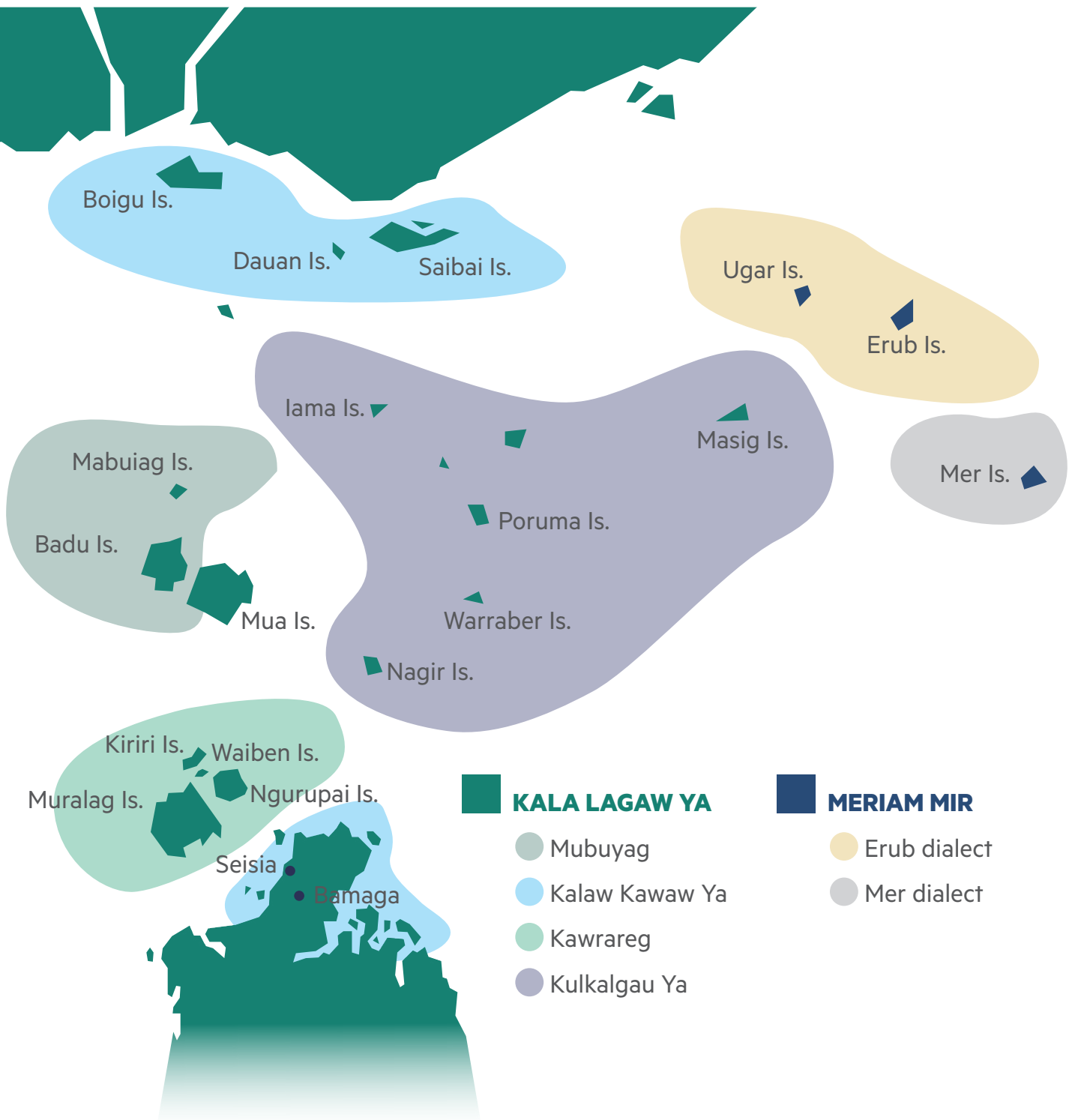


# 02

## BACKGROUND AND HISTORY

### Torres Strait Traditional Languages Map



# Torres Strait Islanders

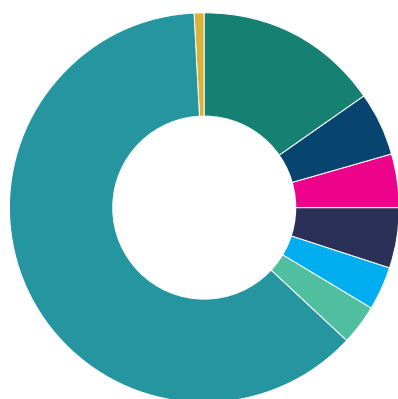
Torres Strait Islanders are of Melanesian background and have their homeland in the Torres Strait Islands, which is situated between the tip of Cape York Peninsula and Papua New Guinea. The Torres Strait Islands (known as ‘Zenadth Kes’ to the Torres Strait Islanders) was named after a Spanish captain, Torres, who sailed through the strait in 1606 on his way to Manila in the Philippines. Torres Strait Islanders number approximately 70,000, with the majority of Islanders living on the mainland of Australia, particularly in North Queensland. [Aboriginal and Torres Strait Islander people: Census, 2021 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/2021/Queensland.xlsx) Of the estimated 5900 Islanders living in the Torres Strait, approximately 2000 live on Thursday Island, the commercial centre of the Torres Straits Pie, and the remaining population are distributed between the 18 inhabited islands throughout the region <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/2021/Queensland.xlsx>.

Following European contact, initially by explorers and then by the London Missionary Society in 1871, Torres Strait Islanders have largely remained on their homelands and their culture and traditions have continued relatively intact. Torres Strait Islanders were able to incorporate Christianity into their existing social organisations, with island chiefs becoming church leaders. The hierarchical structures that controlled social and religious life adapted their pre-contact mode of operating to the new influences brought by European contact. The overall effect of these two factors has meant that Islanders, whilst experiencing negative impacts from colonisation, were arguably not experienced to the same extent as suffered by many Aboriginal people in Australia. These negative impacts were largely attributed to the forced dislocation from their traditional lands and the attempted extermination of their race, language and culture. The Islands of the Torres Strait are divided into the following five main regions: the Eastern Islands, which are volcanic in origin, have rich soil and rise sharply from the sea; the Central Islands, which are flat sandy coral cays; the top Western Islands, situated next to the coast of Papua New Guinea, which are low-lying mangrove islands; and the Western Islands, which are remnants of the Australian Great Dividing Range and consist of old volcanic rock and have scrub vegetation.

