

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

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Cynthia Lui MP, Member for Cook, make this statement of compatibility with respect to the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020.

In my opinion, the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

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

On 15 November 2017, the Government announced that a re-elected government would introduce new laws that recognise the outcomes achieved by Torres Strait Islander families' continued use of Torres Strait Islander traditional child rearing practice. Further, in developing a framework for legal recognition, the new laws will be based on three guiding principles: consent of biological parents; suitability of cultural (or receiving) parents; and the rights and best interests of the child throughout their life (Government Election Commitment 580).

Legally recognising Torres Strait Islander traditional child rearing practice will be a historic step and the first legislation of its kind in Australia. It will formally acknowledge the importance of culture underpinning Torres Strait Islander family structures, communities and social networks, and will resolve long-standing issues faced by Torres Strait Islander people whose legal identity does not reflect their cultural identity and lived experience. In accordance with international and Queensland human rights standards, Torres Strait Islander people have the right to practise their own laws, customs and traditions, including the right to self-determine their own identity.

The Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 (hereafter, the Bill) implements a Government Election Commitment (GEC580).

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

The key features of the Bill are:

- A statutorily appointed and independent Commissioner, who is appropriately qualified and a Torres Strait Islander person, and who will decide an application for a cultural recognition order;
- A cultural recognition order has the effect of a permanent transfer of parentage from the birth parents to the cultural parents;
- Any decision under the Bill, including deciding to make a cultural recognition order, must be for the wellbeing and best interests of a person who is the subject of an application for a cultural recognition order and must be made for the wellbeing, and in the best interests, of the child;
- Consent for legal recognition must be provided by the biological parents and cultural parents (where reasonably and appropriately available);
- Suitability of the cultural parents means that the cultural practice as occurred has been verified by persons with knowledge and understanding of the cultural practice specific to the family's community);
- Information will be exempt from release through the *Right to Information Act 2009* to preserve confidentiality; and
- The Commissioner will have discretion to seek criminal history information about the cultural parents.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Overall, the Bill promotes the right of Torres Strait Islanders to enjoy, maintain, control, protect and develop their kinship ties under section 28(2)(c) of the *Human Rights Act 2019* (HR Act), while still ensuring the protection of children in their best interests in accordance with section 26(2) of the HR Act.

However, the Bill engages or limits a number of other human rights. In my opinion, the human rights recognised under the HR Act that are relevant to the Bill are:

- Recognition and equality before the law (section 15) (relevant to clauses 11 and 20 in respect of who can be appointed Commissioner and when the office of the Commissioner becomes vacant; relevant to clause 32 in respect of the eligibility criteria for a cultural recognition order; relevant to clauses 47 to 54 in respect of dispensation of consent; and relevant to clause 105 in respect of the Commissioner not being civilly liable);
- Freedom of expression (section 21) (relevant to clauses 47 to 54 in respect of dispensing with requirement for consent; and relevant to clauses 44(2)(b) and 101 to 104 in respect of obligation of confidentiality);
- Taking part in public life (section 23) (relevant to clauses 11 and 20 in respect of who can be appointed Commissioner as well as the dismissal and suspension of the Commissioner);
- Property rights (section 24) (relevant to clauses 67 to 71 and 77(5)(a)(i) and (b) in relation to disposition and devolution of property);
- Privacy and reputation (section 25) (relevant to clause 18 in relation to disclosure of Commissioner's conflict of interest; relevant to clause 20 in relation to dismissal and suspension of Commissioner; relevant to clauses 34 to 39 and 41(1) in relation to providing

information as part of an application; relevant to clauses 36(1)(h)(i), 45 and 46 in relation to disclosure of criminal history);

- Protection of families and children (sections 25; 26(1); 26(3)) (relevant to clauses 47 to 54 in respect of dispensing with requirement for consent; relevant to clause 58 in respect of the power to make cultural recognition order; relevant to clause 66 in respect of the effect on relationships of a cultural recognition order; relevant to clauses 72 to 79 in respect of discharge orders; and relevant to clause 77(5)(a)(iii) in respect of the power to make consequential orders about custody or guardianship); relevant to clause 77(5)(a)(ii) in respect of the power to make consequential orders about the child's name);
- Cultural rights – Aboriginal and Torres Strait Islander (section 28) (relevant to clauses 34 to 39 and 41(1) in relation to providing cultural information as part of an application);
- Freedom of thought, conscience, religion and belief (Section 20) (relevant to clauses 34 to 39 and 41(1) in relation to cultural information provided as part of application);
- Fair Hearing (section 31) (relevant to clauses 85 and 89 in relation to evidence; relevant to clause 97 in relation to court hearings not to be public; and relevant to clause 98 in relation to public access to record of proceedings).

