



Guidelines in relation to the
Meriba Omasker Kaziw Kazipa
(Torres Strait Islander Traditional Child
Rearing Practice) Act 2020

Made by the Commissioner, Meriba Omasker Kaziw Kazipa
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Authority to Make Guidelines

Section 108 of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (the **Act**) allows the Commissioner (Meriba Omasker Kaziw Kazipa) to make guidelines for matters within the scope of the Act to assist with fair, timely and consistent compliance with the Act.

These Guidelines are introductory only and deal with issues in a general way. They are not legal advice and additional factors may be relevant in your specific circumstances. For detailed guidance, legal advice should be sought.

When considering these guidelines, regard should always be had to the main principle of the Act that any decision made under the Act must be for the wellbeing and best interests of the person subject to the application.

This document also makes references to the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Regulation 2021* (the **Regulation**).

Disclaimer

While every care has been taken in preparing these Guidelines, the Office of the Commissioner, Meriba Omasker Kaziw Kazipa accepts no responsibility for decisions or actions taken as a result of any data, information, statement or advice, expressed or implied, contained within. To the best of our knowledge, the content was correct at the time of publishing.

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Part 1 – Purpose of these guidelines

The Act is the main authority in relation to applications for Cultural Recognition Orders (**CROs**). It sets out the laws which govern and effect the process to make an application for and determine the outcome of a CRO.

These guidelines are designed to assist the Commissioner (Meriba Omasker Kaziw Kazipa) (the Commissioner) in making their decisions as well as provide for transparent decision making for applicants and others affected by the Act.

Guidance notes

Are used in these guidelines to provide information on some key non-legislative topics.

Main Purpose of the Act – s4

The main purpose of the Act is to recognise Ailan Kastom child rearing practice and establish processes for making applications and decisions about that legal recognition. This purpose is to be achieved by appointing a Commissioner who will decide the applications for a CRO as well as other authorised functions under the Act.

Main Principle – s6

The main principle of the Act is that any decision made under the Act in relation to a person who is the subject of an application for a CRO must be for the wellbeing and best interests of that person. The Act sets out mandatory provisions that the Commissioner must have regard to, and these differ depending on whether the application relates to a child or an adult.

Wellbeing and best interests of a child

In deciding the wellbeing and best interests of a child, who is subject to application for a CRO, anyone making a decision under the Act must have regard to:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and in particular, Ailan Kastom child rearing practice
- the need to perform the powers and functions under the Act having regard to the sensitivity and cultural practices associated with Ailan Kastom child rearing practice
- the legal and cultural benefits if a CRO is made
- recognition of the Birth Parents' assessment of the suitability of the Cultural Parents
- decisions being made in a fair, timely and consistent manner
- any other matter that is directly related to the child's wellbeing and best interests.

Guidance note

Contemporary principles of best interests of children are best known from the "United Nations Convention of the Rights of the Child 1989". In the context of CROs, consideration of best interest principles must relate to the consequences of legal recognition and whether the legal recognition is in the best interests of the person. The Commissioner's role does not include managing or interfering with cultural practice, living arrangements determined by the family or making an assessment about the suitability of the Cultural Parents. Therefore, considerations of best interests must be in the context of whether the legal recognition and the consequences of that recognition are in the child's best interests throughout their entire life including adulthood.

Wellbeing and best interests of an adult

In deciding what is in the wellbeing and best interest of an adult who is subject to application for a CRO, anyone making a decision under the Act must have regard to:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and, in particular, Ailan Kastom child rearing practice
- the need to perform the powers and functions under the Act having regard to the sensitivity and cultural practices associated with Ailan Kastom child rearing practice
- decisions being made in a fair, timely and consistent manner
- the legal and cultural benefits for the adult if the CRO is made recognising Ailan Kastom child rearing practice.

Guidance note

The considerations that the Commissioner must have are not exhaustive. Additionally, they do not restrict or limit the Commissioner from having regard to other matters in deciding the best interests of the person an application relates to.

Part 2 – Interpretation

Terms with specific meaning under the Act

The Act uses several key terms which have specific meaning under the Act. The terms are:

- **Ailan Kastom child rearing practice**
is the practice recognised by Ailan Kastom under which a child’s Birth Parents and the child’s Cultural Parents agree in accordance with Ailan Kastom that the parental rights and responsibility for the child are permanently transferred from the Birth Parents to the Cultural Parents.
- **Birth Parent**
is a person who is recognised at law as being a parent of the child at the time the child is born.
- **Cultural Parent**
is a person who, in accordance with Ailan Kastom child rearing practice, agrees to accept the permanent transfer of the parental rights and responsibility for a child from the child’s Birth Parents to the person.
- **Informed Person**
is a person who has knowledge and understanding of the specific Ailan Kastom child rearing practice that occurred in relation to the application and can verify that the transfer of parentage in relation to the subject child occurred in accordance with Ailan Kastom. This could be a family member such as a grandparent.
- **Other Carer**
is a person other than the child’s Birth Parent or Cultural Parent who has the right and responsibility to make decisions about the child’s daily care under legislation other than this Act or the *Child Protection Act 1999*. An example of an Other Carer may be someone who is not a Birth or Cultural Parent but has parental rights such as a grandparent of the subject child may have family law orders providing for parental responsibility or contact. This is to ensure that person who holds those rights is also informed of and consents to the application.
- **Review Officer**
is a person (other than the Commissioner) appointed by the Minister to review an application under s61 of the Act for a review of a decision decided by the Commissioner.
- **Appointed Person**
is a person (other than the Commissioner) appointed by the Minister to consider an application instead of the Commissioner under s19 of the Act where a conflict of interest has been identified.
- **Administrator**
is a person who is or was:
 - the Commissioner
 - an officer of the Office of the Commissioner
 - a Review Officer
 - an Appointed Person or
 - an officer or employee of the department whose services are made available to the Commissioner under s30(2).

- **The Minister**

The Minister referred to in the Act is the Minister for Seniors, Disability Services and Minister for Aboriginal and Torres Strait Islander Partnerships under the Administrative Arrangements Order (No. 2) 2020 and s33 of the Acts *Interpretation Act 1954* (Qld).

Schedule 1 of the Act has definitions of other terms used within the Act

Terms used within these guidelines

- **Cultural Recognition Order**

a Cultural Recognition Order may be described as a CRO.

- **Application**

unless otherwise specified, application means an application for a CRO.

- **Torres Strait Islander**

is a person who is a descendent of an Indigenous inhabitant of the Torres Strait Islands (as defined in Schedule 1 of the *Acts Interpretation Act 1954* (Qld))

Part 3 – Commissioner and Office of the Commissioner

General

The Commissioner is appointed by the Governor in Council on the recommendation of the Minister. The Minister may recommend an appointment to the Commissioner role only if the person is a Torres Strait Islander and the Minister is satisfied the person is appropriately qualified.

The Commissioner’s role is to independently consider applications for cultural recognition and determine whether a CRO should be made.