Eastern Islanders speak their own traditional language known as Meriam Mer, while Western Islanders speak Kala Lagau Ya. Islanders use Torres Strait Creole (or Kriol), also known as [Ailan Tok](#), Yumplatok or Broken (Brokin), is a mixture of Standard Australian English and traditional languages. It developed from pidgin English while missionaries were on the islands in the 1850s. It has its own distinctive sound system, grammar, vocabulary, usage and meaning.

Most Torres Strait Islanders speak Creole, as it helps speakers of the other languages communicate with each other, and each island has its own flavour. Islanders speak Creole in daily life and on some local and regional radio programs. Creole also spread to the Cape York Peninsula with the Islanders’ migration to the mainland.

While English is widely understood and taught in the Torres Strait, most Islanders use English as a second or third language.



**People Identified as Torres Strait Islander and Identified as both Aboriginal and Torres Strait Islander**

NSW	10,842	TAS	2,460
VIC	3,828	NT	2,501
SA	3,036	QLD	43,845
WA	3,649	ACT	540

Ref. 2021 census data



# Ailan Kastom

## An explanation of traditional child rearing practices

Definition: the meaning of Ailan Kastom child rearing practice in accordance with the Act.

***Ailan Kastom child rearing practice** is the practice recognised by Island customs 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.*

The underlying principle of Torres Strait Islander child rearing practices is that giving birth to a child is not necessarily a reason to be raising the child. The issue of who rears the child is dependent on a number of social factors, and is a matter of individual consideration by the families involved. Children are never lost to the family of origin, as they have usually been placed with relatives somewhere in the family network.

### Variation in Ailan Kastom child rearing practice

With over 130 islands, sandy cays and rocky outcrops of which 18 are inhabited in the Torres Strait, the Ailan Kastom child rearing practices can differ greatly depending on the Island and family involved. That means there is no one, exact practice that covers all of the Torres Straits. What may be practiced on Mer (Murray Island) will vary significantly from Saibai Island. Whilst the above definition of Ailan Kastom child rearing practice encapsulates the essence or common thread in each Island practice, the definition was intentionally left broad enough to encompass these variations in practice.

### An explanation of traditional child rearing practises by Paul Bann, Member of the Meriba Omasker Kaziw Kazipa Advisory Group [\(Ref. pg 71\)](#)

Paul Bann, Member of the Meriba Omasker Kaziw Kazipa Advisory Group explains that Ailan Kastom child rearing practice 'is a widespread practice that involves all Torres Strait Islander extended families in some way, either as direct participants or as kin' to child given under this practice.

He continues by stating that Ailan Kastom child rearing practice 'takes place between relatives and close friends where bonds of trust have already been established.

Describing the practice of permanently transferring a child from one extended family member to another as 'adoption' was originally applied by anthropologists to differentiate between permanent care and temporary care. The practice is now referred to as Ailan Kastom child rearing practice.

### Some of the reasons for the widespread nature of Traditional 'child rearing practices' include:

- To maintain the family bloodline by giving a male child to a relative. This is linked to the inheritance of traditional land in the islands.
- To keep the family name by giving a male child from a relative or close friend into the family.
- To give a family who cannot have a child due to infertility the joy of raising a child. A married couple may give a child to either a single person or another couple. 'Relinquishment' is not restricted to single parents.
- To strengthen alliances and bonds between the two families concerned.
- To distribute boys and girls more evenly between families who may only have children of one sex.
- To replace a child who had been given out to another family – this may occur within extended families.
- To replace a child into the family once a woman has left home so that the grandparents would still have someone to care for.



**Torres Strait Island community members described the differences in child rearing practice within the Torres Strait community:**

“

**Aunty Ivy Trevallion, explained to the committee that in the western islands of the Torres Strait it is custom:**

*... particularly with women, if we marry out we have to replace ourselves back in the family. So the eldest child usually is the one that we place with the family. Another one is that if you have a child out of wedlock the family would raise the child for you. Women in particular are not subjected to any sort of domestic violence or jealousy of any sort. The woman can then walk her life knowing that this child is safe with the family group who would look after it.*

*... The eastern islanders practise mainly through the blood lines, so you have to be related to that person or family for them to give you a child.*

*With the western islands, you can transfer the child.*”

“

**An eastern islander, Uncle Francis Tapim explained:**

*In Mer culture it [the giving of a child] is through the blood line. When we say 'blood line', if I am the brother, Mrs A is the sister and Leo is the child and Mrs A as my sibling has no children, we agree—brother and sister agree to adopt Leo. That is what we mean by through blood line, because we are related through blood. We are siblings. We are first cousins. Cousins are recorded in that with siblings.*”

“

**Mr Ezra Anu, from Saibai Island, shared a west islander view of Torres Strait child rearing practice:**

*From a western island perspective in regards to island adoption, we hold the family circle as very important. In non-Indigenous family circles there is a mother, a father and two or three children. With our family it extends out to uncles, aunties and grandparents.*

*For our community, the waku, the mat that we play on and sit on, is regarded as an analogy of family and community. The strands are woven together which holds our family together. Our relationship with each other and other clan groups is very important and vital. This legislation will legitimise that lore in regards to our recognition of island adoption. I am a product of that.*

*That means that we adopt inside of our totems.*”









# The Woven Mat

*For Torres Strait Islanders, the mat signifies life's journey from cradle to grave. It is used for housing material, sleeping, conceiving, birthing, initiation, education, marriage, welcoming, meeting, transport, hunting, ceremonies, shelter and to our final journey. The interwoven pattern and the weaving of our mat signifies our strength and our unity in any challenges we face, but most importantly in this context it signifies the interconnection of all Torres Strait Islanders, regardless of which island or community we may originate from. We are all interconnected, and the residents of our community are all interrelated.*

*Philemon Mosby, Mayor, Poruma Island*

"For our community, the waku, the mat that we play on and sit on, is regarded as an analogy of family and community. The strands are woven together which holds our family together. Our relationship with each other and other clan groups is very important and vital. This legislation will legitimise that lore in regard to our recognition of island adoption. I am a product of that. That means that we adopt inside of our totems."