Recognition and equality before the law (section 15)

(a) the nature of the right

The right to recognition and equality before the law provides that every person has the right to enjoy the person's human rights without discrimination, and that every person is equal before the law and is entitled to the equal protection of the law without discrimination.

The definition of discrimination under the Act is broad, and extends to discrimination on the basis of attributes which are currently outside the scope of discrimination under the *Anti-Discrimination Act 1991* (and may extend to discrimination on the basis of a person's criminal history and employment status).

Appointment and dismissal of commissioner

Clause 11 provides that the Minister may recommend a person for appointment as commissioner only if (a) the person is a Torres Strait Islander and (b) the Minister is satisfied the person is appropriately qualified. This requirement could be seen as limiting right to recognition and equality before the law as it establishes selective criteria for consideration for appointment as commissioner. By creating a prerequisite that the potential appointee must be a Torres Strait Islander, this clause might engage and limit a person's right to be free from non-discrimination insofar as the person may be ineligible for consideration or appointment as Commissioner solely on the basis of their ethnicity. For the same reasons, the right of equal access to the public service under section 23 is also engaged (see below).

Clause 20 provides for the circumstances in which the officer of Commissioner becomes vacant. This includes where the Commissioner is convicted of an indictable offence, or where the Minister is satisfied that the Commissioner is guilty of misconduct, is incapable of performing the functions or powers of the office or has neglected the functions or powers of the office or performed them incompetently. This potentially limits the right to non-discrimination by treating a person differently on the basis of a conviction or satisfaction of other conduct. Again, the right of equal access to the public service under section 23 is also engaged for the same reasons (see below).

Criteria for making an application

Clause 32 provides for the preliminary criteria for making an application for a cultural recognition order. Clause 32(1)(a) and (c) provides that an application for a cultural recognition order about a person may be made only if at least one birth parent is a Torres Strait Islander and, at the time of the practice occurred, at least one cultural parent is a Torres Strait Islander. This requirement treats birth and cultural parents differently on the basis of race.

Clause 32(1)(b) provides that an application for a cultural recognition order about a person may be made only if the person's birth was registered in Queensland. With some exceptions, only a person born in Queensland may have their birth registered in Queensland under sections 6 and 7 of the *Births, Deaths and Marriages Registration Act 2003*. Accordingly, clause 32(1)(b) treats people differently on the basis of where they were born.

Clause 32(2)(b) provides that an application for a cultural recognition order may not be made if one of the birth parents or cultural parents is not an adult. This treats people differently on the basis of their age.

Dispensation of consent

The Bill provides that a court may hear and decide an application for an order dispensing with the requirement for a statement or information which includes consent, from a parent involved in proceedings under the Bill in certain circumstances (the identity of the relevant parent cannot be established after all reasonable inquiries; relevant parent cannot be located after all reasonable inquiries; the relevant parent is deceased; the person's conception was as a result of an offence committed against the relevant parent; unacceptable risk of harm to the person's birth mother if the relevant parent was made aware of the child's birth or making of a cultural recognition order; and other special circumstances).

This limits the right to recognition to equality before the law because dispensing with the need to obtain the consent of a parent limits that person's ability to participate in the proceedings under the Bill.

Commissioner not civilly liable

Clause 105 provides that the Commissioner is not civilly liable for an act done without negligence. Clause 105(3) provides that the provision does not apply to an administrator if they are a state employee within the meaning of the *Public Service Act 2008*. This may engage and limit a person's right to be recognised as a person before the law as a person is not recognised as having legal competence to commence proceedings against the Commissioner in prescribed circumstances.

(b) the nature of the purpose

The purpose of allowing an act to be done or a decision to be made under the Bill despite the *Anti-Discrimination Act 1991* is to allow for measures to be taken to assist or advance persons or groups of persons disadvantaged because of discrimination, as well as to allow decisions to be made which respect Torres Strait Islander traditional child rearing practice. These purposes are consistent with the rights in sections 15(5) and 28(2)(c) of the HR Act.

The purpose of requiring that the Commissioner is a Torres Strait Islander is to ensure that the appointed person is able to consider applications for cultural recognition with an innate knowledge and appreciation of the confidential and sacred cultural practice. The purpose of

providing for dismissal or suspension of the Commissioner is to ensure that the person holding that office is a person of integrity.

As to the eligibility criteria in clause 32:

- The purpose of requiring at least one birth parent and one cultural parent to be Torres Strait Islander is to align with Ailan Kastom, as confirmed in consultation for the Bill.
- The purpose of requiring that the person's birth was registered in Queensland is to enable the full effect of a cultural recognition order. That is, proposed new section 41DA of the *Births, Deaths and Marriages Registration Act 2003*, to be inserted by clause 123 of the Bill, will allow a transfer of parentage effected by a cultural recognition order to be registered and for the person's birth entry to be closed. If a person's birth is registered in another State or Territory but a cultural recognition order is made under the Bill in Queensland, the order will have the effect of transferring the person's parentage under Queensland law, but not under the State or Territory law where their birth is registered. Accordingly, a further purpose of the eligibility criteria that the birth was registered in Queensland is to avoid inconsistency with the laws of other States and Territories.
- The purpose of requiring all of the applicants to be adults is to protect the best interests of a parent who has not reached the age of 18 (consistent with the human right in section 26(2) of the HR Act).

