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**Kupai Omasker –
Incorporating Traditional Adoption
Practices into Australia's Family Law
System**

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Introduction

Traditional or customary adoption has been occurring in the Torres Strait Islands of Queensland, Australia since time immemorial. Despite this however, the adoptive or receiving parents are unable to be fully recognised as “parents” of their adopted child. Their names can not appear on the child’s birth certificate unless they also formally adopt the child under the Adoption Act 2009 (Qld), which is discouraged.

This causes numerous difficulties for the children and adults involved as well as for the community at large. The need for change has been acknowledged for well over a decade, however, in 2013 (more than 20 years after the landmark decision in *Mabo*¹), Torres Strait Islanders still find themselves waiting for full recognition of their culture’s traditional practices.

Background

Before defining what is meant by “traditional adoption” it is useful to give some background about the Torres Strait Islands and the people that inhabit them.

The Torres Strait Islands are situated in the seaway between the northern tip of Australia and the southern coast of Papua New Guinea. Collectively the islands are home to around 6000 people. About half live on the administrative centre of Thursday Island. Another 45,000 live on mainland Australia, with the largest populations occurring in regional cities in North Queensland.

Torres Strait Islanders are culturally and genetically linked to Melanesian peoples and those of Papua New Guinea. They are regarded as being distinct from other Aboriginal peoples of the rest of Australia, and are generally referred to separately. There are several languages spoken by Torres Strait Islanders. The main three are:

- Miriam Mer – spoken by inhabitants of the Eastern Islands such as Mer (Murray Island);
- Kala Lagaw Ya- spoken by inhabitants of the Western Islands; and
- Kala Kawa Ya – also spoken by inhabitants of the Western Islands.

¹ *Mabo and Others v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR – this case recognised indigenous land rights in Australia in respect of unalienated land. Prior to the decision there was no recognition of indigenous customary law.

Many Islanders also use Torres Strait Kriol (formerly known as broken English) to communicate across island groups.

The closest major regional centre to the Torres Strait Islands is Cairns. Driving from Cairns to the tip of Cape York Peninsula² (Australia) takes about 14 hours and can only be done in the dry season. In the wet season the road is virtually impassable. It is then necessary to catch a ferry from the mainland to the Thursday Island and then another boat to all other islands. Cairns is the closest Family Court Registry to the Torres Strait Islands.

What is Traditional Adoption

Traditional adoption involves permanently giving a child from the biological parent(s) to another person or couple usually extended family or close friends, to “grow up” as their own child. This is done by mutual consent.

The biological parents are often referred to as the giving parents and the parents who will grow up the child the “receiving parents”. The children will not usually be told who their biological parents are (if at all) until they are adults, or at least, mature enough to fully understand the arrangements.

Paul Ban; a Fellow of the Department of Social Work, University of Melbourne, has researched traditional adoption in the Torres Strait over many years. In his thesis he notes “*some of the reasons for the widespread nature of ‘adoption’ include:*

- *To maintain the family bloodline by adopting (usually) a male child from a relative. This is linked to the inheritance of traditional land in the islands.*
- *To keep the family name by adopting 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.*

² Otherwise known as the Northern Peninsula Area (NPA)

- *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 adopted 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.*³

Ban notes that the arrangements for the care of the child are usually made between the birth parent(s) and the receiving parent(s) during the course of pregnancy. He also notes that children are never lost to the family of origin as they have usually been placed with relatives somewhere in the family network.⁴

Traditional adoption is sometimes referred to as Kupai Omasker. The Australian Government's Social Security guide notes "*Kupai Omasker is the project name, given by the Kupai Omasker Working Party. Kupai is the Torres Strait Western Island word for 'umbilical cord', and Omasker is the Torres Strait Eastern Island word for 'children'. The words used together can be interpreted as 'the caring of all our children.'*"⁵

Whilst there is no legislation formally allowing receiving parents to be fully recognised as parents of the traditionally adopted child, there are some instances where the traditional practice is given limited recognition in government policy. For example:

In the context of child support, the Child Support Agency recognises "A person may have a legal duty to maintain another person if...the Family Court has made consent orders recognising Kupai Omasker (the Torres Strait Islander traditional practice of

³ Ban P (1989) *Traditional Adoption Practice of Torres Strait Islanders and Queensland Adoption Legislation* Master of Social Work thesis University of Melbourne

⁴ Ban P. *The rights of Torres Islander children to be raised within the customs and traditions of their society*, Submission to Queensland Government Joint Select Committee on Surrogacy 2008.