**Ms Cynthia Lui MP, Yam Island**

"When we talk about the interconnectedness of our people with each other, it represents that mat because, unlike the westernised society, we are all connected either through blood or simply because of our very existence in these communities. Each of us are related to each other. That is important for us to understand. That is why we are supporting this, and that is why people could not understand before. We are all cousins, mothers, fathers, grandfathers."

**Ms Cynthia Lui MP, Yam Island**

**When introducing the Bill, Ms Cynthia Lui, the Member for Cook, described the practice as:**

... an ancient, sacred and enduring child-rearing practice, an integral part of Torres Strait Islander cultural fabric since time immemorial. This practice sits on the foundations of Torres Strait Islander culture and cultural decision-making processes in Torres Strait Islander community and family life. It promotes inclusiveness by allowing children the ability to grow into their full potential without doubt or questions about their identity.

**The Torres Strait Island Regional Council Mayor Philemon Mosby, stated:**

This is not about being recognised in our communities, that recognition already existed, this is more so for our children to reaffirm their identity and place in a Western Society. As Torres Strait Islanders, we are all interconnected and residents of our communities are all inter-related. Because of our interconnectedness, adoption for Torres Strait Islanders takes on a different context to that in the Western World. So too does extended family and kinship.

Traditionally an agreement is usually made between the families and once the transference has occurred (i.e. giving of the child), the 'mat is closed' (meaning the matter is closed ... permanently). It is important to be aware that discussions around Ailan Kastom and details of the practice itself is considered taboo and are highly sensitive. Any decision to disclose this Ailan Kastom to the subject person, is fundamentally left to the cultural parents.



# The Coconut Palm Tree

## **The coconut palm tree: a metaphor for Islander family life** [\(Ref. pg 71\)](#)

by Steve Mam, McRose Elu, Ivy Trevallion and Allan G. Reid

*This is the presentation on Islander family life given to the National Family Court Conference in Sydney in July 2021. The use of known physical objects as metaphors for describing abstract concepts is a common Islander method of expression.*

### **STAGE 1 THE ROOTS OF THE COCONUT TREE**

The roots of the coconut tree represent the basis of existence for Torres Strait Islanders, out of which arise the seed (refer Stage 9) of future generations. In the same way that the coconut tree depends on its roots to provide stability and an anchor in time and place, Torres Strait Islanders depend on their ancestral roots to 'fix' their existence in humanity through their particular traditions and customs.

**The principle: foundation and heritage.** The past, present, and future parents of Torres Strait Islander existence are embodied in the roots of the coconut tree.

### **STAGE 2 THE TRUNK OF THE COCONUT TREE**

Provided that the roots of the coconut tree are strong, the trunk of the tree shall also be strong and be the conduit for the sap - or 'spiritual energy' - to pass back and forward between the upper and lower parts of the tree. The trunk is the vital channel connecting the upper and lower parts of the tree together.

**The principle: intimate union of male and female - husband and wife.** In a 'fundamental' sense, the union of opposites gives rise to offspring and is a continual process underlying the spiritual existence of Torres Strait Islanders.

### **STAGE 3 THE LEAVES OF THE COCONUT TREE**

As with most indigenous peoples throughout the world, the extended family is an environment enjoyed, having a clearly defined structure. The key-word is relationships and in a defined structure has prominence. Relationships between members of the extended family (the microcosm of economy) are subject to strict rules, with 'place' having jurisdiction.

As with the leaves of the coconut tree which are on display to all, relationships between the extended family, according to tradition, custom and practice, are on display to all and in this sense are exposed without shame.

**The principle: the extended family.** The extended family environment of Torres Strait Islanders is rich with the practice of Traditional Child Rearing.

### **STAGE 4 THE NEW SHOOT OF THE COCONUT TREE**

At the apex of the coconut tree the new shoot grows, and when matured fans out into new leaves. The new leaves when encased in the shoot itself is akin to the embryonic state of childbearing, and, when sprouting, is akin to the birth process.

**The principle: siblings.** Siblings are an important factor in the lifestyle and culture of Torres Strait Islanders.

**STAGE 5 THE FIRST TIER OF LEAVES AROUND THE NEW SHOOT**

Surrounding the new shoot are tiers of leaves whose geometry is different from that of the main body of leaves on the tree. These leaves grow vertically and in a circular pattern around the new shoot. In that sense they are seen by Torres Strait Islanders to be sentinels of the new shoot, though one can only speculate on their actual function in relation to the rest of the tree.

**The principle: the teachers.** This tier of leaves are the aunts and uncles of the siblings. In the traditional moiety system of Torres Strait Islanders, there is a special person for each child who functions as the 'external teacher' as distinct from the biological parents who function as the 'internal teachers'.

**STAGE 6 THE SECOND TIER OF LEAVES AROUND THE NEW SHOOT**

Surrounding the first tier of leaves, which are arranged in a circular pattern around the new shoot, is a second tier of leaves.

**The principle: guardians of knowledge and culture.** This second tier of leaves functions more remotely in relation to the growth of the siblings than does the first tier of leaves surrounding the new shoot. They are the Elders of the community, one of whom is chosen as the principal Elder, known as the Mamoos (pronounced mah-moose). By virtue of their age, the Elders are considered the wise ones of the community whose collective wisdom oversees the everyday existence of Torres Strait Islanders.

**STAGE 7 THE BUNCHES OF COCONUTS**

Coconuts are the result of fertilisation of the flower which produces the fruit and, in whose existence is also the seed of new coconut trees. In the cycle of life, they bear the physical evidence of the sap of the tree.

**The principle: the individual and people.** The simile employed here is that the fruit of the tree (the individual and the people) is the material evidence of the transformation of sap (spiritual energy) via the effect gained through channelling the trunk along the strictures of 'household rule'.

**STAGE 8 THE DEAD LEAVES OF THE COCONUT TREE**

The leaves of the coconut tree having completed their function of photosynthesis for their host (viewed from the perspective of the individual) simply fall to the ground and are strewn around the trunk.

**The principle: old people (ancestors/lineage).** Reproduction after rejuvenation old people having realised their function of maturity (refer Stage 6) pass on from this physical life and join their ancestors in their spiritual life hereafter.