The purpose of the dispensation of consent provisions is to ensure that a person subject to the application for cultural recognition will still have the opportunity to benefit from legal recognition of the cultural practice, subject to the Commissioner's consideration of the application, even if the consent of the relevant parent cannot be reasonably or appropriately established.

The purpose of limiting the Commissioner's civil liability is to allow them to appropriately perform their powers or functions without fear of civil liability when these are carried out without negligence.

(c) the relationship between the limitation and its purpose

Requiring the Commissioner to be Torres Strait Islander helps to achieve the purpose of having a Commissioner who understands Ailan Kastom. Ailan Kastom child rearing practice is unique to individuals of Torres Strait Islander descent. Although the practice varies between the five island groups of the Torres Strait, generally, it is also private confidential family agreement. Given the confidential and sacred nature of the cultural practice, it would be difficult to provide training and information about the practice to ensure that a commissioner who was not a Torres Strait Islander is adequately informed and is able to appropriately consider the information on the Ailan Kastom provided in the application form. This requirement for the Commissioner to be Torres Strait Islander also supports the implementation of the Commissioner's function to promote public awareness of the Commissioner's functions and the office, in particular with the Torres Strait Islander community

Requiring or allowing for the Commissioner to be dismissed or suspended in certain circumstances will help to achieve the purpose of ensuring the Commissioner is a person of integrity.

As to clause 32, restricting the eligibility criteria for making an application will help to achieve each of the purposes identified above.

Allowing for dispensation of consent will help to achieve the purpose of allowing a person to benefit from legal recognition of the cultural practice even though a relevant person does not provide consent, in certain circumstances.

Civil liability may be a potential concern for the Commissioner given the financial and reputational damage that may rise from a claim. In order to mitigate this concern, and to ensure that the Commissioner's decision making is not impeded by it, it is necessary to limit civil liability when the Commissioner's decisions are made without negligence.

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available ways to achieve the purposes of each of the limits on the human right in section 15 have been identified.

In particular, a Commissioner who is not a Torres Strait Islander is unlikely to have an in-depth knowledge and understanding of the cultural practice due to its confidential nature. Further, the confidential nature of practice also means that it may not be possible to ensure that a Commissioner who is not a Torres Strait Islander would be able to obtain sufficient training and information on the practice. Simply providing additional cultural training, or prioritising Torres Strait Islander applicants would not be as effective in ensuring the Commissioner was suitable for the role. The work of the Commissioner may be done by an appointed person under clause 19, an acting Commissioner under clause 21 and a review officer under clause 62. While each of these positions may be filled by a person who is not Torres Strait Islander, they are exceptions to the rule. It remains necessary that generally the work of the Commissioner is carried out by a person who is Torres Strait Islander.

Further, as to civil liability, a person's recourse is not totally extinguished because if the commissioner is not civilly liable if they acted without negligence, as the liability will instead attach to the State. Further the commissioner's liability is not totally extinguished as the limit does not apply where there is negligence. This is consistent with other statutorily appointed administrative decision makers.

(e) The balance between the importance of the purpose and the importance of preserving the human rights, taking into account the nature and extent of the limitation

As to clauses 11 and 20, the importance of ensuring the Commissioner is appropriately qualified and suitable outweighs the right of non-discrimination on the basis of race or conviction status.

As to clause 32, the importance of restricting eligibility criteria (to accord with Ailan Kastom, to avoid inconsistency with the laws of other States and Territories, and to protect parents who are children) outweighs the importance of not treating people differently on the basis of race, place of birth, or age.

As to dispensation of consent (clauses 47 to 54), the importance of allowing the benefits of Torres Strait Islander traditional child rearing practice notwithstanding lack of consent in some cases outweighs the impact on the non-consenting parent's right to recognition as a person before the law.

As to civil liability (clause 105), it is clearly important to ensure that the Commissioner's decision-making under the Bill is not affected by concern of civility liability for acts without negligence. That purpose outweighs a person's recognition as a person before the law, where they would otherwise have a cause of action available to them.

Freedom of expression (section 21)

(a) nature of the right

The right to freedom of expression provides that all persons have the right to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication).

Dispensation of consent

As already outlined the Bill provides that a court may hear and decide an application for an order dispensing with the requirement for a statement or information which includes consent, from a parent involved in proceedings under the Bill in certain circumstances.