Disclosure of Conflict of Interests – s18

Circumstances may arise where the Commissioner considers that they cannot independently consider or decide an application for a CRO due a conflict of interest. This may include (but not limited to) having a family or financial relationship with persons involved in an application for a CRO.

A conflict of interest can arise from circumstances where a person can obtain a benefit, whether direct or indirect, real or perceived from actions or decisions made in that official capacity or the decision is affected by relationships between the parties.

Disclosures of conflict of interest will be dealt with under the Act. If the Commissioner becomes aware of a conflict of interest, a process is set up to allow another person (the **Appointed Person**), independent to the Commissioner, to consider the application. For this to occur, the Commissioner must give the Minister a notice (a **Disclosure Notice**) stating—

- the particulars of the application in sufficient detail to enable the Minister to identify the application
- the reasons the Commissioner is not able to independently consider and decide the application, and
- that the Commissioner will not participate in the process leading to a decision for the application.

Guidance note

If a party to an application has concerns that the Commissioner may have a conflict of interest, such as a familial, financial or some other relationship, the application forms have a designated section for that party to detail their concerns so that the Commissioner is made aware and can act accordingly.

Effect of Disclosure Notice – s19

After the Minister receives a disclosure notice about a conflict of interest, the Minister must appoint a person other than the Commissioner, to decide the application. The Minister may appoint someone as the Appointed Person if the Minister is satisfied that this person is appropriately qualified.

The Appointed Person will consider and decide the application for a CRO as if they had the same powers and functions of the Commissioner. The Appointed Person’s decision is taken to be a decision of the Commissioner; and takes effect as if the decision were the Commissioner’s decision. The Appointed Person must also give a statement of reasons for the decision to each party to the application as well as the Commissioner.

Functions of the Commissioner – s22

The Commissioner’s functions are to:

- independently consider and decide each application for a CRO
- ensure the proper, efficient and effective performance of the office
- provide advice, or make recommendations, to the Minister about the operation of this Act and the office
- promote public awareness of the Commissioner’s functions and the office
- advise the Registrar of Births, Deaths and Marriages (the Registrar) of each CRO made by the Commissioner
- perform any other function conferred on the Commissioner under the Act or another Act.

Guidance note

The Act does not provide that the Commissioner can:

- determine the appropriateness of the arrangements made between Birth Parents and Cultural Parents,
- assess the suitability and of the Cultural Parents to care for the subject person as a parent,
- assist in dispute or conflict resolution between parties to an application, or
- provide legal advice to parties to an application.

Obligations in Commissioner performing functions – s23

The Commissioner must, in performing the Commissioner’s functions, act in accordance with the main principle of the Act (s6).

Powers of Commissioner – s24

The Commissioner has power to do all things necessary or convenient to perform the Commissioner’s functions.

Guidance note

This provision is broad and contemplates that certain actions may need to be taken by the Commissioner that are necessary for the Commissioner to perform their functions but are not expressly provided for in the Act.

Examples may include (but not limited to):

- providing information to the Registrar which is not expressly required under the Act but is necessary for the Registrar to complete and register the change of parentage under the CRO
- verifying the identity of applicants.

Commissioner not subject to direction – s25

The Commissioner is not subject to direction by any person about the way the Commissioner performs the Commissioner’s functions or exercises the Commissioner’s powers.

Guidance note

This provision has the effect of ensuring the Commissioner can make their decisions independently.

Part 4 – Applications for Cultural Recognition Orders

Preliminary Criteria for making an application for CRO – s32

The Act prescribes criteria that must be met before an application for a CRO can be made.

An application for a CRO may only be made if:

- the person subject to the application’s birth was registered in Queensland,
- at least one Birth Parent is a Torres Strait Islander person, and
- at least one Cultural Parent is a Torres Strait Islander person.

An application for a CRO about a person who is a child at the time of the application, may only be made:

- by each of the child’s Birth Parents and Cultural Parents,
- if each applicant is at least 18 years of age, and
- 30 days, or more, after the child’s birth was registered in Queensland.

If a Birth Parent or Cultural Parent is deceased an application can be made if there is at least one surviving Birth Parent and one Cultural Parent consenting to the application.

Guidance note

If both Birth Parents or both Cultural Parents are deceased, the required statements and consents will not be able to be provided and an application will not be able to be made.

Guidance note

Applications may be made if there was only one Cultural Parent at the time the person’s parentage was transferred in accordance with Ailan Kastom child rearing practice. For additional information about an unknown parent or one that cannot be identified please refer to Guidance note:

In rare circumstances criminal history information may cause the Commissioner to hold concerns for the welfare and safety of a child. In those circumstances, the Commissioner should consider the appropriateness of notifying the relevant agencies such as the Queensland Police Service and Child Safety about those circumstances. See Child Safety reporting at page 34 in these guidelines for further information.

See *Part 12 – Human Rights Act 2019* considerations at page 35 of these guidelines for consideration of human rights in relation to criminal history reports.

Dispensation of consent – s48 at page 177.

Making an Application – ss33, 34, 35, 36, 37, 38, 39

Applications must be made in the approved form, which is publicly available at <https://www.qld.gov.au/firstnations>.

Child Applications

When the person subject to the CRO application is a child, the following documents are required:

- a certified copy of the subject child’s Queensland birth certificate
- if applicable, any relevant dispensation of consent order

- if applicable, any adoption orders made in relation to the subject child under the *Adoption Act 2009* (Qld)
- if applicable, any family law order relating to parental rights, contact or living arrangements for the subject person made under the *Family Law Act 1975* (Cth)
- if applicable, any orders made under the *Child Protection Act 1999* (Qld), and
- certified copies of at least two of the Proof of Identity documents prescribed by the Regulation in relation to:
 - each of the Birth Parents
 - each of the Cultural Parents
 - each of the Informed Persons (both the Birth Parents and Cultural Parents may nominate the same Informed Person if they wish), and
 - each of the Other Carers (only if applicable).

A list of Proof of Identity documents is found in the Regulation.

