



**Secretariat National Aboriginal and Islander Child Care**

## **State and territory legislation incorporating the Aboriginal and Torres Strait Islander Child Placement Principle**

### **NEW SOUTH WALES**

#### **Introduction**

SNAICC is undertaking research and resource development work in support of improving compliance with the Aboriginal and Torres Strait Islander Child Placement Principle. SNAICC is therefore pleased that in support of this, Arnold Bloch Liebler a law firm in Melbourne has documented the sections of state and territory legislation that incorporate the Principle.

The Aboriginal or Torres Strait Islander child placement principle (ATSICPP) recognises the importance of Aboriginal and Torres Strait Islander children in out of home care staying connected to family and culture. It also recognises of the destructive impact of historic policies of assimilation and forced and unjustified removal of children on Aboriginal and Torres Strait Islander peoples.

In each jurisdiction the ATSICPP is part of child protection legislation and requires a similar descending order of placement for children who need to be in out of home care. The first preference under the principle is to place the child with their extended family or kinship group, the second preference with their local community and the third preference with another Aboriginal and Torres Strait Islander family in the area. Once all of these options have been fully explored, the fourth preference is a non-family and non-Aboriginal or Torres Strait Islander placement. Implementation of the Principle also requires that relevant Aboriginal or Torres Strait Islander organisations be consulted about the child's placement and that children are assisted to keep in contact with their family, language and culture.

SNAICC extends a warm thanks to ABL for documenting the legislation within which the Principle is embedded in each state and territory and is pleased to make this available on our web site at [www.snaicc.asn.au](http://www.snaicc.asn.au)

Other information and analysis of the Aboriginal and Torres Strait Islander Child Placement Principle will be published by SNAICC in coming months.

#### **March 2011**

---

SNAICC: Secretariat of National Aboriginal and Islander Child Care  
The national peak body for Aboriginal and Torres Strait Islander child and family services  
Suite 8, Level 1, 252 – 260 St. Georges Rd. North Fitzroy VIC 3068  
PO Box 1445, North Fitzroy VIC 3068  
Ph: 03 9489 8099 Fax: 03 9489 8044 [snaicc@vicnet.net.au](mailto:snaicc@vicnet.net.au) [www.snaicc.asn.au](http://www.snaicc.asn.au)

## 1 New South Wales ('NSW')

### 1.1 Fostering

*Children and Young Persons (Care and Protection) Act 1998* (NSW) (the 'Act')

Section 9 of the Act states that the safety, welfare and well-being of the child or young person are paramount and sets out the principles to be applied in the administration of the Act. The elements of the Aboriginal child placement principle concerning placement are addressed in s 13(1)(a)-(d). Chapter 2, Part 2 of the Act concerns Aboriginal and Torres Strait Islander principles, with the self determination principle found in s 11, and importantly, Aboriginal and Torres Strait Islander participation in decision making outlined in s 12. Care plans, while not culturally specific, are found in Part 3, Division 1 of the Act. Relevant provisions of the Act include:

#### 4 Children and young persons to whom this Act applies

The functions conferred or imposed by this Act and the regulations may be exercised in respect of children and young persons:

- (a) who ordinarily live in New South Wales, or
- (b) who do not ordinarily live in New South Wales, but who are present in New South Wales, or
- (c) who are subject to an event or circumstances occurring in New South Wales that gives or give rise to a report.

#### 5 Meaning of "Aboriginal" and "Torres Strait Islander"

(1) In this Act:

**Aboriginal** has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act 1983*.

**Aboriginal child or young person** means a child or young person descended from an Aboriginal and includes a child or young person who is the subject of a determination under subsection (2).

**Torres Strait Islander** means a person who:

- (a) is descended from a Torres Strait Islander, and
- (b) identifies as a Torres Strait Islander, and
- (c) is accepted as a Torres Strait Islander by a Torres Strait Islander community.

**Torres Strait Islander child or young person** means a child or young person descended from a Torres Strait Islander and includes a child or young person who is the subject of a determination under subsection (3).

(2) Despite the definition of **Aboriginal person** in the *Aboriginal Land Rights Act 1983*, the Children's Court may determine that a child or young person is an Aboriginal for the purposes of this Act if the Children's Court is satisfied

that the child or young person is of Aboriginal descent.