**STAGE 9 THE FALLING COCONUTS**

Once the coconuts have reached prime maturity they simply fall off the tree to the ground below and assimilate into seed form for new growth.

**The principle: offspring/new generation.** The falling coconuts represent offspring and new generation and the perpetuation of tradition, custom, culture and practice.

**STAGE 10 THE GROWTH RINGS AROUND THE TRUNK**

Around the trunk of the coconut tree are growth rings which are easily seen.

**The principle: recording of history (visual and aural).** Torres Strait Islanders use the individual growth rings, or collections of them, to fix a record of an event into place. They are visual records seen and understood by those having the 'key' to read the records.



## The journey towards legal recognition

Even though Torres Strait Islander people have practiced this most sacred Ailan Kastom child rearing practice since time immemorial, it is important to understand that it has been an extremely long and arduous road towards the legal recognition of this Ailan Kastom.

*“ In Queensland, whilst we have attained legal recognition of Torres Strait Islander traditional child rearing practices, the real driving force behind this world first achievement was a small band of Torres Strait Islanders and a handful of philanthropists who formed the Kupai Omasker Working Party. In their extraordinary story they tell us of a journey - an epic struggle of setbacks, renewed hope and ultimate triumph.*

*Their story and their work, is a testament of what can be achieved when two cultures work together towards an ultimate goal to address a social wrong and structural injustice.*

**Commissioner Maza**



Members of the Advisory Group with Hon Craig Crawford MP and Commissioner C'Zarke Maza

## Consultations that informed the Act

The Act was developed in response to many years of advocacy by Torres Strait Islander peoples and builds on previous consultations held in 1993 and from 2011 to 2013.

Three Eminent Persons were engaged to provide legal, cultural and gender expertise during the complex and culturally sensitive consultations. The Eminent Persons worked closely with the Queensland Government and Torres Strait Islander communities to ensure the voices of Torres Strait Islander people were reflected in the development of the Act.

### Ms Ivy Trevallion

First Torres Strait Islander social worker, having graduated from Queensland University in 1986 and current Chair of the Kupai Omasker Working Party.

### Honourable Alastair Nicholson AO RFD QC

Former Chief Justice of the Family Court with extensive knowledge and experience of traditional Torres Strait Islander childrearing practices including previous assistance with consultations and advisory to the Kupai Omasker Working Party since 2010.

### Mr Charles Passi

Torres Strait Islander member of the Queensland Centre for Domestic and Family Violence Aboriginal and Torres Strait Islander Advisory Group and former Chair of the National Aboriginal and Torres Strait Islander Healing Foundation (2013-2015).

In 2018, with the support of a panel of Eminent Persons, the Queensland Government led a series of community meetings.

More than 350 Queenslanders participated in meetings held in communities across the state—including Thursday Island, Cairns, Bamaga, Townsville, Mackay, Badu Island, Mer Island, Caboolture, Goodna, Brisbane City and Carindale—in response to ‘Akuar Thoeridhay Kazi’ – For Our Children’s Children’ Consultation Paper.

In 2019, the former Department of Aboriginal and Torres Strait Islander Partnerships facilitated a series of targeted consultations with the Eminent Persons on the draft legislative framework that would guide the introduction of the Bill.

The department held a consultation workshop to discuss the Bill with the Kupai Omasker Working Party, Eminent Persons and Judge Josephine Willis AM, Cairns Federal Circuit Court Judge, with representatives from the former Department of Child, Safety, Youth and Women and Department of Justice and Attorney-General in attendance.

Other organisations were also consulted on the draft Bill including the Queensland Human Rights Commission, the Queensland Family and Child Commission, the Queensland Civil and Administrative Tribunal, the Office of the Public Advocate, the Office of the Public Guardian, the Public Trustee, Queensland Law Society, the Bar Association of Queensland, Legal Aid Queensland, Aboriginal and Torres Strait Islander Legal Services and relevant heads of the judiciary.

### Key findings

#### Some of the key findings from the consultation sessions were:

- All Torres Strait Islander children should be able to obtain a birth certificate that reflects their cultural identity and lived experience.
- Cultural law and protocols dictate that discussion about traditional child rearing practices outside of the family (particularly those directly involved) is ‘taboo’, prohibited and regarded as highly inappropriate.
- Any process for Torres Strait Islander people to obtain legal recognition should be affordable, accessible, culturally appropriate and confidential.



Commissioner C Zarke Maza visits Badu Island



## A timeline of the process

**During the 1950s to 1970s, forced adoptions were widespread in Australia and the emotional damage caused to all those affected, remains prevalent to this day.**

- 1970s** — Torres Strait Islander child-rearing practices whilst not legally recognised, were able to be registered as adoptions under the now repealed Adoption of Children Act 1964 (Qld).
- 1985** — The Queensland government ceased registration of traditional Torres Strait Islander adoptions and issuing new birth certificates to adoptive parents.
- 1986** — Australian Law Reform Commission report *Recognition of Aboriginal Customary Laws*, highlighted that the kinship relationships and child-rearing practices of Aboriginal and Torres Strait Islander peoples are of fundamental importance in bringing up children in their societies, however recommended against specific recognition of such customary adoption. It was the Commission's view that sufficient protection was already provided by the placement principle, which in essence provided that if and when the need arose, to place Aboriginal and Torres Strait Islander children outside their family homes, the Aboriginal Child Placement Principle outlined a preference for these children to be placed with other Aboriginal and Torres Strait Islander people.
- 1988** — Surrogate Parenthood Act 1988 (Qld) passed (now repealed), which prohibited not only commercial surrogacies but also those carried out on an altruistic basis (non-commercialised surrogacy). Basically this Act resulted in some forms of Torres Strait Islander traditional child rearing practices being criminalised.
- 1990** — Family Court commences the Kupai Omasker program led by the Hon. Alistair Nicholson then Chief Justice of the Family Court of Australia. The Hon. Alistair Nicholson continues his important work as a member of the Meriba Omasker Kaziw Kazipa Advisory Group.
- The Kupai Omasker Working Party formally established. With the Working Party, the Queensland Government authorised consultations with Torres Strait Islander people living on the Islands and on the Australian mainland.
- 1993** — A consultation was commissioned by the Queensland Government in 1993 and Torres Strait Islanders were interviewed together with attending community meetings at major towns on the coast of Queensland and six islands in the Torres Strait. This consultation process led to the 1994 'The Tree of Life' Report. The Report found that due to lack of legal recognition of customary adoption, Torres Strait Islander children were being raised in adoptive families and finding out inadvertently that their adoptive name was not the name on their birth certificate.
- 1994** — In June 1994, a report titled 'The Tree of Life', was presented to the Minister for Family Services and Aboriginal and Islander Affairs by the IINA Torres Strait Islander Corporation. The report was developed as a result of the 1993 consultations which outlined the problems Torres Strait Islander people were facing trying to maintain customary adoption without appropriate legal recognition.
- Following representation by the late Chair of the Working Party and a visit to the Torres Strait by the Hon Alastair Nicholson, the Family Court adapted its practices to enable parenting orders to be made in favour of receiving parents. The Family Court remained however unable to correct the birth certificate.
- 1997** — State-wide workshop on Customary Adoption was conducted, funded by the Queensland Government's Office of Aboriginal and Torres Strait Islander Affairs and the Department of Family Youth and Community Care, and was held in Townsville.
- The Office of Aboriginal and Torres Strait Islander Affairs and Department of Families, Youth and Community Care report 'The Legal Recognition of Torres Strait Islander Traditional Adoption' confirmed previous findings on the high frequency of customary adoption within the community, and provided direction to the Queensland Government regarding legislative and non-legislative change, including that legislative recognition of this issue be considered by both the Commonwealth and the Queensland Governments.
- The report was endorsed by the Torres Strait Islander community at their Seventh National Conference in Rockhampton in late September 1997.

