NATIONAL ABORIGINAL AND TORRES STRAIT ISLANDERS WOMEN'S ALLIANCE

SUBMISSION

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TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGTHTS OF INDIGENOUS PEOPLES

VICKIE TAULI CORPUZ

Dear Madam, Special Rapporteur on the rights of Indigenous Peoples

The National Aboriginal and Torres Strait Islanders Women's Alliance (NATSIWA) thank you for the opportunity to provide to you our submission.

We also congratulate you on your selection as being the first women to be the Special Rapporteur on the rights of Indigenous Peoples, we wish you well in your leadership, the discussion and deliberations in your position.

Introduction

The National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA) is the peak body for Aboriginal and Torres Strait Islander women in Australia. The leadership team of Directors are Indigenous women each representing states and territory across Australia.

NATSIWA is concerned for Aboriginal and Torres Strait Islander women in Australia when it comes to domestic and family violence, funding, family law matters and the traditional adoption of children in Thursday Island. The overview of this submission will focus on these concerns of the law, policies, gaps and barriers that affect Aboriginal and Torres Strait Islander women in these areas.

Summary

Aboriginal women and girls in Australia have traditional been the centre role in taking care of families and communities, though it is shown that they are now suffering unfairness in the systems. This is through the different policies and laws in Australia that should be relevant to

Aboriginal women in regards to domestic violence and family law. Indigenous women interact within the legal system and policies in two major ways, as participants within it, and as women affected by it.

While the Australian Federal Government and State Governments have made some attempts to provide the human rights instruments for Aboriginal and Torres Strait Islander women. The Australian Federal Government and State Governments need to work more collectively with Aboriginal and Torres Strait communities and address, implement and adopt, policies, legislations and program to have a cultural, holistic and right-based approach for the empowerment and safety of Aboriginal and Torres Strait Islander women.

> " The Outcome Document of the World Conference on Indigenous People in which States committed to intensify efforts, in cooperation with Indigenous Peoples, to prevent and eliminate all forms of violence and discrimination against Indigenous peoples, individuals, in particular women, children, youth, older persons and person with disabilities by strengthening legal, policy and institution frameworks, and recalling the work of Indigenous-specific UN mechanism in addressing violence against women and girls."[1]

1. Data

The statistic below will demonstrate how serve violence is against women in Australia, for Aboriginal and Torres Strait Islander women, they experience both far higher rates and more serve forms of violence compared to other women.[2]

- At least one woman a week is killed by a partner or former partner in Australia
- One in three Australian women has experience physical violence since the age of 15
- One in five Australian women has experience sexual violence
- Of these women who experience violence, more than half have children in their care.[3]

Domestic or family violence against women is the largest driver of homelessness for women.[4] This is only in statistics, there are many unreported acts of violence, especially for Aboriginal and Torres Strait Islander women, so the number is far higher.

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[1] United Nations General Assembly - Human Rights Council, Thirty-second session – Agenda item 3 - Promotion and protection of all human right, civil, political, economic, social and cultural rights, including the right to development – Distr:Limited 28 June 2016 – ap.ohch.org/documents/E/HRC/d_res_dec/A_HRC_32_L28.docx

[2] Domestic Violence Prevention Centre Gold Coast Inc.- http://www.domesticviolence.com.au/

[3] Domestic Violence Prevention Centre Gold Coast Inc – http://www.domesticviolence.com.au/

[4] Domestic Violence Prevention Centre Gold Coast Inc - http://www.domesticviolence.com.au/

The Declaration on the Rights of Indigenous Peoples article 22 (2) states that:

> 'States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."

2. Defunding

Funding for Aboriginal women's legal service have only been extended till 2018, there is only $30 million for family violence legal assistance over three years, and that is 10 million a year and shared between multiple services.

From the 1 July 2017, other services that provide legal advice and support such as the Community Legal Centre will suffer cuts to funding across Australia and they will be forced to close their doors or turn away people due to the 30% cut to Commonwealth funding.

Domestic violence is not classed as a criminal offence and orders are made in the lower Courts. Grants of aids to assist with people with funds who are low income earners or who are on welfare and are only provided for indictable offence, civil matters and family law matters. Funds are not provided for lower courts which are where domestic violence orders are heard or made.