⁵ Social Security Guide 3.5.1.10 Qualification summary for parenting payment

adoption).”⁶ Interestingly, the reverse does not apply. The fact that orders are in place does not mean the biological parents no longer have a duty to maintain the child. This is different to the situation where a step parent formally adopts a child and the biological parent’s obligation ceases. Under a traditional adoption however, it is unlikely the receiving parents would seek child support from the biological parents.⁷

The Australian Government’s Guide to Social Security Law refers to Kupai Omasker and notes “A carer, who is not the natural parent of a child, can be qualified to receive [parenting payments] in relation to the child, as long as no person with legal responsibility for the child is also living in the same home or providing care for the child.”⁸

Currently, indigenous parents are discouraged from adopting children under the Adoption Act 2009 (Qld).⁹ Paul Ban notes however, that prior to 1988 it was not uncommon for Torres Strait Islanders to formalise traditional adoptions under the Adoption Act 1964. This practice changed around 1988 when the department responsible for adoptions had a change of policy and stopped allowing traditional adoptions to be formalised in this way.¹⁰

Torres Strait Islander communities were then left in a void. There was no legislative recognition of customary adoption, but nor could the practice be formalised through another process.

In the 1990’s people lobbied the government for change. As a stop gap measure the Family Court introduced a procedure to allow parenting orders to be made in favour of receiving parents with the consent of the biological parents. I will speak more about the practical aspects of this procedure later in the paper.

⁶ Child Support Agency: The Guide 2.6.15 – Reason 9 – the duty to maintain any other person

⁷ When there is an administrative assessment in place a carer entitled to child support can make an election that the administrative assessment end under s151 Child Support (Assessment) Act 1989.

⁸ Social Security Guide 3.5.1.10 Qualification summary for parenting payment

⁹ See Adoption Act 2009 (Qld) s7

¹⁰ Ban P (1989) *Traditional Adoption Practice of Torres Strait Islanders and Queensland Adoption Legislation* Master of Social Work thesis University of Melbourne Chapter 1.

The difficulty with orders is that whilst Family Court Orders can deal with whom a child lives, and issues of parental responsibility, an Order does not allow the receiving parents to be recognised as the child's parents on the child's birth certificate. Further, Family Court orders do not have effect for succession and status purposes.

By the early 2000's over a hundred traditional adoption cases were heard by the Family Court. It did not go unnoticed however that whilst this practice continued, the introduction of the Surrogate Parenthood Act in 1988 (Qld) made all forms of surrogacy illegal.¹¹

It was not until 2010 when the Surrogacy Act (Qld) was introduced that non commercial or altruistic surrogacy was decriminalised. Prior to this, Torres Strait Islanders had continued to lobby for recognition of their culture when consultations were conducted prior to both the Adoption Act 2009 and the Surrogacy Act 2010 being enacted. They felt ignored when both acts were drafted with no provision for their traditional adoption to be formally recognised.¹² As Ivy Trevallion (a Member of the Working party on recognition of Torres Strait Islander child rearing practices) has stated "*The State Government recently reviewed the old Adoption Act [1964], and left Torres Strait Islanders behind. They invited us because they wanted to justify surrogacy from a white perspective. They did it; they used us to go and talk about our customs so that they can justify their reasons for making it legal. What about making our customs legal too?*"¹³

Western Adoption

In Queensland, adoption is currently regulated by the Adoption Act 2009. The 2009 Act is significantly different to its 1964 predecessor in that it allows birth parents to express their views about the type of family in which they would like to see their child grow up.

¹¹ Brown C, Willmott L, White B; *Surrogacy in Queensland: Should Altruism be a crime?* (2008) 20 Bond Law Review 1 at

¹² Per Ivy Trevallion ABC Radio National interview "Torres Strait child rearing and Mainstream Law" broadcast 5 June 2012.

¹³ ABC Radio National interview "Torres Strait child rearing and Mainstream Law" broadcast 5 June 2012.

The 2009 Act also recognises it may be in the child's best interest to maintain a relationship with his or her birth family. The Act provides for an adoption plan where a child's birth parents and prospective adoptive parents can reach mutual agreement about how open the adoption arrangement will be¹⁴.