In addition to the documents listed above, the application must include the following:

- A signed and appropriately witnessed statement from each Birth Parent addressing:
 - the nature and details of the Ailan Kastom child rearing practice that occurred
 - that the parental rights and obligations for the child were transferred under Ailan Kastom to the Cultural Parents under Ailan Kastom
 - the reasons the Birth Parents consider a CRO will be in the best interests of the child
 - whether to the Birth Parents' knowledge, the child is aware that the Ailan Kastom child rearing practice occurred
 - that the Birth Parents are not aware of any matter that might be detrimental to the wellbeing and best interests of the child
 - the name and address of a person both Birth Parents nominate as the Informed Person for the application
 - that the Birth Parents consents to the making of inquiries of and the exchange of information with, the Informed Person for the purpose of helping the Commissioner decide whether to make a CRO
 - that each Birth Parent gives their informed consent to the application being made.
- Note that Birth Parents *may* also provide details about (these are not mandatory):
 - their relationship with the child
 - any relevant financial support
 - any decisions the Birth Parents have been involved in (such as education or medical treatment).
- A signed and appropriately witnessed statement from each Cultural Parent addressing:
 - the nature and details of the Ailan Kastom child rearing practice that occurred
 - that the parental rights and obligations for the child were transferred under Ailan Kastom to the Cultural Parents under Ailan Kastom
 - the reasons the Cultural Parents' consider a CRO will be in the best interests of the subject child
 - the period the child has lived with the Cultural Parents
 - the name and address of a person both the Cultural Parents nominate as the Informed Person for the application

- that the Cultural Parents consent to the making of inquiries of and the exchange of information with, the Informed Person for the purpose of helping the Commissioner decide whether to make a CRO
 - whether to the Cultural Parents' knowledge, the child is aware that the Ailan Kastom child rearing practice occurred
 - the Cultural Parent's consent to the Commissioner requesting a copy of the Cultural Parent's criminal history and relying on any information contained in that history to make the CRO
 - that the Cultural Parent is not aware of any matter that might be detrimental to the wellbeing and best interests of the subject child.
- Note that Cultural Parents *may* also provide details about (these are not mandatory):
 - the relationship between the Birth Parents and the subject child
 - the relationship between the Cultural Parents and the subject child
 - the child's living arrangements
 - any relevant financial support
 - decisions made in relation to the child (such as who makes decisions about education or medical treatment).
 - A signed statement from the Birth Parents' nominated Informed Person and the Cultural Parents' nominated Informed Person addressing:
 - the Informed Person's understanding of the Ailan Kastom child rearing practice that occurred in relation to the application
 - whether the Ailan Kastom child rearing practice occurred in accordance with Ailan Kastom
 - the Informed Person's relationship, if any, to the Birth Parents, the Cultural Parents and the child the subject of the application.
 - If the child has an Other Carer, then a statement must also be provided by the Other Carer addressing the following:
 - the Other Carer's relationship with the child
 - that the Other Carer gives their informed consent to the application being made
 - the reasons the Other Carer considers a CRO will be in the best interests of the child.

Adult Applications

When the person subject to the CRO application is an adult, applications will need to include:

- A certified copy of the subject person's Queensland birth certificate
- If applicable, any relevant dispensation order
- Certified copies of at least two of the Proof of Identity documents (a list of Proof of Identity documents is found in the Regulation):
 - the applicant
 - each of the Birth Parents
 - each of the Cultural Parents
 - each of the Informed Persons (both the Birth Parents and Cultural Parents may nominate the same Informed Person if they wish), and
 - each of the Other Carers (only if applicable).

In addition to the above, the application must include:

- A signed statement from the Applicant addressing:
 - how the applicant was made aware that they were the subject of Ailan Kastom child rearing practice
 - what information was provided to them about the Ailan Kastom child rearing practice
 - the nature of the relationship they have with their Cultural Parents
 - the nature of the relationship they have with their Birth Parents
 - your consent to the Commissioner making enquiries and exchanging information with the Birth Parents, Cultural Parents and the Informed Person for the purposes of deciding whether to make a CRO, and
 - that the applicant gives their informed consent to the application.
- A signed statement from each Birth Parent must be provided addressing:
 - the nature and details of the Ailan Kastom child rearing practice that occurred
 - that the parental rights and obligations for the child were transferred under Ailan Kastom to the Cultural Parents under Ailan Kastom
 - the name and address of a person both Birth Parents nominate as the Informed Person for the application
 - that the Birth Parents consent to the making of inquiries of and the exchange of information with, the Informed Person for the purpose of helping the Commissioner decide whether to make a CRO
 - that the Birth Parents gives their informed consent to the application being made.
- A signed statement from each Cultural Parent must be provided addressing:
 - the nature and details of the Ailan Kastom child rearing practice that occurred
 - that the parental rights and obligations for the child were transferred in accordance with Ailan Kastom to the Cultural Parents under Ailan Kastom
 - the name and address of a person both the Cultural Parents nominate as the Informed Person for the application
 - that the Cultural Parents consent to the making of inquiries of and the exchange of information with, the Informed Person for the purpose of helping the Commissioner decide whether to make a CRO
 - that the Cultural Parents gives their informed consent to the application being made.
- A signed statement from the Birth Parents' nominated Informed Person and the Cultural Parents' nominated Informed Person addressing:
 - the Informed Person's understanding of the Ailan Kastom child rearing practice that occurred in relation to the application
 - whether the Ailan Kastom child rearing practice occurred in accordance with Ailan Kastom
 - the Informed Person's relationship, if any, to the Birth Parents, the Cultural Parents and the person the subject of the application.

Part 5 – Cultural Recognition Order

The Commissioner must deal with an application for a CRO by considering and deciding the application under Part 5 of the Act. Part 5 deals with the following:

- the Commissioner requesting additional information from applicants
- withdrawal of applications by applicant
- criminal history checks on Cultural Parents
- dispensation of consent orders through an application to the court
- discharge of dispensation of consent orders through an application to the court
- matters the Commissioner must be satisfied with before for deciding a CRO
- what a CRO must state
- the process for internal review of the decision if the Commissioner decides not to make a CRO.

Commissioner may make a request for additional information – s41

The Commissioner may give notice to an applicant requesting further information, or a document, the Commissioner reasonably requires to decide an application. This may occur for example where an application has not included the required documents or statements.

A notice from the Commissioner requesting further information must state a reasonable period of at least 30 business days in which the applicants must provide the requested information. The notice must also state that the applicant may request an extension of the period in which to provide the documentation or information. This may occur when the applicant is having difficulties in obtaining the required documentation due to unforeseen delays such as:

- a birth certificate from the Registry of Births, Deaths and Marriages may take longer than anticipated to arrive
- delays associated with Australia Post.

The purpose of these time frames is to ensure that decisions about applications are not delayed indefinitely while at the same time avoiding imposing timeframes on applicants that may not reasonably be complied with.

The time frame may be extended by the Commissioner either on their own initiative or after an applicant has made a request for further time. There is no prescribed way that an applicant may make this request. However, the Commissioner may ask that the applicant make their request in writing to avoid any dispute about the agreed time in which the additional information should be provided.

Withdrawal of application – s42

Any party to an application may withdraw their consent to an application by written notice to the Commissioner.

There is no prescribed format for the written notice, however the Office of the Commissioner has developed a notice template which is available at:

<https://www.qld.gov.au/firstnations>.

Although notices may be accepted in any written form, it is recommended that notices be sent to the following:

- PO Box 7576 Cairns QLD 4870
- office@ocmokk.qld.gov.au

If written notice is received by some other means the application will be paused while the Commissioner confirms the identity of the party providing notice.

On the Commissioner's receipt of the notice of withdrawal, the application ends. The Commissioner must then give the applicant and other parties to the application notice that the application has been withdrawn.