**1998** — Further consultation conducted by the Working party with Torres Strait Islander people in Queensland as a result of the 1997 National Conference on the legal recognition of customary adoption.

**1999** — A discussion paper was issued by the Queensland Government's Department of Aboriginal and Torres Strait Islander Policy Development which recommended 'full and proper' consultation take place with the Torres Strait Islander community over proposed ways in which customary adoption could be incorporated legally into existing adoption legislation.

**2001** — Family Law Pathways Advisory Group noted in their 2001 report titled 'Out of the Maze' that there needed to be meaningful consideration given to amending the Family Law Act 1975 (C'wlth) to incorporate Indigenous child rearing practices.

**2004** — Kupai Omasker subject to review by the Family Law Council, made recommendations that the Family Law Act 1975 (C'wlth) be amended to acknowledge that children of Indigenous origins have a right, in community with other members of their group, to enjoy their own culture and to recognise traditional adoption practices of Torres Strait Islander people.

**2008** — Investigation into Altruistic Surrogacy committee recommended developing options for recognising traditional Torres Strait Islander adoptions.

**2009** — Introduction of Adoption Act 2009 (Qld) which recognised that Island custom includes a customary child rearing practice that is similar to adoption, in so far as parental responsibility for a child is permanently transferred to someone other than the child's parents.

**2010** — Queensland Government commences consultation in the Torres Strait and on the mainland of Queensland.

Commencement of Surrogacy Act 2010 (Qld) to decriminalise non-commercial and altruistic surrogacy.

**2011** — The Department of Aboriginal and Torres Strait Islander and Multicultural Affairs consults with Torres Strait Islander people in the Torres Strait.

**2012** — The Department of Aboriginal and Torres Strait Islander and Multicultural Affairs have consultations with Torres Strait Islander people on the mainland.

The Family Court of Australia in 2012 highlighted its limitations when dealing with Torres Strait Islander child rearing practices and advocated for the Federal and State governments to introduce new laws that respect this practice. As noted by Watts J in *Beck and Anor & Whitby and Anor* [2012] FamCA 129 at 75:

"...the first Respondent is recorded on the birth certificate as the child's father and the second Respondent is recorded on the birth certificate as the child's mother. There is currently no power under the Family Law Act to make any order that would rectify that situation. Notwithstanding the orders I make today, under the Family Law Act, the Respondents remain the child's parents and the Applicants do not become the child's parents. The difficulty with the birth certificate is an example of a practical problem that flows from the lack of formal recognition of the Applicants as the parents of the child. The problem has been discussed for more than 25 years in various significant Government reports. The Federal Government has the power to amend the Family Law Act to enable a court to declare persons in the positions of the Applicants in this case as parents. Alternatively, the states have power to amend State legislation to allow full recognition of traditional Torres Strait Islander child rearing practices. Maybe one day the law will be changed."

**2017** — During the 2017 Queensland election campaign, the Queensland Government made commitments to:

*Introduce new laws that legally recognise the outcomes achieved by Torres Strait Islander families' continued use of traditional 'adoption' (GEC 580);*

*Appoint an eminent person who will help consult with Queensland's Torres Strait Islander community on the laws to recognise Torres Strait Islander adoption (GEC 581); and*

*The government further committed to allocate \$1 million to implement the legislation.*



- 2018** — Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) engaged three Eminent Persons, Ms Ivy Trevallion, Mr Charles Passi and the Hon. Alistair Nicholson to provide legal, cultural and gender expertise during the complex and culturally sensitive consultations with Queensland's Torres Strait Islander community.
- The Eminent Persons met for the first time on 12 June 2018 together with representatives from DATSIP, Department of Child Safety, Youth and Women (DCSYW), Department of the Premier and Cabinet (DPC) and the Department of Justice and Attorney-General (DJAG); and then again on the 28 June 2018.
- DATSIP coordinated more than 30 consultation meetings (including community, small group and individual meetings) held in the Torres Strait and across Queensland in November and December 2018. This included: Thursday Island, Murray Island, Badu Island, Cairns, Bamaga, Townsville, Mackay, Goodna, Caboolture, and Brisbane. Over 350 Queenslanders participated in these meetings.
- 2019** — DATSIP engaged with Alistair Nicholson and Ivy Trevallion regarding the model.
- DATSIP worked with colleagues across the Queensland Government, including Births, Deaths and Marriages Registry, Queensland Civil and Administrative Tribunal and Right to Information Unit to develop a framework that will legally recognise Torres Strait Islander traditional child rearing practices.
- 2020** — Queensland's first Torres Strait Islander Member of Parliament Cynthia Lui, Member for Cook, introduced the draft Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practices) Bill 2020.
- The Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practices) Act 2020 (Qld) was granted royal assent on 14 September 2020.
- Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATSIP) works to establish the Office of the Commissioner.
- This includes engagement with relevant agencies across the Queensland Government including Births, Deaths and Marriages Registry, Queensland Police Service, Department of Justice and Attorney-General (DJAG) and the Department of Children, Youth Justice and Multicultural Affairs (DCYMA).
- 2021**
- 1 April 2021** — Proclamation of some provisions of the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practices) Act 2020.
  - 1 July 2021** — Proclamation of remaining provisions of the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practices) Act 2020.
  - 12 July 2021** — C'Zarke Maza commences duties as inaugural Commissioner.
  - August 2021** — Office of the Commissioner officially opened.
  - 1 September 2021** — Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practices) Regulation 2021 commenced.
  - 7 September 2021** — Meriba Omasker Kaziw Kazipa application process opened.  
Meriba Omasker Information Management System (MOIMS) goes live to undertake record keeping and uploading of information relating to the application process.
  - 22 November 2021** — First CRO was granted