This may limit the right to freedom of expression. By dispensing consent for a person, that person's ability to make submissions, convey information and most importantly, in some cases, to be placed on notice of the existence of the dispensation, may be limited.

Confidentiality obligations

When considering an application for a cultural recognition order, the Commissioner is required by clause 44(2)(b) to maintain confidentiality.

Clause 101 defines confidential information. Clause 102 provides that the Commissioner and others involved in administering the Bill must not disclose confidential information unless certain circumstances exist. Clause 103 provides the circumstances in which particular information may be accessed by an applicant for a cultural recognition order. Clause 104 prohibits publishing identifying material, unless consent has been obtained.

These duties of confidentiality limit the ability of a person to communicate freely.

(b) the nature of the purpose

The consent of relevant parents is required for an application for a cultural recognition order. The purpose of the dispensation of consent is to enable an application for a cultural recognition order to proceed where a relevant parent, for example, cannot be located, is deceased, or presents an unacceptable risk of harm to the birth mother, their consent cannot be given.

The purpose of restricting access to confidential information is to ensure the proper use of information which is provided for the purpose of obtaining a cultural recognition order. Ensuring the proper use and protection of what may be sensitive personal and cultural information will assist in protecting the rights of the persons to whom the information relates.

(c) the relationship between the limitation and its purpose

The dispensation of consent process is directly linked to the purpose of the limitation as it will mean that applications in the specific circumstances provided for in the Bill can still be considered.

The restrictions on access and publication of confidential information is directly linked to the purpose of ensuring the proper use and protection of personal and cultural information.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

In recognition of the significance of dispensing with consent, an application for dispensation can only be made to a court. A relevant parent must be served a copy of the application for dispensation of consent which provides information about where and when the application is to be heard. After being served the notice, the parent is a party in the proceeding and is able to challenge the application in court if they choose to do so. A relevant parent has recourse regarding a discharge order as they are able to apply for the discharge of the dispensation order in the event they were not served with a copy of the application.

There are no less restrictive and reasonably available ways to achieve the confidentiality purpose which is less restrictive of the freedom of expression.

(e) the balance between the importance of the purpose and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The potential limitations on the freedom of expression is necessary to ensure that applications for cultural recognition orders can still be considered where obtaining consent is not reasonable or appropriate. The importance of freedom of expression is outweighed by the importance of maintaining confidentiality in personal and cultural information.

Taking part in public life (section 23)

(a) the nature of the right

This right affirms the right to have access, on general terms of equality, to the public service and to public office. The right interacts with the general right to equality (section 15) and includes that the criteria and processes for appointment, promotion, suspension and dismissal within the public service must be objective and reasonable, and non-discriminatory.

As noted above, clause 11 provides that the Commissioner must be Torres Strait Islander and otherwise appropriately qualified. This may limit the right of people who are not Torres Strait Islander to equal access to the public service.

Clause 20 provides for the Governor in Council to remove the Commissioner from office on the recommendation of the Minister, if the Minister is satisfied on the following grounds: that the commissioner is guilty of misconduct, is incapable of performing the functions or powers of the office or has neglected the functions or powers of the office or performed them incompetently. Clause 20(1)(b) provides that the office of Commissioner automatically becomes vacant if the Commissioner is convicted of an indictable offence. Clause 20(5) provides for suspension of the Commissioner from office if there is an allegation of misconduct or a matter has arisen that may be grounds for removal. Removal or suspension of the Commissioner may impact on the Commissioner's right to take part in public life in respect of their ability to hold public office.

(b) the nature of the purpose

It is important that the Commissioner has the understanding and cultural awareness necessary to discharge their duties. Requiring that the Commissioner be Torres Strait Islander may also fall within the ambit of section 15(5) of the HR Act, insofar as requiring the person to have Torres Strait Islander ethnicity will assist or advance persons or groups of persons disadvantaged because of discrimination.

Ensuring that positions of public office are held by individuals with a high degree of integrity is consistent with a free and democratic society, particularly given the significance of the Commissioner's role in this case.

(c) the relationship between the limitation and its purpose

Requiring that the Commissioner be Torres Strait Islander helps to ensure that the person who is appointed has the innate knowledge, awareness and appreciation of Torres Strait Islander culture which is necessary for the performance of their role under the Bill.

The disqualification and suspension framework will ensure that a person who is guilty of misconduct, is incapable of performing the functions or powers of the office, has neglected the functions or powers of the office, or performed them incompetently, is able to be removed from office. This is essential to maintaining the integrity of the role of the Commissioner. Similarly enabling suspension of the Commissioner where there are allegations or potential grounds for removal, will ensure the integrity of the role of Commissioner.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

One less restrictive way in which the purpose of clause 11(3)(a) may be achieved could be to require demonstrated knowledge of Torres Strait Islander culture in order to be eligible for appointment as Commissioner. This, however, is not as effective as requiring the person to be Torres Strait Islander themselves. As stated above, the confidential nature of Torres Strait Islander practices also means that it may not be possible to ensure that a Commissioner who is not a Torres Strait Islander would be able to obtain sufficient training and information. The Commissioner's identity as Torres Strait Islander may also impact the level of comfort of applicants engaging with and communicating to the Commissioner. Accordingly, no less restrictive and reasonably available ways to achieve the purpose (as effectively) have been identified. Nor has a less restrictive alternative to clause 20 been identified.