Criminal History Checks – ss45–46

Section 45 of the Act allows the Commissioner to ask Queensland Police Service Commissioner for a criminal history report about the Cultural Parents if the application relates to a child.

It is not a mandatory for the Commissioner to obtain a criminal history report for every application and is therefore at the Commissioner's discretion.

Guidance note:

Circumstances in which the Commissioner may consider obtaining a criminal history report could arise where the Commissioner becomes aware of information through assessing an application in which one or more of the Cultural Parents may have a criminal history that is relevant to the application. That history may affect the Commissioner's decision about whether the making of the CRO is in that child's best interests and wellbeing.

Applicants are required to state that they are not aware of any matter that might be detrimental to the wellbeing and best interests of the child. This principle is broad in its effect, and it may be difficult to determine exactly what might be detrimental to the wellbeing and best interest of the child. Applicants are encouraged to disclose any information which they are unsure of that may relate to the best interests and wellbeing of the child. This information may assist the Commissioner in deciding whether further information is required and whether a criminal history check would assist in deciding the application.

A Cultural Parent having a criminal history does not necessarily mean that a CRO would not be in the child's best interests. This will be a decision for the Commissioner to make and will depend on the nature, frequency and recency of that criminal history as it relates to the wellbeing and best interests of the child in the context of legally recognising a CRO.

If the Commissioner receives a report about a Cultural Parent's criminal history, the Commissioner will provide written notice to the relevant Cultural Parent. The notice will include a copy of the report and provide for a period of at least '30 business days' notice for that Cultural Parent to respond to the Commissioner's notice and any concerns that the Commissioner has raised.

The Commissioner must ensure the criminal history report is destroyed as soon as practicable after it is no longer needed for the purpose for which it was requested.

Note: Under s102(3) the Commissioner may disclose information contained in a Cultural Parent's criminal history if the disclosure is made in:

- a notice of intention not to make a CRO,
- a statement of reasons given under s58(2)(a) of the Act.

Guidance note:

In rare circumstances criminal history information may cause the Commissioner to hold concerns for the welfare and safety of a child. In those circumstances, the Commissioner should consider the appropriateness of notifying the relevant agencies such as the Queensland Police Service and Child Safety about those circumstances. See Child Safety reporting at page 34 in these guidelines for further information.

See *Part 12 – Human Rights Act 2019* considerations at page 35 of these guidelines for consideration of human rights in relation to criminal history reports.

Dispensation of consent – s48

The application for a CRO is consent based and can only be considered or decided if the Commissioner is satisfied that all required parties have given full, free and informed consent to the making of the application and the order being made. However, the Act recognises that there may be circumstances where the consent of a party may be unable to be obtained. A process is available under the Act to allow for applicants to apply to a court for an order dispensing with the need for the consent of that person.

The Act provides that these applications must be made to the Children Court constituted by a Childrens Court judge, under the *Childrens Court Act 1992* (Qld).

Notice of application – s49

As soon as practicable after filing an application for an order dispensing with the need for the consent of a stated party, the applicant must serve a copy of the application on:

- the stated party
- each other party who is an applicant for the CRO, and
- the Commissioner.

The court may dispense with the requirement to serve a copy of the application on the stated party if the court is satisfied of any of the following matters:

- the applicant cannot establish the identity of the party after making all reasonable enquiries
- the applicant cannot locate the party after making all reasonable enquiries
- the conception of the person the subject of the application for a CRO was a result of an offence committed by the party
- there would be an unacceptable risk of harm, to the birth mother of the person the subject of the application for a CRO if the party were made aware of the person's birth or the application for a CRO, and
- there are other special circumstances for dispensing with the requirement to serve a copy of the application.

As the process of determining a dispensation order application is determined by the Court, ordinary service, notice and relevant court rules apply.

Although the Commissioner must be served with a copy of an application, the Commissioner is not a respondent and is therefore not required to participate in any proceedings relating to a dispensation order.

If the court makes a dispensation order, the applicants must provide the Commissioner with notice that the order was made and provide a copy of the order. The Commissioner

must then consider and decide any associated application for a CRO without the need for the consent of the party stated in the order.

Court may dispense with need for consent – s52

The court may make an order dispensing with the need for consent of a stated party if the court is satisfied of any of the following matters:

- the applicant cannot establish the identity of the party after making all reasonable enquiries
- the applicant cannot locate the party after making all reasonable enquiries
- the conception of the person the subject of the application for a CRO was a result of an offence committed by the party
- there would be an unacceptable risk of harm to the birth mother of the person subject of the application for a CRO if the party were made aware of the person's birth or the application for a CRO
- Queensland Civil and Administrative Tribunal (QCAT) has made a declaration that the party does not have capacity to give the consent
- a court or tribunal of another jurisdiction has made an order or other direction, however called, that the party does not have the capacity to give the consent, or
- the court is satisfied there are other special circumstances for giving the dispensation.

If the person the subject of an application for a CRO is a child and the party is or believed to be the person's Birth Parent, the court must not give the dispensation:

- Within 30 days after notice is given to the party under s49, or
- If the court has reason to believe there is a current application under the:
 - *Status of Children Act 1978* (Qld) for a declaration of parentage for the child, or
 - *Family Law Act 1975* (Cth) by the party for a parenting order for the child.

There are other special circumstances for dispensing with the requirement to serve a copy of the application.

Guidance note

It is recommended that parties obtain independent legal advice about their application for a dispensation of consent order. The Commissioner is unable to assist parties with making an application for a dispensation of consent order as this would be providing legal advice.

However, the Commissioner may advise parties that a dispensation order may be necessary before the Commissioner can consider an application if the Commissioner identifies a required party's consent has not been provided.

If the applicant needs to obtain an order dispensing with a person's consent, the Commissioner and the parties may need to discuss suspending the consideration of an application until the court proceedings are finalised. In those discussions, parties should keep the Commissioner informed about the progress of any court proceedings so that the Commissioner can determine a reasonable time to consider the application. Depending on the complexity of the court proceedings, an application for a CRO may be delayed for a significant period. It is not unusual for court proceedings to take several months to be finalised.

Discharging a dispensation of consent order – s55

If a court makes a dispensation order; and a copy of the application for the order was not served on a stated party, then that party can apply to the court for discharge of the dispensation order.

The applicant must serve a copy of the application for discharge of the dispensation order on each other person who was a party to the proceeding for the dispensation order.

The Commissioner is not a party to the proceedings.

The court may discharge the dispensation order if:

- a CRO has not been made, and
- the Court is satisfied a ground on which the dispensation order was made under s52 does not apply.

Guidance note

The Commissioner is not a party to those proceedings and there is no requirement under the Act for the party to serve the Commissioner with a copy of such application.

However, the Commissioner should be notified as soon as possible as the proceedings will end if a CRO is made. If a CRO is made, only a court can discharge the CRO. The Commissioner may need to delay making a decision about an application if a CRO has not yet been made and an application to discharge a dispensation of consent order has been made in accordance with s41 of the Act.