# The Bill



On **16 July 2020**, Ms Cynthia Lui MP, Member for Cook, introduced a private members Bill, the **Meriba Omasker Kaziw Kazipa** (Torres Strait Islander Traditional Child Rearing Practice) into State Parliament (the Bill). The Bill was introduced with the full support of the Queensland Parliament and was adopted by the Queensland Government and referred to the relevant portfolio committee (the committee) to prepare their report on the Bill.

**The objectives of the Bill were to:**

- recognise Ailan Kastom child rearing practice
- establish a process for applications to be made for the legal recognition of the practice
- provide for a decision making process that will establish the legal effect of the practice

**An integration of traditional law into modern law**

The Bill proposed a framework that will formally recognise traditional Torres Strait Islander Ailan Kastom into law. According to the Torres Strait Island Regional Council, the Bill carried ‘specific and important significance as a new nexus between LORE and LAW’.

The committee noted the historic nature of this Bill, the first legislation in any Australian Parliament to include Torres Strait Islander languages, and the ‘first legal framework of its kind in Australia’.

As stated during the departmental briefing by Ms Kathy Parton, Deputy Director-General (DDG), Policy and Corporate Services, DATSIP:

*“Legally recognising Torres Strait Islander traditional child rearing practice is an important step forward in the Queensland Government’s journey to a reframed relationship with First Nations people and acknowledges the strength of Torres Strait Islander culture.”*

*“I think it is great that this has been put forward because this is literally closing the gap of understanding—for those like my little son, who is traditionally adopted, to know that he is loved under the lore umbrella but also under law.”*

Mabuiag Islander father



L to R: Hon Leeanne Enoch MP, Tomisina Ahwang, Ms Cynthia Lui MP and Hon Shannon Fentiman MP at the introduction of the Bill, 16 July 2020.



## Parliamentary Committee recommendations of the Bill

### Recommendation 1

The committee recommends the Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 be passed.

### Recommendation 2

The committee recommends that the Department of Aboriginal and Torres Strait Islander Partnerships prioritise the implementation of education programs that are culturally appropriate, independent and supportive, as well as mindful of the sensitive nature of the Ailan Kastom process.

The committee recommends that the department explore opportunities for the provision of independent counselling and support to be made available to people who may experience trauma as a result of their interaction with the legal recognition process.

### Recommendation 3

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

### Recommendation 4

The committee recommends that the clause 124 of the Bill be amended so that section 44 of the *Births, Deaths and Marriages Registration Act 2003* is further amended to explicitly instruct the Registrar to remove the names of the birth parents from the new birth certificate.

### Recommendation 5

The committee recommends that clause 124 of the Bill be amended so that section 44 of the *Births, Deaths and Marriages Registration Act 2003* is further amended to ensure that the Registrar may give requested information relating to a closed entry for a person (who is the subject of the traditional recognition order, and while still a child) only with the consent of one or more of the cultural parents (and/or guardian).

### Recommendation 6

That proposed section 45 of the Bill be amended to ensure the destruction of any criminal history information received by the Commissioner under that section occurs as soon as practicable after the information is no longer needed for the purpose for which it was requested, similar to other relevant Queensland Acts.



The Hon Craig Crawford MP, Commissioner C'Zarke Maza and Cynthia Lui MP

## Inquiry process of the Bill



On 17 July 2020, the committee invited stakeholders and subscribers to make written submissions on the Bill. Nineteen submissions were received. The committee received written advice from the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) in response to matters raised in submissions.

The committee received a public briefing about the Bill from DATSIP; Aunty Ivy Trevallion, Chair of the Kupai Omasker Working Party; and the Queensland Human Rights Commission on 22 July 2020. A second public briefing about the Bill was received from DATSIP in Brisbane on 10 August 2020.

The committee held six public hearings and three private hearings for the inquiry and heard evidence from 78 witnesses. As well as the public hearing held in Brisbane on 10 August 2020, the committee held public hearings and private hearings in Townsville, Cairns, Bamaga, Thursday Island and Saibai Island from 3 to 7 August 2020.

The Bill also made consequential amendments to: the Adoption Act 2009, the Births, Deaths, and Marriages Registration Act 2003, the Criminal Code, the Domestic and Family Violence Protection Act 2012, the Domicile Act 1981, the Evidence Act 1977, the Guardianship and Administration Act 2000, the Industrial Relations Act 2016, the Integrity Act 2009, the Payroll Tax Act 1971, the Powers of Attorney Act 1998, the *Public Service Act 2008* and the *Right to Information Act 2009*.

## Establishment and appointment

The Bill proposed the establishment of a new Commissioner and their office. The Commissioner will be an appropriately qualified senior Torres Strait Islander person with a deep understanding and knowledge of traditional child rearing practice.

It is proposed officers employed in the Office of the Commissioner would be appointed under the *Public Service Act 2008*.