(e) the balance between the importance of the purpose and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The potential limitation to the right to take part in public life is necessary to ensure that the Commissioner is an upstanding member of the community who will undertake their functions appropriately. On balance, the limits on the right to take part in public office are reasonable and demonstrably justified.

The importance of ensuring understanding and appreciation of Torres Strait Islander practices, by requiring the Commissioner to be Torres Strait Islander, also outweighs the limit on the right to take part in public life of people who are not Torres Strait Islander. Further, the requirement arguably falls within the exception to discrimination in section 15(5) of the HR Act.

Property rights (section 24)

(a) the nature of the right

This right protects the right of all persons to own property (alone or with others) and provides that people have a right not to be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under general law (e.g. interests in land, contractual rights and shares) and may include some statutory rights (especially if the

right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

Disposition of property

Clauses 67 to 71 provide for the disposition and devolution of property, including the disposition of property to a person who is the subject of a cultural recognition order. Under these provisions, the Public Trustee may make inquiries where there has been a bequest to an unlocatable child and will be the trustee for the unlocatable child. In performing this role, the trustee may charge a fee (from the estate) for carrying out these functions. The right to property may be engaged as it allows the Public Trustee to charge a fee for their services.

Clause 77(5)(a)(i) and (b) allows the Childrens Court, when making a discharge order, to make consequential orders relating to the ownership of property. By providing that power to alter property interests, the Bill engages the right to property.

(b) the nature of the purpose

The purpose of the limitation in clauses 67 to 71 is to allow for the Public Trustee to carry out their functions (by providing a mechanism for them to recoup the costs of acting on behalf of the unlocatable person) and to enable the eventual provision of property to persons who are the subject to a cultural recognition order, but who are unable to be located. Allowing for fees to be taken from an estate (property to be dealt with) to enable the Public Trustee to carry out their functions, will ultimately ensure the protection of a person's property rights. The *Public Trustee Act 1978* provides that the Public Trustee may charge fees for the services it provides or performs.

The purpose of the power in clause 77(5) is to allow the Childrens Court to deal with the full consequences of discharging a cultural recognition order.

(c) the relationship between the limitation and its purpose

Allowing the Public Trustee to recoup their costs from the estate will help to ensure that the Public Trustee can carry out its function.

Providing the Childrens Court with powers to make consequential orders about property will allow the Court to deal with the full consequences of discharging a cultural recognition order.

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available ways to achieve the purpose of the relevant clauses of the Bill have been identified. The statutory obligations on the Public Trustee provide significant safeguards to ensure that the property rights of an unlocatable person are protected as the Public Trustee is a statutory authority established under the *Public Trustee Act 1978* and is subject to an integrity framework under other legislation including the *Right to Information Act 2009*, *Information Privacy Act 2009*, *Public Interest Disclosure Act 2010* and the HR Act. The Childrens Court will also be required to act judicially when exercising the power under clause 77(5) of the Bill.

(e) The balance between the importance of the purpose and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The potential limitations on the right to property are necessary to ensure that the property rights and interests of a person subject to a cultural recognition order are maintained. Any limit on property rights is reasonable and demonstrably justified.

Privacy and reputation (section 25)

(a) the nature of the right

A person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have the person's reputation unlawfully attacked. The scope of the right to privacy is very broad. The right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home and individual identity.

Commissioner

Clause 18 provides that the Commissioner must notify the Minister of certain conflicts of interest including those arising from his or her familial or financial interests. Clause 20(4) provides for the Governor in Council to remove the Commissioner from office on the recommendation of the Minister, if the Minister is satisfied that: the Commissioner is guilty of misconduct, is incapable of performing the functions or powers of the office or has neglected the functions or powers of the office or performed them incompetently. Likewise, clause 20(5) provides for suspension of the Commissioner from office if there is an allegation of misconduct or a matter has arisen that may be grounds for removal. These provisions may limit the Commissioner's right to privacy and reputation.

Application

Clause 35 provides that the birth parents must provide a signed statement with an application for a cultural recognition order and that it must state each of the prescribed matters contained within the clause. This includes, but is not limited to, the details and nature of the relationship the child has with the birth parent/s, the details of the Ailan Kastom child rearing practice that occurred and the reasons the birth parent considers a cultural recognition order will be in the best interests of the child.