When the Commissioner is dealing with an application that includes a dispensation order, the Commissioner may seek confirmation from the parties to the application that there are no proceedings on foot in relation to a discharge of the dispensation order from the affected party before making the CRO.

A person affected by a dispensation order may be entitled to apply for the dispensation of consent order to be revoked, however, the court cannot discharge a dispensation of consent order once a CRO has been made.

If a CRO already been made, that person may need to consider making an application to the court that the CRO be discharged. Such an application will need to meet the grounds for discharge of a CRO set out in s73 of the Act. Refer to Grounds for Discharge – s73 at page 26 of these guidelines for further information.

Criteria the Commissioner must be satisfied with before deciding to make a Cultural Recognition Order – s56

Before deciding to make a CRO the Commissioner must be satisfied:

- that, subject to any dispensation order, each Birth Parent and Cultural Parent gave full, free and informed consent to the making of the application for the order
- if the application contains a signed statement from an Other Carer—that Other Carer gave full, free and informed consent to the making of the application (again subject to any dispensation order)
- if the person the subject of the application for the order is a child—that the making of the order is for the wellbeing and in the best interests of the child and
- that the transfer of parentage occurred in accordance with Ailan Kastom child rearing practice
- that each applicant was entitled to apply under s32 of the Act
- that the requirements mentioned in s34 of the Act are satisfied

- that each applicant has provided the required information or statement.

Notice of Intention before deciding not to make a Cultural Recognition Order - s57

If the Commissioner is considering not making a CRO the Commissioner must provide each party to the application a notice (a 'notice of intention').

The notice of intention must state:

- the reasons the Commissioner is considering not making the order
- that an applicant may within 30 business days after receiving the notice of intention give the Commissioner information or documents not included in the application that support the making of the order
- that an applicant may request that the Commissioner extend the above period.

If an applicant requests an extension of time, the Commissioner may agree to extend the period by notice to the applicant.

In deciding the length of time and whether to grant any extension of time, the Commissioner will have regard to s6(2)(a)(v) which says that decisions must be made in a fair, timely and consistent manner.

Deciding about a Cultural Recognition Order – s58

After considering an application, and where relevant, the information and documents provided in response to a notice of intention the Commissioner will decide to make or not to make a CRO.

Where the subject person is a child, the Commissioner must give each party to the application, a statement of reasons and if an order is made, a copy of that order.

Guidance note

An Other Carer is considered to be a *party* to an application.

The term *party* has a broader meaning under the Act and is distinct from the term *applicant*. The terms are not interchangeable.

Additionally, noting the impact and effect a CRO would have on the rights of an Other Carer and that their consent is required, principles of natural justice require an Other Carer to be given notice of the decision and the reasons for that decision.

Where the subject person is an adult, the Commissioner must give the applicant, the Birth Parents and the Cultural Parents a statement of reasons and if an order is made, a copy of that order.

The Commissioner and the Office of the Commissioner must not provide an Informed Person with the outcome of the Commissioner's decision. This is because, having regard to the confidentiality provisions of s102 of the Act, the Commissioner should not provide any further information to an Informed Person once a decision about an application for a CRO has been made. The Birth and Cultural Parents' consent to the Commissioner exchanging information with an Informed Person only extends to the purpose of helping the Commissioner decide whether to make a CRO.

What a Cultural Recognition Order must state – s59

CROs must state the following:

- that the order is made under the Act in recognition of Ailan Kastom
- the subject person's name
- the name of each of the person's Birth Parents and Cultural Parents
- that the person's parentage is transferred from the Birth Parents to the Cultural Parents
- the date of the decision
- any other information prescribed by regulation.

Guidance note

In addition to the above, in order for the Registrar to issue a new birth certificate for the person subject to the CRO, additional information may need to be provided by the Commissioner, for example:

- the birthplace of each Cultural Parent
- the occupation of each Cultural Parent
- any other children from the relationship between each Cultural Parent that the subject person will have upon the making of the CRO.

This additional information will be provided by the Commissioner to the Registrar. The Registrar may then decide to correct the registry to incorporate the above information.

Despite the above, the CRO is the only document contemplated by the Act which provides evidence of the Ailan Kastom child rearing practice and transfer of parentage being legally recognised.

Application for internal review s60

Where the Commissioner decides not to make a CRO, applicants may seek to have the Commissioner's decision internally reviewed.

The application for internal review must be made to the Minister:

- in the approved form
- jointly by the parties, and
- within 20 business days after the statement of reasons for the decision was given to the parties.

The Minister may extend the period within which the application for internal review may be made.

Internal review process s61

Within 20 business days after the Minister receives an application for internal review, the Minister must appoint a Review Officer (other than the Commissioner) to review the Commissioner's decision. The Review Officer should be appropriately qualified.

The Review Officer must consider the application and review the Commissioner's decision. The Review Officer will then either decide to confirm the Commissioner's decision or decide to revoke the Commissioner's decision and make a CRO.

The Review Officer must give a statement of reasons to the parties to the application for internal review and the Commissioner.

Effect of Review Officer's decision to make a Cultural Recognition Order – s62

If the Review Officer revokes the Commissioner's decision and makes a CRO, the reviewed decision is taken to be a decision of the Commissioner.

The Commissioner must give effect to the decision as if the decision was made by the Commissioner and no application for internal review had been made. In the event that a CRO is made, s58(2) and (3) will apply in terms of who must be provided with a copy of the order.

Part 6 – Registration of Cultural Recognition Orders

Notifying the Registrar of Births, Deaths and Marriages – s63

As soon as practicable after a CRO is made by the Commissioner, the Commissioner must give a copy of the order to the Registrar of Births, Deaths and Marriages.

Guidance note

There is no requirement for the Registrar to provide parties to an application confirmation or certification that registration of a CRO has occurred.

If a party to an application requires a birth certificate from the Registrar following the making and registration of a CRO, then that party will need to make an application to the Registrar.

Entitlement to certificate, information relating to particular entries – s64

The following parties may request authorisation from the Commissioner to obtain a certificate, information, source document or a copy of the CRO held by the Registrar:

- a person who was an applicant for a CRO that was made by the Commissioner
- an adult who was the subject of a CRO
- if a person mentioned above has a guardian, the person's guardian.

The Commissioner must provide this authorisation upon request.

However, the Commissioner may decide to exclude information from the authorisation if the Commissioner is satisfied that allowing access to the certificate, information, source document or the copy of the CRO would be an unreasonable invasion to a person's privacy or otherwise unreasonably harm a person's interest. An example provided in the Act includes *'part of a document showing a person's birth was the result of a sexual offence'*.

Once the person has the authorisation, they may make an application to the Registrar (accompanied by an authorisation from the Commissioner) for the requested information that is set out in the authorisation.

The Registrar must grant the application if it relates to an entry about the CRO in the register of births and the cultural recognition register.

A certificate or copy of a source document given under this section and relating to a closed entry must be endorsed 'Not to be used for official purposes'.