Consultation in TI during the enquiry process for the Bill, 8 August 2020



# The Act



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

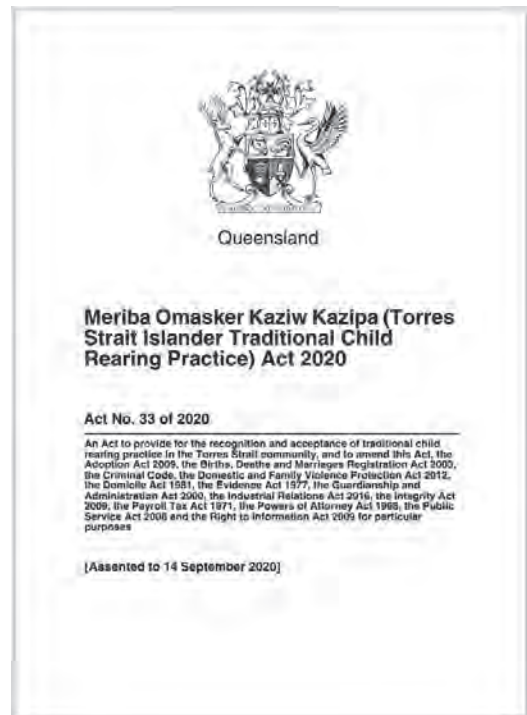
On **8 September 2020**, the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (the Act) was passed in the Legislative Assembly and received assent on **14 September 2020**.

The Act commenced on 1 July 2021 (apart from sections relating to the appointment of the Commissioner and establishment of their office, which commenced on 1 April 2021).

The Act provides for the legal recognition of Ailan Kastom traditional child rearing practice, through the making of a CRO, for Torres Strait Islander people.

The Act is the first legislation of its kind in Australia, reconciling traditional law with western law and recognises the strength and enduring Torres Strait Islander culture. It is also the first Act to use traditional language in its title.

As well as the process for applying for legal recognition, the Act also established a Commissioner and an Office of the Commissioner. The Commissioner makes CROs that permanently transfer parentage to the cultural parents.



**A Significant day – Passing of the Act in Parliament, 8 September 2021**

*L to R: The Hon. Anastacia Palaszczuk, Premier, Aunty McRose Elu, Mr Craig Crawford MP, Aunty Ivy Trevallion, Belzah Lowah, Ezra Tom, Hon Dianne (Di) Farmer MP, Hon Shannon Fentiman MP*

**The Act’s purpose:**

*The Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020 (the Act) was passed in September 2020. The Act provides a process for families to seek legal recognition of traditional child rearing practices.*

Applications for legal recognition are considered by the Commissioner who decides if a CRO should be made.

A CRO will permanently transfer a person’s parentage from the *birth parents* to the cultural parents. Following this, a new birth certificate can be applied for from Births, Deaths and Marriages.

It is important to highlight the very sensitive and taboo nature of these Ailan Kastom child rearing practices. Details regarding the actual practice are not required to be disclosed as part of the application process. Further there are confidentiality measures in place within the Act to ensure that information that is secret or sacred in nature cannot be released or shared (see section 102 of the Act).



L to R: Hon Leeanne Enoch MP, Ms Cynthia Lui MP and Mr Lance McCallum MP with the Act



## Key elements of the Act

The framework for legal recognition has been designed so that it is affordable, accessible, culturally appropriate and confidential. The framework is opt-in, consent based and voluntary.

The key elements of the Act are outlined below:

<b>Eligibility</b>	<p>There are preliminary eligibility criteria including that:</p> <ul style="list-style-type: none"> <li>• one or both of the birth parents and one or both of the cultural parents are of Torres Strait Islander descent</li> <li>• the child's birth was registered in Queensland</li> <li>• the cultural practice has occurred.</li> </ul>
<b>Application</b>	<p>In making an application:</p> <ul style="list-style-type: none"> <li>• for a child, the application is made by the birth and cultural parents</li> <li>• for an adult, the application is made by the adult.</li> </ul> <p>The application is required to include:</p> <ul style="list-style-type: none"> <li>• statements from the birth parents, cultural parents (and where an adult, the subject of an application for an order is the applicant, a statement by the adult)</li> <li>• that the applicants understand the permanent and lasting effect of making an order for legal recognition</li> <li>• if applicable, the informed consent of an 'other carer' (a person with legal decision-making responsibility for the child) to the application being made</li> <li>• statements from persons with knowledge and understanding of the cultural practice (informed persons) nominated by each of the birth parents and cultural parents to verify that the cultural practice occurred.</li> </ul> <p>Parties will be given the opportunity to seek legal advice on the consequences of legal recognition.</p>
<b>Consideration by the Commissioner</b>	<p>The Commissioner considers the application and must be satisfied that the following requirements have been met before granting legal recognition:</p> <ul style="list-style-type: none"> <li>• full, free and informed consent to legal recognition has been provided by the birth and cultural parents and, if applicable, the other carers</li> <li>• that the making of the order is for the wellbeing and best interests of the child</li> <li>• that the transfer of parentage occurred in accordance with Ailan Kastom child rearing practice</li> <li>• that each applicant was entitled to apply</li> <li>• that the requirements for the application are met</li> <li>• that each applicant has provided the required information or statement.</li> </ul> <p>In deciding what is for the wellbeing and best interest of a person who is the subject of an application, the Act sets out a number of other principles the Commissioner must have regard to. For example:</p> <ul style="list-style-type: none"> <li>• the need to ensure appropriate recognition and preservation of Ailan Kastom in general and Ailan Kastom child rearing practice in particular:             <ul style="list-style-type: none"> <li>- the need to perform the powers and functions under this Act having regard to the sensitivity and cultural practices associated with Ailan Kastom child rearing practice;</li> <li>- the legal and cultural benefits for the child if the CRO is made recognising Ailan Kastom child rearing practice;</li> <li>- recognition of the birth parents' assessment of the suitability of the cultural parents;</li> <li>- decisions must be made in a fair, timely and consistent manner; and</li> <li>- any other matter that is directly related to the child's wellbeing and best interests.</li> </ul> </li> </ul>
<b>Decision</b>	<p>The Commissioner considers the application and must be satisfied that the following requirements have been met before granting legal recognition:</p> <ul style="list-style-type: none"> <li>• full, free and informed consent to legal recognition has been provided by the birth and cultural parents and, if applicable, the other carers</li> <li>• that the making of the order is for the wellbeing and best interests of the child</li> <li>• that the transfer of parentage occurred in accordance with Ailan Kastom child rearing practice</li> <li>• that each applicant was entitled to apply</li> <li>• that the requirements for the application are met</li> <li>• that each applicant has provided the required information or statement.</li> </ul>