Clause 36 contains the same requirements for the statement of the cultural parents, but with additional requirements such as details of the child's living arrangement, current address details, and consent to the Commissioner requesting a copy of the criminal history (the last of which is dealt with separately below).

Clause 37 provides that an application by a person for a cultural recognition order about the person must include a signed statement from the person and must contain certain prescribed matters.

Clauses 38 and 39 provide for the information to be provided in statements by an informed person or other carer.

The requirements of these clauses (35 to 39) limit the right to privacy and reputation of applicants by requiring the disclosure of personal or sacred information in the contents of the required statement. Some of this information, including detailed information about family relationships may be deeply personal.

Disclosure of criminal history

The Commissioner, at their discretion, may ask for a criminal history report for a cultural parent (clause 45). The person's criminal history report reveals the convictions recorded against that person in respect of offences, including spent convictions (but does not include convictions

that have been set aside or quashed). In the United Kingdom, it is considered that convictions become part of a person's private life as they recede into the past. Ordinarily, a conviction recedes into the past at the point that it becomes spent. Because clause 45 authorises the disclosure of spent convictions, it may interfere with the cultural parent's right to privacy.

(b) the nature of the purpose

The purpose of the limitation in regard to the Commissioner is to ensure that the duties and functions of the office of Commissioner are properly performed by a person of integrity.

The purpose of the limitation in regard to the application process is to enable the Commissioner to have sufficient information to be able to independently consider and decide the application. This information is an important safeguard to ensure an informed decision, given the significant legal effect of a cultural recognition order. The Commissioner does not have a role in deciding whether the practice should or could not have occurred and is not interfering with the cultural practice.

The purpose of the criminal history provisions is to provide additional safeguards for children who are subjects of an application for a cultural recognition. This is a similar approach to existing legislation that provides for the legal transfer of parentage. Protecting children in their best interests (section 26(2) of the HR Act) is a proper purpose.

(c) the relationship between the limitation and its purpose

The conflict of interest, removal and suspension provisions ensure the integrity of the role of the Commissioner and of any decisions or acts they may make. Disclosing personal information in the statements of the birth parents, cultural parents and others will ensure the Commissioner is appropriately informed of all relevant information to make the decision about whether to make a cultural recognition order.

Disclosing a cultural parent's criminal history will enable the Commissioner to obtain information which may be relevant to the best interests and safety of the child.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available way to achieve the purpose of the limits on the right to privacy have been identified. The proposed framework relies primarily on information obtained from the applicants and persons who provide verification that the practice occurred. The requirement for personal information to support the application process, is done so in accordance with information privacy principles under the *Information Privacy Act 2009* (IP Act). This Act provides that an agency can have control of a document containing personal information if it proposes to use the information for a particular purpose (Schedule 3, section 9(1) of the IP Act). Additionally the agency must use only the parts of the personal information that are directly relevant to fulfilling the particular purpose (Schedule 3, section 9(2) of the IP Act). This information will be subject to confidentiality provisions including an offence of unauthorised disclosure, and exemptions from right to information process. Other provisions ensure that the Commissioner will deal with private information with integrity, including the requirement to declare any conflict of interest and the possibility of removal for misconduct.

When it comes to the disclosure of a person's criminal history, one alternative might have been to exclude spent convictions. However, excluding spent convictions would not be as effective in protecting the best interests of the child who is the subject of the application.

(e) the balance between the importance of the purpose and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The limitations on the right to privacy are necessary to ensure the integrity of the Commissioner and their decision-making, and to ensure sufficient information is available to the Commissioner to enable them to make an informed decision. On balance the limitations are reasonable and demonstrably justifiable.

The importance of ensuring the safety and wellbeing of the relevant child who is the subject of an application under the Bill is paramount. The rights of the child outweigh the importance of preserving the privacy of the applicant cultural parent/s, who may be required to disclose details of their criminal history, even where that information extends to spent convictions which are not otherwise disclosable.

Non-interference with families and protection of families (sections 25 and 26)

(a) the nature of the right

Section 25 also protects against interference with family. The purpose of the right is to protect the intimate relations which people have in their family and which are indispensable for personal actuation.

A closely related right is section 26 which entitles families to protection by both the State and society. It also recognises that children have the same rights as adults, but with additional protections according to their best interests and the fact that they are children. One of the underlying principles of the International Convention on the Rights of the Child is that ‘the best interests of the child’ shall be a primary consideration in all actions concerning children. The right also includes the right to a name and to birth registration. The broad term ‘families’ recognises that families take many forms and accommodates the various social and cultural groups in Queensland whose understanding of family may differ. Cultural traditions may be relevant when considering whether a group of persons constitute a ‘family’.

Many provisions in the Bill have an impact on family relationships, by formally recognising, altering, creating and dissolving family relationships, including relationships between a child and their birth parents, and between a child and their cultural parents. Each of these impacts engages the right of non-interference with family in section 25(a) and/or the right of families to be protected in section 26(1) of the HR Act.

