicable in the community or region in question under the relevant application.</li> </ol> <p>Under this recommendation and given the powers of the Minister under the MOKK Act, the Minister should seek the assistance of the Kupai Omasker Working Party or a similar cultural authority to ensure that such candidate has the requisite knowledge and understanding of the Ailan Kastom child rearing practice.</p>
32.	<p>It is recommended that the Commissioner (including any decision maker acting in the stead of the Commissioner) be permitted to appoint an 'informed person/s' for the purpose of assisting the Commissioner in deciding upon an application, the Kupai Omasker Working Party or a Torres Strait Islander having the knowledge and understanding of the Ailan Kastom child rearing practice in the community or region in question under the relevant application, where the Commissioner (or any decision maker acting in the stead of the Commissioner) does not possess sufficient cultural knowledge and understanding of the practice in the relevant community or region. An appointment may require protocols be implemented to ensure that any advice sought maintains the level of confidentiality contemplated by the MOKK Act, as well as ensuring due diligence is undertaken to avoid any conflicts.</p>
33.	<p>Consider whether there should be a requirement for the following decision makers to be a Torres Strait Islander:</p> <ol style="list-style-type: none"> <li>an 'appointed person';</li> <li>an 'acting commissioner'; and</li> <li>a 'review officer'.</li> </ol>
34.	<p>It is recommended that the State reconsider whether the Office should be a statutory body with the necessary capability to control funds as:</p> <ol style="list-style-type: none"> <li>this will likely resolve the issues in relation to the staffing of the officers of the Office; and</li> <li>by doing so may allow the Office to maintain the efficacy of its sole function, as the discretionary support from the Department would be ancillary and not necessary to its operational needs.</li> </ol>

No.	Recommendations
35.	<p>It is recommended that the State:</p> <ol style="list-style-type: none"> <li>a. considers the position of the Program Support Office, and amendments be made to the MOKK Act to clarify whether it forms part of the Office or that of the Department; and</li> <li>b. considers the implementation of a transitional plan for the current organisational structure of the Program Support Office, so as to align the Program Support Office with the Office and with the provisions of the MOKK Act, especially as they relate to the recognition of the Commissioner's powers and functions over and in relation to the Office and the Officers. Such restructure may include the Director within the Program Support Office reporting directly to the Commissioner instead of the Executive Director of the Department - streamlining the structure and operations of the Office and the Program Support Office, as required by the MOKK Act.</li> </ol> <p>A Memorandum of Understanding may be the appropriate vehicle for the operational aspects of this recommendation 5.</p>
36.	<p>Review the MOKK Act's eligibility and criteria requirements under section 32 of the MOKK Act to establish who may initiate an application for a cultural recognition order. From this it may be necessary to provide a clear definition as to who any additional applicants may be.</p>
37.	<p>In addition to recommendations 13 and 14 below and based upon stakeholder feedback during this Review, consideration should be made as to whether the Commissioner should be empowered to request a copy of a child's history from Child Safety, but also more generally the parties to the application.</p>
38.	<p>Review the discretion to dispense with consent where the Court is satisfied there are special circumstances under section 52(d) of the MOKK Act, including whether 'special circumstances' should be defined to provide clarity to the Court around the issue.</p> <p>Additionally, there may be further scope, in assisting an applicant, to provide what supporting documentation would assist their application for dispensation.</p>
39.	<p>There should be an amendment to provide proof of death certificates for birth parents or cultural parents in the application process.</p>
40.	<p>Seek clarification from the Office of the Commissioner and the Registrar as to whether applications may be considered for deceased children. The MOKK Act may be amended accordingly.</p>
41.	<p>Given feedback from various stakeholders during this Review, it is recommended that the State consider undertaking targeted consultations with key stakeholders as to reoccurring issues surrounding parent confidentiality and sacred and secret information which are problematic when considering adult applicants. Further, the State may consider seeking advice from Crown Law to identify necessary amendments to the MOKK Act and other relevant legislation to address this concern. Amendments to the MOKK Act and other relevant legislation may then be implemented to overcome such concerns.</p>
42.	<p>It is recommended that the definition of 'informed person' in Schedule 1 of the MOKK Act is reviewed to consider whether an informed person should be a Torres Strait Islander person.</p>
43.	<p>Review section 45 and 46 of the MOKK Act to clarify how the Commissioner will proceed with an application when a criminal history report is not provided.</p>
44.	<p>Review section 45 of the MOKK Act to expand the request for criminal history reports to include domestic violence history reports.</p>
45.	<p>It is recommended that section 55 of the MOKK Act be reviewed to introduce a positive duty to notify the Commissioner when an application is made to discharge a dispensation order.</p>
46.	<p>It is recommended that the Dictionary in Schedule 1 be expanded to include a clear definition for a 'party' for the purposes of cultural recognition orders under section 58, where the subject is a child.</p>
47.	<p>It is recommended that a joint review between the Office of the Commissioner and Births Deaths and Marriages be conducted to assess the feasibility of an amendment to the MOKK</p>

No.	Recommendations
	Act (and possibly the <i>Births Deaths and Marriages Registration Act 2003</i> ) which streamlines processes to register and document legal and cultural identities as well as relevant family members such as siblings.
48.	Given the sensitivity of documents or information requested under section 64(2), it is recommended that an amendment to section 5 of the Regulation be made to ensure that such a request is signed in the presence of an 'authorised witness', as defined under the Regulation.
49.	It is recommended that a review be conducted of the application of sections 61A and 66A of the <i>Industrial Relations Act 2016</i> to understand whether further amendments to the <i>Industrial Relations Act 2016</i> are required to clarify the point where the right to parental leave is activated.
50.	It is recommended that section 79 of the MOKK Act be amended to provide that the Commissioner will update its Information Management System to reflect the discharge order against the relevant application, and that the Commissioner may take any other action that is appropriate under the circumstances to ensure proper administration of the discharge order.
51.	It is recommended that a new subsection 79(c) be inserted into the MOKK Act to provide for other relevant parties to be given a copy of the certified copy of the discharge order for their references.
52.	It is recommended that section 112 of the MOKK Act be amended to empower the Governor in Council to provide regulation to reduce, waive or refund court fees, similar to that of section 266 of the <i>Justices Act 1886</i> .
53.	It is recommended that a new provision be considered that requires notification to be provided to the Commissioner from either the Court or the appellant (the practicalities of this will need to be considered) when there is an appeal to the court under section 92 of the MOKK Act. This would ensure that there is efficiency of process and that the Commissioner is prepared to take any appropriate action.
54.	It is recommended that a new provision be inserted into the MOKK Act that requires notification to be provided to the Commissioner from either the Court or the appellant (the practicalities of this will need to be considered) when there is a stay of decision. This ensures efficiency of the process and any appropriate action from the Commissioner is considered.
55.	It is recommended that the Minister consider whether it is appropriate to insert an initial complaints process within the MOKK Act that is managed and processed by the Department to assist in resolving an offence against the MOKK Act before it is sent before the Magistrates Court. If so, the complaint process should include how and where the complaint is to be lodged, and the criteria for which the matter is to be decided.
56.	It is recommended that, section 100(1) of the MOKK Act is amended to provide references to the <i>Justices Act 1886</i> to ensure that complainants are aware of the relevant legislative instrument (and therefore processes) that apply to an offence under the MOKK Act.
57.	If a complaint for an offence against this MOKK Act is commenced within the Department's internal process, or application made to a Magistrates Court, it is recommended that the Commissioner is notified of the complaint or application so that the Commissioner may take any necessary action, as appropriate.
58.	Given the sensitivity of the restricted information requested under section 103(1) of the MOKK Act, it is recommended that there is an additional requirement for a request under section 6 of the Regulation, to be signed in the presence of an authorised witness, as defined under the Regulation.
59.	It is recommended that section 111(1) of the MOKK Act is reviewed to provide that a further review of the MOKK Act is required within 3 years from the date that any amendments to the MOKK Act are made, but no later than the 5 year mark of the legislation's adoption.
60.	It is recommended that a new definition is inserted into the MOKK Act under Schedule 1 Dictionary that provides that chief executive means 'chief executive' as it is described under section 33(11) of the <i>Acts Interpretation Act 1954</i> (Qld).

No.	Recommendations
61.	It is recommended that a definition of 'discharge of dispensation order' (with a reference to that term in section 55) be inserted into Schedule 1 Dictionary of the MOKK Act.
<b>Cost Benefit Analysis</b>	
62.	As MOIMS was recently established it is recommended that the existing dashboard is broadened to include both financial and non-financial measurements using a balanced scorecard model. Adding the following key performance indicators in these three (3) areas (Learning and Growth, Customer and Financial Measures) would allow the Office to better track their success and to understand the impact that the MOKK is having upon the community. This approach would predicate a holistic foundational evaluation methodology for future reviews.
63.	<p>The Department undertake relevant 'enabling legislation' to separate the Office as an independent statutory body like the Family Responsibility Commission, this would provide several advantages from a financial and an organisational perspective:</p> <ul style="list-style-type: none"> <li>• The Commissioner would have clear leadership and decision making responsibilities over the Program Support Office and fulfil the role in accordance with the Act.</li> <li>• It builds community trust and increases customer engagement and CRO applicant activity.</li> <li>• The funding level is more responsive to evolving demand needs for the Office's services from the community.</li> <li>• Establishment of a Program Support Office FTE workforce which provides a robust and consistent service to the community and maturity of the Office partnerships and business operations.</li> <li>• Creates efficiency in operational approval processes and provides flexibility regarding authorising travel or expenditure to assist with the performance of the Act.</li> </ul>
64.	It is recommended the Meriba Omasker Kaziw Kazipa Advisory Group function be reviewed and consideration be given to formalise its role within the Commissioner's office and the Program Support Office.

## 2 Introduction

The *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* is a first of its kind, the Act recognises Torres Strait Islander lore in Western Law and establishes a process for the legal recognition of Torres Strait Islander traditional child rearing practice.

'Meriba Omasker' and 'Kaziw Kazipa' is made up of language terms from Eastern Island language and Top Western Island languages of the Torres Strait and collectively is translated as 'for our children's children'.

Over 30 years of advocating by the Kupai Omasker Working Party, various community consultations, a 2017 Queensland election commitment and the work of the Eminent Persons and many others have led to a process for legal recognition to be established.

The Act recognises Ailan Kastom child rearing practice in which a child's birth and cultural parents agree in accordance with Ailan Kastom that the parental rights and responsibilities for the child are permanently transferred from the birth parents to the cultural parents.

### 2.1 Office of the Commissioner<sup>1</sup>

The Office of the Commissioner is not considered a statutory body for the Financial Accountability Act 2009 or the Statutory Bodies Financial Arrangements Act 1982. The Office of the Commissioner, while independent, is hosted by the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts and supported by a co-located Meriba Omasker Kaziw Kazipa Program Support Office.

The Meriba Omasker Kaziw Kazipa Program Support Office also provides support and information to those considering making an application for a Cultural Recognition Order.

### 2.2 Meriba Omasker Kaziw Kazipa Advisory Group

It is important to pay respects and homage to the efforts of the Kupai Omasker Working Party (**Working Party**) over three decades that led to the introduction in September 2020 of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020*.

The original members of the Working Party, with the exception of Group founder Uncle Steve Mam (deceased), are current members of the official Meriba Omasker Kaziw Kazipa Advisory Group.

### 2.3 Review of the MOKK Act

Section 111 of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (the Act) states that:

- (1) *The Minister must review the operation and efficacy of this Act within 2 years after its commencement.*
- (2) *The Minister must table in the Legislative Assembly a report on the outcome of the review as soon as practicable after the review is completed.*

Tagai Management Consultants was engaged by the Department to conduct the review of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* in accordance with the Terms of Reference.

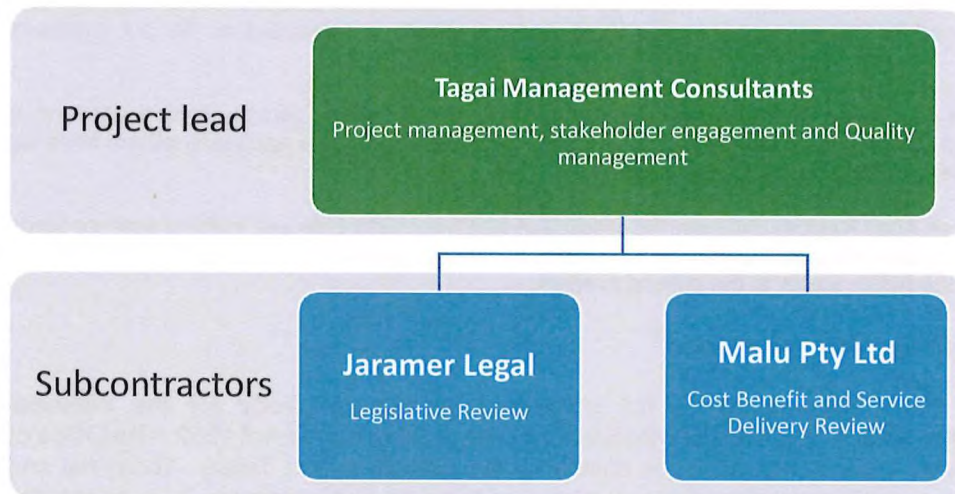
To ensure Torres Strait Islander cultural appropriate delivery Tagai Management Consultants created a project team consisting of Indigenous businesses owned by Torres Strait Islander

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<sup>1</sup> <https://www.ocmokk.qld.gov.au/commissioner/office-commissioner>

business owners with traditional connection to the Torres Strait. The following diagram outlines the project team and their areas of focus for the review which is contained in this report.

### Meriba Omasker Kaziw Kazipa Review Project Team



### 3 Terms of Reference

The primary purpose of the project is to review the operation and efficacy of this Act including:

- Review the present MOKK model of operations;
- Make recommendations for any improvements to the MOKK program delivery;
- Make recommendations of any major policy or legislative issues that are a barrier to the efficacy of the Act; and
- Consider ongoing resourcing requirements and preferred agency for program delivery.

The review also considered the following additional areas:

- The roles and responsibilities of the:
  - Meriba Omasker Kaziw Kazipa Advisory Group;
  - Other Department units (e.g., Regional Offices, Strategic Policy and Legislation, Facilities Management, etc.); and
  - Service providers connected through process or service agreement.
- Audit outcomes of existing Department internal reviews
- Communications Strategy as well as Education and Community Engagement activities
- Identification and recommendation of any policy or legislative issues that are a barrier to the efficacy of the Act within the evolving policy landscape and contemporary Queensland Government policy, including the Local Thriving Communities reform.
- Funding and expenditure requirements to effectively deliver the Meriba Omasker Kaziw Kazipa program and fulfil the requirements of the Act.
- Any other factors or considerations that the consultant considers to be relevant to the assessment of the operation and efficacy of the Act.

## Out of scope

- Drafting of any legislative or policy amendments, identified through the review;
- Direct consultation with MOKK applicants or their families; and
- Implementation of improvement opportunity findings.

## Limitations and Exclusions

- The MOKK Act and its functions have been fully operational for a short period of time.
- Lack of stakeholder awareness and understanding about the Act and the Office and the Program Support Office in community workshops.
- Access to relevant cabinet submissions and relevant government publications/decisions.
- Community workshops participation was very low which minimised the capture of community opinions and feedback.
- There are minimal benchmark documents and data available due to the short period of business operations.
- Inability to gather feedback from CRO applicants due to privacy and confidentiality provisions.
- Due to the MOKK Act privacy and confidentiality provisions past and current CRO applicants were excluded from the review consultation process.

## 4 Review Methodology

The review process adhered to the terms of reference and explored the following qualitative and quantitative data and information sources:

- Cost benefit and resourcing review of the Program Support Office and Office;
- Legislative review of the MOKK Act;
- Meetings with the Meriba Omasker Kaziw Kazipa Advisory Group;
- Individual and group Interviews with MOKK Advisory group members, key partner organisations, Program Support Office staff, community members and the Commissioner;
- Community stakeholder workshops in Townsville, Mackay, Cairns, Waibene and 2 workshops in Brisbane (southside and northside);
- Research and comparative analysis of other First Nation child-rearing and adoption practices and administration.
- A review of relevant documentation provided by the Program Support Office;
- Desktop research of national and international First Nations traditional adoption practices and administration practices; and
- An online survey (SurveyMonkey) distributed via social media channels (Facebook and LinkedIn) and email to the public, community members, Meriba Omasker Kaziw Kazipa Program Support Office staff, Office of the Meriba Omasker Kaziw Kazipa Commissioner, Meriba Omasker Kaziw Kazipa Advisory Group, key partners and any other identified individual or organisations.

### 4.1 Consultation

The review consultation activities were conducted in a culturally appropriate approach to ensure respect and a culturally safe environment for all stakeholders. The approach to communication and consultation included (but not limited to):

- principles to guide our engagement approach;

- a six-step model for conducting engagement activities; and
- recognising that tools and strategies must be fit-for-purpose, and appropriate to the audience on which we are seeking to engage.

#### 4.2 Principles for engagement

Tagai Management Consultants utilised five key principles to guide stakeholder engagement activities for the review. The principles set the standards to create a consistent, open and respectful working relationship.

Each engagement interaction was tailored and was driven by the purpose, level and type of engagement undertaken. It is also important to note that the process operated at the strategic and operational ends of stakeholder engagement activities concurrently with different stakeholders.

When engaging with stakeholders the following principles guided all engagement activities.