For information access requests in relation to documents and information held by the Commissioner, refer to s103 of the Act and the section of these guidelines titled Access to particular information – s103 at page 29.

Part 7 – Effect of Cultural Recognition Orders

Effect on relationships – s66

Where the Commissioner makes a CRO about a person:

- the person’s parentage is transferred from the Birth Parents to the Cultural Parents
- the person becomes a child of the Cultural Parents
- the Cultural Parents become the parents of the person
- the person stops being a child of the Birth Parents, and
- the Birth Parent stops being a parent of the person.

Other relationships are determined in accordance with the above provisions.

See also s106 of the Act and Relationship with Adoption Act and Other Laws – s106 at page 30.

Effect on disposal of property – s67

Dispositions of property whether by will or otherwise and devolutions of property in relation to a person who dies intestate will be similarly impacted in accordance with the changes in relationships listed in s66 of the Act.

For example, a person subject to a CRO will be regarded as a child of their Cultural Parent and no longer a child of the Birth Parents. Issues associated with these changes may need to be resolved or addressed by making changes to a person’s will.

Guidance note

Matters associated with property and estate are complex. It is recommended that any person affected by a CRO consider obtaining independent legal advice about how that order will impact on the person’s entitlement to property whether by will or any other instrument.

Public trustee to make inquiries if bequest to unlocatable person – s68

Circumstances may arise where:

- a will is made after the commencement of the Act and the testator of that will makes a disposition of property to a person:
 - who is described as being a child of the testator or of another person, and
 - whose parentage was transferred to another person or persons as a result of a CRO
- the personal representative of the testator is unable to determine the name and address of the person.

These circumstances may arise because the personal representative is unable to locate a beneficiary named in a will if they have had their name changed and a new entry in the Births, Deaths and Marriages register following a CRO.

If the above occurs, the personal representative is required to provide the Public Trustee with a copy of the will and a notice stating that the personal representative is unable to determine the name and address of the person.

The Public Trustee will then attempt to determine the name and address of the person and if that person has died the date of death of that person. The public trustee will seek necessary information from:

- the Commissioner, and
- the Registrar.

If the Commissioner receives a request from the public trustee, the Commissioner must give the public trustee the name and address of the person held in the Commissioner's records.

The Public Trustee will provide the personal representative with information they are authorised to provide under s68(6) of the Act in assisting the personal representative in identifying and locating the person named under the will.

Guidance note

The above process is most likely to be used in circumstances in which a person may potentially miss out on inheriting property which they have been gifted under a person's will, due to the recipient's identity being changed under a CRO. Because of the change in identity, it may be impossible for the personal representative to identify and locate the person without information from the Commissioner and/or the Registrar.

Part 8 – Discharge of Cultural Recognition Order

Grounds for Discharge – s73

A party to an application may apply to a court for an order discharging a CRO if the CRO was made:

- because of a false or misleading document or representation
- because a person acted fraudulently or used undue influence on another person
- because a person did not provide full, free and informed consent
- some other improper basis or
- there are other exceptional circumstances that warrant the discharge.

The Act provides that 'undue influence' in this section includes:

- the use or threatened use of force or restraint
- causing or threatening to cause injury
- causing or threatening to cause any other detriment.

The Act does not give a definition or example of what 'exceptional circumstances' might be.

Application for discharge order – s74

An application for a discharge order must be made to a court. It must state the ground on which it is made.

As soon as practicable after filing the application in the court, the applicant must serve a copy of it on each person who was a relevant party for the CRO; and who was required to consent to the application for the CRO. The applicant must also provide a copy to the Commissioner.

Respondent to proceeding – s75

The Commissioner is not a respondent to proceedings related to an application for the discharge of a CRO. Any other person served with a copy of an application for a discharge order is a respondent in the proceeding.

Guidance note

Although the Commissioner is not a respondent to the proceedings, the Commissioner may be called upon by the court to provide evidence about an application for a CRO. It may be necessary to obtain legal advice if this occurs.

Court may make a discharge order – s77

The court may only make a discharge order if it is satisfied of a ground mentioned in s73(1) of the Act.

However, if an application for a discharge order is about a child who was the subject of a CRO, the court may only make a discharge order if it considers the discharge is for the wellbeing and in the best interests of the child.

This demonstrates the permanent nature of a CRO.

What is in a discharge order

The discharge order must state the following information:

- the name of the person who applied for the discharge order
- the name of the person about whom the CRO was made and the date the order was made
- the date the discharge order is made
- any other information prescribed by regulation.

Other orders the court may make

If the court makes a discharge order, it may also make any other order:

- it considers appropriate in the interests of justice, and
- if the person the subject of the CRO is a child—make any other order to protect the wellbeing and best interests of the child.

These other orders may be about any matter relating to the wellbeing or best interests of the person, including, for example, any of the following matters:

- if the person the subject of the CRO is a child:
 - the ownership of property or
 - the child’s name, or
 - the custody or guardianship of the child
- if the person the subject of the CRO is an adult—the ownership of property.

Effect of discharge order – s78

On making a discharge order discharging a CRO, the rights privileges duties, liabilities and relationships of the person subject to the CRO and each of the relevant parties to the CRO are the same as if the CRO was never made.

Applicant must give copy of order – s79

As soon as possible after a discharge order is made, the applicant must provide a certified copy of the discharge order to:

- the Registrar of Births, Deaths and Marriages, and
- the Commissioner.

Part 9 – Court Proceedings

Court Proceedings – ss80–91

The Childrens Court of Queensland has jurisdiction over court proceedings made under the Act.

In dealing with the Act, parties might need to have matters of dispute resolved by the court. The Commissioner is unable to provide advice or assistance to families involved in court proceedings and recommends that parties consider obtaining their own independent legal advice in relation to such proceedings.

All parties are encouraged to resolve any disputes on any issues arising under the Act, in line with the principle of full, free and informed consent set out in the Act.

Appeals – s92

A party may appeal to the appellate court against a decision on an application for a dispensation order or discharge order the party—

- was an applicant for a dispensation order and the dispensation order was not made
- is a stated party and a dispensation order has been made about the party, or
- was an applicant for a discharge order and the discharge order was not made.

The Commissioner is not a party to any appeals process and is unable to assist parties in relation to any appeals.

The Commissioner recommends that parties keep the Commissioner informed as to the status of any proceedings or appeals as this may impact on any pending applications.

False or misleading information – ss99–100

A person must not give information under the Act to the Commissioner that the person knows is false or misleading in a material particular. A person found guilty of doing so commits an offence and faces a potential maximum penalty of 100 penalty units.

Providing false and misleading information may also provide grounds for a CRO to be discharged. See Grounds for Discharge – s73 for further information.

Guidance note

A critical element of this provision is that the party giving the information 'knows' the information to be false or misleading 'in a material particular'. This means that a person must be aware that the information they are providing is false and is significant, rather than trivial or inconsequential information. This requires consideration of the information provided as a whole, in the context of the circumstances in which the information was provided and the purpose for providing the information.