(3) Despite the definition of *Torres Strait Islander* in subsection (1), the Children's Court may determine that a child or young person is a Torres Strait Islander for the purposes of this Act if the Children's Court is satisfied that the child or young person is of Torres Strait Islander descent.

## **8 What are the objects of this Act?**

The objects of this Act are to provide:

(a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and

(b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and

(c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

## **9 Principles for administration of Act**

(1) This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

(2) Subject to subsection (1), the other principles to be applied in the administration of this Act are as follows:

(a) Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.

(b) In all actions and decisions made under this Act (whether by legal or administrative process) that significantly affect a child or young person, account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person.

(c) In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.

(d) If a child or young person is temporarily or permanently deprived of his or her family environment, or cannot be allowed to remain in that

environment in his or her own best interests, the child or young person is entitled to special protection and assistance from the State, and his or her name, identity, language, cultural and religious ties should, as far as possible, be preserved.

(e) If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement.

(f) If a child or young person is placed in out-of-home care, the child or young person is entitled to a safe, nurturing, stable and secure environment. Unless it is contrary to his or her best interests, and taking into account the wishes of the child or young person, this will include the retention by the child or young person of relationships with people significant to the child or young person, including birth or adoptive parents, siblings, extended family, peers, family friends and community.

## **Part 2 – Aboriginal and Torres Strait Islander principles**

### **11 Aboriginal and Torres Strait Islander self-determination**

(1) It is a principle to be applied in the administration of this Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible.

(2) To assist in the implementation of the principle in subsection (1), the Minister may negotiate and agree with Aboriginal and Torres Strait Islander people to the implementation of programs and strategies that promote self-determination.

### **12 Aboriginal and Torres Strait Islander participation in decision-making**

Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

### **13 Aboriginal and Torres Strait Islander Child and Young Person Placement Principle**

#### **(1) The general order for placement**

Subject to the objects in section 8 and the principles of section 9, an Aboriginal or Torres Strait Islander child or young person who needs to be placed in statutory out-of-home care is to be placed with:

(a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal and Torres Strait Islander community to which the child or young person belongs, or

(b) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or it would not be in the best interest of

the child or young person to be so placed - a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or

(c) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or (b) or it would not be in the best interests of the child or young person to be so placed - a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence, or

(d) if it is not practicable for the child or young person to be placed in accordance with paragraph (a), (b) or (c) or it would be detrimental to the safety, welfare and well-being of the child or young person to be so placed - a suitable person approved by the Director-General after consultation with:

(i) members of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

(ii) such Aboriginal and Torres Strait Islander organisations as are appropriate to the child or young person.

**(2) Relevance of self-identification and expressed wishes of child or young person**

In determining where a child or young person is to be placed, account is to be taken of whether the child or young person identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child or young person.

**(3) Child or young person with parents from different Aboriginal or Torres Strait Islander communities**

If a child or young person has parents from different Aboriginal or Torres Strait Islander communities, the order for placement established by paragraphs (a), (b), (c) and (d) of subsection (1) applies, but the choice of a member or person referred to in those paragraphs is to be made so that the best interests of the child or young person will be served having regard to the principles of this Act.

**(4) Child or young person with one Aboriginal or Torres Strait Islander parent and one non-Aboriginal and Torres Strait Islander parent**

If a child or young person has one Aboriginal or Torres Strait Islander parent and one non-Aboriginal and Torres Strait Islander parent, the child or young person may be placed with the person with whom the best interests of the child or young person will be served having regard to the principles of this Act.

(5) If a child or young person to whom subsection (4) applies:

(a) is placed with a person who is not within an Aboriginal or Torres Strait Islander family or community, arrangements must be made to ensure that the child or young person has the opportunity for continuing contact with his or her Aboriginal or Torres Strait Islander family, community and culture, or

(b) is placed with a person who is within an Aboriginal or Torres Strait Islander family or community, arrangements must be made to ensure that the child or young person has the opportunity for continuing

contact with his or her non-Aboriginal and Torres Strait Islander family, community and culture.