Dispensation of consent

Clauses 47 to 54 provide for the consent of a birth parent or cultural parent in certain circumstances. By allowing for family relationships to be altered without a parent’s consent, the rights in section 25 and 26 of the HR Act are engaged.

Making and effect of cultural recognition order

Clause 58 provides the Commissioner with a power to make a cultural recognition order, the effect of which is set out in clause 66. By transferring parentage, these provisions engage the rights in sections 25 and 26 of the HR Act.

Discharge of cultural recognition order

Part 8 of the Bill deals with the discharge of a cultural recognition order through an application to a court. The application for a discharge can be made on any of the following grounds: an order was made because of false or misleading document or representation; fraud or undue

influence; consent was not full, free and informed; and other exceptional circumstances. This may limit the right to families and children. On the making of discharge order, the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the cultural recognition order had not been made.

When discharging a cultural recognition order, the court is also empowered to make consequential orders about custody or guardianship of the child (under clause 77(5)(a)(iii)). Such an order would interfere with family and engage the rights in section 25 and 26 of the HR Act. The court is also empowered to make consequential orders about the child's name (clause 77(5)(a)(ii)). This may limit the right to a name under section 26(3) of the HR Act.

(b) the nature of the purpose

The purpose of dispensing with consent, and of making a cultural recognition order is to allow a child to have the benefit of formal recognition of their traditional child rearing practice, despite the absence of a parent's consent. This accords with the human right under section 28(2)(c) of the HR Act.

Discharge orders are proposed only in very limited circumstances, where it is in the best interests of the child and there are exceptional circumstances. The purpose of this limitation is to protect the best interests of a person subject to a cultural recognition order where a cultural recognition order has been made based on false or misleading information, or without the informed consent of an applicant.

(c) the relationship between the limitation and its purpose

The framework for making cultural recognition orders and dispensing with consent help to achieve the Bill's overall purpose of recognising traditional Torres Strait Islander traditional child rearing practice.

The discharge framework will ensure that applications for cultural recognition orders are truthful and are made with an applicant's full, free and informed consent. In keeping with the private nature of the practice, the Bill provides that the hearing of an application for a discharge order is not open to the public and limited in terms of who may attend. In order to ensure there is legal certainty for applicants following the making of a discharge order, the Bill provides that the court may make additional consequential orders if the court considers it appropriate in the interest of justice. Such circumstances might include changes to the given child's name or the ownership of property.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available way to achieve the purpose of the limits on family have been identified. The limits are necessary to achieve the overall purpose of the Bill to promote the right under section 28(2)(c) of the HR Act. The discharge of consent framework is consistent with other legislation that provides for transfer of parentage. The Bill provides safeguards around the discharge process in that the court must not make a discharge order if it considers the discharge is not in the child's wellbeing and best interests; and the court hearings are closed to maintain the privacy of the parties involved and to prevent disclosure of any confidential cultural information.

(e) the balance between the importance of the purpose and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The potential limitations on the right to non-interference with family and to protection of families is necessary to ensure a valid application process for a cultural recognition order. On balance, the purpose of recognising Torres Strait Islander traditional child rearing practice under section 28(2)(c) of the HR Act outweighs the potential limits on the rights to family under sections 25 and 26.

Cultural rights – Aboriginal and Torres Strait Islander (section 28); and Freedom of thought, conscience, religion and belief (Section 20)

(a) the nature of the rights

Aboriginal and Torres Strait Islander peoples are recognised as having a rich and diverse culture. There are many hundreds of distinct Aboriginal Torres Strait Islander groups in Australia, each with geographical boundaries and an intimate association with those areas. Many of these groups have their own languages, customs, laws and cultural practices.

The HR Act explicitly protects the right to live life as an Aboriginal person or Torres Strait Islander who is free to practise their culture. They must not be denied certain rights in relation to traditional knowledge, spiritual practices, language, kinship ties, relationship with land and resources, and protection of the environment.

The right to freedom of thought encompasses the right of everyone to develop autonomous thoughts and conscience, to think and believe what they want and to have or adopt a religion, free from external influence, and to demonstrate the religion or belief through worship, ritual, practice and teaching.

The concepts of ‘religion’ and ‘belief’ have been interpreted relatively broadly so as to include mainstream and alternative religions and beliefs. There is no requirement in the right that the religion or belief have any ‘institutional characteristics’ or practices associated with traditional or mainstream religions.

The right to demonstrate a religion (whether individually or collectively) encompasses a broad range of rights including engaging in worship, observance, practice and teaching. ‘Worship’ can include for example using ritual formulae and objects, displaying symbols, and observing holidays and days of rest. ‘Observance’ can include ceremonial acts, dietary regulations, wearing distinctive clothing and participating in rituals associated with certain life stages.