Prior to 2009, Adoption in Queensland was regulated by the Adoption Act 1964. The focus was very much on closed adoptions with the birth parents having little say in who raised their children. Adoptions were organised by an adoption agency and there was no contact between the birth parents and adopting parents. The identities of each remained a secret from each other.

Torres Strait Islander child rearing practices did not sit comfortably with the Western concept of adoption in the mid 1980s and early 1990's. Since the 2009 Act was introduced however, there are many more similarities than was previously the case. It is therefore surprising to the writer, that to date, the Queensland Government has failed to legislate formally recognising traditional child rearing practices. The Queensland Government is however, currently conducting a consultation with Torres Strait Islander communities with a view to possible legislative recognition of the practice of Kupai Omasker.¹⁵

Torres Strait Islanders are currently discouraged from formalising their traditional practices through the Adoption Act.¹⁶ The Queensland Department of Communities' policy paper "Future Adoption Law for Queensland (2008)", states¹⁷:

"The Government intends to introduce new adoption laws that respect Aboriginal tradition and Island custom and will not promote adoption as an appropriate option for the long-term care of an Aboriginal or a Torres Strait Islander child.

¹⁴ Adoption Act 2009 (Qld) s165

¹⁵ Family Law Council "Improving the Family Law System for Aboriginal and Torres Strait Islander Clients"; A report to the Attorney-General prepared by the Family Law Council; February 2012; p94

¹⁶ Adoption Act 2009 (Qld) s7

¹⁷ Page 6

Queensland's early legislation and child welfare policies and procedures allowed the forcible removal of Aboriginal and Torres Strait Islander children from their families and had a devastating impact on Australia's Indigenous peoples. Some children who were removed were placed with non-Indigenous adoptive parents and grew up without knowing their culture.

After noting that adoption is an unknown concept in Aboriginal customary law the report continues *“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. This practice is sometimes referred to as either ‘customary adoption’ or ‘traditional adoption’.* *New adoption laws for Queensland will respect Aboriginal tradition and Island custom and will not promote adoption as an appropriate option for the long-term care of an Aboriginal or Torres Strait islander child.*

However, in recent times, a parent or guardian of a Torres Strait Islander child has explored adoption for the child's care and asked the Department of Child Safety to make arrangements for the child's adoption. New adoption laws will include a range of safeguards to ensure, in these circumstances, the child's culture is respected and the adoption of an Aboriginal or Islander child only proceeds if there is no better option available for the child's long-term stable care. These safeguards will have regard to the standards recommended in the Bringing Them Home report for Aboriginal and Torres Strait Islander children relevant to adoption¹⁸

The writer can't help but wonder whether in trying hard not to repeat the mistakes of the past, and recognise tradition and culture, the government is in fact exacerbating the problem by not giving a formal process to fully recognise Torres Strait Islander traditional child rearing practices. The policy paper makes no reference to the difficulties faced by Torres Strait Islanders because there is no legislation that allows the receiving parents to be recognised as the child's parent. Further, whilst referring to

¹⁸ Human Rights and Equal Opportunity Commission, Bringing Them Home – Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Sydney, 1997, 661-663.

the “Bringing them Home Report”¹⁹ the paper does not completely reflect the comments made in that report.

The report itself says *“Adoption for indigenous children should be a last resort and, where it is desirable in the child’s best interests, should be within the Indigenous community except when the child’s best interests require some other placement. Culturally appropriate alternatives to adoption should be preferred. They include*

- 1. custody and guardianship arrangements short of adoption,*
- 2. culturally appropriate counselling of prospective relinquishing parents and their families ensuring that alternatives are explored and adequate family support is offered to enable them to keep the child, and*
- 3. ‘open adoption’ which secures continuing contact between the child and his or her parents, other family members and community.”*

The report continues *“When adoption is determined to be in the child’s best interests, the child should remain in contact with his or her biological family and community. His or her cultural and native entitlements and future rights and responsibilities may depend on the continuity of these ties. His or her spiritual and emotional well-being almost always does. ‘Open Adoption’ is the most appropriate for Indigenous children (and possibly for all children). Open adoption has been variously defined.*

There is no universally accepted definition of open adoption. Definitions range from ‘an adoption in which the birth parent meets the adoptive parents’ relinquishes all legal, moral and nurturing rights to the child’ but retain the right to continuing contact and knowledge of the child’s whereabouts and welfare’ to ‘shar[ing] with the child why a mother would place the child for adoption’ (NSW Law Reform Commission 1994 page 53).