#### 4.3 Consultation Findings and Recommendations

The following is a summary of the stakeholder engagement activities:

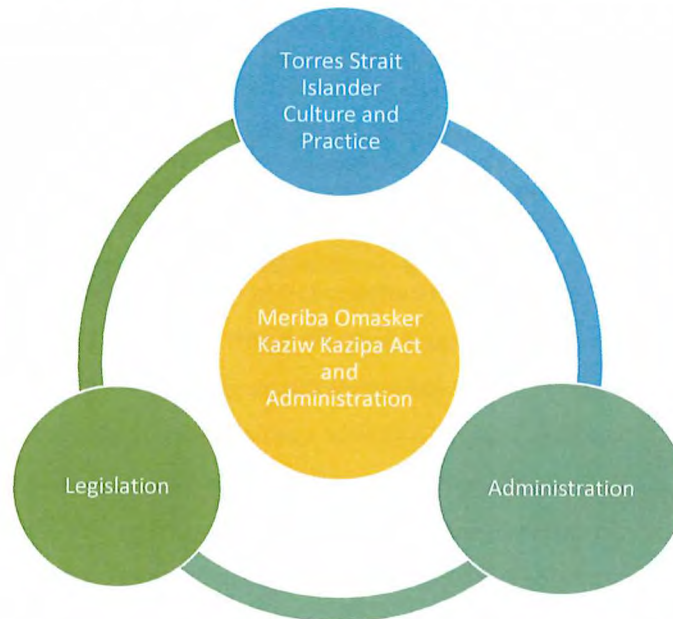
<b>Group meetings</b>	<p>Group feedback meetings were requested by the Meriba Omasker Kaziw Kazipa Advisory Group and the Queensland Indigenous Family Violence Legal Service.</p> <p>The project team met with the Meriba Omasker Kaziw Kazipa Advisory Group face to face on two occasions and conducted a virtual session with leaders of the Queensland Indigenous Family Violence Legal Service.</p>
<b>Individual interviews (face-to-face, phone and virtually)</b>	<p>Individual interviews were conducted with the Meriba Omasker Kaziw Kazipa Advisory group members, key partner organisations, Program Support Office staff, community members and the Commissioner including</p>

	various key stakeholders and community members from across Queensland and Australia.
<b>Community stakeholder workshops and the number of participants</b>	<p>Face to face Workshops were scheduled between the 6<sup>th</sup> of November until the 1<sup>st</sup> of December 2023. The Workshops were focused on key communities where there was a high concentration of Torres Strait Islander families and communities where Cultural Recognition Orders cases had been received or processed.</p> <p>Various advertising mediums were used to let the community know of the Workshops including social media, email, phone calls, radio (4 Meriba Wakai on two occasions) and word of mouth.</p> <p>The project team invited the Meriba Omasker Kaziw Kazipa Advisory Group elders to support Workshops that were being held in their locations. Mr. Francis Tapim supported the Townsville community workshop but no other elders were available to attend any of the other Community Workshops.</p> <p>The following are the communities where the Workshops were conducted and the number of participants that attended the Workshops:</p> <p>Townsville (Venue: Townsville Sports Reserve): 8 attendees</p> <p>Mackay (Venue: Resources Centre of Excellence): 14 attendees</p> <p>Cairns (Venue: DTATSIPCA Cairns Office): 0 attendees</p> <p>Waibene (Venue: Mura Kosker Sorority Inc): 0 attendees</p> <p>Southside Brisbane (Venue: Inala Wangarra): 0 attendees</p> <p>Northside Brisbane (Venue: Brisbane Congress Congregation at Zillmere): 0 attendees</p>
<b>Online survey (SurveyMonkey)</b>	<p>An online survey (SurveyMonkey) was circulated to community members, Program Support Office staff, Office, Meriba Omasker Kaziw Kazipa Advisory Group, key partners and any other individual or organisation. <b>31</b> responses were received, with <b>22</b> completing the survey fully.</p> <p>The online survey overview and link was distributed through social media platforms (Facebook and LinkedIn), emails sent through the Department networks, key stakeholders and to the Meriba Omasker Kaziw Kazipa Advisory group to distribute to their networks and also to complete the survey.</p>

#### 4.4 Consultation – Themes and Findings

The consultation process provided valuable cultural, legislative and operational responses from various stakeholders, leaders, elders and professionals

There were three key themes identified from the analysis of the consultation process: Torres Strait Islander Culture and Practice, Administration and Legislation:



The following are the key themes and findings from the consultation process and the recommendations:

#### Torres Strait Islander Culture and Practice

- The legislative recognition of the preservation of customary role of traditional Torres Strait Islander child rearing practices was celebrated and supported by Indigenous and non-Indigenous stakeholders.
- “English is not the first language for Torres Strait Islander peoples and understanding the paperwork and information required can be confusing for families”. Torres Strait Islander elders and community members shared the importance of translating the Meriba Omasker Kaziw Kazipa Act and the administration documents into English, Yumplatok, Meriam Mir and Kala Lagaw Ya which are the four main languages spoken by Torres Strait Islander people.
- The Act and the Administration “provides a source of connection to family”. It is a formal process that allows Torres Strait Islander children to have confirmation of belonging and “have formal ‘Western’ identification”.
- Ensure that the integrity of the “traditional” Ailan Kastom child rearing process is not lost.
- It was shared strongly the Act was a good starting point for the legislative recognition of the preservation of the customary role of traditional Torres Strait Islander child-rearing practices but, in time the MOKK Act should capture individual child-rearing practices of each Torres Strait Islander tribe/clan group.

#### Recommendations

- Translate the Meriba Omasker Kaziw Kazipa Act and the administration documents into English, Yumplatok, Meriam Mir and Kala Lagaw Ya which are the four main languages spoken by Torres Strait Islander peoples’.

- The MOKK Act should capture individual child-rearing practices of each Torres Strait Islander tribe/clan group.

## Administration

- Elders and community members do not know what “MOKK” is and what that it refers to.
- Gain community confidence in the legislation and processes therein and those administering it.
- Costs associated with families to obtain the required legal documentation were viewed as onerous for low income families.
- The CRO application form is long and complex.
- Community inquiries are not just related to CRO applications but also to other family and individual matters which the Program Support Office staff assist or refer to relevant agencies where applicable. The community inquiries are now being tracked by the Program Support Office staff.
- Not many Torres Strait Islander people are aware of the MOKK Act in Queensland, other States and Territories.
- The Cultural Support Officer cultural competency training package needs to be developed and capture the various Ailan Kastom Child Rearing Practice protocols. (MOKK Advisory Group feedback)
- Not enough community legislation information sessions.
- Lack of clarity around separation and independence of Commissioner.
- Ineligibility processes of some applicants needs to be reviewed.
- A majority of stakeholders consulted shared that the Office of the Commissioner Meriba Omasker Kaziw Kazipa and the Program Support Office needed to amalgamate into an independent operational entity in order to improve operational efficiency, establish it is own identity and improve community trust and engagement.
- There should be more than one Commissioner Meriba Omasker Kaziw Kazipa and additional CSOs to mitigate service continuity risks (e.g. illness, leave, etc) and provide adequate statewide service coverage.
- The Meriba Omasker Kaziw Kazipa Advisory group role and responsibilities needs to be reviewed and consideration be given to formalise and its function to continue supporting the Commissioner Meriba Omasker Kaziw Kazipa and the Program Support Office.

## Recommendations

- Review the CRO application cost structure and associated criteria.
- Explore creating additional Commissioner positions to mitigate service continuity risks (e.g. illness, leave, etc) and provide adequate statewide service coverage.
- Continue to track the additional services provided to the community by the Program Support Office.
- Review the CRO forms in order to create a simplified version that is user friendly automated version.
- Review the Cultural Support Officer cultural competency training package to ensure it captures the various Ailan Kastom Child Rearing Practice protocols.
- Review current community education strategy.
- Ensure that the child’s story is recorded and kept as part of the birth certificate process.

### 4.5 Program Support Office Responses

The following is a summary of the Program Support Office staff (Cairns and Waibene) responses:

- There is an improved relationship with Legal services.
- The definition of partner organisation roles and responsibilities is improving.
- The Meriba Omasker Information Management System (MOIMS) has its limitations which needs to be reviewed and addressed in order to create improved data integrity and ensure its fit for purpose.

- The Program Support Office has only been active in the last couple of years, more work needs to be done to develop partnerships with key partners in sectors like health, child safety, corrective services, and within other relevant State and Territory authorities and organisations.
- The Cultural Support Officers have increased their community education and engagement activities.
- The Commissioner to visit and talk with as many potential MOKK Act clients to gain insights.
- The Program Support Office is required to provide services to a diverse community living in remote communities.
- The Program Support Office should become an independent entity with its own charter, responsibilities, and budget under the direction of the Commissioner Meriba Omasker Kaziw Kazipa.
- There needs to be a review of staff training, human resources, systems, process review in order to further mature the strategic and operational functions of the Program Support Office.
- Ensuring the integrity of the "traditional" Ailan Kastom child rearing process is not lost.
- Not enough marketing and promotion to let communities know how the Program Support Office can assist them.
- The Program Support Office is a small team, that caters to a large client base and region.
- Not enough community engagement from the Program Support Office beyond Cairns.

#### Program Support Office Recommendations

- Assist families in the process of acknowledgement and entering the name of cultural parents, not their biological parents.
- Review the Meriba Omasker Information Management System (MOIMS) in order to create improved data integrity and ensure its fit for purpose.
- Increase engagement and promotion with the community and families to provide more information regarding the legislation and the services.
- Create initiatives for elders to share cultural knowledge that supports the MOKK Act legislation.
- Review the Program Support Office staff training, human resources, systems, process review in order to further mature the strategic and operational functions of the Program Support Office.
- Explore employing more CSOs to be situated in Southeast Queensland, Central Queensland to ensure adequate statewide service coverage.
- Increase in staff and funding for outreach and communication portals.
- Program Support Office staff to be trained properly in cultural norms and understand the sensitivity of the process when engaging or providing information/information sessions to the community or families.
- Formalise partnership arrangements with suitable organisations who can provide other avenues of support and entry into the system (e.g., CJG's community legal centres, etc.)
- Program Support Office to not use jargon – e.g., Program Support Office staff when providing information to families and communities.
- The Program Support Office becomes a separate function under the direction of the Commissioner in accordance with the MOKK Act.

#### Legislation

- The MOKK Act may be interpreted from a Western cultural perspective. The MOKK Act is NOT adoption legislation.
- Complications around recognition with those who have passed on.
- Western interpretation of the legislation loses perspective of the cultural practice that was originally passed for.
- "Cumbersome in its design".
- Ensure that the Integrity of the "traditional" Ailan Kastom child rearing process is not lost
- The legislation only has two (2) years of existence so there will be uncertainty.
- The MOKK legislation is often interpreted from a Western legal perspective.
- Linking the MOKK legislation with other Queensland legislation, such as Inheritance Act, Privacy Act, Child Protection Act, etc.
- The Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020 sets a precedent for the consideration across other jurisdictions for the legislative recognition of other First Nations Traditional Child Rearing Practice, in particular Queensland Aboriginal peoples.

- The Legislation is only for Torres Strait Islanders born in Queensland and does not capture other jurisdictions due to the migration of Torres Strait Islander people over the years and increasing since the 1967 Referendum<sup>2</sup>. The expansion of the jurisdictional elements of the Act into other Australian States and Territories was considered an important evolution of the MOKK Act.

#### Recommendations

- Better processes for dispensations for consent.
- Simplified legislation to include better forms' format.
- Consideration of the different Torres Strait Islander traditional adoption practices and laws across the tribal groups.
- For the legislation to be inclusive of all age groups, not just for children.
- Include a cultural framework on how the MOKK Act links to other cultural laws.
- Ensure that the child's story is recorded and kept as part of the birth certificate process.

#### 4.6 Meriba Omasker Kaziw Kazipa Advisory Group Responses

The following is a summary of the Meriba Omasker Kaziw Kazipa Advisory Group responses:

- The Meriba Omasker Advisory Group does not currently have an ongoing role and responsibility with the MOKK Act or supporting the Commissioner.
- There is a feeling that the Group is a "toothless tiger" with no meaningful role and responsibility.
- The MOKK Act has not been developed through Torres Strait Islander context but based on a Western legal system foundation which "dilutes" the Ailan Kastom Child Rearing Practice protocols and various nuances practiced by the Torres Strait Islander tribal groups.
- There is no formal succession planning for the Meriba Omasker Kaziw Kazipa Advisory Group which is an important issue as the Group members are elderly.
- "The purpose of the practice is for giving".
- Kinship law, land law, language law are all elements that need to be considered in the evolution of the MOKK Act and its administrative functions.
- The child's story and family connection to be recorded.
- Support the Commissioner and the Program Support Office for better culturally appropriate solutions.
- Provides community feedback to the Program Support Office and vice versa.
- Provides legal advice to the legal process, particularly if there are disputes.
- To ensure that cultural protocols are upheld and provide culturally correct guidance and information.
- To be the Torres Strait Islander voice in the MOKK legislation/processes to Government.
- The Group could support other states/territories First Nations people to progress their traditional child rearing practices.

#### Meriba Omasker Kaziw Kazipa Advisory Group Recommendations

- Review the Meriba Omasker Kaziw Kazipa Advisory Group terms of reference, roles/responsibilities and structure.
- Explore establishing the Meriba Omasker Kaziw Kazipa Advisory Group as a formal cultural administration support function to the Office of the Commissioner Meriba Omasker Kaziw Kazipa.

<sup>2</sup> [http://www.workingwithindigenoussaustralians.info/content/Indigenous\\_Australians\\_2\\_Torres\\_Strait\\_Islanders.html](http://www.workingwithindigenoussaustralians.info/content/Indigenous_Australians_2_Torres_Strait_Islanders.html)

## 5 The MOKK Act

### 5.1 The Purpose of the MOKK Act

Under the MOKK Act's preamble, the recognition of the child rearing practice through Ailan Kastom under the laws of Queensland is central to the MOKK Act. The purpose of the MOKK Act and how that purpose is to be achieved is expressed under sections 4 and 5 respectively as to:

- (1) recognise Ailan Kastom child rearing practice;<sup>3</sup> and
- (2) establish a process for making applications for, and decisions about, the legal recognition of the practice,  
  
and that:
- (3) such purpose is to be achieved by providing for the appointment of a Commissioner to consider and decide applications for cultural recognition orders.

Ailan Kastom is integral to the fabric of Torres Strait Islander society. The practice, which is usually a private and confidential family arrangement, involves the sharing of responsibility of raising children with family and close friends by effecting the permanent transfer of parentage from a child's birth parents to the child's cultural parents.<sup>4</sup> This transfer of parentage results in the child assuming the cultural parents' surname and having the same rights and entitlements as any children born of the cultural parents.

Given the practice of Ailan Kastom takes place in an intricate, extended family setting where the concept and understanding of 'family' to Torres Strait Islander people is considerably broader than that of Western society,<sup>5</sup> the concern that Parliament seeks to resolve under the MOKK Act is the acknowledgement of the importance of culture underpinning Torres Strait Islander family structures, community, and social networks aiming to resolve the long-standing issues faced by Torres Strait Islander people whose legal identity does not reflect their cultural identity and lived experience.<sup>6</sup>

Therefore, the MOKK Act is specific to traditional child rearing practices recognised by Torres Strait Islander society and not cultural adoptions in any general or broader sense. On this basis, there is an intention under the MOKK Act not to assimilate, but rather preserve and differentiate the unique standing of Ailan Kastom within Torres Strait Islander customary law and society. This recognition under the MOKK Act not only enables Torres Strait Islander children and adults, given under Ailan Kastom, the ability to participate fully in the political, economic, social and cultural life of Queensland,<sup>7</sup> but also provides a necessary nexus between two established legal systems. Therefore, it is important to note that the operation of the MOKK Act has no bearing on whether the giving and receiving of a child under Ailan Kastom has taken place under Torres Strait Islander customary law, rather the MOKK Act's recognition of the practice affects the legal and cultural benefits of that child or adult under the laws of Queensland. Thus, the MOKK Act serves as a vital nexus between these two independent legal jurisdictions.

Given the recognition that there was no other way to achieve the policy objectives other than to establish a framework in legislation,<sup>8</sup> the MOKK Act is 'the first of its kind' in Australia and not otherwise uniform to legislation of the Commonwealth or another State.<sup>9</sup> The nexus the MOKK Act creates is reflective of similar

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<sup>3</sup> Defined as 'the practice recognised by Ailan Kastom under which a child's birth parents and the child's cultural parents agree in accordance with Ailan Kastom that the parental rights and responsibility for the child are permanently transferred from the birth parents to the cultural parents' (see, MOKK Act s 8).

<sup>4</sup> A child's birth parent is understood under the MOKK Act as a person who is recognised at law as being a parent of the child at the time the child is born. While a child's cultural parent is a person who, in accordance with Ailan Kastom, agrees to accept the permanent transfer of the parental rights and responsibility for a child from the child's birth parents (see, MOKK Act ss 8 and 9).

<sup>5</sup> Explanatory Notes, *Policy objectives and reasons for them*, p 1.

<sup>6</sup> *Ibid*, 2.

<sup>7</sup> *Ibid*, 7. Note that the resulting issuance of a birth certificate provides the child or adult an 'important requirement for the purpose of enrolling in school, obtaining a driver licence, obtaining a passport, opening a bank account, or accessing inheritance'.

<sup>8</sup> *Ibid*, 2.

<sup>9</sup> *Ibid*, 12.

enactments overseas, including the *Aboriginal Custom Adoption Recognition Act*,<sup>10</sup> as enacted within the Northwest Territories of Canada. Like the *Aboriginal Custom Adoption Recognition Act*, the MOKK Act pursues the recognition of cultural adoptions by appointing and empowering a Commissioner to make administrative decisions on whether a cultural adoption has taken place by issuing a recognition order. In both jurisdictions, the issuance of the triggering order does not in itself change the legal status of the relevant applicant, rather the order (or certificate under the *Aboriginal Custom Adoption Recognition Act*) permits the relevant authority to take the subsequent steps to register the cultural adoption, thus recognising the adoption as made under the respective customary law.

Under the MOKK Act, the application and decision making process are generally encompassed within three parts:

- (1) applications may be made in accordance with Part 4 of the MOKK Act, specifically where an applicant is eligible and has provided the requisite documents detailed under the MOKK Act and the relevant Regulations necessary for the Commissioner to make a cultural recognition order;
- (2) applications are then assessed and decided upon by the Commissioner, or upon dispensation by the Court, under Part 5 of the MOKK Act. It is an obligation that the Commissioner deal with each application, which may include the Commissioner requesting further information from the applicant or the police commissioner, and be satisfied of particular threshold requirements before making or not making a cultural recognition order;<sup>11</sup> and
- (3) under Part 6, the Commissioner, upon the making of a cultural recognition order, advises the Registrar of Births, Deaths and Marriages of the order made. This in turn sets in motion the registration of the child or adult's details under the order on the Births, Deaths and Marriages register and the issuance of a new birth certificate.