The Commissioner may need to decide whether a referral to the Queensland Police Service is necessary in instances in which a party to an application has knowingly provided false or misleading information. In doing so the Commissioner should consider:

- the nature of the information and to what extent it was false or misleading
- the effect and significance of providing the false and misleading information if it was relied upon.

Part 10 – Confidentiality and access to information

Confidentiality of information – s102

Administrators of the Act must not disclose confidential information that has become known in the course of performing functions under the Act.

However, Administrators are permitted to disclose confidential information to another person where:

- it is permitted under the Act
- it is required or permitted under another law
- if the person to whom the information relates, consents to that disclosure
- if the disclosure is in a form that does not identify the person to whom the information relates.

Under s102(3) the Commissioner may disclose information contained in a Cultural Parent's criminal history if the disclosure is made in:

- a notice of intention not to make a CRO
- a statement of reasons given under s58(2)(a) of the Act.

Access to particular information – s103

An applicant for a CRO may apply in writing to the Commissioner for a copy of restricted information about the application for a CRO.

Restricted information means:

- the application for the CRO
- information or a document that accompanied the application or the order
- information or a document that was given to the Commissioner under s41, or
- a statement of reasons given under ss58(2) or (3).

In deciding whether to grant the application for a copy of restricted information the Commissioner must have regard to the need to:

- protect a person's privacy, and
- safeguard a person from harm.

If the Commissioner decides not to grant access to restricted information, the Commissioner will provide the applicant written notice of the Commissioner's decision and a statement of reasons for that decision.

If the Commissioner grants the application, the Commissioner may grant access to all or a part of the restricted information. A statement of reasons for the decision is not required under the Act.

Publishing identifying material – s104

A person must not publish identifying material unless written consent has been given by each identified person. If the identified person is a child, then that person's Birth Parents and Cultural Parents must provide written consent.

Identifying material includes confidential or other information about:

- a party, or a relative of a party, to an application for a CRO

- a party, or a relative of a party, to a court proceeding relating to an application for a discharge order, or
- a person whose consent to an application for a CRO is or was required.

Publish means publish to the public by television, radio, the internet, newspaper, periodical, notice, circular or other form of communication.

This provision should be considered in the context of protecting the sacred and secret nature of the Ailan Kastom child rearing practice according to Ailan Kastom.

Relationship with Adoption Act and Other Laws – s106

When a CRO about a child is made, the order has effect as if the order were a final adoption order made under the *Adoption Act 2009* (Qld).

A CRO takes effect as if:

- the child subject to the CRO were a child adopted under the *Adoption Act 2009* (Qld)
- a Cultural Parent named in the CRO were an adoptive parent named in a final adoption order
- a Birth Parent named in the CRO were a Birth Parent named in a final adoption order.

Upon the making of a CRO the Cultural Parents will become the mother and father of the child.

Decisions about person with impaired capacity – s107

Circumstances may arise which a decision-maker (such as the Commissioner or the court) is making a decision that may affect the rights and interests of an adult who has impaired capacity in relation to the following:

- an application for a CRO
- a request for access to confidential information
- an application for discharge of a CRO
- an appeal against a decision on dispensation of consent or discharge order.

In those cases, the decision maker must consider:

- that person's right to participate, to the greatest extent practicable, in the decision-making process
- that person must be given the support and access to information necessary to enable the adult to decide as part of, or participate in, the decision-making process.

The approved application forms include provision for parties to disclose to the Commissioner any information that may relate to a person's capacity to consent to making an application.

Guidance note

A guardian or attorney for an adult with impaired capacity will be unable to consent on behalf of that person to apply for a CRO as an application would be considered a special personal matter and is restricted under the *Guardianship and Administration Act 2000* (Qld). In cases where a person is impaired to the extent that they are not capable of providing their views and wishes it may be necessary for the parties to consider seeking an order from the Childrens Court of Queensland dispensing with the need for that person's consent.

Approved Forms - s109

Section 109 of the Act allows the Commissioner to approve forms for use under the Act.

Information in an approved form must, if the approved form requires, be verified by a signed statement.

The Act specifies the following must be made in the approved form:

- applications for a CRO – s33 of the Act and
- application for internal review – s60 of the Act.

Part 11 – Other considerations

Witnessing requirements

All statements made by:

- Birth Parents
- Cultural Parents
- Other Carers
- Informed Persons
- Adult applicants.

Are to be witnessed by an authorised witness (as defined in the Regulation).

This requirement is necessary to safeguard the application process.

Identification Documents

Applications for a Child

In relation to applications for children, s33(1)(b)(vi) states that any applications must be accompanied by documentation or information prescribed by regulation. The Regulation requires two identification documents to prove the identity of:

- Cultural Parents
- Birth Parents
- Informed Persons, and
- Other Carers.

The accepted identification documents are set out in Schedule 1 of the Regulation.

Applications for an Adult

The approved form for adult applications requests that parties to an application provide identification documents in line with those set out in the Regulation for child applications. The basis for requesting this information is as follows:

Section 34(3) of the Act – Requires applications for a person who is an adult must include signed statements from each:

- Birth Parent (in accordance with s35 of the Act)
- Cultural Parent (in accordance with s36 of the Act)
- the adult applicant (in accordance with s37 of the Act)
- nominated Informed Person (in accordance with s38 of the Act).

For the Commissioner to be able to properly verify that the required signed statements have been provided, the Commissioner will also need to verify the identity of the persons making those statements. To ensure this can occur it is necessary for parties to provide identification documents. For consistency, the accepted documents in the Approved Form for Adult Applications are the same as those set out in Schedule 1 of the Regulation.

If the Commissioner receives an application for an adult that does not include the necessary identification documentation, the Commissioner should contact the applicant to determine why the documents were not provided. If the documents are not able to be provided, the Commissioner may exercise their discretion in deciding what other steps may be taken to verify the identity of the respective parties.

Guidance note: Birth certificates and issues of parentage

A person (who is not a biological parent) may be listed on a birth certificate and alternatively a Birth Parent may not be listed. Section 25 of the *Status of Children Act 1978* (Qld) provides that a person named as a parent on a person's birth certificate is presumed to be the parent, however this presumption is rebuttable and will depend on the specific circumstances. Additionally, even if a parent does not appear on a birth certificate this does not prove that the person is not a parent of the person. For this reason, the Commissioner may require additional information from the applicants before being able to determine whether all necessary consents have been provided in an application.

Parties should attempt to resolve any issues about identification of Birth Parents before making an application. If the Commissioner becomes aware of an application where there are issues associated with a Birth Parent's claim or the accuracy of a birth certificate, the Commissioner will consider whether any further action is necessary to ensure that all required Birth Parents' consent has been provided.

If the issues cannot be resolved between the parties, it may be necessary to have the dispute resolved through some other means such as a court by making an application for a declaration about parentage or a dispensation of consent order.