The first definition reflects the Inquiry’s intentions. In addition the child should retain the right to contact and knowledge of the biological family’s whereabouts. The family as a whole, and not just the natural parents, should remain in contact. “Family” for

¹⁹ Australian Report - *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, tabled in Parliament 26 May 1997.

these purposes must be defined according to the customs and Law of the particular Indigenous community. To protect the best interests of the child the degree of contact between child and natural family would be determined ideally by agreement between child the natural and adoptive families, or failing that, by court order. The advice of the relevant Indigenous child and family service agency would be invaluable in either case.

In 1997 when the “Bringing them Home” Report was tabled, The Adoption Act in Queensland only provided for closed adoption. Whilst there are still differences between traditional child rearing practices and “western adoption” under the 2009 legislation, those differences are considerably less than was the case under the 1964 Adoption Act.

One difference is the requirement under the Adoption Act 2009 that the child be kept informed of matters affecting him or her in a way and to an extent that is appropriate, having regard to the child’s age and ability to understand.²⁰ This requirement conflicts with traditional adoption practice. A traditional adoption typically occurs when a child is very young. The child is not usually told about his or her biological parents (if at all) until he or she is an adult. Recognition by the Family Law Courts can occur at any time however it is not envisaged that a child who did not otherwise know about the adoption, would suddenly be informed about the process so his or her views could be obtained for the purpose of the family court proceedings.

This is because under the Family Law Act the best interests of the child are the paramount consideration when making a parenting order²¹. Section 60CC(3) sets out how a court determines what is in a child’s best interest. Factors taken into account include :

- any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views.²²

²⁰ Adoption Act 2009 (Qld) s 6(2) (d).

²¹ Section 60CA

²² Section 60CA(3)a

- if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right: ²³

Another difference between most western adoptions and traditional adoptions is that traditional adoptions are arranged between the giving and receiving parents. Historically this was not the case with western adoptions although the current Adoption Act allows the biological parents significantly more involvement than was previously the case. Further, The Adoption Act 2009 has special provisions for step parents to adopt children. If a step parent can adopt a child and the natural parent cease to be a parent of the child, it is difficult to understand why the Queensland government has been so reluctant to legislate allowing Torres Strait Islanders to also formalise their child rearing practices.

In any process, a document similar to the adoption plan could specifically set out the involvement the biological parents would continue to have in the lives of the child. For example the document could set out that the biological parents will be recognised as aunt/ uncle, sister/brother etc as often occurs in a traditional adoption.

Importantly, as is the case in a western adoption, it would be imperative that the effect of formalising the traditional adoption would be to recognise the receiving parents as the parents of the child²⁴. Specific orders could also be made in relation to the child's name²⁵. The process should also recognise the relationship of the receiving parents and the child for succession purposes²⁶.

Surrogacy

Another arrangement with some similarities to traditional adoption is altruistic (or non commercial) surrogacy. This has now been legalised under the Surrogacy Act 2010 (Qld). One of the main differences to traditional adoption is that in a surrogacy,

²³ Section 60CC(3)h.

²⁴ Adoption Act 2009 (Qld) s214(2)

²⁵ Ibid s215

²⁶ Ibid s216

arrangements must be made before the birth mother becomes pregnant. In a traditional adoption, arrangements are generally made after the birth mother is pregnant.

Surrogacy arrangements are not enforceable. The birth mother can change her mind at any time prior to a parentage transfer order, and the intended parents may decide not to permanently care for the child.

After the baby is born the birth mother is presumed to be the mother to the baby and her partner (if any) is presumed to be the father. The biological parents must still be registered on the child's birth certificate under the Birth Deaths and Marriages Registration Act 2003, however the birth parents can apply to the Children's Court for an order that the parentage of the child be transferred.