## 5.2 Administrative Service Model – Legal Recognition<sup>12</sup>

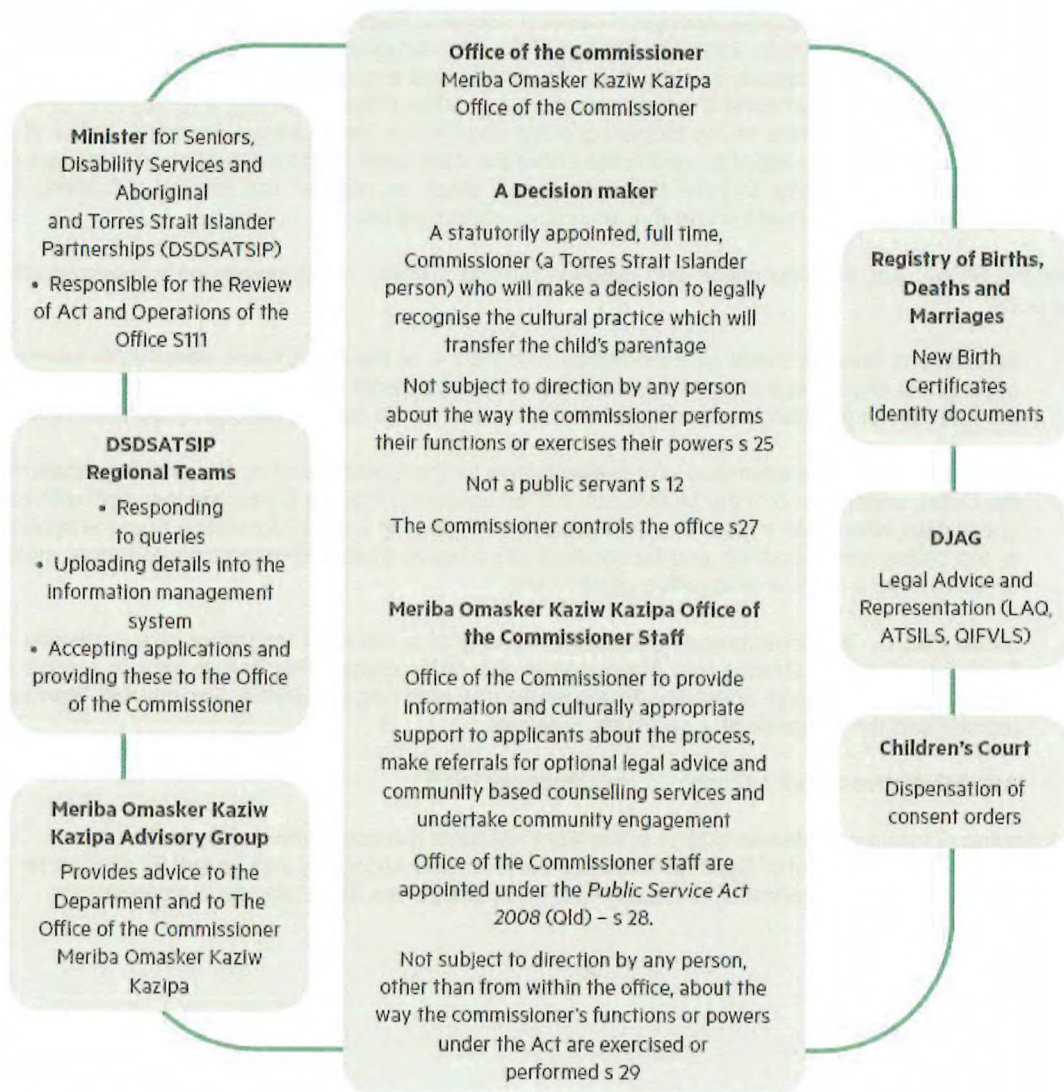
The following diagram provides an outline of the Administrative Service Model for the MOKK Act. Please note: The Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships is now the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts.

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<sup>10</sup> SNWT 1994, c 26.

<sup>11</sup> See in particular the MOKK Act s 56. Note that the Commissioner, or any decision-maker who is not the Commissioner, must make a decision to make or not make a cultural recognition order taking into consideration the 'wellbeing and best interests of the person' subject to the order (see, MOKK Act s 6).

<sup>12</sup> <https://www.ocmokk.qld.gov.au/resources/ocmokk/publications/2022-meriba-omasker-annual-report-office-commissioner.pdf>



## Part 2 – The Review

### 1 Commissioner and the Office of Commissioner

#### 1.1 Appointment of the Commissioner: Appropriately Qualified

As contemplated by section 5 of the MOKK Act, and in pursuit of the MOKK Act's main purpose,<sup>13</sup> the MOKK Act is to be achieved by providing for the appointment of a Commissioner to consider and decide applications for cultural recognition orders. The Commissioner may only be recommended by the Minister for appointment by the Governor in Council where the individual is a Torres Strait Islander person and where the Minister is satisfied the person is 'appropriately qualified'.<sup>14</sup>

<sup>13</sup> Note that the main purpose of the MOKK Act is to recognise Ailan Kastom child rearing practice and to establish a process for making applications for, and decisions about, the legal recognition of the practice (see, MOKK Act s 4).

<sup>14</sup> MOKK Act ss 11(2) and (3).

Once appointed, the Commissioner is a statutory office holder subject to the terms of the MOKK Act.<sup>15</sup> This includes holding office for the term stated in the Commissioner's instrument of appointment<sup>16</sup> and on the terms and conditions not otherwise provided by the MOKK Act that are decided by the Governor in Council.<sup>17</sup> The MOKK Act makes it explicit that the Commissioner's appointment is not by way of the *Public Sector Act 2022*,<sup>18</sup> thus the Commissioner is not a public sector employee.<sup>19</sup> Furthermore, the role of the Commissioner is one not subject to the direction of *any person* regarding the way the Commissioner performs the Commissioner's functions or exercises the Commissioner's powers,<sup>20</sup> and thus the Commissioner is independent.

During this Review, the issue was raised as to whether the requirement that the Commissioner be 'appropriately qualified' is wanting of further clarity, specifically whether there needs to be suitability requirements in addition to those found under the Act. It goes without saying that it is an established principle at law as to the requisite tripartite test to be applied in determining whether a person is a Torres Strait Islander.<sup>21</sup> Therefore, the question at hand is whether there are threshold requirements implicit under the MOKK Act that the Minister may be satisfied as demonstrating that the individual is appropriately qualified.

The MOKK Act does not provide any explicit indication as to what is meant by the term 'appropriately qualified'. However, the term is not ambiguous, as the definition is to be found under the *Acts Interpretation Act 1954*. 'Appropriately qualified', when utilised for an appointment to office, means having the qualifications, experience or standing appropriate to perform the functions of the office.<sup>22</sup> The Commissioner's functions are principally found under section 22 of the MOKK Act and include:

- (1) to independently consider and decide each application for a cultural recognition order;
- (2) to ensure the proper, efficient and effective performance of the Office;
- (3) to provide advice, or make recommendations, to the Minister about the operation of the MOKK Act and the Office;
- (4) to promote public awareness of the Commissioner's functions and the Office;
- (5) to advise the Registrar, under the *Births, Deaths and Marriages Registration Act 2003*, of each cultural recognition order made by the Commissioner; and
- (6) any other function conferred on the Commissioner under the MOKK Act or another Act.

As the understanding of 'function includes duty',<sup>23</sup> the other functions conferred on the Commissioner under the MOKK Act include:

- (1) providing the Minister a disclosure notice, where the Commissioner considers that the Commissioner cannot independently consider and decide a particular application for a cultural recognition order or where the Commissioner becomes aware of a direct or indirect conflict of interest the Commissioner has in the application for a cultural recognition order;<sup>24</sup>
- (2) in performing the Commissioner's functions, act in accordance with the main principle of the MOKK Act,<sup>25</sup> specifically that any decision made by the Commissioner under the MOKK Act in relation to

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<sup>15</sup> Ibid s 12.

<sup>16</sup> Ibid s 13(1); note that the term of appointment must not be for more than 3 years, although the Commissioner may be reappointed (see, ss 13(2) and (3)).

<sup>17</sup> Ibid s 14(2).

<sup>18</sup> Ibid.

<sup>19</sup> *Public Sector Act 2022* (Qld) s 12(2)(a)(ii). See also, MOKK Act s 15.

<sup>20</sup> MOKK Act s 25 (emphasis added).

<sup>21</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70; see also *Love v Commonwealth* (2020) 270 CLR 152.

<sup>22</sup> *Acts Interpretation Act 1954* Sch 1.

<sup>23</sup> Ibid.

<sup>24</sup> MOKK Act s 18(1).

<sup>25</sup> Ibid s 23.

a person who is the subject of an application for a cultural recognition order must be for the wellbeing and best interests of the person;<sup>26</sup>

- (3) making a record of each application for a cultural recognition order;<sup>27</sup>
- (4) dealing with an application for a cultural recognition order by considering and deciding the application under Part 5 of the MOKK Act;<sup>28</sup>
- (5) giving the applicant, and all other parties to the application for a cultural recognition order, notice in circumstances where the application has been withdrawn by the applicant;<sup>29</sup>
- (6) considering an application for a cultural recognition order in accordance with any Guidelines;<sup>30</sup>
- (7) when considering an application for a cultural recognition order acting in a way that is fair and reasonable, maintains confidentiality, and complies with natural justice;<sup>31</sup>
- (8) ensuring that a criminal history report is destroyed as soon as practicable after it is no longer needed for the purpose for which it was requested;<sup>32</sup>
- (9) giving a cultural parent notice of receipt of that cultural parent's criminal history report, in circumstances where the Commissioner has made a request to the police commissioner for the report under section 45 of the MOKK Act;<sup>33</sup>
- (10) continue to consider and decide upon an application for cultural recognition, in circumstances where the Court has made an order dispensing the need for the consent of a stated party as part of the application;<sup>34</sup>
- (11) before making a cultural recognition order, being satisfied of the considerations listed under section 56;<sup>35</sup>
- (12) giving each party to the application for a cultural recognition order a notice of intention, in circumstances where the Commissioner is considering not making a cultural recognition order;<sup>36</sup>
- (13) deciding to make or not make a cultural recognition order, including the provision of reasons (and where applicable a copy of the order) to the relevant parties to the application;<sup>37</sup>
- (14) give effect to a reviewed decision of a review officer as if the reviewed decision were the Commissioner's decision, in circumstances where an application for internal review has been made and a review officer appointed by the Minister;<sup>38</sup>
- (15) giving a copy of any cultural recognition order made to the Registrar, under the *Births, Deaths and Marriages Registration Act 2003*;<sup>39</sup>

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<sup>26</sup> Ibid s 6.

<sup>27</sup> Ibid s 33(2).

<sup>28</sup> Ibid s 40.

<sup>29</sup> Ibid s 42(3).

<sup>30</sup> Ibid s 44(1).

<sup>31</sup> Ibid s 44(2)(a)-(c).

<sup>32</sup> Ibid s 45(5).

<sup>33</sup> Ibid s 46(2).

<sup>34</sup> Ibid s 54(2).

<sup>35</sup> Ibid s 56.

<sup>36</sup> Ibid s 57(1).

<sup>37</sup> Ibid s 58.

<sup>38</sup> Ibid s 62(b).

<sup>39</sup> Ibid s 63.

- (16) giving an authorisation to obtain a certificate, information, source document or a copy of the recognitions order to an eligible person, in circumstances where that person has made a request under section 64;<sup>40</sup>
- (17) giving the public trustee the name and address of a person whose record the Commissioner holds, in circumstances where the public trustee has made a request to the Commissioner for information in relation to a bequest to an unlocatable person;<sup>41</sup>
- (18) not, directly or indirectly, disclosing confidential information, that has become known to the Commissioner in the course of performing the Commissioner's functions under the MOKK Act, to another person unless the disclosure is permitted under the MOKK Act;<sup>42</sup>
- (19) having regard to a need to protect a person's privacy and the need to safeguard a person from harm, in circumstances where the Commissioner is deciding whether or not to grant an application by an applicant for a cultural recognition order for a copy of restricted information about the application for a cultural recognition order;<sup>43</sup>
- (20) giving the applicant written notice of the Commissioner's decision not to grant an application for access to restricted information (including a statement of reasons), in circumstances where the Commissioner has decided not to grant the application for a copy of restricted information about the application for a cultural recognition order;<sup>44</sup>
- (21) not publishing identifying material unless written consent to the publication has been provided by the relevant person;<sup>45</sup> and
- (22) giving the Minister an annual report outlining the specific under section 110 as soon as practicable after each financial year, but no later than 31 October.<sup>46</sup>

Based on the identified functions above, including the fact that the Commissioner is an independent decision maker in control of the Office,<sup>47</sup> the Commissioner's position is one that inherently requires qualifications, experience or standing equal to that of a chief executive officer of a governmental department or agency or similar leadership role. It also requires an individual who is acutely aware of the legal obligations thrust upon the Commissioner under the MOKK Act, especially the identification and management of conflicts of interest, confidential and personal information, and privacy issues. However, this understanding coupled with the requirement that the Commissioner be a Torres Strait Islander person, is not enough as it fails to account for the triggering part of the nexus, specifically the Commissioner's knowledge and understanding (including to what extent) of the Ailan Kastom as it applies to any given application.

As identified above, a key element to the decision making process that establishes the legal effect of the practice of Ailan Kastom<sup>48</sup> is the appointment of the Commissioner under the MOKK Act. The Commissioner must arguably have standing equal to a chief executive officer of a governmental department or agency or similar leadership role, be acutely aware of the Commissioner's legal obligations under the MOKK Act, and most importantly that the Commissioner must be a Torres Strait Islander person under the Act,<sup>49</sup> the Commissioner, once appointed, is likely to be seen as the preeminent arbiter of Torres Strait Islander customary law, specifically as it relates to Ailan Kastom. However, as not all Torres Strait Islanders are knowledge holders of the Ailan Kastom child rearing practice, nor knowledgeable of all variations of the practice throughout the Torres Strait Islands, the concern is that an individual may be appointed without the underlying clout required of an arbiter of Torres Strait Islander customary law. This is especially concerning where a decision maker, other than the Court and the Commissioner, is appointed

<sup>40</sup> Ibid s 64(2).

<sup>41</sup> Ibid s 68(4).

<sup>42</sup> Ibid s 102(1); see also definition of 'administrator' (MOKK Act Sch 1 (Dictionary)).

<sup>43</sup> Ibid s 103(2).

<sup>44</sup> Ibid s 103(4).

<sup>45</sup> Ibid s 104(2).

<sup>46</sup> Ibid s 110(1).

<sup>47</sup> Ibid s 27.

<sup>48</sup> Explanatory Notes, Policy objectives and the reasons for them, p 1.

<sup>49</sup> MOKK Act s 11.

to act in the stead of the Commissioner without the same requirement (or the requirement to be of Torres Strait Islander descent, at minimum).

While the Honourable Craig Crawford noted during the second reading of the MOKK Bill that the Commissioner is to have 'appropriate cultural experience',<sup>50</sup> there is nothing under the MOKK Act confirming this. It may be argued that the requirement is otherwise implicit, as the Commissioner's compliance with the MOKK Act's main principle requires the Commissioner to have regard to the need to ensure appropriate recognition and preservation of Ailan Kastom in general and in particular, and the need to perform the powers and functions under the MOKK Act having regard to the sensitivity and cultural practices associated with Ailan Kastom.<sup>51</sup> However, it is to be tried as to whether the threshold of having regard to the need to ensure appropriate recognition and preservation of the practice in general and in particular to a region or community and to the sensitivities and cultural practices of Ailan Kastom is equal to the Commissioner having the requisite cultural experience contemplated by the Honourable Craig Crawford. Therefore, an issue that subsequently arises is the potential appointment of a Commissioner (or a decision maker acting in the stead of the Commissioner) with little to no understanding of Ailan Kastom in general or in particular. This issue is exacerbated by the fact that the practice is otherwise intimate cultural knowledge and steeped in secrecy, and therefore, no lexicon exists from which the Commissioner (or a decision maker acting in the stead of the Commissioner) may draw the requisite cultural knowledge and understanding, including the present Guidelines. Understandably the issuance of such lexicon is highly questionable and likely to be culturally inappropriate.

Currently, the closest resource available to the Commissioner, should this issue ever arise, would be the Kupai Omasker Working Party. However, while the Kupai Omasker Working Party (inclusive of its panel of Eminent Persons) was influential in the advocacy and drafting of the MOKK Bill, given its depth of cultural knowledge, the MOKK Act is silent on any relationship it may have with the Commissioner and/or the Minister (especially in relation to providing input on the suitability of candidates). If it is not already contemplated under the Kupai Omasker Working Party's terms of reference, an ongoing relationship with the Commissioner and the Minister holds foreseeable benefit in the ongoing implementation of the MOKK Act's objectives. One could argue that the Commissioner is enabled 'to do all things necessary or convenient to perform the Commissioner's functions', which may include seeking the advice of the Kupai Omasker Working Party or that of an informed person being a Torres Strait Islander person who possesses the knowledge and understanding of the Ailan Kastom child rearing practice in the community or region in question under the relevant application (given the nuances of the practice across the Torres Strait Islands), this is not otherwise mandated under the MOKK Act in circumstances where the Commissioner does not have the requisite cultural knowledge. Although remote, the dilemma becomes one where the Commissioner has not independently turned his or her mind to the consideration as to whether the transfer of parentage occurred in accordance with the Ailan Kastom child rearing practice in the community or region in question under the relevant application. How this involvement is envisaged may be determined between the relevant stakeholders, especially any legal requirements contemplated under the MOKK Act in relation to confidentiality and the management of conflicts.

The prospect of the aforementioned dilemma is additionally concerning, based on feedback to the initial draft of this Report, if there be scope for the MOKK Act to be utilised for a disingenuous purpose, specifically in circumstances where there is a desire to avoid Child Protection Proceedings or the involvement of Child Safety. Thus, the risk is one of a sleeping Commissioner rubber stamping an application solely on the material and statements provided thereunder or under a partial understanding of the practice. This is especially concerning if, based on the construction of the MOKK Act, any decision maker acting in the stead of the Commissioner (i.e. the review officer) likewise does not have the requisite understanding and knowledge of the Ailan Kastom child rearing practice in the community or region in question under the relevant application. This highlights the potential, although remote, for systemic failures throughout the decision making process.

Feedback to the initial draft of this Report highlighted the fact that during the recruitment and vetting process for the current Commissioner, there was an assessment undertaken of each candidate's cultural experience and understanding of Ailan Kastom, and this assessment included members of the Kupai Omasker Working Party. While this is important to publicly note and emphasises the point at the time which the Commissioner's cultural experience and understanding should be satisfied, the issue is the

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<sup>50</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 2022, 2206 (Craig Crawford, Minister for Aboriginal and Torres Strait Islander Partnerships).

<sup>51</sup> MOKK Act s 6(2)(a)(i)-(ii); see also, s 23.

situation where the decision maker, including the Commissioner, does not have the requisite cultural experience or understanding to make an independent decision on an application for a cultural recognition order in the particular setting of a specific community. As was cited during the second reading of the MOKK Bill, specifically in summarising a point by the Honourable Alastair Nicholson QC, 'a change of identity involving issuing a new birth certificate is not something to be carried out by a rubber stamp'.<sup>52</sup> Given that various models were contemplated up to the adoption of the MOKK Act, including whether like under the *Aboriginal Custom Adoption Recognition Act* a similar multi commissioner framework be developed, the MOKK Act is the current framework in Queensland and therefore the focus upon a single commissioner necessitates the implementation of transparent redundancies to ensure the integrity and reliability of the decision making process.

Additionally, whether the Commissioner (or any decision maker acting in the stead of the Commissioner) has the requisite cultural knowledge and understanding is vital under the MOKK Act, as an administrator is not civilly liable for an act done, or omission made, honestly and *without negligence* under the MOKK Act.<sup>53</sup> What constitutes a negligent act by the Commissioner (or other decision maker acting in the stead of the Commissioner) in relation to any claim that the Commissioner failed to consider whether the cultural adoption occurred in accordance with Ailan Kastom child rearing practice as it pertains to the community or region in question under the relevant application has not been tried and therefore is unknown. Therefore, consideration should be had as to whether there are sufficient cultural safeguards under the MOKK Act that ensure that the decisions made are in recognition of the Ailan Kastom child rearing practice as it pertains to the relevant community or region.

