

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

Human Rights Certificate

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

In accordance with section 41 of the HR Act, I, Craig Crawford, Minister for Seniors and Disability Services and Minister for Aboriginal and Torres Strait Islander Partnerships provide this human rights certificate with respect to the *Meriba Omakser Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Regulation 2021* (the Regulation) made under the *Meriba Omakser Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (the Act).

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The purpose of the Act is to recognise Ailan Kastom traditional child rearing practice; and establish a process for making applications for, and decisions about, the legal recognition of the practice. To achieve this purpose the Act provides for the appointment of a commissioner to consider and decide applications for cultural recognition orders.

The Regulation supports the achievement of the purpose of the Act as it enables the commissioner to appropriately manage cultural recognition order applications (applications) by prescribing:

- A method of identity verification for applications and requests for information to ensure that there are safeguards in place to minimise the opportunity for fraud and protect a person's privacy; and
- Requiring consenting statements that accompany applications to be signed in the presence of an approved witness to minimise fraud and support the requirement that consent was freely given by a person.

Giving consent to a cultural recognition order is significant, and it is important that the commissioner be satisfied that consent was freely given by relevant parties (section 56(a) of the Act). The commissioner must have regard to the need to protect a person's privacy and safeguard them from harm (sections 103(2) and s 64(3) of the Act).

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

In my opinion, the following human rights are engaged by the Regulation:

- Privacy and Reputation (section 25 of the HR Act); and
- Protection of families and children (section 26 of the HR Act).

The Regulation may potentially limit the right to privacy and reputation by:

1. prescribing requirements for consent statements, made as part of the application for a cultural recognition order, to be witnessed by an authorised person; and
2. for persons to provide specific proof of identity documentation at the application stage and when requesting information/ documents post-cultural recognition order.

These requirements in the Regulation also potentially limit the right to the protection of families and children, as they may prevent people who do not have the necessary identity documents or have limited access to an approved witness from pursuing a cultural recognition order.

Consideration of reasonable limitations on human rights (section 13 HR Act)

Right to privacy and reputation (section 25 of the HR Act)

The right to privacy and reputation protects persons from all interferences and attacks on their privacy, family, home, correspondence (written and verbal) and reputation. This extends to private relationships. This right is limited where a person's privacy, family, home or correspondence is unlawfully or arbitrarily interfered with. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

The Regulation may interfere with a person's right to privacy to the extent that specific proof of identity documentation required to make an application or to request information/ documents about a cultural recognition order includes personal information.

Given the significance of the legal effects of a cultural recognition order (the permanent transfer of parentage), the purpose of the requirement for identity documents is to ensure that the commissioner is able to verify the identity of parties to a cultural recognition order; and to ensure that information about the order, which is generally highly sensitive and confidential, can only be accessed by those people entitled to that information.

Requiring the production of identity documents is a reasonable method of achieving this purpose and strikes a fair balance between the right to privacy of the person giving the information, the privacy of the parties to the cultural recognition order, and the ability of the Commissioner to verify the identity of the parties.

The Regulation may also limit the right to privacy by requiring consenting statements to be witnessed by approved witnesses. This requirement may make it more difficult to maintain the confidentiality of private relationships (for example, if the witnessing person unintentionally reads the consenting statement). However, the purpose of requiring witnesses is to support full, free and informed consent, and to ensure the correct person has signed the statement.

Given the significance of the legal impact of a cultural recognition order (the permanent transfer of parentage), this requirement is considered necessary and justified.

There are no less restrictive and reasonably available ways to achieve these purposes. The regulation appropriately limits who may be a witness; persons eligible to witness documents

(e.g. lawyers and JPs) are subject to professional obligations to protect confidentiality; and the witness is not required to review the statement, only to view the signatory sign the statement with their consent. Further the Act provides further protections for the right to privacy. The Commissioner must maintain confidentiality when considering an application for a cultural recognition order. The Act also provides for penalties for disclosure of confidential information.

On balance, the purpose of providing identity documents and prescribe witnessing requirements outweigh the potential impacts on a person's right to privacy. The Regulation will have a positive impact by ensuring only approved persons can access confidential information; providing a level of assurance that consent by birth and cultural parents is provided freely; and by confirming the identify of parties to an application which has significant legal implications.

Protection of families and children (Section 26 of the HR Act)

This right entitles families to protection by both the State and society. It also recognises that children have the same rights as adults, but with additional protections according to their best interests and the fact that they are children. One of the underlying principles of the International Convention on the Rights of the Child is that 'the best interests of the child' shall be a primary consideration in all actions concerning children. The meaning of families is broad and recognises that families take many forms and accommodates the various social and cultural groups in Queensland whose understanding of family may differ. Cultural, religious and other traditions will be relevant when considering whether a group of persons constitutes a 'family.

As noted above, section 3 of the regulation require individuals to provide certain identity documentation to support an application for a cultural recognition order. Applications must also be supported by consenting statements, which must be witnessed by an approved witness.

These requirements have the potential to limit the right to protection of families and children, as some prospective applicants may be prevented from applying for a cultural recognition order if they do not have the necessary identity documents or have limited access to an approved witness. This may prevent an order being made even though legal recognition of the Torres Strait Islander cultural practice may be in the best interests of the child.

The purpose of the requirement for identity documents and the witnessing requirements for consent statements is to enable the Commissioner to verify the identity of applicants and that free consent was given where consent is required. This is essential considering the legal significance of the order (permanent transfer of parentage) and supports the achievement of the purpose of the Act.


There are no less restrictive and reasonably available ways to achieve the purpose of the requirements in the regulation. The identity documents listed in Schedule 1 of the Regulation and the list of approved witnesses is consistent with Queensland requirements for important legal documents and is broad ranging in attempt to reduce barriers for people seeking cultural recognition orders.

On balance, ensuring the application process for legal recognition contains safeguards to verify the identity of applicants and help to ensure that free consent is provided where it is required,

outweighs the potential limitation of this right. These requirements will support the Commissioner to make a decision that is in the best interests of the child.

Conclusion

I consider that the Regulation is compatible with the HR Act because although it limits, restricts or interferes with human rights, the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.



CRAIG CRAWFORD MP
MINISTER FOR SENIORS AND DISABILITY SERVICES AND
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS

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