Interestingly the department of Justice and Attorney General's website on surrogacy notes "*Surrogacy arrangements can occur without a transfer of parentage. However, the transfer of the parentage is desirable because it creates legal certainty for the child in relation to a number of future life events, such as the name of the child, the child's birth certificate and the child's entitlement under wills and deceased estates.*" Such comments are equally applicable to traditional child rearing practices of Torres Strait Islanders yet to date that point has failed to resonate with the Queensland government, at least, significantly enough to legislate on the issue.

An intended parent can apply to the children's court to transfer parentage from the biological parent(s) to the intended parents. The court must be satisfied of the matters set out in s22(2). These include

- The parentage order is for the wellbeing and in the best interests of the child.
- The surrogacy arrangement was made before a child was conceived.
- The parties obtained independent legal advice prior to entering into the surrogacy arrangement.
- The parties obtained counselling from an appropriately qualified counsellor about the surrogacy prior to entering into the arrangement.
- The surrogacy arrangement was made with the consent of all the parties.

- The surrogacy arrangement is in writing and signed by the birth mother, her partner (if any) and the intended parents.
- The application was made 28 days after, and within six months of, the child's birth.
- The child: has lived with the intended parents for at least 28 consecutive days; lived with the intended parents at the time of lodging the application; and is still living with the intended parents at the court hearing.
- The birth mother, the birth mother's partner (if any) and the intended parents were at least 25 years when the surrogacy arrangement was made.
- The birth mother, the other birth parent (if any) and the intended parents all consent to the making of the parentage order.
- A surrogacy guidance report that has been prepared by an independent and appropriately qualified counsellor has been provided to the court.
- There is evidence of a medical or social need for the intended parents to want to make the surrogacy arrangement.

Once a transfer of parentage order is made, the intended parents can apply to the Registry of Births, Deaths and Marriages to have a new birth entry created noting the child and creating a new birth entry for the child that includes the intended parents' details.

A notation is made in the register that links the new record with the original record. The birth certificate will not include any information that is included in the closed register. When the child is 18 he or she can access the original record.

Difficulties Caused by Non Recognition of Traditional Adoption Practices

Unlike Surrogacy or Western Adoption, there is no process for receiving parents to have their names registered on the child's birth certificates following a traditional adoption. Further, because receiving parents are not recognised as parents of the adopted child, the child does not have automatic rights of inheritance under succession law.

The lack of formal recognition of traditional adoption, means uncertainty can be created about parental responsibility for the child. For example, in a paper published

in February 2012, the Family Law Council refers to a case where a child had been living for a considerable time with “receiving parents” under a Kupai Omasker arrangement. The child’s receiving parents had made an arrangement for the child to spend time with the child’s natural parents. Issues arose whilst the child was with them and the Queensland Department of Communities (Child safety services) intervened and took the child into care. Because of lack of any parenting orders or official birth certificate, the Department did not recognise the receiving parents as having any standing to have the child returned to live with them.²⁷

The lack of birth certificates is particularly problematic. In an increasingly bureaucratic world, paperwork is required by most government run departments including schools, hospitals, and social security. If there are no Family Court orders in place, the lack of formal recognition leaves it open to a giving parent to decide to take the child back solely for monetary reasons²⁸. The birth mother may decide she is short on cash so takes back an adopted child to get social security benefits for the child.

In a traditional adoption, children will not usually be informed of the arrangement (if at all) until the time is right or they are mature enough to understand it. But now a medical emergency, even a school excursion can mean that children find out about their birth parents before they are old enough to understand.²⁹ Ivy Trevallion (member of the working party on recognition of Torres Strait islander child rearing practices) notes when they find out in this way “*Children [get] angry with their adopted parents; they start to misbehave; they have behaviour problems in class. All sorts of problems they pick up, and the schools nowadays want their full birth certificates, they want this and that, and the parents have to tell them before they’re old enough to know where they come from. We’re supposed to be Australian, we indigenous people of this country, yet our customs are not recognised. We’ve been able to learn to survive in dominant culture. Dominant culture has not learnt to survive in our culture, because they’re continuously asking us to explain ourselves and justify our existence*

²⁷ Family Law Council. *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*; A report to the Attorney-General; February 2012.

²⁸ Ibid. per Alistair Nicholson

²⁹ Anita Baraud. *Torres Strait Child Rearing and Mainstream law* – Law Report – ABC Radio National audio show transcript 5 June 2012.