Therefore, a requirement under the MOKK Act that the Commissioner (or any decision maker acting in the stead of the Commissioner) have the requisite cultural knowledge and understanding of the Ailan Kastom child rearing practice or be permitted to seek the independent advice of the Kupai Omasker Working Party or that of an 'informed person' that is a Torres Strait Islander possessing the knowledge and understanding of the Ailan Kastom child rearing practice in the community or region in question under the relevant application would likely overcome the dilemma and provide a necessary redundancy not present under the MOKK Act. It will also provide a threshold to whether the Commissioner (or any decision maker acting in the stead of the Commissioner) has acted in a manner that is negligent. However, this subsequently raises the spectre as to how the advice sought complies with the objectives of the MOKK Act to maintain the confidentiality of the information and to avoid conflicts otherwise.

The 'informed person' is only able to provide support for the relevant application through a signed statement on behalf of the applicant or parents (cultural or birth parents). The Commissioner is not able to independently seek advice from informed persons or bodies of its choosing, such as the Kupai Omasker Working Party, who have a wealth of knowledge of cultural practices. Further, under the current version MOKK Act, the 'informed persons' are the persons nominated through the application itself (through the signed statement) and not nominated by the Commissioner.

## Recommendations

1. It is recommended that a requirement be included in the MOKK Act for the recruitment and vetting of candidates for the role of Commissioner to ensure they have the necessary level of knowledge and understanding of the Ailan Kastom child rearing practice, as generally applicable under Torres Strait Islander customary law.  
Under this recommendation, the Minister should seek the assistance of the Kupai Omasker Working Party or a similar cultural authority to ensure that such candidate has the requisite knowledge and understanding of the Ailan Kastom child rearing practice.
2. It is recommended that the Commissioner (including any decision maker acting in the stead of the Commissioner) be permitted to appoint, as an 'informed person(s)' for the purpose of assisting the Commissioner in deciding upon an application, the Kupai Omasker Working Party or a Torres Strait Islander having the knowledge and understanding of the Ailan Kastom child rearing practice in the community or region in question under the relevant application, where the Commissioner (or any decision maker acting in the stead of the Commissioner) does not

<sup>52</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 2022, 2207 (Craig Crawford, Minister for Aboriginal and Torres Strait Islander Partnerships).

<sup>53</sup> MOKK Act s 105(1) (emphasis added).

possess sufficient cultural knowledge and understanding of the practice in the relevant community or region. An appointment may require protocols be implemented to ensure that any advice sought maintains the level of confidentiality contemplated by the MOKK Act, as well as ensuring due diligence is undertaken to avoid any conflicts.

## 1.2 Appointment of other decision makers: Suitability criteria

Under the MOKK Act, there are principally four decision makers.<sup>54</sup> Unlike the Commissioner, the MOKK Act is unclear as to whether any other decision maker, acting in the stead of the Commissioner, be a Torres Strait Islander. The MOKK Act does require the Minister to be satisfied that each decision maker is appropriately qualified, however, given the explicit requirement for an individual appointed as the Commissioner to be a Torres Strait Islander, it is peculiar that the remaining three decision makers not be Torres Strait Islanders, if and when appointed.

As we have identified above, it is likely that the understanding of 'appropriately qualified' inherently requires qualifications, experience or standing equal to that of a chief executive officer of a governmental department or agency or similar leadership role. However, the lack of any explicit requirement that a decision maker be a Torres Strait Islander creates a flagrant proposition that a decision maker acting in the stead of the Commissioner may exercise their powers under the MOKK Act not having the clout of the preeminent arbiter of Torres Strait Islander customary law, specifically in relation to Ailan Kastom. It is also our understanding that if this proposition is true, then the main principle cannot be seen to implicitly require the Commissioner, or any other decision maker acting in the stead of the Commissioner, to have the requisite cultural knowledge and understanding of Ailan Kastom.

The Department and Commissioner should consider whether there is merit in ensuring that the 'appointed person', 'acting commissioner' and 'review officer' be a Torres Strait Islander. This may ensure a greater understanding of cultural protocols and knowledge in traditional adoption practices.

### Recommendation

3. There should be a requirement that the following decision makers be a Torres Strait Islander:
  - a. an 'appointed person';
  - b. an 'acting commissioner'; and
  - c. a 'review officer'.

## 1.3 The Office and the Program Support Office

During the Review, three issues arose in relation to the Office and the Program Support Office. Firstly, whether the Office's status is complimentary to its function to support the Commissioner in the performance of the Commissioner's functions. Secondly, whether the officers of the Office, like the Commissioner, are sufficiently independent of the Department to pursue the function of the Office or would be hard-pressed as servants of two masters. Finally, whether the Program Support Office and its officers share the same traits as the Office and its officers.

### (1) The Office

Under section 26 of the MOKK Act, the Office is established with the sole function 'to help the commissioner perform the commissioner's functions'. It is also understood that the Office 'consists of the commissioner and the officers of the office',<sup>55</sup> resting under the auspices of the Commissioner.<sup>56</sup> However, and of significant importance:

<sup>54</sup> The four decision makers include: the Commissioner; an 'acting commissioner' appointed under section 21 in circumstances where the Office is vacant; an 'appointed person' appointed under section 19(1) in circumstances where the Commissioner has issued the Minister with a disclosure notice; and the 'review officer' appointed under section 61 in circumstances where the Minister receives an application for internal review. We have excluded the Court from this list for obvious reasons.

<sup>55</sup> MOKK Act s 26(3).

<sup>56</sup> Ibid s 27.

- (a) the Office is not a statutory body for the *Financial Accountability Act 2009* or the *Statutory Bodies Financial Arrangements Act 1982*, emphasising its incapability to control funds;<sup>57</sup>
- (b) in addition to (a) above, the Office's status is somewhat vague, as it may be argued that it is a public sector entity that may have its own public sector employees, however hinging on it not being part of the Department;<sup>58</sup> and
- (c) the administrative support services and facilities the Office requires to perform its functions effectively may be requested of the Department,<sup>59</sup> but the Department is under no obligation to provide administrative support services and facilities.

Given that the Office is incapable of controlling funds and the Department sits in a position to discretely allocate resources to the Office, there exists a conspicuous financial leash under the MOKK Act. Reflecting upon the Financial Overview, this leash is realised when one takes note of the various cost centres set up and managed by the Department on behalf of the Office and the Program Support Office. This financial leash raises the spectre that the MOKK Act contemplates a base scenario in which the Commissioner personally undertakes all activities in pursuance of the Commissioner's functions in consideration of the Commissioner's remuneration; that the resourcing of the office is ancillary to and relevant only in circumstances where there the Department is of the mind that there is a deviation from that base scenario.

Therefore, it is likely that this financial leash needs to be untethered to overcome any risk that inadequate allocation of resources to the Office will stymie the Office's function to help the Commissioner exercise the Commissioner's powers and functions. Additionally, the existence of the financial leash strikes at the broad goals contemplated under the MOKK Act as there is an inherent risk that if the views of the Commissioner (and by extension the Office in pursuit of its function to assist the Commissioner) are not formulated independent to the State, the value of the Commissioner as an element in the decision making process is lost. Therefore, we recommend the State reconsider whether the Office should be a statutory body with the necessary capability to control funds. This will also likely resolve the issues in relation to the staffing of the officers of the Office.

## (2) The officers of the Office

The officers of the Office:

- (a) unlike the Commissioner, are appointed as public sector employees under the *Public Sector Act 2022*,<sup>60</sup> meaning that if there is the opportunity to engage an officer external to the Department where the Office is a 'public sector entity', those officers are likely the employees of the Department and not the Office if it is shown that the Office is part of the Department. This is unlikely to be found in relation to the Office given the need for the Commissioner to hold office in a manner that is independent to the Department;<sup>61</sup>
- (b) are, by arrangement with the Department, made available to the Commissioner (not the Office) as officers of the Office. This raises the spectre as to whether the Commissioner or the Office would be liable for any acts done by those officers;<sup>62</sup>
- (c) as made available to the Commissioner under the MOKK Act, continue to be an officer or employee of the Department on the same terms and conditions applying to the officer or employee before being made available to the Commissioner,

<sup>57</sup> Ibid s 31; see also, *Financial Accountability Act 2009*, s 9(2)(d); and *Statutory Bodies Financial Arrangements Act 1982* s 6(2)(b).

<sup>58</sup> *Public Sector Act 2022* ss 8(1)(d) and 8(3).

<sup>59</sup> MOKK Act s 30(1).

<sup>60</sup> Ibid s 28.

<sup>61</sup> *Public Sector Act 2022* ss 7(b), 8(1)(d) and 8(3).

<sup>62</sup> Ibid s 30(3).

which may implicitly include any obligations to act upon the reasonable directions of the Department,<sup>63</sup> and

- (d) are only exempt from directions from outside of the Office to the extent the direction relates to 'the way the commissioner's functions or powers under this Act are performed or exercised', underlying that each officer may still be subject to the direction of the Department where such directions fall outside of the exemption (e.g., a direction reassigning the officer).<sup>64</sup>

Based on the above, there arises a paradox as the MOKK Act empowers the Commissioner with control of the Office and provides the Commissioner particular authority to do all things necessary or convenient to perform the Commissioner's functions,<sup>65</sup> including ensuring the proper, efficient and effective performance of the office,<sup>66</sup> but is otherwise silent on the ability of the Commissioner to directly appoint officers of the Office. As has been outlined above, the fact that the Office is incapable of controlling funds drives this paradox further. Therefore, the question remains as to whether the MOKK Act permits the Commissioner to engage Officers directly, or whether the Commissioner is restricted to seeking that assistance from the Department.

What is certain is that, like the allocation of administrative support services and facilities to the Office by the Department, staffing arrangements are also discretionary. This creates the potential dilemma that the Office's staff resourcing needs are secondary to those of the Department and, therefore, subject to understaffing and/or undesirable staffing turnover, which may impact the Office's productivity and morale, leading to a breakdown of the efficacy of the Office's sole function.

The particular staffing arrangements under the MOKK Act add complexity to the financial leash highlighted above as it exacerbates the uncertainty of resourcing and emphasises a reliance upon potentially hard-pressed employees and officers that are beholden to the Department. As highlighted above, there is a risk that inadequate allocation of resources to the Office may effectively stymie the Office's function to help the Commissioner exercise the Commissioner's powers and functions. Again, this poses the risk that if the views of the Commissioner (and, by extension, the Office) are not formulated independently of the State, the value of the Commissioner as an element in the decision-making process is lost. This may be of particular concern as feedback to this Review suggests that the current officers assisting the Commissioner are located within the Program Support Office and not the Office, where the Commissioner's jurisdictional authority is placed.

As proposed above, we recommend the State consider whether the Office should be a statutory body with the necessary capability to control funds, being a necessary component to engaging with public service employees directly. By doing so would allow the Office to maintain the efficacy of its sole function as the discretionary support from the Department would be ancillary and not necessary to its operational needs.

### (3) **The Program Support Office**

Unlike the Office, the Program Support Office is not contemplated under the MOKK Act and is likely part of the Department. When detailing the estimated costs for the implementation of the MOKK Act, within the Explanatory Notes, there was a specification of 'establishing an office to support the work of the commissioner', being a separate line item to 'establishing an office within the [Department] to provide support to applicants'.<sup>67</sup> We see these two separate expenditures foreshadowing the subsequent establishment of the two separate offices, respectively the Office and the Program Support Office.

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<sup>63</sup> Ibid s 30(2).

<sup>64</sup> Ibid s 29.

<sup>65</sup> Ibid s 25; see also generally, *Northern Land Council v Quall* [2020] HCA 33 at [33] (discussion relating to provisions expressing the power to do all things necessary or convenient implicitly providing for the right to delegate).

<sup>66</sup> MOKK Act s 22(b).

<sup>67</sup> Explanatory Notes, Estimated cost for government implementation, p 2.

Additionally, it appears that each office was to have separate functions. While the Office is mandated to help the Commissioner is expressed under the MOKK Act, the Program Support Office is mandated to provide support to applicants is not. Therefore, it is more than likely that the MOKK Act's identification of the office called the Office of the Commissioner (Meriba Omasker Kaziw Kazipa) is to the exclusion of the Program Support Office. If that is the case, then the Program Support Office is likely part of the Department, as contemplated under the Explanatory Notes. However, it is our understanding that since the implementation of the MOKK Act, the Program Support Office has been conventionally aligned with the Office under the auspices of the Commissioner.<sup>68</sup>

Based on the above analysis, jurisdictional issues arise given it is ambiguous as to whether:

- (a) the Program Support Office is part of the Department and therefore not a public sector entity in its own right;
- (b) the Program Support Office and the Office have co-existing functions;
- (c) the Commissioner's control under the MOKK Act extends to the Program Support Office; and
- (d) the officers of the Program Support Office are similarly exempt from direction from outside of the Program Support Office to the extent the direction relates to 'the way the commissioner's functions or powers under this Act are performed or exercised'.

Based on the above, we would recommend that the State consider the position of the Program Support Office and clarify under the MOKK Act whether it forms part of the Office or that of the Department. Additionally, given the ambiguities above there is likely to arise differences of opinion as to whether the operational needs of the Commissioner and the Office are being met, especially where there are questions relating to the Commissioner and Department's jurisdictional authority. Therefore, a need for the Commissioner and the Department to implement a transitional plan that aligns the Program Support Office with the Office, including restructuring particular reporting lines of the officers and other c-suite staff within the Program Support Office may be needed to resolve those issues, if and when they arise. As noted within the Financial Overview, it may be prudent for the Department and Commissioner to put into place a Memorandum of Understanding in pursuance of the Department's 2021-2022 Strategic Internal Audit Plan, which may seek to also resolve the operational shortcomings highlighted in this Report.

## Recommendations

4. It is recommended that the State reconsider whether the Office should be a statutory body with the necessary capability to control funds as:
  - a. this will likely resolve the issues in relation to the staffing of the officers of the Office; and
  - b. by doing so may allow the Office to maintain the efficacy of its sole function, as the discretionary support from the Department would be ancillary and not necessary to its operational needs.
5. It is recommended that the State:
  - a. considers the position of the Program Support Office and amendments be made to the MOKK Act to clarify whether it forms part of the Office or that of the Department; and

<sup>68</sup> 'Torres Strait Islander traditional child rearing practice', *The State of Queensland (Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts)* (Web Page, 18 October 2023) <<https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/family-social-programs/torres-strait-islander-traditional-child-rearing-practice>>; contra, see, 'Meriba Omasker Kaziw Kazipa Program Support Office', *The State of Queensland (Office of the Commissioner (Meriba Omasker Kaziw Kazipa))* (Web Page, 18 October 2023) <<https://www.ocmkk.qld.gov.au/commissioner/meriba-omasker-kaziw-kazipa-program-support-office>>.

- b. considers the implementation of a transitional plan for the current organisational structure of the Program Support Office, so as to align the Program Support Office with the Office and with the provisions of the MOKK Act, especially as they relate to the recognition of the Commissioner's powers and functions over and in relation to the Office and the Officers. Such restructure may include the Director within the Program Support Office reporting directly to the Commissioner instead of the Executive Director of the Department - streamlining the structure and operations of the Office and the Program Support Office, as required by the MOKK Act.

A Memorandum of Understanding may be the appropriate vehicle for the operational aspects of this recommendation 5.

## 2 Cultural Recognition Orders

### 2.1 Eligibility and Supporting Documentation<sup>69</sup>

Since the MOKK Act's inception, several issues have been realised in relation to the eligibility and criteria requirements for making applications for cultural recognition orders. The issues range from the types of consent required to the impacts of non-disclosure between families and their children in keeping with the secret and sacred nature of the practice.

#### (1) Access to relevant orders

Based on feedback received from the initial draft of this Report, it was noted that while section 33 of the MOKK Act provides that an order made under the *Child Protection Act 1999* in relation to a child, being the person the subject of the application, be provided under an application, there may arise issues where a party (i.e., the cultural parent) is unaware or unable to obtain a copy of the order relevant to the application. Further, section 33 does not contemplate the inclusion of Intervention with Parental Agreements, which are common precursors to the involvement of the Court. Therefore, based upon that feedback, consideration should be made as to whether the Commissioner should be empowered to request a copy of a child's history from Child Safety but also, more generally, the parties to the application. This additional empowerment under the MOKK Act would provide the Commissioner sight as to current Court proceedings or interventions with the child, current investigations into the other parties of the application by Child Safety, as well as a means to assess whether further enquires are necessary to determine whether, in pursuit of the main principle of the MOKK Act, a genuine traditional practice underlines the application and the Commissioner's decision will be for the child's wellbeing and best interests.

#### (2) Consent & Deceased Parents

In circumstances where both cultural or both birth parents are deceased, a person is not eligible to apply for a cultural recognition order. This is because the required statements and consents will not be able to be provided and the application will not satisfy the preliminary criteria for making an application.

The preliminary criteria for making an application for a cultural recognition order when a birth parent or cultural parent is deceased are set out in section 32(4) of the MOKK Act. According to the Explanatory Notes, section 32(4) clarifies that if a birth parent or cultural parent is deceased, the application for a cultural recognition order can only be made if at least 1 (one) birth parent and 1 (one) cultural parent are applicants.<sup>70</sup> 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.<sup>71</sup> This requirement relates directly to the three key criteria of the MOKK Act in achieving its policy objectives. In particular:

<sup>69</sup> MOKK Act, Part 4, Divisions 1 and 2.

<sup>70</sup> Ibid s 32(4).

<sup>71</sup> Explanatory Notes, Part 4 Applications for cultural recognition orders, Division 1 Eligibility and criteria, p 18.

- (a) *consent of the birth parents and cultural parents for legal recognition* (emphasis added);
- (b) suitability of cultural parents in that the practice as occurred had been verified by person with knowledge and understanding of the practice specific to the family's community; and
- (c) a decision for a cultural recognition order must be made for the wellbeing and best interests of the child.

The consequence of requiring full, free and informed consent from both a birth parent and a cultural parent is that several enquiries have been unable to progress further. For example, consider a scenario where both birth parents and cultural parents are deceased, and the child is unaware of the identities of their birth parents. However, elders and other family members are aware of the situation. Although there is continued family knowledge of the practice, the MOKK Act restricts the child from accessing the legal and cultural benefits of a cultural recognition order.

Another scenario to consider is where a child has lived with their cultural parents for ten years (one being Torres Strait Islander and the other non-Indigenous), but their Torres Strait Islander cultural parent died three years ago, leaving a non-Indigenous cultural parent as the sole parent. Surviving birth parents and an informed person can provide statements, documentation and consent, however, the non-Indigenous cultural parent will not be able to satisfy the criteria at section 32(1)(c) of the MOKK Act, which prescribes that at the time the person's parentage is transferred in accordance with Ailan Kastom child rearing practice, at least one cultural parent is a Torres Strait Islander.<sup>72</sup>

In both scenarios, broadening the eligibility and criteria requirements or establishing relevant grounds for dispensing with consent would undermine the first policy objective noted above. However, there may be practical routes to enhancing the third objective, which is acting in the wellbeing and best interests of the child.