**(6) Placement of child or young person in care of person who is not an Aboriginal or Torres Strait Islander**

The following principles are to determine the choice of a carer if an Aboriginal or Torres Strait Islander child or young person is placed with a carer who is not an Aboriginal or Torres Strait Islander:

(a) Subject to the best interests of the child or young person, a fundamental objective is to be the reunion of the child or young person with his or her family or Aboriginal or Torres Strait Islander community.

(b) Continuing contact must be ensured between the child or young person and his or her Aboriginal or Torres Strait Islander family, community and culture.

These principles are subject to subsection (2).

**(7) Exceptions: emergency placements and placements of short duration**

Subsection (1) does not apply to:

(a) an emergency placement made to protect a child or young person from serious risk of immediate harm, or

(b) a placement for a duration of less than 2 weeks.

(8) Where an emergency placement is made to protect an Aboriginal or Torres Strait Islander child or young person from serious risk of immediate harm, the Director-General must consult with the appropriate Aboriginal or Torres Strait Islander community as soon as practicable after the safety of the child or young person has been secured.

In the course of any consultation under this Part, the Director-General must have regard to the right of Aboriginal or Torres Strait Islander children and young persons and their families to confidentiality.

*Note* In the course of any consultation under this Part, the Director-General must have regard to the right of Aboriginal or Torres Strait Islander children and young persons and their families to confidentiality

**"care plan"** means a plan to meet the needs of a child or young person:

(a) that is developed through agreement with the parents of the child or young person, or

(b) that represents a set of proposals for consideration by the Children's Court.

A care plan is not enforceable except to the extent to which aspects of it are endorsed by an order of the Children's Court.

**14 Records relating to Aboriginals and Torres Strait Islanders**

(1) All records made within the Department relating to the placement in

statutory or supported out-of-home care of Aboriginal and Torres Strait Islander children and young persons are to be kept permanently.

(2) If an Aboriginal or Torres Strait Islander child or young person has been placed in statutory or supported out-of-home care:

(a) the child or young person, and

(b) a birth or adoptive parent of the child or young person, and

(c) a person authorised in writing by the child, young person or parent,

is entitled to have access, in accordance with the regulations, to all records kept by the Department that relate to the placement.

(3) (Repealed)

(4) Subsection (2) does not confer a right or entitlement to information that is subject to the *Adoption Information Act 1990*.

(5) The regulations may make provision for or with respect to the keeping of and access to records to which this section applies.

### **32 Initial identification—Aboriginals and Torres Strait Islanders**

If the Director-General has reason to believe that a child or young person who is the subject of a report may be an Aboriginal or Torres Strait Islander, the Director-General is to make such inquiries as are reasonable in the circumstances to determine whether the child or young person is in fact an Aboriginal or Torres Strait Islander.

## **Part 3 – Care plans and parent responsibility contracts**

### **Division 1 – Care plans**

#### **38 Development and enforcement of care plans**

(1) A care plan, developed by agreement in the course of alternative dispute resolution, may be registered with the Children's Court and may be used as evidence of an attempt to resolve the matter without bringing a care application in accordance with Part 2 of Chapter 5. Section 38F provides that a care plan or parent responsibility contract is taken to be registered with the Children's Court when it is filed with the registry of the Court without the need for any order or other further action by the Court.

(2) A care plan that allocates parental responsibility, or aspects of parental responsibility, to any person other than the parents of the child or young person, takes effect only if the Children's Court makes an order by consent to give effect to the proposed changes in parental responsibility.

(3) The Children's Court may make such other orders by consent for the purpose of giving effect to a care plan (being orders of the same kind as it could make in a care application that is duly made under Part 2 of Chapter 5) without the need for a care application under that Part and without the need to be satisfied of the existence of any of the grounds under section 71 if the

Court is satisfied that:

- (a) the proposed order will not contravene the principles of this Act, and
- (b) the parties to the care plan understand its provisions and have freely entered into it, and
- (c) in the case of a party other than the Director-General, the party has received independent advice concerning the provisions to which the proposed order will give effect.

## **78 Care plans**

(1) If the Director-General applies to the Children's Court for an order, not being an emergency protection order, for the removal of a child or young person from the care of his or her parents, the Director-General must present a care plan to the Children's Court before final orders are made.