Therefore, Aboriginal Women's legal services and community legal services are important for women who are victims of domestic or family violence because these services are free and women can receive the legal representation and advice they need to apply for domestic violence protection orders. If these services are closed due to defunding some women will not have the funds for a private lawyer and their voices as victims will not be heard. If they do not make an order for protection against domestic violence, they will remain silent and can continue to stay in an abusive relationship.

For Aboriginal and Torres Strait Islander women, it is important that they have legal support and representation. This is because if they do not have legal representation they may not understand or know how to provide the evidence that is required for a domestic violence order or a breach of domestic violence order and order may not be made. When they have legal representation, their legal adviser will provide the adequate evidence to ensure the domestic violence protection order is provided to them by the court. This also applies to the representation, legal advice and support for the Family Law courts, though this is more concerning for Aboriginal and Torres Strait Islander women in remote area.

The Government must continue to fund Aboriginal women's legal services and community legal service, as they are the very organisations that can save lives.

3. Family Law courts

In 2010, The Special Rapporteur for Indigenous Peoples Rights, James Ayana had commended in his report on the situation of Indigenous peoples in Australia, the Government for attaching urgency and priority to the issue of protecting vulnerable groups and abating violence against women and children. The special Rapporteur had reported a lack of access by Aboriginal and

Torres Strait Islander women, especially women in remote communities, to legal assistance. In addition, the Special Rapporteur head expression of concerns that government authorities fail to engage in a real dialogue with Aboriginal and Torres Strait Islander women to formulate practical and culturally appropriate strategies to protect women and children at risk. The Special Rapporteur also received information alleging that mainstream domestic violence and child protection models are inconsistent with Aboriginal and Torres Strait Islander cultures.

For Aboriginal and Torres Strait Islander women, the Family Law courts of Australia is another difficult and unfair process for them, especially when there are children involved and domestic violence orders in place.

There are two Federal Courts exercising family jurisdiction in Australia, the Family Court of Australia and the Federal Circuit Court of Australia. Due to defunding by the Government, there is no longer services court services to remote areas.

Under the Federal Family Law Act there is a presumption of joint parental responsibility of each child. The Act aims where possible to preserve the relationship between children and both parents. Therefore, the Family Law Courts are to act in 'the best interest of the child/children".

This is concerning for Aboriginal and Torres Strait Islander women, who are forced to leave their family home because of domestic violence towards them. This is because of the relocation laws, and women in remote areas may not have the family support available and the only way for them to receive support or keep safe is to relocate to another area.

The relocation laws in Family law are unfair to some women, but especially to Aboriginal or Torres Strait Islander women who have made an application for apprehended violence and restraining orders in a lower court. If a mother decides to relocate and remove the children from the family home without the consent of the children's father and if they do relocate the father can immediately apply to the Family Law court for a recovery order. The mother will have no prior notice of this, especially if she is unaware of the laws or fears for her safety. This order can have the children removed from the mother or have the mother return to the primarily area they were living within a set time This is because the Family Law Courts may find that moving is going to limit the time child/children live or spend with a parent or another significant person in their lives.[5]

This forces the mother under the relocation order to either return the child/children to the father or return with them to the area from which she is left, endangering her. This does not matter if there has been domestic violence in place for the mother, the courts will only address the interest of the child. The courts will consider if there is family violence, not domestic violence.

A mother can only relocate if there is an agreement between the mother and father or if a court agrees, the courts may not grant permission, as the courts only concern is the child/children. If

[55] Family Law Court of Australia, http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/relocation-and-travel/

there is a child protection order in place, the Family Courts will not intervene with a child protection order.

Case example: A couple were in a relationship for 14 years, domestic violence had taken place, the mother placed a domestic violence order on the father even though they still lived in the same house. The mother then decided to move away with their 4 biological children to a different city and to where her family lived and she had support.

The father immediately went to the Family Court and filed a recovery order against the mother for the children. Under s670 of the Family Law Act 1975, it is an order that requires child/children to be returned to a parent who has parental responsibility for the child. The court made the order for the father and the Court ordered authorising or directing another person or persons to find, recover and deliver the child, in most instance this will be the Australian Federal Police. [6] The mother under the order had to return with the children to the same town as the father, until a parental order was made. Under the parental order, it was a share order where the children live with the mother for one and the father the next. The mother ended up residing in the same town without her family support which she needed at a vulnerable time in her life.