*or the reasons why we do things. Why should we explain a custom to people who don't understand the concepts behind why we do things?"*³⁰

At present, Torres Strait Islanders are not able to grow up properly appreciating their culture. Children have a right to identity or a sense of self, but not recognising traditional adoption places that at significant risk. The lack of legislative recognition of traditional child rearing practices also creates legal uncertainty. On at least two occasions the Family Court has been called upon to determine cases where the applicants have argued there has been a traditional adoption (which has not been formalised through the courts) and then the biological parents have wanted the child back.

Contested Cases where Traditional Adoption has been Alleged

The first of such cases commenced in 1997. The case was *Kitchell Zitha and Bon*³¹. I acted for the applicants in that case.

A little 6 year old boy "Stephen"³² had lived with "Ray and Irene" on Thursday Island for much of his life. Ray and Irene believed Stephen's biological parents, "Rose" and "Shane", had given Stephen to them to raise under a traditional adoption. Ray and Irene had been married for many years. They had several children of their own but they were all much older than Stephen.

The biological parents were not married. They were not related to Ray and Irene but were well known to them. Shane had worked for Ray in the past and Rose had a close association with the family. The biological mother already had several other children of her own.

In 1997 whilst Stephen was living with Ray and Irene the biological mother decided she wanted him back, and came and collected them. The mother denied there had been any arrangement for a traditional adoption. The parties attended mediation on

³⁰ *ibid*

³¹ Unreported TV2198 of 1997 delivered 4 September, 2001

³² For the sake of anonymity some facts including the names of the parties have been changed

the island but the matter could not be resolved and Family Court proceedings commenced.

Due to various factors, including the remoteness of the parties, it was some time before the matter was heard. Ultimately the parties³³ entered into consent orders for a shared care arrangement whereby the child lived with each party for a period of time. The consent arrangements continued for many months but did not work successfully and the matter was then brought back before the courts.

After a final hearing, Justice Buckley determined that Stephen should live with Ray and Irene however, Justice Buckley stopped short of making a finding that a traditional adoption had taken place. He noted “*The issue is an extremely complex one and varying practices and nuances that apply are such that it would more appropriately be a matter for the relevant elders to determine.*”

The reluctance to determine a traditional adoption existed was certainly not surprising in this matter. The consent arrangement the parties had entered into prior to the final hearing was in the form of the usual consent orders parties would have in most matters. Prior to the final hearing a status quo had been developed that was very different to a traditional adoption arrangement. The case was argued almost as a normal parenting matter.

The case did highlight however, the significant practical difficulties faced by indigenous people living in a remote location. English was not the first language of any of the parties nor of many of the witnesses, there were numerous cultural issues to deal with, legal resources were very limited on the island, and all parties were represented by solicitors in Cairns – over 800 kilometres away.

For the most part, all communications with the clients occurred via telephone. Whilst Ray could read English, Irene found it difficult and relied on Ray to explain letters and documents sent. All parties were legally aided. The time funded to prepare for

³³ The arrangement was between the Bons and Ms Zitha – the biological father died prior to a final hearing.

trial was significantly less than the time actually taken to properly prepare the matter for hearing.

The case further highlighted the need for formal recognition of traditional child rearing practices. After the case commenced, the Family Court introduced a practice direction³⁴ setting out the process for parties to follow when seeking parenting orders following a traditional adoption. The practice direction has since been repealed but parties are still able to apply for parenting orders to recognise arrangements that have been put in place.

The next traditional adoption case I was involved in was quite different. In *Lara v Marley & Sharp*³⁵ I again acted for the alleged receiving parents and the applicants in the matter. However, there was a much shorter time between the proceedings being commenced and the final hearing. Also, interim orders had been made requiring the child to continue living with the non biological parents. This was different to the previous case.

This case concerned a 3 year old girl called Alice. Since she was 3 months old, she had lived with Simon and Irma Lara whom I acted for. Her biological parents were Elizabeth Sharp and Tom Marley. Tom Marley and Irma Lara were brother and sister. The Laras believed that Alice had been given to them to “grow up”; that is, they had traditionally adopted her. In early 2003 however the biological parents sought to recover Alice and have her live with them.

During the course of the case, the biological parents agreed Alice had lived with the Laras most of her life, but they argued this was only ever meant to be a temporary arrangement. They likened it to baby sitting even though it had gone on for over 2 years. Much evidence was heard during the course of the matter, including evidence from other family members about how Alice came to live with the Laras. In particular Tom and Irma’s sister gave evidence the arrangement was meant to be a traditional adoption.