In the first instance, the entry point to broadening the eligibility and criteria requirements is section 32 of the MOKK Act. Consideration could be given to whether family members other than birth or cultural parents, informed persons, or a combination of both may be able to initiate an application for a cultural recognition order. This would cascade into amending the procedural requirements prescribed in the subsequent sections in Divisions 1 and 2 of Part 4.

In the second instance, seeking a court order from the Children's Court<sup>73</sup> to dispense with the need for consent of a stated party could potentially obviate the requirement to obtain consent where both cultural parents and birth parents are deceased. A discretion for the Court to dispense with the need for consent where the Court is satisfied there are special circumstances for giving the dispensation is established under section 52(1)(d) of the MOKK Act.

It is noted, however, that the recent decision of *HD & MD v MP & Unknown*<sup>74</sup> found it unnecessary to consider the gamut of 'special circumstances' as they relate to section 52 of the MOKK Act. In that case, section 49(4)(a) was satisfied, given the applicants could not establish the identity of the child's biological father after making all reasonable enquiries. Thus, Fantin DCJ found it unnecessary to identify whether any special circumstances existed in dispensing with consent. Given an application under section 33 of the MOKK Act and in relation to a child, must include any orders made in relation to that child under the *Family Law Act 1975* (Cth), it is recommended, based on feedback during this Review, that the State consider whether any definition of 'special circumstances' could provide additional scope for the Court, in exercising its discretion, to consider the decisions

<sup>72</sup> MOKK Act s 32(1)(c).

<sup>73</sup> Ibid s 81, provides that these applications must be made to the Childrens Court constituted by a Childrens Court judge, under the *Childrens Court Act 1992* (Qld).

<sup>74</sup> [2022] QChC 24.

and findings of the Federal Circuit and Family Court of Australia, especially where those decisions and findings are made in relation to whether that child has been given and received in accordance with Ailan Kastom. Therefore, there is an opportunity to provide a specific definition of 'special circumstances', which may include the Court considering the decisions and findings of the Federal Circuit and Family Court of Australia. Additionally, a more specific understanding of what constitutes 'special conditions' may assist an applicant when making an application for dispensation of consent.

Broadly speaking, this entry point could be underpinned by supporting guidelines that establish a policy, or policies, where consent may be dispensed where the birth or cultural parent is unable to provide consent, but family members, other than birth or cultural parents, or informed persons, or a combination of both may be able to provide an alternative form of consent.

In addition to exploring these options, it should be considered whether a requirement to provide proof of death for deceased birth or cultural parents should be included in the application process and stipulated in the MOKK Act, and subsequent Guidelines.

### Recommendations

6. Review the MOKK Act's eligibility and criteria requirements under section 32 of the MOKK Act to establish who may initiate an application for a cultural recognition order. From this it may be necessary to provide a clear definition as to who any additional applicants may be.
7. In addition to recommendations 13 and 14 below and based upon feedback provided during this Review, consideration should be made as to whether the Commissioner should be empowered to request a copy of a child's history from Child Safety, but also, more generally, the parties to the application.
8. Review the discretion to dispense with consent where the Court is satisfied there are special circumstances under section 52(d) of the MOKK Act, including whether 'special circumstances' should be defined to provide clarity to the Court around the issue. Additionally, there may be further scope in assisting an applicant, to provide what supporting documentation would assist their application for dispensation.
9. Consider an amendment to provide proof of death certificates for birth parents or cultural parents in the application process.

## 2.2 Recognising Deceased Children

In circumstances where a child has passed away, there is the potential for issues to arise where the cultural parent or parents may wish to seek a posthumous cultural recognition order and birth certificate recognising the cultural parental relationship.

Pursuant to section 66 of the MOKK Act, the legal effect of a cultural recognition order is that:

- (1) the person's parentage is transferred from the birth parents to the cultural parents;
- (2) the person becomes a child of the cultural parents;
- (3) the cultural parents become the parents of the person;
- (4) the person stops being a child of the birth parents; and
- (5) a birth parent stops being a parent of the person.

Under the current eligibility requirements in the MOKK Act, there is no express statement that the child that is the subject of a cultural recognition order must be living at the time of the application. Under the *Births, Deaths and Marriages Registration Act 2003* the definition of 'child' includes a deceased stillborn child, however, that is insufficient grounds to propose that the scope could be

widened to encompass updating the birth certificates and death certificates of older children who have passed away.

If such an application came before the Commissioner and a cultural recognition order was granted, on the basis that the Act does not expressly preclude deceased children, clarification would still need to be sought about how the order would be received by the Registrar.

#### Recommendation

10. Seek clarification from the Office of the Commissioner and the Registrar as to whether applications may be considered for deceased children. The MOKK Act may be amended accordingly.

### 2.3 Requirements for Adult Children

Concerns have been raised numerous times about children who are of the age of majority (eighteen years old) or older needing to make an adult application for a cultural recognition order themselves.

Once a child has turned eighteen years old, parents cannot submit a cultural recognition order application on their behalf. Some of these children may not know about the practice in relation to them, as it is not in line with Ailan Kastom for children to be made aware of the practice unless the parents decide to inform them. It is our understanding that this is causing distress for parents who wish to seek a cultural recognition order for a child who is the age of majority, but the parents do not wish for their child to be informed that the practice has occurred. This is especially problematic when the adult child is seeking to apply for identity documentation where a birth certificate must be provided.

A further issue arising from the current process of adults being required to make their own applications is that the practice occurred as an arrangement between the birth parents and cultural parents. It is not an arrangement made with the child.

Section 8 of the MOKK Act provides:

*Ailan Kastom child rearing practice is the practice recognised by Ailan Kastom under which a child's birth parents and the child's cultural parents agree in accordance with Ailan Kastom that the parental rights and responsibility for the child are permanently transferred from the birth parents to the cultural parents.*<sup>75</sup>

This clearly establishes that the agreement is between the birth and cultural parents in accordance with Ailan Kastom. However, section 32(5) of the MOKK Act stipulates that an application for a cultural recognition order about a person who is an adult at the time of the application is made only by the person. Therefore, if adult applicants are aware of the practice as it applies to them and are privy to all of the details pertaining to the history of the arrangement, these requirements are not problematic. However, if the adult has limited knowledge and/or is not aware of the practice then they may face significant difficulties with accessing a cultural recognition order.

Such issues could potentially be addressed by importing discretions that enable cultural parents to access parallel application processes that keep sacred and secret material confidential. However, this would not correlate with broader societal norms and legislation that establishes that children become adults when they turn the age of majority.<sup>76</sup>

#### Recommendation

11. Given feedback from various stakeholders during this Review, it is recommended that the State consider undertaking targeted consultations with key stakeholders as to reoccurring issues surrounding parent confidentiality and sacred and secret information which are problematic when

<sup>75</sup> Ibid s 8.

<sup>76</sup> United Nations Convention on the Rights of the Child Art 1; and Child Protection Act 1999 s 8.

considering adult applicants. Further, the State may consider seeking advice from Crown Law to identify necessary amendments to the MOKK Act and other relevant legislation to address this concern. Amendments to the MOKK Act and other relevant legislation may then be implemented to overcome such concerns.

## 2.4 Requirements for Informed Persons

Under the MOKK Act, there is no apparent requirement that the 'nominated informed person' of the birth parents or cultural parents must identify as a Torres Strait Islander person. This raises questions in relation to the cultural authenticity of potentially receiving statements regarding Ailan Kastom child rearing practices from a person who is not a Torres Strait Islander person.

Division 2 of the MOKK Act sets out the requisite documents and statements required for an application, and a statement must be provided by a 'nominated informed person' for both the birth parents and cultural parents.<sup>77</sup> An informed person, for an application for a cultural recognition order, means a person who has:

- (1) knowledge and understanding of the specific Ailan Kastom child rearing practice that occurred in relation to the application; and
- (2) can, for the purpose of the application, verify that the practice occurred in accordance with Ailan Kastom.<sup>78</sup>

In addition to addressing these two matters, a statement provided by an informed person must also address the person's relationship, if any, to the birth parents, the cultural parents, and the person the subject of the application.<sup>79</sup> For example, it may specify that they are a family member such as a grandparent or aunt or uncle.

Given the sacred and secret nature of Ailan Kastom child rearing practices, it may be considered that an informed person would be a Torres Strait Islander person, therefore it would be both culturally and legally appropriate to clarify this in the MOKK Act. Further, it is important to clarify the role of the informed person because the Commissioner may communicate with the informed person in relation to the information provided in their statement, although they are not a party to the application.<sup>80</sup>

### Recommendation

12. It is recommended that the definition of 'informed person' in Schedule 1 of the MOKK Act is reviewed to consider whether an informed person should be a Torres Strait Islander person.

## 3 Applying for Cultural Recognition Order<sup>81</sup>

### 3.1 Criminal History Reports

Technical issues relating to the application process have been noted regarding the Commissioner's discretion to request criminal history reports. Under section 45 of the MOKK Act, the Commissioner may ask the Queensland Police Service Commissioner for a criminal history report about the Cultural parents if the application relates to a child. While there is no doubt these reports provide valuable information, it has been questioned whether it might be more relevant to the application process to request the cultural parent's domestic violence history as well.

A domestic violence order (**DVO**) is an official document issued by the court to stop threats or acts of domestic violence. A DVO is a civil court order so it will not appear on the respondent's criminal

<sup>77</sup> MOKK Act s 34(1)(c).

<sup>78</sup> Ibid Sch 1.

<sup>79</sup> Ibid s 38.

<sup>80</sup> Guidelines, p 33.

<sup>81</sup> MOKK Act, Part 5, Division 1 and 2.

history. However, it is a criminal offence to disobey an order, and this will appear on the respondent's criminal history.<sup>82</sup>

The Commissioner may consider obtaining a criminal history report where the Commissioner becomes aware of information through assessing an application in which one or more of the cultural parents may have a criminal history that is relevant to the application. That history may affect the Commissioner's decision about whether the making of the cultural recognition order is in the child's best interests and wellbeing.<sup>83</sup> Given that the child's interests and wellbeing are the paramount consideration, obtaining domestic violence reports should be the natural corollary to the Commissioner's existing discretion to request criminal history reports.

In closing off the process of obtaining criminal history reports, and potentially domestic violence reports if they were included in the MOKK Act, the MOKK Act does not specify the procedure to be undertaken if a written report is requested from the Police Commissioner, but it is not provided on the basis that it did not exist.

Sections 45 and 46 of the MOKK Act establish the parameters of the request to the Police Commissioner and how a criminal history report should be dealt with 'as soon as practicable after receiving the report'. This includes giving written notice to the cultural parent that is the subject of the report and allowing time for them to respond with any information or documents about any information contained in the report. After the report is no longer needed for the purpose for which it was requested, the Commissioner must ensure the report is destroyed as soon as practicable.

To clarify the process in relation to requesting criminal history reports, it may be beneficial to include a provision that details how the Commissioner will proceed with an application when a report is not provided by the Police Commissioner.

#### Recommendations

13. Review section 45 and 46 of the MOKK Act to clarify how the Commissioner will proceed with an application when a criminal history report is not provided.
14. Review section 45 of the MOKK Act to expand the request for criminal history reports to include domestic violence history reports.

## 4 Dispensing with Consent

There are two seemingly contradictory provisions in the MOKK Act in relation to notifying the Commissioner of the outcomes of Court proceedings when dispensing with consent. In one scenario, where there is dispensation of consent, there is a positive duty to notify the Commissioner, but where there is discharge of a dispensation order, there is no express duty to inform the Commissioner.

As noted previously, the MOKK Act provides that applications within the MOKK Act must be made to the Children's Court under the Children's *Court Act 1992 (QLD)*. Under section 55, the Court can discharge a dispensation order,<sup>84</sup> but there is no provision for the Commissioner to be notified of a discharge of a dispensation order. This is because the Commissioner is not a named person in the proceedings. Whereas under section 53, if the Court dispenses with consent, the applicant must serve a copy of the order to the Commissioner, despite the Commissioner not being a respondent and not being required to participate in the proceedings.

According to the Guidelines, the Commissioner *should* (emphasis added) be notified as soon as possible of proceedings to discharge a dispensation order because the proceedings must end if a

<sup>82</sup> Queensland Courts, *What is a domestic violence order?* (Web page 30 October 2023) <<https://www.courts.qld.gov.au/going-to-court/domestic-violence/domestic-violence-orders/what-is-a-domestic-violence-order>>.

<sup>83</sup> Guidelines p 16.

<sup>84</sup> The circumstances where a Court may discharge a dispensation order is where a copy of the application for the order was not served on the stated party. Guidelines, *Discharging a dispensation of consent order – s55*, p 19.

cultural recognition order is made, as only a Court can discharge the cultural recognition order.<sup>85</sup> Therefore, to provide the Commissioner with an opportunity to delay making a decision about an application, if there are proceedings on foot in relation to a discharge of the dispensation order, it would be beneficial to introduce a positive duty to notify the Commissioner when an application is made.

#### Recommendation

15. It is recommended that section 55 of the MOKK Act be reviewed to introduce a positive duty to notify the Commissioner when an application is made to discharge a dispensation order.

## 5 Making a Cultural Recognition Order

Pursuant to section 58 of the MOKK Act, after having regard to information in an application, the Commissioner must decide to make a cultural recognition order, or not make such an order.<sup>86</sup> If the subject of the application for the cultural recognition order is a child, the Commissioner must give each party to the application reasons for the decision and, if an order, a copy of that order.<sup>87</sup> If the applicant is an adult, the Commissioner must give to the applicant's birth parents and cultural parents reasons for the decision, and if an order, a copy of that order.<sup>88</sup>

In the instance of adult applicants, the statement of reasons and the order must be provided to the 'applicant' who 'is an adult' and the applicant's birth parents and cultural parents – this is relatively certain. However, section 58(2) prescribes that the statement of reasons and the order must be provided to each 'party' to the application, where the subject of the cultural recognition order is a child. Given that the application documentation required under section 34 references documentation from birth parents, cultural parents, other carers and informed persons, it is not immediately apparent which of those persons is considered a 'party'. According to the Guidelines, an 'other carer' is considered to be a party to an application for a child, but an 'informed person' is not a party to an application for an adult. Further, the Guidelines state that the term 'party' has a broader meaning under the MOKK Act and is distinct from the term 'applicant', and the terms are not interchangeable.<sup>89</sup>

To avoid any potential confusion, it may be beneficial to define the terms 'applicant' and 'party' for the purposes of section 58 in the Dictionary at Schedule 1. Existing definitions for 'stated party' and 'relevant party' already feature in the Dictionary in Schedule 1, and relate to sections 48 and section 72, respectively.

#### Recommendation

16. It is recommended that the Dictionary in Schedule 1 be expanded to include a clear definition for a 'party' for the purposes of cultural recognition orders under section 58, where the subject is a child.

## 6 Registration of Cultural Recognition Orders

### 6.1 Granting of authorisation and confirmation of practice

Under the Issues Register at Item 13, queries were raised in relation to the operation of section 64 of the MOKK Act. It was discussed that under section 64, a person who was an applicant for a cultural recognition order or an adult who was the child subject at the time is able to apply to Births, Deaths and Marriages to access previous certificates or source documents, whereby the Commissioner's authorisation is required prior to such application to Births, Deaths and Marriages.

<sup>85</sup> Guidelines p 19.

<sup>86</sup> MOKK Act s 58(1).

<sup>87</sup> Ibid section 58(2).

<sup>88</sup> Ibid section 58(3).

<sup>89</sup> Guidelines p 20.

A query was raised as to whether the granting of the authorisation for when 'an adult who was the subject of a cultural recognition order' applies, then confirms the cultural adoption practice occurred. It was also queried whether the Commissioner should consider additional steps not outlined in the MOKK Act when giving such authorisation.

It is our view that confirmation of the practice occurs when the Commissioner provides a statement for the reasons of the decision and a copy of the order under section 58 of the MOKK Act. Section 59 further elaborates on what the order must state, including 'that the order is made under the Act in recognition of Ailan Kastom'. Section 63 additionally states that 'the Commissioner must give the Registrar a copy of the order' as soon as possible after the order is made. Therefore, these aforementioned sections establish and confirm that the practice occurred and provide an appropriate avenue for requesting an authorisation under section 64. We consider that no additional steps are required by the Commissioner before granting authorisation under such a request, and do not recommend any amendment with respect to these queries.

## 6.2 Entitlement to certificate, information relating to particular entries

There are concerns that arise after the granting of a cultural recognition order that relates to the alignment of the child or adult's legal and cultural identities and the pre-existing registration of siblings on birth certificates. In relation to the first instance, Births Deaths and Marriages change of name provisions do not apply to cultural recognition orders, so subjects of a cultural recognition order may have to access their previous birth certificate under section 64 of the MOKK Act and new birth certificate from Births, Deaths and Marriages to support changing their name with particular entities.

Another option that is currently taking place is that applicants are encouraged to complete an Addendum Form. The information included on this form relates to the name that will be included on the new birth entry and other information usually found on a birth certificate. The Commissioner will forward this form to Births, Deaths and Marriages with the cultural recognition order to ensure that the new entry and any new birth certificates are as comprehensive as possible.

In relation to the second instance, subjects of a cultural recognition order can apply for a new birth certificate that lists cultural parents as parents. Where a person had siblings registered at the time of birth, such as biological siblings who are not recognised as siblings, the removal of the subject person can only be made with an application to correct a certificate.

To simplify the approach to making these changes, an amendment to the MOKK Act to capture legal and cultural identities and preferred family members could be considered in collaboration with Births, Deaths and Marriages. These changes would require a review of administrative and system capacities and should be undertaken jointly between the Commissioner and Births Deaths and Marriages.

## 6.3 Entitlement to certificate, information relating to particular entries

In summary, sections 63 and 64(1) to (4) of the MOKK Act provide that:

- (1) after a cultural recognition order is made, the Commissioner must give a copy of the order to the Registrar-General of Births, Deaths and Marriages; and
- (2) an applicant for a finalised cultural recognition order; an adult who was the subject of a cultural recognition order; or a guardian of any of the two, may make an application (if authorised by the Commissioner – who may, under certain circumstances, exclude parts of the request) to the Registrar, to be provided with a certificate, information, source document or a copy of the relevant cultural recognition order.

Under section 5 of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Regulation 2021 (Regulation)*, such an application to the Registrar must be accompanied by certified copies of certain documents. However, the concern raised by the Issues Register is that there is no requirement to ensure that the application is signed in the presence of an authorised witness (generally a lawyer or notary public, commissioner for declarations, justice

of the peace, person knowing the applicant for at least 1 (one) year and has no other involvement in the application or cultural recognition order).

Given the sensitive nature of the documents or information being sought under such an application, it may be prudent to include the additional requirement for an authorised witness to confirm the integrity of the application and to minimise potential risks of fraud and provide comfort to the Commissioner that free and informed consent was obtained (as required under section 56(a) of the MOKK Act).