This is because Family Law Acts makes it very clear the best interest of the child, and if it is seen that the children are not affected by domestic violence:

- the father has a right and is also responsible for the care and welfare of the children until the children reaches the age of 18.
- that arrangements which involve share responsibilities and cooperation between the parent are in the best interest of the child.[7]

The courts consider that it is in the children's best interest to live in close vicinity to their father, that their relationship could continue in a meaningful way. The mother was ordered to return the with the children and was ordered to reside within a particular distance of the area where the father lived.

This is concerning, especially where there has been domestic violence and the mother has no family support or does not come from that area or community. Aboriginal and Torres Strait Islander women can feel isolated and this can also lead to depression and mental health issues for the mother.

4. Ailan Kastom and Thursday Island adoption

In 2010, The Special Rapporteur for Indigenous Peoples Rights James Ayana's recommendation in his report on the situation of Indigenous peoples in Australia, in regards to

[6] Family Law Court of Australia, http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/relocation-and-travel/

[7] Family Law Court of Australia, http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/relocation-and-travel/

Legal and Policy framework was; The Commonwealth and state government should review all legislation, policies and programmes that affect Aboriginal and Torres Strait Islanders, in light of the Declaration on Rights of Indigenous Peoples. From this recommendation, the Commonwealth and State Governments need to review the legislation for the Ailan Kastom and Thursday Island adoption.

History

Following European contact, the various island communities were identified as a single cultural group by the colonisers when they purported to assume sovereignty over the island. A body of customs, traditions, observances and beliefs, referred to as Ailan Kastom, survived European contact and continues through adaptation when under pressure from the imposition of white Australian values and laws. Ailan Kastom, which is Torres strait Islander customary law, forms a strong bond between the different island communities and between Torres Strait Islanders living in the region and on the mainland. (Beckett 1987, Lawrence and Lawrence 2004)

This continued survival of traditional law was recognised by the High Court of Australia in its landmark decision, Mabo v Queensland (1992) 175 CLR 1. That case related to land on Mer, one of the most significant Torres Strait Islands. The late Eddie Mabo was one of the leading plaintiffs and his claim to the relevant land was dependent upon the legal validity of his traditional adoption. This was recognised by traditional law on Mer but not by Australian law and the claim may well have failed if it had been brought by Mabo alone.

Traditional Adoption

Traditional adoption is integral to Ailan Kastom and is a widespread practice that involves all Torres Strait Islander extended families in some way, either as direct participants or as kin to adopted children. Adoptions are arranged between relatives and close friends where bonds of trust and reciprocity have already been established. There is no 'assessment' and 'approval' by an independent and usually white authority. Some of the reasons for the widespread nature of adoption include (Ban 1989) are:

- 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.
- 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 has 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.

The most common way an adoption takes place is for a woman who is pregnant to make a promise to the potential adoptive parents that the child will belong to them from the time of birth. The underlying principle of Torres Strait Islander adoption is that it cannot be assumed that a birth parent will always be the parent who raises the child. The issue of who raises the child is dependent on several social factors such as those listed and is a matter of individual consideration by the families involved. Children are not lost to their birth family, as they are usually given to relatives or close friends within their kinship and social network.

History of Legal Recognition and withdrawal of legal recognition

Prior to 1985 Torres Strait Islanders could have traditional adoptions both formalised and legalised by the Queensland Government under adoption legislation used by all Queenslanders. The legalisation took place with administrative simplicity, with there being no attempt by the Government to understand and define the practice.

A political decision was made in 1985 to treat traditional adoption applications in the same manner as applications by all other Queenslanders who wanted an adoption Order. It was decided that no further study would be carried out in the Torres Strait of the difference between customary adoption and 'adoption' as defined in legislation and that Torres Strait Islanders should be discouraged from applying for legal adoption. The policy position was that traditional adoption falls outside the parameters of adoption legislation and should not be considered as 'adoptions.' (Ban 1989)

This decision struck a significant blow to the incorporation of this aspect of Ailan Kastom into Australian domestic law and ignored an important aspect of the traditional law of Torres Strait Islander peoples.