³⁴ No 8 of 2004

³⁵ [2003] FamCA 1393

Chief Justice Nicholson (as he then was) heard the matter. He determined Alice should live with Mr and Mrs Lara and that they should also have sole parental responsibility for her; thus allowing them to make both day to day and long term decisions for her about such things as medical matters, her education, and where she lived without consulting the biological parents.

It was ordered that the biological parents be able to spend time with Alice but only twice a year in two block periods which would most likely happen during school holidays. In this case the parties did not live in close proximity to each other. The biological parents lived near the northern tip of Cape York Peninsula and my clients were in Cairns.

In the past the biological parents had spent time with Alice but this was generally when they came to Cairns for appointments and stayed with the Laras. On occasions the Laras also went to the Cape to visit friends and family taking Alice with them. At these times Alice saw her biological parents but she had always referred to the Laras as her mother and father and the biological parents were treated as an Uncle and Aunt.

It was a sad case in that prior to early 2003 the parties had a very close relationship. Irma Lara had helped raise her brother Tom and both biological parents trusted the Laras so much they gave Alice to them to care for. In his Judgment, the Chief Justice said *“It is to be hoped that the passage of time will heal some of the wounds of this dispute where the family members will be able to resume their previous warm and loving relationship. However I can not assume this” para 269*

The epilogue to the matter is that some 6 months ago I ran into the Laras. I am pleased to say not very long after the case things did settle down and the family was able to resume the relationship they previously enjoyed.

In the case of Lara, Chief Justice Nicholson outlined some of the difficulties faced by Torres Strait Islanders. He noted (at para 39) *“[kupai omasker] has been given no legal recognition under Australian law, which is of great concern to Torres Strait Islanders and carries with it practical difficulties in relation to inheritance, proof of*

identity and the need for children to obtain parental consent to certain activities and decisions.....

“A residence order does not amount to an adoption order, and can of course be subsequently revoked or varied in appropriate cases. It does have the advantage of recording such arrangements and obviating some of the practical difficulties involved in non recognition of the practice by conferring parental responsibility upon the receiving parents.

“The court has now made some hundreds of such orders. Features are that they are made with the consent of all relevant parties that can be ascertained; before such orders are made a report is prepared by a Court Counsellor with the assistance of an indigenous Court family consultant; and the Judge hearing the matter normally sits with one or more Elders as assessors to ensure that what is being recognised is a traditional adoption.

Importantly it is not the Court, but the parties and the community that determine that a traditional adoption has taken place. As I see it, the Court's role is simply to recognise that fact and make orders accordingly in the best interests of the child or the children concerned.’

During his paper on this topic at the last Congress in Canada³⁶, his Honour referred to his decision in Lara. He noted his view in that case that it was not for the Court to conclude that traditional adoption had occurred but rather the community, because the issues had to be determined under a law that did not recognise traditional adoptions. He continued *“On reflection I think that this view was only partially correct. I was correct in the sense that it is the traditional community that originally determines whether there should be a customary adoption and puts that process into effect. It now seems to me that if there is a dispute as to whether a traditional adoption has occurred in the context of a family law case where the best interests principle is to be applied, it is a relevant matter for the judge to determine this as an issue of fact as*

³⁶ *The Law of Customary Adoption: A Comparison of Australian and Canadian Approaches*; 5th World Congress on Family Law and Children’s Rights, Halifax Nova Scotia, Canada, 24 August, 2009, p7

part of the process of determining what order would be in the child's best interests. It would not be determinative of that issue but might be highly relevant to it..."

Family Court Recognition

As indicated previously, after consultation with Torres Strait Islander communities, the Family Court has allowed receiving parents to apply for parenting orders in relation to a child they are raising under a traditional adoption arrangement. This helps avoid the situation the parties faced in the previous cases I have referred to. Orders can cover with whom a child is to live and who has parental responsibility for the child. In such cases, the best interests of the child is the paramount consideration. In reality however, the Family Court formalises an arrangement which in all likelihood would continue whether or not it was sanctioned by the court.