It is noted that the requirement for an authorised witness to verify documents is consistent with the regulatory requirements that relate to the certification of documents under the *Births, Deaths and Marriages Registration Regulation 2015* (Qld)<sup>90</sup>.

### Recommendations

17. It is recommended that a joint review between the Office of the Commissioner and Births Deaths and Marriages be conducted to assess the feasibility of an amendment to the MOKK Act (and possibly the *Births Deaths and Marriages Registration Act 2003*) which streamlines processes to register and document legal and cultural identities as well as relevant family members such as siblings.
18. Given the sensitivity of documents or information requested under section 64(2), it is recommended that an amendment to section 5 of the Regulation be made to ensure that such a request is signed in the presence of an 'authorised witness', as defined under the Regulation.

## 7 Effect of Cultural Recognition Orders

It is understood that the Office of the Commissioner has been investigating and undertaking some analysis of the MOKK Act in relation to cultural recognition orders and the impact on parental leave. The concern is whether it is the cultural recognition order that activates the access to parental leave or is the practice itself, for example, through a statutory declaration applying for 'cultural parent leave', that satisfies the ability to access parental leave.

Section 61A of the *Industrial Relations Act 2016* (Qld) was inserted to expressly provide 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. In such a case, the right for parental leave is activated when a cultural recognition order is approved.

However, there is some ambiguity where an employee provides notice to their employer to take long cultural parent leave where such notification must be provided at least 10 weeks before the expected date when a cultural recognition order will be made transferring a child's parentage to the employee'.<sup>91</sup> The employee must give the employer a statutory declaration by the employee stating (among other things) that the employee is an 'intended cultural parent'<sup>92</sup> and also provide the expected parental transfer date.<sup>93</sup> This being the case, the employee is able to apply for cultural parent leave when a statutory declaration is made. However, the date for the commencement of cultural parent leave is 'the expected date when a cultural recognition order is made'. Initially, this does not give certainty of the commencement date of such leave, although gives the employer an indication of the approximate date of such leave. Given this, it is likely that the right to access and commence cultural parent leave is the date of the cultural recognition order, thus aligning such date with section 61A, discussed above. The Explanatory Notes give little guidance around this aspect.

<sup>90</sup> *Births, Deaths and Marriages Registration Regulation 2015*, ss 7(2), 8(6), 10(3), 11(3), 12(3) and definition of 'qualified witness' in Schedule 4 Dictionary.

<sup>91</sup> *Industrial Relations Act 2016* s 66A(2).

<sup>92</sup> *Ibid* s 57 – 'intended cultural parent' means a cultural parent whose application for a cultural recognition order has not been decided.

<sup>93</sup> *Ibid* s 66A(3).

## Recommendation

19. It is recommended that a review be conducted of the application of sections 61A and 66A of the *Industrial Relations Act 2016* to understand whether further amendments to the *Industrial Relations Act 2016* are required to clarify the point where the right to parental leave is activated.

## 8 Discharging Cultural Recognition Order

Under sections 72 to 79 of the MOKK Act, a 'relevant party'<sup>94</sup> can apply to a Court to discharge the cultural recognition order (a **discharge order**) on the grounds where the order was made:<sup>95</sup>

- (1) because of a false or misleading document or representation; or
- (2) because a person acted fraudulently or used undue influence on another person; or
- (3) because a person did not provide full, free and informed consent; or
- (4) on some other improper basis.

Otherwise, the Court may further consider exceptional circumstances that warrant the discharge order.

As soon as practical after filing the application for a discharge order in the Court, the applicant must serve a copy of the application to other relevant parties and any person who was required to consent to the application for the cultural recognition order, as well as the Commissioner.<sup>96</sup>

Once a discharge order is made by the Court, the applicant of the discharge order must give a certified copy of the discharge order to the Registrar-General of Births Deaths and Marriages, and also the Commissioner.<sup>97</sup> There is no express requirement for the Commissioner to take any action including making updates to its database or notifying any relevant parties of the outcomes. Nor is there a requirement for the applicant to provide copies of the certified copy of the discharge order to other relevant parties.

## Recommendations

20. It is recommended that section 79 of the MOKK Act be amended to provide that the Commissioner will update its Information Management System to reflect the discharge order against the relevant application, and that the Commissioner may take any other action that is appropriate under the circumstances to ensure proper administration of the discharge order.
21. It is further recommended that a new subsection 79(c) be inserted into the MOKK Act to provide for other relevant parties to be given a copy of the certified copy of the discharge order for their reference.

## 9 Court Proceedings

### 9.1 Court Fees

Section 82 and 83 of the MOKK Act respectively provide that:

- (1) the *Uniform Civil Procedure Rules 1999* apply in relation to proceedings under the MOKK Act as if the proceedings were proceedings in the District Court; and

<sup>94</sup> MOKK Act s 72 of the Act – 'relevant party' means - for a cultural recognition order about a child or adult, is a birth parent or cultural parent of that person; or in the case of an adult only, the adult themselves).

<sup>95</sup> Ibid s 73(1).

<sup>96</sup> Ibid s 74(3).

<sup>97</sup> Ibid ss 79(a) and (b).

- (2) a regulation made under the *Supreme Court of Queensland Act 1991* about how fees are to be received and dealt with in the Courts applies in relation to a proceeding in the Childrens Court under the MOKK Act as if the proceeding were a proceeding in the District Court.

Pursuant to section 91 of the MOKK Act, each party to a proceeding must pay its own costs of the proceeding.

There are a number of provisions that relate to applications to a Court, including for the purposes of applying for:

- (1) dispensation order;<sup>98</sup>
- (2) discharge of dispensation order;<sup>99</sup> and
- (3) discharge order.<sup>100</sup>

Given sections 82 and 83 above refer to the District Court, it is presumed that District Court fees would apply. At the date of this Review, filing fees for an application that is an originating process in a civil proceeding in the District Court amounts to \$989.90.<sup>101</sup>

The concern raised in item 26 of the Issues List was that the intention of the cultural recognition process was that it would not impose costs on the participants.

In reviewing the *Uniform Civil Procedure Rules 1999*, there is no apparent mechanism to waive such Court fees. The same applies for the *Supreme Court of Queensland Act 1991*.

Section 112 of the MOKK Act provides that the Governor in Council may make regulations under the MOKK Act in relation to prescribed fees payable under the MOKK Act.

The *Justices Act 1886* has a similar reference to the Governor in Council making regulations about fees.<sup>102</sup> However, the *Justices Act 1886* has more robust provisions for making a regulation including providing for a reduction, waiver or refund of fees. This approach can be applied to the MOKK Act by empowering the Governor in Council to make such regulations.

## Recommendation

22. It is recommended that section 112 of the MOKK Act be amended to empower the Governor in Council to provide regulation to reduce, waive or refund Court fees, similar to that of section 266 of the *Justices Act 1886*.

## 9.2 Appeals

Under section 92 of the MOKK Act, a party may appeal to the appellate court against a decision on an application under three separate grounds:

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

For clarification purposes:

<sup>98</sup> Ibid s 52.

<sup>99</sup> Ibid s 55.

<sup>100</sup> Ibid s 73.

<sup>101</sup> District Court fees, District Court fees in a civil proceeding (Web page 30 October 2023) <<https://www.courts.qld.gov.au/about/fees/fees-in-the-courts/district-court-fees#FU>>.

<sup>102</sup> *Justices Act 1886* s 266.

- (1) a 'stated party' is defined under section 48(1) of the MOKK Act and refers to a situation where, if an applicant for a cultural recognition order is not able to apply for a cultural recognition order with the consent of a party whose consent is otherwise required, the applicant may apply to a Court for an order dispensing with the need for the consent of the party, where they will then be considered a 'stated party';
- (2) a 'dispensation order' is an order of the Court made under section 52(1) of the MOKK Act dispensing the need for the consent of a stated party as part of the application for a cultural recognition order; and
- (3) a 'discharge order' is an order made under section 73(1) of the MOKK Act where a relevant party for a cultural recognition order applies to the Court for an order discharging the cultural recognition order on grounds set out in section 73(1).

Generally, under section 93 of the MOKK Act, the appeal is commenced by filing a notice with the registrar of the appellate court and then the appellant is required to serve a copy of the notice on the persons as relevant under subsections 92 (a) to (c) mentioned above.

The concern under this process is that there is no mechanism for the notification to the Commissioner of any such appeal. It is important that such notification to the Commissioner is provided to ensure that the Commissioner stays abreast of any such appeal, as the Commissioner may be required to take appropriate action in circumstances where a dispensation order is granted or there is an appeal against the Court not making a discharge or a cultural recognition order and the Commissioner is required to act on any relevant decision of the Court.

#### Recommendation

23. It is recommended that a new provision be considered that requires notification to be provided to the Commissioner from either the Court or the appellant (the practicalities of this will need to be considered) when there is an appeal to the Court under section 92 of the MOKK Act. This would ensure that there is efficiency of process and that the Commissioner is prepared to take any appropriate action.

### 9.3 Stay of decision

Under section 94 of the MOKK Act, an appellate court may stay a decision appealed against to secure the effectiveness of the appeal.

The concern here is similar to that under section 93 discussed above, where there is no mechanism for notification to the Commissioner of any relevant stay of decision. It is fitting for notification of any such stay of decision to ensure that the Commissioner remains updated, is prepared for any relevant outcome of an appeal and therefore allows the Commissioner to consider the appropriate action required.

#### Recommendation

24. It is recommended that a new provision be inserted into the MOKK Act that requires notification to be provided to the Commissioner from either the Court or the appellant (the practicalities of this will need to be considered) when there is a stay of the decision. This ensures the efficiency of the process, and any appropriate action from the Commissioner is contemplated.

### 9.4 Offences and legal proceedings

Under section 100 of the MOKK Act, a proceeding for an offence against the MOKK Act is required to be heard and decided summarily. Section 100(2) provides that such a proceeding must start within the later of 1 (one) year after the offence was allegedly committed, or 6 (six) months after the offence comes to the complainant's knowledge but within 2 (two) years after the offence was allegedly committed.

The MOKK Act imposes penalties or imprisonment, as set out in the respective sections for offences for:

- (1) providing false or misleading information (section 99);
- (2) an administrator who discloses confidential information (section 102); and
- (3) an individual or a corporation for publishing identifying material (section 104).

The concern raised by the Issues Register (item 18) for the above offences is that there is no guidance as to where the complainant can lodge their complaint and where the matter will be heard and decided. This said, the current approach is consistent with other similar legislative instruments including:

- (1) *Health Ombudsman Act 2013* (Qld), section 264;
- (2) *Family Responsibilities Commission Act 2008* (Qld), sections 125 and 126;
- (3) *Births, Deaths and Marriages Registration Act 2003* (Qld), section 50;
- (4) *Adoption Act 2009* (Qld), sections 305, 314 and 315;
- (5) *Child Protection Act 1999* (Qld), sections 99ZG, 187, 189 and 194; and
- (6) *Surrogacy Act 2010* (Qld), section 53.

Although the majority of the above legislative instruments expressly state that offences are to be heard summarily, many specifically refer to the *Justices Act 1886* as guidance for the means for summary hearings<sup>103</sup>. It is noted that section 271 of the *Health Ombudsman Act 2013* and section 309 of the *Adoption Act 2009* provide for indictable offences not to be heard by a Magistrate and sets out a process for such proceedings – however, this does not appear relevant for the MOKK Act as offences are expressed to be summary offences only under the MOKK Act.

While the MOKK Act does not specifically mention that summary proceedings are to be conducted under the guidance of the *Justices Act 1886*, generally summary matters are to be heard before a Magistrates Court. To be specific, section 139 of the *Justices Act 1886* provides that a summary offence is to be heard in a Magistrates Court.

The above said, item 18 of the Issues Register indicated a preference for offences to be initially dealt with under the Department's complaints handling process. Further, there was also a concern that the Commissioner should be notified when any complaint is lodged under the complaints handling process.

Given that the abovementioned legislative instruments refer to the *Justices Act 1886*, it may be prudent to insert a similar reference in the MOKK Act to the *Justices Act 1886* so that complainants understand which legislative instrument would apply to any processes for complaints, should they decide not to pursue the internal complaints handling process.

<b>Recommendations</b>	
<b>25.</b>	It is recommended that the Minister consider whether it is appropriate to insert an initial complaints process within the MOKK Act that is managed and processed by the Department to assist in resolving an offence against the MOKK Act before it is sent before the Magistrates Court. If so, the complaint process should include how and where the complaint is to be lodged, and the criteria for which the matter is to be decided.
<b>26.</b>	It is recommended that section 100(1) of the MOKK Act is amended to provide references to the <i>Justices Act 1886</i> to ensure that complainants are aware of the relevant legislative instrument (and therefore processes) that apply to an offence under the MOKK Act.

<sup>103</sup> See *Family Responsibilities Commission Act 2008* s 133; *Health Ombudsman Act 2013* s 271; *Births, Deaths and Marriages Registration Act 2003* s 52; *Child Protection Act 1999* s 183; and *Adoption Act 2009* s 309 and 311.

27. If a complaint for an offence against this MOKK Act is commenced within the Department's internal process or application is made to a Magistrates Court, it is recommended that the Commissioner is notified of the complaint or application so that the Commissioner may take any necessary action, as appropriate.

## 10 Confidentiality and access to information

### 10.1 Access to particular information

This is a similar issue to that discussed above in relation to section 64 of the MOKK Act. Under section 103(1) of the MOKK Act, an applicant for a cultural recognition order may apply in writing to the Commissioner for a copy of 'restricted information' about the application for a cultural recognition order.

Generally, 'restricted information', about an application for a cultural recognition order under the MOKK Act, means:

- (1) the application for the order; or information or a document that accompanied the application for the order; or
- (2) information or a document that was given to the Commissioner to assist in deciding a cultural recognition order (see section 41); or
- (3) a statement of reasons in relation to a cultural recognition order (see section 58(2) or (3)).

Under section 6 of the Regulation, such an application under to the Commissioner must be accompanied by certified copies of certain documents. However, similarly to the concerns raised through an application under section 64 of the Act, there is no requirement to ensure that the application was signed in the presence of an authorised witness. Again, given the sensitive nature of the restricted information being sought, it may be prudent to include the additional requirement for an authorised witness to be involved in the process to alleviate that concern.

### Recommendation

28. Given the sensitivity of the restricted information requested under section 103(1) of the MOKK Act, we recommend that there is an additional requirement for a request under section 6 of the Regulation, to be signed in the presence of an authorised witness, as defined under the Regulation.

## 11 Miscellaneous

### 11.1 Review of MOKK Act and operations of office

Under section 111(1) of the MOKK Act, the relevant Minister must review the operation and efficacy of the MOKK Act within 2 years after its commencement.

The concern is that there is no requirement for further review of the MOKK Act after this Review.

As a comparison, section 327 of the *Adoption Act 2009* expresses that the Minister must ensure the operation of this Act is reviewed as soon as practicable after the day that is 5 years after the day the *Adoption and Other Legislation Amendment Act 2016* commences. Given the significant changes made by the *Adoption and Other Legislation Amendment Act 2016*, this statutory requirement was included so that the Minister would review its operation, as soon as practicable, five years from its commencement. Further, the provision required that the review must include a review of the effect of the *Adoption Act 2009* on parties to an adoption and their families.<sup>104</sup>

<sup>104</sup> *Adoption and Other Legislation Amendment Bill 2016*, Explanatory Notes, Policy objectives and the reasons for them.

Given the potential for this Review to make significant changes to the MOKK Act, it may be prudent to include a provision that is similar to section 327 of the *Adoption Act 2009* to ensure that a further review is conducted within 5 years of any such amendment applying to the MOKK Act. We suggest that this occurs within 3 years from the date of any amendments to the MOKK Act.

#### Recommendation

29. It is recommended that section 111(1) of the MOKK Act is reviewed to provide that a further review of the MOKK Act is required within 3 years from the date that any amendments to the MOKK Act are made, but no later than the 5 year mark of the legislation's adoption.

## 12 Schedule 1 Dictionary

### 12.1 Chief Executive

The MOKK Act makes reference to a 'chief executive' a number of times. However, it is unclear as to where or which organisation the chief executive represents. This requires further clarification to ensure that it removes any ambiguity.

#### Recommendation

30. It is recommended that a new definition is inserted into the MOKK Act under Schedule 1 Dictionary that provides that chief executive means 'chief executive' as it is described under section 33(11) of the *Acts Interpretation Act 1954* (Qld).

### 12.2 Discharge order

It is noted that the MOKK Act currently sets out the definition of 'discharge order' in the Dictionary. The discharge order only refers to one relevant section, that is, section 73(1), as holding the only definition for a discharge order (discharging a cultural recognition order).

Conversely, an application can also be made to discharge a dispensation order under section 55 of the MOKK Act. A concern was raised during the consultation process as to whether it would be appropriate to include the definition of 'discharge order' to include a discharge of dispensation order under section 55. However, the discharge of dispensation order under section 55 is not the same as a 'discharge order' which refers to the discharge of a cultural recognition order. So, to alleviate any confusion it may be considered appropriate to include in Schedule 1 Dictionary a definition of 'discharge of dispensation order' with a reference to section 55 to adequately distinguish it from a 'discharge order' under section 73.

#### Recommendation

31. It is recommended that a definition of 'discharge of dispensation order' (with a reference to that term in section 55) be inserted into Schedule 1 Dictionary of the MOKK Act.

## 13 Cost benefit Analysis

### 13.1 Background – Cultural Recognition Orders

In Queensland, the number of individuals who both identify and are recognised as Torres Strait Islanders within their community comprises approximately 43,845<sup>1</sup> people. By the end of 2023, the Office had granted 24 CROs and replied to 817 enquiries. CRO and enquiries correspond to a contact rate of 1.8% of this population.

The Office of the Commissioner (“Office”) commenced its operations in August 2021, with the first Cultural Recognition Order (“CRO”) granted in November of the same year. A Cultural Recognition Order is an order made by the Commissioner that transfers a child’s parentage from their birth parents to their cultural parents in accordance with Ailan Kastom child rearing practice.

If this percentage is applied to the entire Torres Strait Islander population across Australia, it suggests the potential for an additional 1,260 enquiries and nationwide CRO. However, this number does not include the traditional child rearing practice that occurred prior to the implementation of the Office in 2021 and, that could be retrospectively recognised under the legislation.

The Australian Institute of Health and Welfare’s data<sup>2</sup> from 2017 to 2021 shows that 34 Indigenous Australian children were adopted. Furthermore, only six Indigenous Australian children were formally adopted throughout the country in the 2021-2022 period. In Queensland alone, the Torres Strait Islander community, CROs issued through the office represented three times the number of formal adoptions of Indigenous children across Australia within a comparable timeframe<sup>3</sup>. This notable difference highlights the possibility that the actual rate of Indigenous Australian adoptions might be higher when traditional cultural practices are factored in, as opposed to relying solely on statistics from formal Western adoption practices.