In 1990 a working party representing Torres Strait Islander people was then formed to press for formal recognition of traditional adoption. The working party was called Kupai Omasker, names representing the two major Islander languages and it maintains its work to this day, having met as late as yesterday (23 March 2017) with senior public servants and political representatives to seek recognition of traditional adoption by the Queensland Parliament

In 1994, following representations by the late Chair of the Working Party and a visit to the Torres Strait by the Hon Alastair Nicholson, then Chief Justice of the Family Court of Australia, the Family Court adapted its practices to enable parenting orders to be made in favour of receiving parents under traditional adoptions and thereafter some hundreds of these orders were made by the Court. This was never intended to be more than an attempt to solve part of the non-recognition problems in relation to traditional adoption because the Court as a Federal Court lacked power to direct the issue of new birth certificates or affect entitlements to land and like matters which are the subject of State law under the Australian Constitution. It did however have the effect of confirming the receiving parents right to have care and control of the children and make decisions for their medical treatment etc.

At the instance of the Working Party, successive Queensland Governments have authorised consultations with Torres Strait Islanders living on the Islands themselves and on the Australian mainland in 1993 and 2011-12.

Consistent themes reported throughout the first consultation in 1993 and by the second 20 years later were that, due to lack of legal recognition of customary adoption, children were being raised in adoptive families and finding out inadvertently that their adoptive name was not the name on their birth certificate.

This caused stress to the children and to the adoptive parents, as under custom children are not told about their adoption until they are considered old enough to understand, which is often in their teenage years. Another theme was disputes over estates where the deceased did not leave a Will (common among Torres Strait Islanders), as those who were adopted through custom stated they had no legal right to challenge those who were biological offspring. The third major theme was that custom adoption was not legally recognised by the courts when disputes arose over the future care of a child who was the subject of an adoption. (Ban 1994).

In 1997 a national conference on the legal recognition of customary adoption was funded by the Queensland Government and held in Townsville. Elected Torres Strait Islander representatives confirmed the issues outlined in the 1994 Report and confirmed the authority of the Torres Strait Islander Working Party, which was established in 1990, to continue negotiations with the government. An outcome of that conference was another consultation by the Working Party in 1998 with Torres Strait Islanders in Queensland.

A Discussion Paper by the newly named Department of Aboriginal and Torres Strait Islander Policy Development was issued in October 1999. The Discussion Paper recommended that a further 'full and proper' consultation take place with the Torres Strait Islander community over proposed ways in which customary adoption could be incorporated legally into existing adoption legislation. Thereafter for reasons which are far from clear, the then Government lost interest and the matter was left in abeyance for some years.

Following repeated Working Party requests throughout most the first decade of the twenty first century to re-open the issue of legal recognition of Torres Strait Islander customary adoption, the Queensland government approved a second extensive consultation in the Torres Strait and on the mainland of Queensland in 2010.

The second consultation was undertaken by Queensland government employees with expertise in the relevant areas and included the former Chief Justice of the Family Court of Australia, the Honourable Alastair Nicholson. It occurred in the Torres Strait mid-2011 and on the mainland mid to late 2012.

Problems arising from non-recognition

There was a remarkable similarity in the outcomes of the two consultancies conducted twenty years apart regarding issues concerning the lack of legal recognition of customary adoption practice. It was noted that the practice is integral to Torres Strait Islander cultural identity and will continue despite lack of legal recognition. However, participants still wanted legal

recognition, particularly in the form of a new birth certificate that reflected the permanently changed status of the child from being part of the birth, or giving family, to being part of the receiving, or customary adoptive family.

Adults who were given as children and were not registered post 1984 when registration under the Adoptions Act ended indicated that they experience several practical difficulties. Practical issues include being able to get a driver's license, open a bank account, getting married and inheritance.

Other barriers experienced by children under the age of 17 relate to enrolment at school where a birth certificate is required and the school not using the receiving parent/s surname of the child. These issues impact on the lives of children at every milestone and some are further outlined below:

Birth Certificates

Not having a birth certificate reflecting the receiving parent/s as the legal parents was nominated as the most significant impact of a lack of legal recognition with flow on effects throughout a person's life. This is because children:

- are unaware they have been given and consequently do not have the details to get their birth certificate;
- The biological parent/s have not registered the birth; or
- The receiving parents are unable to obtain their child's birth certificate because they are not named on the document.

Some adults indicated that they have changed their name by deed poll but this has still led to issues regarding inheritance where the receiving parent/s pass away intestate. There were also issues regarding legal responsibility for funeral arrangements in relation the person who has been given.

Other barriers are also being experienced by adults, particularly those just entering adulthood relate to obtaining their own birth certificate and drivers licences. This in turn leads to difficulties with employment and being able to open bank accounts and obtaining tax file numbers and passports. A passport requires a birth certificate regardless of whether a name has been changed by deed poll or whether the Family Courts have made an order giving parental responsibility to the receiving parent/s registering the child in their name.