The former Chief Justice of the Family Court has explained the process followed by the Court when making parenting orders. He said, the court *"did so in a way that was quite careful, we had the assistance of a Torres Strait Islander woman consultant who worked for the Court. She worked with our court counsellors to visit the various islands and prepare reports on people who wanted to, in effect, legitimise these arrangements that they had made. They would seek out the giving parents to ensure that they had consented to the process, then they would also check on the receiving parents. Police checks were done because of course we had to be satisfied in relation to the issue of the welfare of the child... They were particularly pleased to have some formal basis for the arrangements that they had made, because it enabled them to make parental type decision in relation to children that they were actually parenting."*³⁷

The 2012 case of *Beck and Anor & Whitby and Anor*³⁸ is a recent example of the Family Court making parenting orders in favour of receiving parents to formalise a traditional adoption arrangement. In that case Mr and Mrs Beck were the receiving parents and Mr Whitby and Ms Marlow were the biological parents. It was noted

³⁷ ABC Radio National interview "Torres Strait Child Rearing and Mainstream Law" broadcast 5 June 2012.

³⁸ *Beck and Anor & Whitby and Anor* [2012] Fam CA 129

there was agreement the child would live with the Becks and refer to Mr Whitby and Ms Marlow as uncle and aunty and to her biological sibling as cousin. After referring to the relevant sections of the Family Law Act, Watts J noted the traditional Torres Strait Island child rearing practices were a weighty matter in his decision. A family report had been prepared and all interviews were conducted in the presence of an Indigenous Family Liaison Officer who had experience dealing with Kupai Omasker matters. In his decision Watts J noted *“the First Respondent is recorded on the birth certificate as the child’s mother. There is currently no power under the Family Law Act to make an order that would rectify that situation. Notwithstanding the orders I make, 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 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 power to amend the Family Law Act to enable a court to declare persons in the position 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”*.³⁹

Need for Change

As recognised by Watts J, Family Court orders are not sufficient to have birth certificates changed to note the receiving parents as the child parents. The receiving parents are also not formally recognised as the child’s parents in the eyes of the law so other rights concerning succession and inheritance⁴⁰ do not automatically pass to the child.

Article 8 of The United Nations Convention on the Rights of the Child⁴¹ states *“All children have the right to an identity – an official record of who they are. Governments should respect children’s right to a name, a nationality and family ties”*.

³⁹ Ibid para 75.

⁴⁰ It is beyond the scope of this paper to discuss the complexities of inheritance rights and traditional Adoption in any detail however the as yet unpublished paper “Kupai Omasker – Inherited Discrimination” by Jeneve Frizzo [Senior Associate at O’Connor Law, Cairns] ” notes that the recognition of receiving parents on birth certificates on traditionally adopted children would be of significant assistance in this area.

⁴¹ Ratified by Australia in 1990.

Article 9 states “*Children have the right to live with their parent(s), unless it is bad for them...*” The lack of recognition of traditional adoption leads to uncertainty about a child’s most basic of rights. Who are the parents of a child traditionally adopted? What is the child’s correct name? What is the identity of the child?

A child’s sense of identity is critical to his/her emotional well being and development. To date, this seems to have been largely ignored by State and Federal Governments. A significant change needs to occur to enable the child’s birth certificate to reflect the name of the receiving parents. This could be done in manner similar to a surrogacy arrangement whereby the original birth certificate is amended once a court order is made transferring parentage. The original birth certificate could still be retained but not able to be accessed until a child is 18 or with the consent of the giving and receiving parents.

Whether the court making the order is the State Children’s Court or a Family Law Court⁴² is a matter for the legislature, however, there are foreseeable benefits in it being a Family Law Court. The principles to be applied could be consistent across different states and there is already an existing practice in the Family Court recognising traditional adoptions.

It is imperative the process to be followed when applying for the relevant Court order is user friendly for the parties involved. If it is too difficult it will not be used and problems currently being faced will continue.

The potential remoteness of parties involved, difficulty speaking English, limited legal resources and ability to obtain independent legal advice must all be considered along with relevant cultural sensitivities. Past and current practices of the Family Court provide a useful platform which can be built upon, and improved, to ensure that the rights of indigenous children are no longer ignored or put in the too hard basket. Whilst consultation is important, it is useless without action. It is time that action, finally occurred.

⁴² Family Law Courts include both the Family Court and Federal Magistrates Court (soon to be the Federal Circuit Court)