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<sup>1</sup> (Australian Bureau of Statistics, 2023), (Australian Bureau of Statistics, (2006-2031))

<sup>2</sup> (Australian Institute of Health and Welfare, 2023)

<sup>3</sup> “ibid”

## Analysis

### 13.2 Cost / Benefit Analysis

Based on the submitted financial Expenditure Budget provided to us dated as of 30 June 2022 and, the proposed expenditure budget for the year 30 June 2023 and 30 June 2024.

Using the documents listed above, we have performed a comparative analysis of two key items, the staff cost per CRO application and the staff cost per enquiry. What we have identified is that the staff cost, despite adding an additional employee to the Program Office team, has decreased dramatically over twelve months for both CRO applications and for each enquiry.

We adopted a conservative approach to estimating the future demand for CRO applications and enquiries that recognised that the Office has operated for fewer than two years. Additionally, there have been no commissioned studies that focus on estimating the demand for Ailan Kastom with regard to Torres Strait Islander traditional child-rearing practice. This makes it harder to model the potential demand for these services and to estimate the potential demand for retrospective applications as well.

Noting the above, we increased the actual CROs granted from 24 to 36 for 2024 and, a commensurate increase in enquiries from 817 to 1,225. This extrapolation operates under two assumptions that the Program Support Office staff numbers remain stable at eight employees (8 FTE's – a Director, a Manager, 3 x Cultural Support Officers, a Business Support Officer and an Executive Assistant) and that demand for the Office's services would increase and start to normalise over the following calendar year. Both inputs are shown in Charts 13A and 13B.

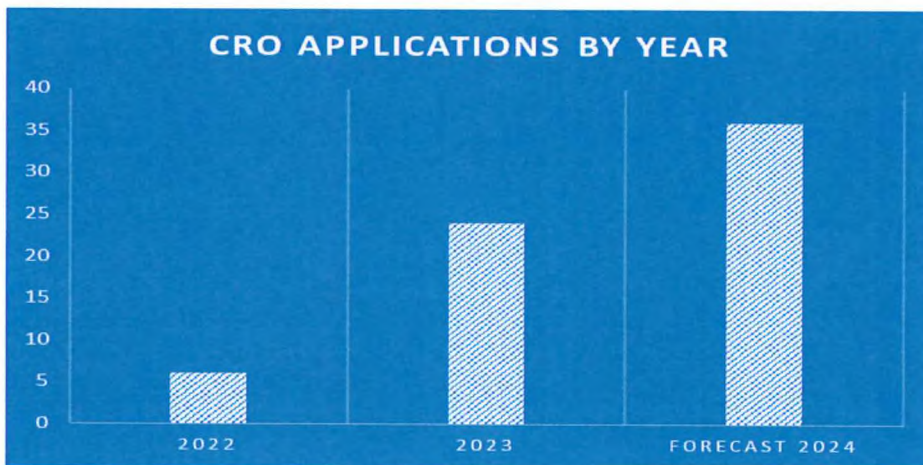


Chart 13A: CRO Applications by Year

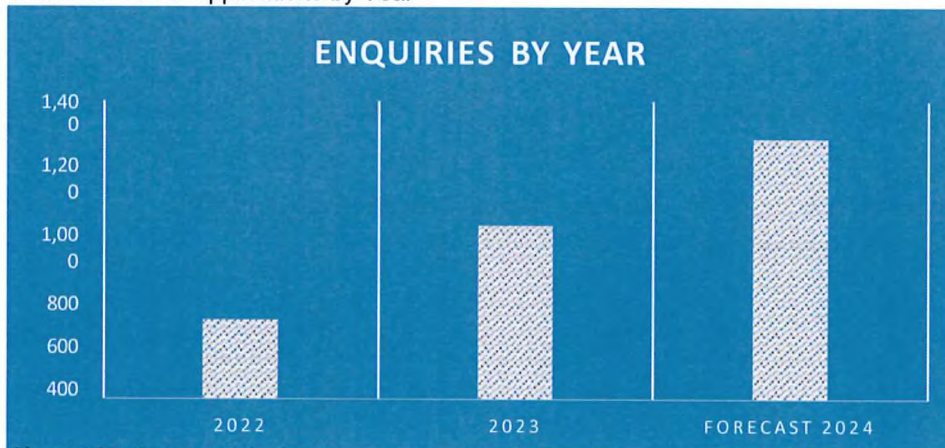


Chart 13B: Enquiries by Year

The reduction in Program Support Office employee Costs compared to CRO Applications and Enquiries is shown further in charts 13C and 13D found below. These demonstrate the historical staff cost compared to the projected increase in enquiries and CROs; the relationship between the two factors shows that program staff cost steadily decreases over the elapsed time. An explanation of how the costs were calculated is provided in section 13.4.

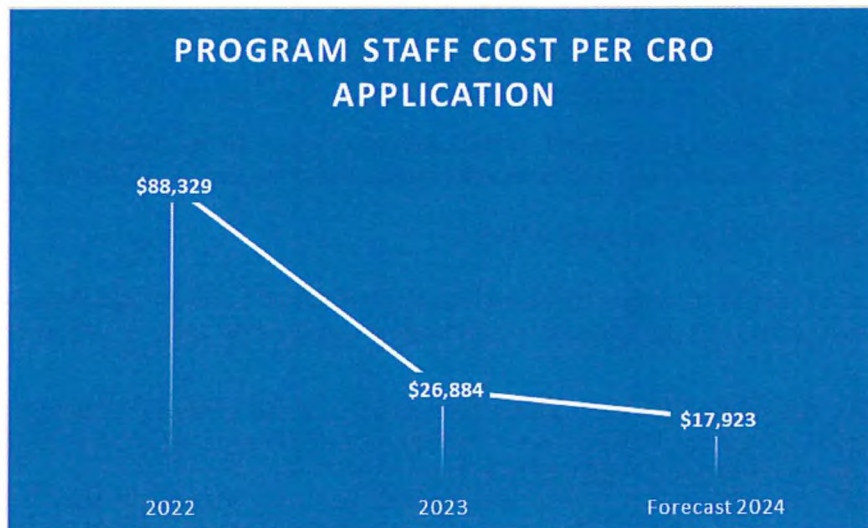


Chart 13C Program Staff Cost per CRO Application

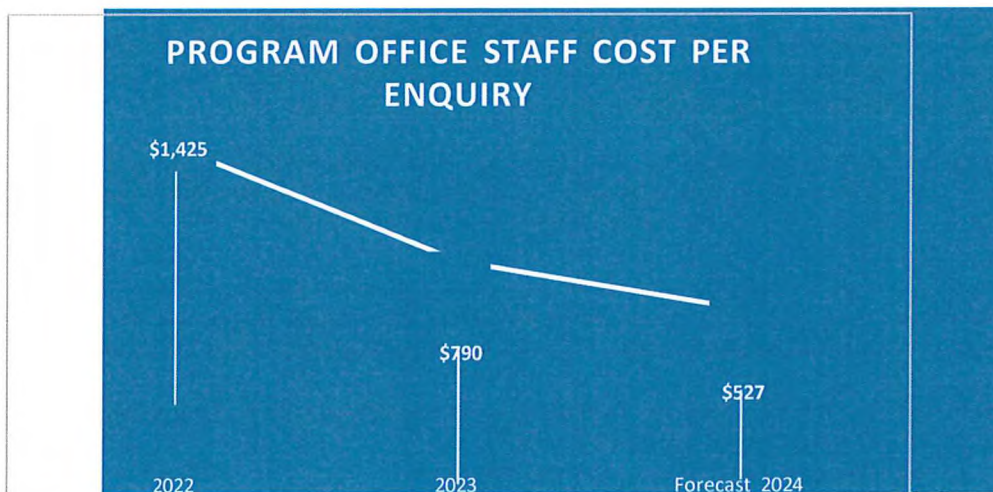


Chart 13D Program Staff Cost per Enquiry

During our interviews we were advised that the 'ideal' time taken to process a CRO application is between 6 to 8 weeks. However, we were not provided with the average application process time, which precluded us from applying staff costs for an 'average' individual CRO application. Having an 'average application time' also provides an opportunity to conduct further analysis to identify the reasons for applications that are outside of one standard deviation on either side from the identified average.

### 13.3 Analysis - Key Performance Indicators

The Meriba Omasker Information Management System (MOIMS) has its limitations. While it captures CRO and logs the number of enquiries made to the Office, it does not record client satisfaction rates for their services and other non-financial indicators. Currently, MOIMS emphasises metrics that gauge the office's engagement with passives, and promoters) and explaining how NPS is calculated with the Torres Strait Islander community, since the existing Key Performance Indicators (KPIs) primarily focus on internal business metrics. Which include but are not limited to.

- The number of enquiries categorised by phone, email, or face-to-face meetings.
- The number of applications originating from an initial enquiry.
- The duration taken for each application, from initiation to completion.

Considering that the Office was established in 2021 and drawing from our interview findings, we propose the adoption of new KPIs to broaden benchmarks for stakeholder engagement in specific areas.

### 13.4 Suggested Key Performance Indicators

As MOIMS was recently established, one of our recommendations is that the existing dashboard be broadened to include both financial and non-financial measurements using a balanced scorecard model.

Due to the sensitive nature of the application process and the cultural sensitivity around Ailan Kastom, it is reasonable to expect that there will be consistently more enquiries relative to applications. Adding the following key performance indicators in these three

(3) areas (Learning and Growth, Customer and Financial Measures) would allow the Office to better track their success and to understand the impact that the program is having upon the community. This approach would predicate a holistic foundational evaluation methodology for future reviews.

#### *Learning and Growth*

The following Key Performance Indicators build upon the internal business model indicators that are implemented and listed above. The suggested indicators to be included in the dashboard would focus on demonstrating the office's ability to improve its service delivery over time.

- Response time from fault to fix, i.e., from problem or blockage arising in a CRO application to resolution. However, there should be space to provide further context regarding the response time, for instance, the delay due to the complexity of the application.
- Percentage of calls answered vs abandoned; in this case, how many calls to the Office are abandoned by the caller prior to speaking with a representative. It would also be helpful to combine this statistic with the average wait time until the call is picked up by the Office.
- Response time to email enquiries and this can be segmented into multiple categories to provide further insight. A few examples are listed here:
  1. CSO email response time to the initial inquiry,
  2. CSO phone call response time to an initial inquiry,
  3. CSO response time between the length of time the inquiry was submitted vs the CSO's initial contact with the Applicant.

## Customer

The addition of the following three Key Performance Indicators would assist the Office with measuring their engagement with the community about their service delivery.

Customer Effect Score – measures how much effort a customer must undertake to get an issue resolved, a request fulfilled, or a question answered. However, it is best employed in conjunction with the Customer Satisfaction Score and a Net Promoter Score, as it only measures the response from a single interaction and not over the course of the application. An example of a Customer Effect Score question can be found here “on a scale of ‘very easy’ to ‘very difficult’, how easy was it to interact with the Office.”

Customer Satisfaction Score - is the sum of all positive responses, divided by the total responses collected, then multiplied by 100. The outcome leaves you with the overall percentage of satisfied clients. It’s a relatively quick survey, which lends itself to being implemented at multiple stages of the CRO application process to find out how clients experience changes at various stages. This simple and user-friendly approach is designed to reduce service access challenges and improve the customer experience.

Net Promoter Score (“NPS”) is a customer loyalty and satisfaction measurement taken by asking customers how likely they are to recommend the Office to other community members on a scale of 0-10. An example of NPS is shown below explaining how it sorts clients into three categories (detractors,

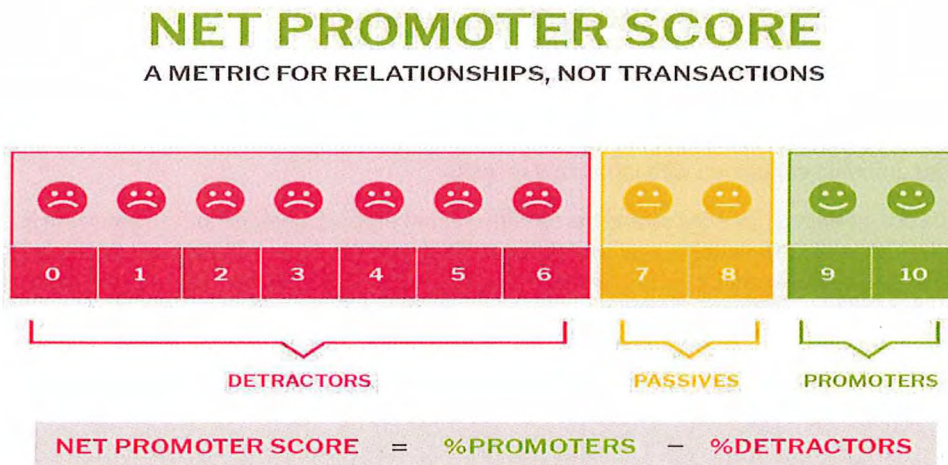


Chart 13E Net Promoter Score

Ideally, the Office would apply a sliding scale to measure their interactions falling within the right two categories, with clients being classified as either passive (neither good nor bad) or promoters (recommend the office) for all their transactions with the community. This is achievable as the office provides a unique service to a specific client cohort, and the service is tailored to realise community expectations and individual and family aspirations, which are key elements of successful client and community engagement and participation and useful measures in determining the effectiveness of the Office.

#### *Financial measures*

Currently, the operational costs for each application and enquiry, along with the cost to process the average CRO application, are not included in the MOIMS dashboard. Charts 13A and 13B were prepared by calculating the total program staff employee cost and then dividing them by the number of CROs and enquiries.

In time, this calculation can be broadened to include other direct costs associated with providing the service to the community, such as travel costs (flights, accommodation, boat travel) and local office expenses. A decision must be made about how to allocate the fixed overheads from the Commissioner's office to each application and enquiry.

- Program Staff Office Cost versus CRO.
- Program Staff Office Costs allocated to each individual enquiry.
  - Program Staff Office Cost divided by the time allocated for each CRO application.

These three key performance indicators will help to assess the program's cost, but it is important that further activity metrics and evaluation methods are applied to accurately assess and forecast the Office's value to the community through the provision of its unique service.

#### **13.5 Analysis – Funding & Expenditure Requirements**

We were provided with the following financial review for the Office dated 18 July 2023, which included the budgeted amounts contrasted with the actual receipts.

Based on the documents provided to us and the current community engagement rates, the current financial position of the Office of the Commissioner and Program Support Office are sufficient to fulfill the legislated functions and responsibilities in accordance with the Act, noting that the current funding arrangement ends on 30 June 2024.

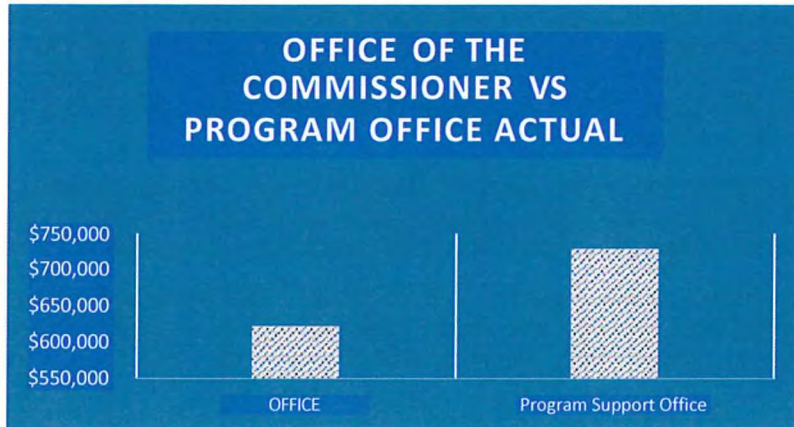


Chart 13F: Office of Commissioner vs Program Support Office Actual Expenditure

The above chart separates the 2023 actual expenditure for the Office of \$1.3 million (AUD) across three cost centres, the Office of the Commissioner, MOKK Program Support Office, and Strategic Policy, Legislation and Program Reform (Departmental Legal Policy). The Program Support Office constitutes 54% of the overall budget and incorporates the first point of client contact and all other elements of client service excluding approval of CROs.

We identified the top five expense line items for the office, and the largest operating expense is employee expenses totalling \$787,405 or 58% of the total budget. With a service orientated office, this seems appropriate.

The next four largest expenses for the offices are shown in Chart 3.32 below and represent 27% of the total budget. With the information on hand an internal review should be undertaken on the four items below: Operating Leases, Travel, Office Unallocated Expenses and Outsourced Corporate Services. These line items provide an opportunity to generate further savings; although travel is a key component of service delivery, any savings here are likely to come by way of reduced fares and to be expended on increased client travel.

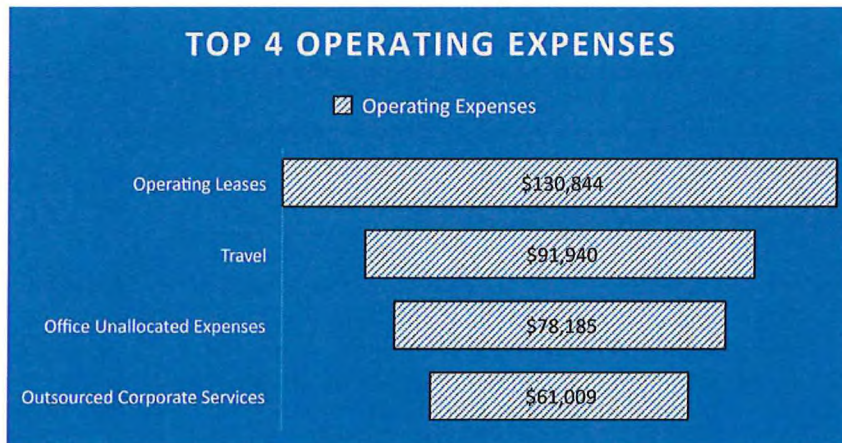


Chart 13E: Largest Operating expenses excluding employees.

However, we note that Operating Leases are allocated to the Commissioner's budget. These leases are primarily comprised of office lease payments for the property and a car park located at 3 / 63 - 67 Spence Street, Cairns 4870 in Queensland. The Office assumed the property lease from another Department, in part to reduce the upfront Office fit out costs, in accordance with state government Information Technology security requirements.

To test the commerciality of the current lease arrangement for the above-named property, we conducted a limited market comparison of the office leases available within Cairns. Our findings are summarised in chart 13G and are for properties that are of a similar size to the existing lease at 241 square meters.

While the existing lease is more expensive on a per square meter basis compared to the other two available leases. Two points must be factored into a cost-benefit analysis, firstly the relocation costs of moving the office and of potentially upgrading any IT facilities to comply with State government requirements.