In the Torres Strait parents, can enrol their child in school without a birth certificate and the child is enrolled using the receiving family's name. This is not the case in any other part of Queensland where a birth certificate is required. Children living in the outer islands are required to leave home to attend high school and a birth certificate is required.

Further, the Federal Government funds flights for the children to attend school and flights are booked in the name that appears on the birth certificate. Many parents who have received children

and some parents who have given children advised the consultation team that they were very concerned the children would find out they had been given when they boarded flights.They expressed concern about this occurring because per cultural lore the child is only to be advised by the receiving parent at the appropriate time.

Employment

The ability to get a Tax File Number and a Bank Account can be affected where a person cannot obtain a birth certificate nor has other documents in another name.

Because of the continued non- recognition of traditional adoption, the children over the past thirty-three years who do not have a legal relationship with their parents have suffered emotional and psychological harm when they engage with administrative systems that require the production of a birth certificate. They are also subject to legal injustices in any situation where a legal entitlement flows from being recognised in law as the "child" of the adoptive parents – for example, in intestacy cases or where a compensation or insurance payout flows only to the legally recognised children of a deceased parent.

Torres Strait Islanders have consistently said in both consultations that they would like their customary adopted children to have new birth certificates issued, to have the same legal relationship as between biological parents and the children. They understand the implications of full legal recognition and cannot understand why it has been so long and their practice is still not formally recognised. Their practice has different origins and intentions to western adoption, it is not a custom practiced by Aboriginal Australians, but is peculiar to their culture in the Australian context. Similar traditional adoption practices occur in Papua New Guinea, where they are legally recognised and amongst indigenous peoples in Canada, where legal recognition is similarly given in several provinces.

While the Working Party is still in contact with the Queensland Government and some progress appears to be being made, it still has no firm indication that legislation to correct the problem will be introduced in the near future.

This becomes very challenging for the children who are through the island traditional adoption, because the western world and the Australia laws require proof of birth, next of kin, drivers licence and other everyday requirements for identification. This issues deeply affects Torres Strait Islander communities and peoples, and it is a question of how to recognise the cultural importance of the island adoption practice and the legal realities with the laws, policies and legalisations from the Western system.

Case example; The Superannuation Fund which is a compulsory requirement to have when a person is employed. In the death of the super fund member the funds or the superannuation death benefit can be paid to the dependant of the fund member to the fund members estate.[8] A super fund can only directly pay a superannuation death benefit to a dependant this a nominated

[8] SuperGuide – Simple independent superannuation information
https://www.superguide.com.au/superannuation-topics/death-benefits

beneficiary. A dependant (as defined under the superannuation laws) is a spouse or child of any age or anyone who has an interdependency relationship with the member.[9]

This creates difficulties for the island traditional adoption, because the child is not seen as to be in an interdependency relationship with the biological parent. The child of the biological parent is then unable to prove to the courts or superannuation tribunals that are dependants. The child then is unable to make any economic gain or estate gain from their biological parents for these reasons.

RECOMMENDATIONS

1. National Aboriginal and Torres Strait Islander Women's Alliance requests the United Nations Special Rapporteur for Indigenous Peoples to support the people of the Torres Strait in her report to the United Nations and ask it to convey similar support for legally recognised traditional adoption to the Queensland Government in Australia.
2. We further recommend your direct attention to call upon the State Governments and Federal Government to take appropriate steps to co-ordinate the State and Federal legal systems and properly fund circuit courts to remote areas so that Aboriginal and Torres Strait Islander women can have improved legal services.
3. We further recommend that Aboriginal and Torres Strait Islander women/children who are arrested and hold in custody at police stations and prisons have full access to medical and legal services.
4. We further recommend that you call upon all States and Territory's to follow Queensland's State Government who are going to be analysing, consulting and identifying suitable 'safe at home' security options or solutions that will expressly benefit Aboriginal and Torres Strait Islander persons, specifically the women at risk of or affected by domestic and family violence living in remote areas of Queensland. This will also help and identify the number of Aboriginal and Torres Strait Islander women who are affected by homeless due to domestic and family violence.

Thank you for your consideration. Please contact the interim CEO below if you have any questions or require further information.

ceo@natsiwa.org.au

[9] SuperGuide – Simple independent superannuation information
https://www.superguide.com.au/superannuation-topics/death-benefits