<b>Notice of intention</b>	<p>Before deciding not to make a CRO, the Commissioner must give the applicants an opportunity to respond to a notice of intention.</p> <p>The notice is to include the proposed decision, the reasons for the proposed decision and that the applicants may provide further information to the Commissioner in support of the making of an order.</p>
<b>Right of review</b>	<p>If the applicants are not satisfied with the Commissioner’s decision not to make a CRO, the Act provides that an applicant may seek an internal review of the decision.</p> <p>The Minister appoints a review officer to consider the application, review the Commissioner’s decision and make a decision to:</p> <ul style="list-style-type: none"> <li>• confirm the Commissioner’s decision; or</li> <li>• revoke the Commissioner’s decision and make a CRO.</li> </ul> <p>Applicants may also be able to seek a judicial review of the Commissioner’s decision. An application for judicial review is made under the <i>Judicial Review Act 1991</i>.</p>
<b>New record</b>	<p>Following the making of a CRO, the Commissioner notifies the Registrar of Births, Deaths and Marriages, as soon as practicable.</p> <p>Once received, the Registrar of Births, Deaths and Marriages will register the transfer of parentage issuing a new record for the child and the original birth record is closed.</p> <p>The Registrar will close the original birth entry, reflective of the child’s birth identity, and note a reference regarding the transfer of parentage registration on the birth entry, and a reference regarding the closed birth entry on the cultural recognition register.</p> <p>There will be no notation about the closed entry on the new birth certificate to ensure consistency with the sacred nature of the custom.</p>
<b>Other elements of the Act</b>	
<b>Dispensation of consent</b>	<p>There may be circumstances where consent cannot be established, for example:</p> <ul style="list-style-type: none"> <li>• applicants cannot locate the relevant parent after making all reasonable enquiries</li> <li>• there would be an unacceptable risk of harm to the birth mother if the relevant parent was made aware of the application for legal recognition.</li> </ul> <p>To address this, the Act provides an avenue for an applicant to make an application to the Children’s Court to dispense with a person’s consent.</p>
<b>Impaired capacity</b>	<p>There may be circumstances where a parent or adult is the subject of the application and has impaired capacity. The Act provides that a decision maker must ensure that an adult with impaired capacity is given the support and access to information necessary to participate, to the greatest extent practicable, in the decision-making process.</p>
<b>Discretion to seek criminal history</b>	<p>As a safeguard, the Act provides:</p> <ul style="list-style-type: none"> <li>• for cultural parents to consent to a criminal history check as part of their statement, and</li> <li>• gives the Commissioner discretion to ask the Queensland Police Service for a written report about a cultural parent’s criminal history including recorded convictions and spent convictions.</li> </ul>
<b>Discharge orders</b>	<p>The Act provides that a birth parent, cultural parent or the adult applicant may apply to the Children’s Court for an order to discharge a CRO (discharge order). If the court makes the discharge order, the effect would be as if the CRO had not been made.</p> <p>Under the Act the grounds for a discharge order may be that the order was made:</p> <ul style="list-style-type: none"> <li>• because of a false or misleading document or representation</li> <li>• because a person acted fraudulently or used undue influence</li> <li>• because a person did not provide full, free and informed consent</li> <li>• the order was made on some other improper basis, or</li> <li>• if there are other exceptional circumstances that warrant the discharge.</li> </ul>



# The Regulation (commenced 1 September 2021)

## Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Regulation 2021

Section 112 of the Act provides that the Governor in Council may make regulations under the Act.

The Act further provides the following can be prescribed by regulation:

- information to accompany an application for a CRO for a child (section 33(1)(b)(vi));
- what a CRO must state (section 59(f)); and
- information to be included in a discharge order (section 77(3)(d))

The objectives of *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Regulation 2021* (the Regulation) are to provide safeguards against the potential for fraud and undue influence in the making of an application for a CRO for a child and a request for confidential information; and to support the commissioner in being satisfied that each birth parent and cultural parent gave free consent by requiring the following:

- evidence to accompany an application for CRO for a child and a request for confidential information as proof of a person's identity; and
- statements made as part of an application for a CRO be witnessed in the presence of an authorised witness.

### Achievement of policy objectives

To achieve its policy objectives, the Regulation prescribes the following operational and procedural matters:

#### Evidence of identity

The following persons are required to provide evidence of their identity:

- A person signing a statement to accompany an application for a CRO under sections 35, 36, 38 and 39 of the Act;
- A person who requests authorisation from the Commissioner to obtain a certificate, information, source documents or a copy of the CRO under section 64 of the Act;
- A person who applies to the Commissioner for a copy of restricted information under section 103 of the Act;

Evidence of a person's identity in the above cases will be satisfied when a person provides a certified copy of two of the documents listed in Schedule 1 of the Regulation.

This will provide an effective method of identity verification, to ensure that there are safeguards in place to minimise fraud and protect access to confidential information.

#### Witness supporting statements

A person signing a statement in an application for a CRO (under sections 35, 36, 37, 38 and 39) must sign it in the presence of an authorised witness. To minimise potential risks of fraud, the Regulation provides that an authorised witness is limited to certain people such as a solicitor, justice of the peace, or a person who has known the person signing the statement for at least 1 year and who has no other involvement in the application for the CRO.

Giving consent to a CRO is significant, and it is important that the Commissioner be satisfied that consent was freely given (as required under section 56(a) of the Act).

The requirements set out in the Regulation to provide certified proof of identification and witnessed documentation are therefore considered reasonable and appropriate.

The prescribed identity documents and authorised witnesses are considered accessible and consistent with similar regulatory requirements pertaining to the re-registration of life events on the Births, Deaths and Marriages Registry such as the *Civil Partnerships Regulation 2012* and the *Births, Deaths and Marriages Registration Regulation 2015*.

#### Consistency with policy objectives of authorising law

The Regulation is consistent with the objective of the Act, that is, to provide for the legal recognition of Ailan Kastom traditional child rearing practice by providing a voluntary application process, and decision making framework by an independent statutory Commissioner.

The Regulation ensures the Commissioner is satisfied with veracity of the provided information and documents in order to make a decision on a request for an application for a CRO and requests for authorisation to access closed entries or source documents and requests for access to restricted information, both providing access to confidential information likely to contain that of secret and sacred nature.

It is necessary or convenient to prescribe a requirement for consenting statements to be witnessed because it will facilitate the proper operation of the Act.