Timeframes for considering and deciding an application

The Commissioner must act in a way that is timely and reasonable. However, there is no specific timeframe within which the Commissioner is required to assess and decide CRO applications.

The timeframes for consideration of applications may vary as each application is individual. For example, some applications may require the Commissioner to seek additional information and documents as provided for in the Act. An applicant has at least 30 business days to respond to an additional information request by the Commissioner, but this may be extended.

Information sharing with Informed Persons

Informed Persons are not applicants in an application and therefore do not have the same rights to access of information under s103 of the Act.

The Commissioner may, by notice given to an applicant for a CRO, ask the parties to an application for further information or a document the Commissioner reasonably requires, to decide whether to make a CRO. This may include a request for further information from the Informed Person.

Guidance note

The Commissioner may communicate with the Informed Person in relation to information provided in their signed statement which sets out:

- details about the Informed Person's understanding of the Ailan Kastom child rearing practice that occurred in relation to the application
- whether the Ailan Kastom child rearing practice occurred in accordance with Ailan Kastom
- the Informed Person's relationship with the:
 - Cultural Parents
 - Birth Parents and
 - the person subject to the application.

With the above in mind, both Birth Parents and Cultural Parents' consent to the Commissioner making inquiries of, exchanging information with the Informed Person for the purposes of helping the Commissioner decide whether to make a CRO in accordance with s38 of the Act.

The extent to which the Commissioner will need to exchange information with the Informed Person will vary between each application and is at the discretion of the Commissioner in parallel with the general powers granted in s24 of the Act.

Child Safety reporting

The Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) is the agency responsible for ensuring the safety and wellbeing of children in Queensland who do not have a parent who is able and willing to protect the child from harm. The DCYJMA's powers and authority stem from the *Child Protection Act 1999* (Qld).

Although unlikely, there may be circumstances in which the Commissioner or government officers involved in administering the Act become aware of information which causes the person reasonably suspect that a child has suffered significant harm, is suffering significant harm or is at an unacceptable risk of suffering significant harm and there is no parent willing and able to protect the child from that harm.

In those circumstances, consideration must be had as to the appropriateness of reporting the suspected abuse. While there is no mandatory reporting requirement for the Commissioner or government officers involved in administering the Act under the *Child Protection Act 1999*, it is an offence under the *Criminal Code 1899* for an adult to fail to report belief of a child sexual offence to police; and to fail to protect a child from a child sexual offence that applies in an institutional setting.

Information on reporting child abuse is available at:

<https://www.cyjma.qld.gov.au/protecting-children/reporting-child-abuse>

Part 12 – Human Rights Act 2019 considerations

Section 58 of the *Human Rights Act 2019* (Qld) makes it unlawful for a public entity:

- to act in or make a decision in a way that is not compatible with human rights, or
- in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Proper consideration includes (but not limited to):

- Identifying the human rights that may be affected by the decision, and
- Considering whether the decision would be compatible with human rights.

The Commissioner is regarded as a public entity under section 9(1)(f) of the *Human Rights Act 2019* (Qld).

The Commissioner may make a variety of decisions under the Act. The following decisions have been identified under the Act that are likely to involve human rights considerations:

- contact and exchange information with the Informed Person – ss35(1)(g) and 36(1)(f) of the Act
- whether or not to make a CRO – s40 of the Act
- request additional information – s41 of the Act
- request a criminal history check – s45 of the Act
- providing confidential information – s64 of the Act.

Consideration of human rights relevant to the above decisions

Information decisions

Four out of the above five decisions all involve a person's right not have their privacy unlawfully or arbitrarily interfered with (s25 of the *Human Rights Act 2019* (Qld)). These are:

- contact and exchange information with the Informed Person
- request additional information
- request of a criminal history report, and
- provide information in relation to an information request.

Key elements of the above human rights are that the decision is either unlawful or arbitrary.

The Commissioner's decisions in relation to the above are not unlawful because:

- they are expressly authorised under the Act.
- free and fully informed consent is provided by the applicants, Birth Parents, Cultural Parents and Other Carers for the Commissioner to make these decisions and take whatever action is required
- the Commissioner has a general power to do all things necessary or convenient to perform the Commissioner's functions.

The decisions are not arbitrary because:

- the exchange of information is necessary and relevant to the Commissioner as this will assist the Commissioner in deciding whether the:
 - eligibility requirements to apply for a CRO under the Act have been met

- making of the CRO is in the person's best interests.
Therefore, the Commissioner making a decision under the above provisions does not interfere with an identified human right.

Whether or not to make a Cultural Recognition Order

Section 40 of the Act requires the Commissioner to deal with applications for a CRO by deciding the application under part 5 of the Act. The Commissioner's decision about whether or not to make a CRO requires consideration of a Torres Strait Islander person's cultural right to hold distinct cultural rights and enjoy, maintain, control, protect and develop culture with members of their community (s28 of the *Human Rights Act 2019* (Qld)).

It is considered that the Commissioner's decision to make a CRO would not interfere with the human right identified above.

However, it is considered the Commissioner's decision to *not* make a CRO *may* interfere with the human right identified above. This interference may occur because the decision not to make the CRO has legal implications on the recognition of the relationships developed under Ailan Kastom and this therefore interferes with a person's cultural identity and lived experience. This interference may occur due to the impact deciding whether or not to make a CRO will have on that person's life. Arguably the decision not to make a CRO and refusal to legally recognise the arrangement interferes with cultural rights as it has the effect of not acknowledging the occurrence of the practice.

However, it must be borne in mind that the CRO does not make any changes to the Ailan Kastom child rearing practice, regardless of whether or not the order is made. The effect of the order is to legally recognise the practice, not interfere with it.

Justification for interference with human right

The main principle for administering the Act is that any decision made under the Act in relation to a person who is subject to an application for a CRO must be for the wellbeing and best interests of the person.

Best interests are distinguished when it comes to consideration of applications for adults and children.

Child applications

Best interest considerations for applications in relation to children must have regard to:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and in particular, Ailan Kastom child rearing practice
- the need to perform the powers and functions under the Act having regard to the sensitivity and cultural practices associated with Ailan Kastom child rearing practice
- the legal and cultural benefits if the CRO is made
- recognition of the Birth Parents' assessment of the suitability of the Cultural Parents
- decisions being made in a fair, timely and consistent manner
- any other matter that is directly related to the child's wellbeing and best interests.

Adult applications

Best interest considerations for applications in relation to adults are limited when compared to applications in relation to children. These considerations are:

- the need to ensure appropriate recognition and preservation of Ailan Kastom in general and Ailan Kastom child rearing practice in particular
- the need to perform the powers and functions under the Act having regard to the sensitivity and cultural practices associated with Ailan Kastom child rearing practice
- decisions must be made in a fair, timely and consistent manner, and
- the legal and cultural benefits for the adult if the CRO is made recognising Ailan Kastom child rearing practice.

There may be situations in which the best interests of the person who the application relates to means that a CRO should not be made. In those circumstances the interference with a human right may be necessary and justified.