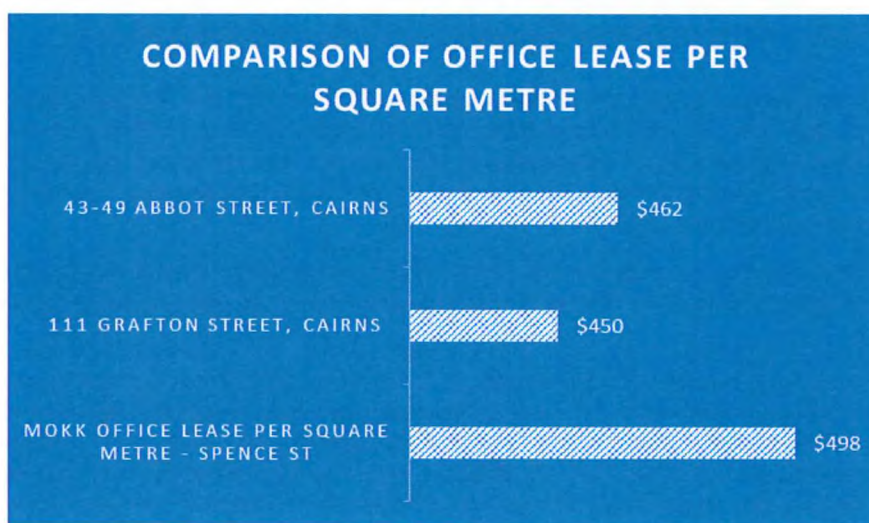


Chart 13G: Office Lease comparison per square metre

The following two expense items are travel and unallocated office expenses. Travel is an integral component of the funded service schedule to deliver client outcomes, and future travel planning considerations should include collaboration with other stakeholders to reduce expenditure and increase cost sharing efficiencies.

**13.6 Analysis - Memorandum of Understanding:**

In accordance with the departmental 2021-22 Strategic Internal Audit Plan highlighted a department management action to develop a Memorandum of Understanding in consultation with the Commissioner to formalise an agreement outlining the future governance arrangements. Our understanding is that a Memorandum of Understanding has not been established for the services provided by the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts ("the Department") to the Office of the Commissioner. The support facilitated through the establishment of the MOKK PSO is costed through a routine budget line item of Corporate Services and is allocated annually, and as such, may not accurately reflect the actual cost of services provided to the Office of the Commissioner.

It is difficult to identify further efficiency opportunities given the lack of historical data and the absence of comparable expenditure benchmarks given the service's infancy and unique functions. Additionally, conducting a process mapping around service delivery would help to identify nonvalue added steps,

currently included within the process, that could be removed to improve productivity and to reduce costs. Any identified limitations should be incorporated in successive reviews.

### 13.7 Analysis – Limitations

In the process of preparing this report, several limitations have been observed that may affect the entirety and accuracy of our findings. The Meriba Omaker Information Management System (MOIMS), due to cultural sensitivities, is presently incapable of furnishing client satisfaction rates for their services. This is one of the reasons that we recommended the inclusion of additional financial and non-financial key Performance Indicators at 3.21.

Our understanding is that MOIMS is a basic system that is not highly functional or interactive to function as a data or reporting system. There would be significant improvement required from MOIMS prior to the introduction of dashboard KPIs.

Additionally, there is a significant shortage of information available for establishing an international benchmark suitable for the Torres Strait Islander population. This benchmark would be essential for determining a potential sample size for the creation of a financial model that could calculate the value provided to the community or even estimate the underlying latent demand for the Office's services in future and for historical CRO applications.

To illustrate, data regarding the Māori Whangai traditional adoption, which shares similarities with Ailan Kastom, remains uncollected by the New Zealand government. This absence of data is attributed to the New Zealand government's perception of the process as informal, and it consequently was not recognised under the 1955 Adoption Act. In essence, the current lack of sufficient data or benchmarks poses challenges in quantifying the value that the program brings to the Torres Strait Islander community. This should be a key determinant in assessing the program's effectiveness.

Additionally, one of the key challenges was the limited ability to pinpoint areas for enhanced efficiency, due to the absence of historical data. This information serves as a foundation for assessing current performance and forecasting future trends. Without this data, it is significantly more challenging to identify potential inefficiencies or areas of improvement.

Moreover, the unique and specialised nature of the Office of the Commissioner functions intensifies this challenge. Many organisations rely on comparable spending benchmarks, which measure financial and service delivery data, from similar entities to measure their overall efficiency. As this is the only service of its kind in Australia, there are few, if any, similar entities to draw such comparisons or review and incorporate performance measures and lessons learnt. This absence of comparable benchmarks further hinders our ability to establish a clear spending baseline and measure performance against best practices. Ultimately, this makes it critical that internal metrics are developed to assess and optimise future operations.

### 13.8 Organisational Structure

#### Office of the Commissioner

Currently, the Office of the Commissioner sits within the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts. An organisational chart can be found at Appendix B. From inception and pre-appointment of the Commissioner, the Department established three cost centres.

- i. Office of the Commissioner – sole legislated function (s26-30),
- ii. MOKK Program Support Office (Departmental), non-legislated, and
- iii. Strategic Policy, Legislation and Program Reform (Departmental Legal Policy), non-legislated.

All three cost centres are controlled and administered by the Department, and the Commissioner is allocated a delegation level in accordance with public sector financial management practices. From 2021 there has been no separation or independent financial discretion afforded to the Commissioner over his budget, despite his statutory responsibilities to the Minister Leanne Enoch and possessing seniority equivalent to a Chief Executive.

Division 2 Office of the Commissioner 26 Office of the commissioner

- (1) An office called the Office of the Commissioner (Meriba Omasker Kaziw Kazipa) is established.
- (2) The office's function is to help the commissioner perform the commissioner's functions.
- (3) The office consists of the commissioner and the officers of the office.

From a financial perspective, the Commissioner does not have access or been allocated any additional resources to establish a functional Office of the Commissioner and relies on departmental goodwill to resource Torres Strait Islander client activities.

Consequently, since this is the third year of the Act being in effect, is it reasonable to anticipate that the department will transition and/or translate the Program Support Office functions across to the Office of the Commissioner functions in future.

### 13.9 Overview Meriba Omasker Kaziw Kazipa Program Office

The Program Support Office is established as a departmental function and resource and is co-located within the Office of the Commissioner. The service activity facilitated by the Program Support Office is described in the role description as:

*Meriba Omasker Kaziw Kazipa Program Support Office has been established to support the Office of the Commissioner, and to provide information and culturally appropriate support to applicants about the application process for Cultural Recognition Orders as well as make referrals for optional legal advice, community-based counselling services, and undertake community engagement.*

The Program Support Office organisational chart contained in Appendix B shows that the Program Office has an organisational strength of eight employees. Seven of these positions are currently filled, and one is waiting to be filled. Excluding the Program Office Director, the remaining roles or some 87.5% of all positions were established on a non-recurrent basis with a contract end date of 30 June 2024.

Given that the Act's effectiveness is dependent on the retention of highly skilled employees to assist with the completion of CROs, to process same and to maintain the confidence of the Torres Strait Islander community with the implementation of the Act. This absence of formalised long term employment contracts creates a substantial risk of inducing employee turnover that would have a detrimental impact on service delivery.

The Program Office's financial approvals and delegations sit within the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts. This means that key approvals for the Program Office, such as travel to the outer islands and car hire, are approved by the Department. Given the remoteness of the area and, the few travel or accommodation service providers can result in higher costs or non-availability of resources if there is a delay with authorising administrative approval.

### 13.10 Office of the Commissioner and Program Office Recommendations

The future and legitimacy of the Act, the Office of the Commissioner, and the position of the Commissioner are at risk in the absence of any consolidated negotiations and actions to sustain the current service arrangements and functions.

There are several problems arising out of the existing organisational structure, such as the misalignment of reporting and financial delegations from the Program Support Office with the Department and the Commissioner.

1. If the Office was constituted as an independent statutory body like the Family Responsibility Commission, this would provide several advantages from a financial and organisational perspective.
2. The Commissioner would have clear leadership responsibilities over the Program Office,
3. It creates a perception of independence from the Department and, their community *brand*,
4. The funding level is more responsive to evolving demand needs for the Office's services from the community.
5. Provides surety to Program Support Office employees regarding their long-term employment and, to the community of the continued operation of the Act. Thereby reducing the risk of staff turnover.
6. Accelerate approval processes and provide flexibility regarding authorising travel or expenditure to assist with the performance of the Act.
7. Provides a sense of ownership around decisions and activities undertaken by the Office.

## Recommendations

Noting the Limitations identified in section 13.8, we recommend the following actions are undertaken, namely more research, inclusion of additional Key Performance Indicators and, that the level of funding may need to be adjusted if CRO demand significantly increases.

Fieldwork be conducted that would help to assess the effectiveness of the program, and more importantly, to quantify the actual demand for the services provided by the Office. The fieldwork results can then be used to create an economic model to calculate the Program's value. Given the potential size and scope of the potential fieldwork the Office considers the research is conducted in conjunction with a research focused University.

Bourke (2018)<sup>4</sup> found that culture is significantly and positively associated with physical health, social and emotional wellbeing, and reduces risk-taking behaviours. Most publications present evidence on the impact that culture, or culturally based interventions, have on social and emotional wellbeing outcomes<sup>5</sup>.

Further fieldwork is conducted to estimate the demand for recognition of previous traditional child rearing practices within the Torres Strait Islander community. Given the uniqueness of the research involved, it might be a project that can be done in conjunction with a research university.

Further fieldwork is conducted to establish a link, if any, between application or access to Cultural Recognition Orders and Socioeconomic Outcomes 4 & 5 of the National Agreement of Closing the Gap.

Further fieldwork is conducted to establish a link, if any, between application or access to Cultural Recognition Orders and Socioeconomic Outcome 14 from the National Agreement of Closing the Gap.

The additional Key Performance indicators listed in section 3.21 are included in the MOIMS dashboard reporting to provide a more holistic assessment of the office's performance. Noting the current MOIM limitations identified in section 4.4.

A further review of Operating Leases, Travel, Office Unallocated Expenses and Outsourced Corporate Services should be undertaken annually to identify opportunities to reduce expenditure within these line items.

A Memorandum of Understanding be established between the Department and the Office regarding Outsourced Corporate Services, and any other services provided from the Department to the Office.

While the current funding level appears to be sufficient to discharge the Office's services (currently operating with 9 FTEs) ex under the Act, if demand significantly increases, then this will need to be revisited and should be included in the next Internal Audit.

Explore separating the Department from the Office of the Commissioner Meriba Omasker Kazipa and the Program Support Office which would be amalgamated under the direction of the Commissioner.

<sup>4</sup> (Bourke, 2018)

<sup>5</sup> (Department of Health, 2021)

## **Cost Benefit Analysis Conclusion**

The recent establishment of the Office in 2021 has seen a notable rise in both enquiries and CROs. With 1.8% of the Torres Strait Islander population within Queensland reaching out for assistance or to access recognition of a traditional child rearing practice.

This suggests a significant engagement level with the community, especially when one considers the comparative number of traditional Indigenous child rearing practices and the Cultural Recognition Orders granted to Torres Strait Islanders.

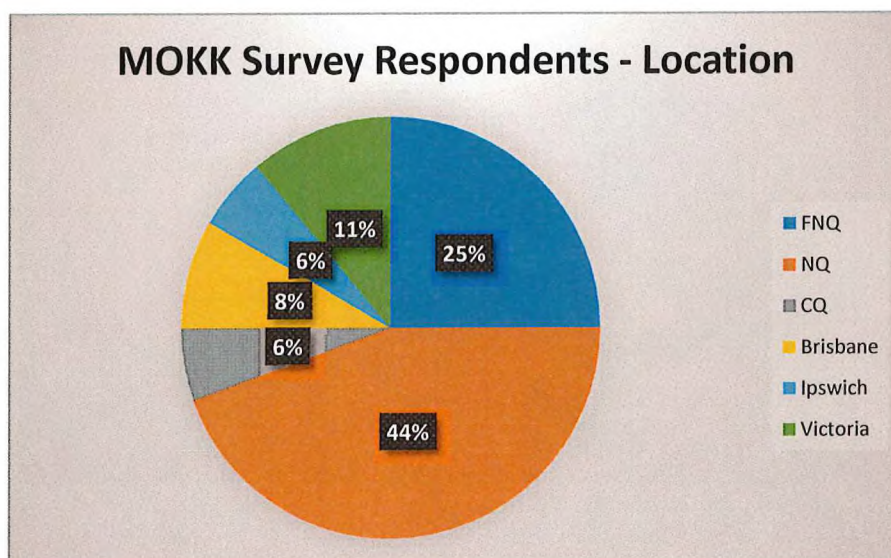
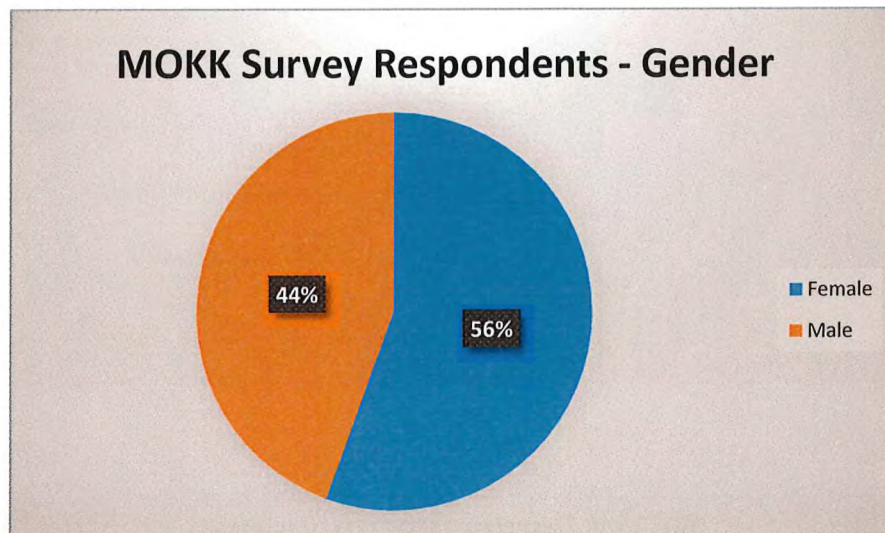
The financial analysis has indicated that, over time, the efficiency of the program has improved, evidenced by the decreasing staff costs for both applications and enquiries. This improvement can be attributed to the experience and knowledge acquired by the staff over the operational period. However, the offices are currently challenged to effectively record the value of their services to the community, and this is a key benchmark that should be included in all future reporting.

However, the Meriba Omasker Information Management System (MOIMS) currently captures limited metrics, and there is an opportunity to further refine its capability to better serve the community and the office's objectives. By integrating suggested metrics such as Learning and Growth, Customer, Financial measures, and Traditional Child Rearing Practice Measures, the offices can comprehensively gauge their performance and make informed decisions to improve their services by utilising a Balanced Scorecard method.

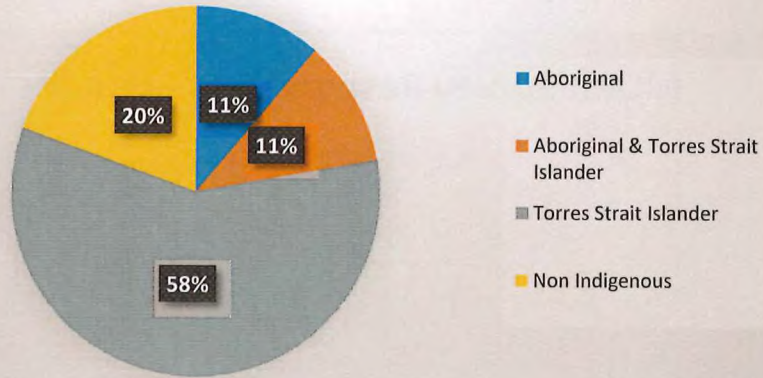
Moreover, certain limitations hinder a more extensive and comparative analysis, such as the cultural sensitivity surrounding the collection of satisfaction rates and the lack of similar data from international communities like the Māori.

In summary, while the services have achieved commendable success within a short span of its establishment, there is potential for growth and refinement in the areas of governance, operational functionality, and information management practices. As the offices continue their essential work in recognising traditional child-rearing practices and serving the Torres Strait Islander community, the continued evolution and expansion of the business metrics will be crucial in ensuring its ongoing success and efficacy.

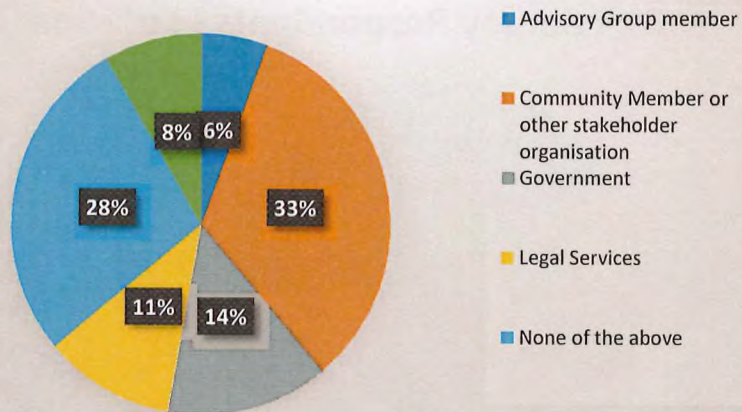
## Appendix A: Meriba Omasker Kaziw Kazipa Survey Summary of Results



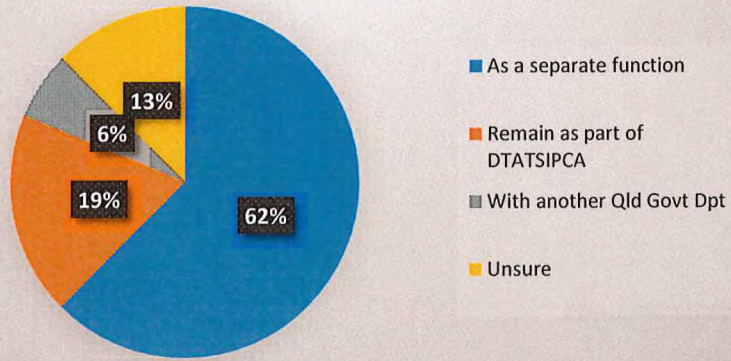
### MOKK Survey Respondents - Identity



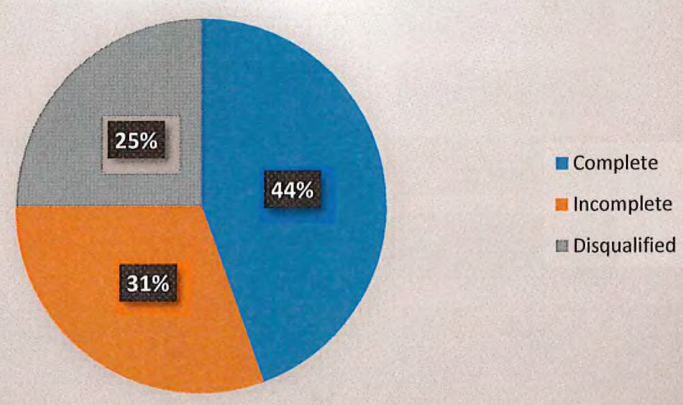
### MOKK Survey Respondents - Stakeholder Category



### Preferred service delivery option for the Program Support Office



### MOKK Survey Overall Status



Appendix B: Organisational Chart