Application information for cultural recognition

The Bill provides that as part of the application, information on the nature and details of the Ailan Kastom child rearing practice that occurred must be provided by the birth parents, cultural parents, an adult applicant and an informed person. This may limit cultural rights of Aboriginal peoples and Torres Strait Islander peoples; and the right to freedom of thought, conscience, religion and belief as it requires information about a cultural practice – Ailan Kastom child rearing practice – to be included in an application for legal recognition. In particular, disclosure of traditional knowledge will necessarily limit the right of Torres Strait Islander people to control and protect their traditional knowledge and kinship ties (section 28(2)(a) and (c) of the HR Act).

(b) the nature of the purpose of the limitation

The purpose of requiring a statement on the nature and details of the Ailan Kastom child rearing practice as part of the application for a cultural recognition order is to enable the Commissioner to independently consider and decide the application. Practically, the statement addresses the suitability of the cultural parents by verifying that the cultural practice has occurred. The Commissioner does not have a role in deciding whether the practice should or could not have occurred.

(c) the relationship between the limitation and its purpose

The statements enable the Commissioner to independently consider the application and to make an informed decision which is critical given the significant legal effect of a cultural recognition order. As such the statement forms part of the application process for the scheme which would not be able to operate without it.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available way to achieve the purpose of obtaining the necessary information has been identified. Safeguards are in place to protect the confidential cultural information provided in the application: the information is prohibited from disclosure under the *Right to Information Act 2009*; any personal information gathered for the purposes of the Bill is done so in accordance with information privacy principles under the *Information Privacy Act 2009*; and the confidentiality provisions in the Bill provide that any sacred or secret information according to Ailan Kastom cannot be directly or indirectly disclosed by the Commissioner or any other person involved in the administration of the Bill, for example staff in the Office of the Commissioner.

(e) the balance between the importance of the purpose of the Bill, and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The potential limitations on cultural rights are necessary to ensure that the Commissioner has the appropriate information to be able to independently consider and decide the application. This information is an important safeguard to ensure an informed decision given the significant legal effect of a cultural recognition order. On balance the limits on cultural rights are reasonable and demonstrably justified.

Fair Hearing (Section 31)

(a) the nature of the right

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings, and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

Impacts on evidence

When exercising its jurisdiction under the Bill, the Childrens Court is not bound by the rules of evidence (clause 85), and in proceedings before the court, a child cannot be compelled to give evidence (clause 89). A child may only be called to give evidence, and be cross examined if they do give evidence, with the leave of the court. This may limit the right to fair hearing as it impacts on the rules of evidence and places restrictions on who can be called as a witness.

Closed court hearings

Clause 97 of the Bill provides that hearings for proceedings under the Act are not open to the public and that the court must exclude from the room in which the court is sitting any person not listed in the clause, unless the court is satisfied it is in the interests of justice to permit them to be present during the hearing. The internal limitation to the right to a fair hearing applies in this situation. Section 31(1) of the HR Act provides that hearings must be public, but section 31(2) provides an exception, whereby a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of the hearing if it is in the public interest or the interests of justice to do so.

Access to court records

Clause 98 provides that a person may not have access to the court's record of proceedings unless court gives approval to have access. This may limit the requirement in section 31(3) of the HR Act that all judgments or decisions made by a court in a proceeding be publicly available.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of dispensing with the rules of evidence is to allow the court to adopt a less formal procedure. The purpose of ensuring that a child cannot be compelled to give evidence is to provide a safeguard to protect the child from the potential emotional distress that may occur if the child is asked, for example, to testify against their cultural or biological parents or other persons, or reveal culturally sensitive information.

The purpose of ensuring that proceedings under the Act (and the court's record of those proceedings) are not open to the public also recognises the secret and sacred nature of the Ailan Kastom child rearing practice. It also consistent with the internal limitation of section 31(2) HR Act.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Each of the potential limits on the right to a fair trial help to achieve their purpose of allowing an informal procedure, protecting children, and safeguarding the secrecy of Ailan Kastom.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

No less restrictive and reasonably available way to achieve the purpose of the clauses 85, 89, 97 and 98 have been identified. The potential limitations on this right are necessary to protect the rights of children and other vulnerable people in court proceedings. These safeguards are consistent with existing statutory safeguards in court proceedings. The limits on public access to proceedings and court records are necessary to protect sensitive family information and the secrecy of Ailan Kastom.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The potential limitations to the right to a fair trial are outweighed by the need to provide safeguards for children and other vulnerable people in court proceedings, and to ensure that the Ailan Kastom child rearing practice continues as a secret and sacred cultural practice.

Conclusion

In my opinion, the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 is compatible with the human rights protected under the *Human Rights Act 2019*.

CYNTHIA LUI MP
MEMBER FOR COOK

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