(2) The care plan must make provision for the following:

(a) the allocation of parental responsibility between the Minister and the parents of the child or young person for the duration of any period for which the child or young person is removed from the care of his or her parents,

(b) the kind of placement proposed to be sought for the child or young person, including:

(i) how it relates in general terms to permanency planning for the child or young person, and

(ii) any interim arrangements that are proposed for the child or young person pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) the arrangements for contact between the child or young person and his or her parents, relatives, friends and other persons connected with the child or young person,

(d) the agency designated to supervise the placement in out-of-home care,

(e) the services that need to be provided to the child or young person.

(3) The care plan is to be made as far as possible with the agreement of the parents of the child or young person concerned.

(4) The care plan is only enforceable to the extent to which its provisions are embodied in or approved by orders of the Children's Court.

(5) Other requirements and the form of a care plan under this section may be prescribed by the regulations.

*Adoption Act 2000* (NSW) (the ‘Act’)

Section 7 of the Act states that the best interests of the child are paramount. Section 8 of the Act outlines the principles to be applied. Section 33 concerns Aboriginal participation in decision making with respect to who must be consulted about the placement of an Aboriginal child and s 34 requires the Aboriginal child placement principles to be applied, with the principles outlined in s 35. Relevant provisions of the Act include:

**4 Meaning of “Aboriginal” and “Torres Strait Islander”**

(1) In this Act:

**Aboriginal** has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act 1983*.

**Aboriginal child** means a child descended from an Aboriginal and includes a child who is the subject of a determination under subsection (2).

**Torres Strait Islander** means a person who:

- (a) is descended from a Torres Strait Islander, and
- (b) identifies as a Torres Strait Islander, and
- (c) is accepted as a Torres Strait Islander by a Torres Strait Islander community.

**Torres Strait Islander child** means a child descended from a Torres Strait Islander and includes a child who is the subject of a determination under subsection (3).

(2) Despite the definition of **Aboriginal** in subsection (1), the Court may determine that a child is an Aboriginal for the purposes of this Act if the Court is satisfied that the child is of Aboriginal descent.

(3) Despite the definition of **Torres Strait Islander** in subsection (1), the Court may determine that a child is a Torres Strait Islander for the purposes of this Act if the Court is satisfied that the child is of Torres Strait Islander descent.

**7 What are the objects of this Act?**

The objects of this Act are as follows:

- (a) to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice,
- (b) to make it clear that adoption is to be regarded as a service for the child concerned,
- (c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage,
- (d) to recognise the changing nature of practices of adoption,

(e) to ensure that equivalent safeguards and standards to those that apply to children from New South Wales apply to children adopted from overseas,

(f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements,

(g) to encourage openness in adoption,

(h) to allow access to certain information relating to adoptions,

(i) to provide for the giving in certain circumstances of post-adoption financial and other assistance to adopted children and their birth and adoptive parents.

## **8 What principles are to be applied by persons making decisions about the adoption of a child?**

(1) In making a decision about the adoption of a child, a decision maker is to have regard (as far as is practicable or appropriate) to the following principles:

(a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,

(b) adoption is to be regarded as a service for the child,

(c) no adult has a right to adopt the child,

(d) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances,

(e) the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved,

(e1) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare,

(f) if the child is Aboriginal—the Aboriginal child placement principles are to be applied,

(g) if the child is a Torres Strait Islander—the Torres Strait Islander child placement principles are to be applied.

(2) In determining the best interests of the child, the decision maker is to have regard to the following:

(a) any wishes expressed by the child,

(b) the child's age, maturity, level of understanding, gender, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant,

- (c) the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity,
- (d) any disability that the child has,
- (e) any wishes expressed by either or both of the parents of the child,
- (f) the relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives) in relation to whom the decision maker considers the question to be relevant,
- (g) the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood,
- (h) the nature of the relationship of the child with each proposed adoptive parent,
- (i) the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child,
- (j) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour,
- (k) the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

## **9 Participation of child in decisions**

(1) To ensure that a child is able to participate in any decision made under this Act that has a significant impact on his or her life, the decision maker is responsible for providing the child with the following:

- (a) adequate information, in a manner and language that the child can understand, concerning the decision,
- (b) the opportunity to express his or her views freely, according to his or her abilities,
- (c) information about the outcome of the decision and an explanation of the reasons for the decision,
- (d) any assistance that is necessary for the child to understand the information and to express his or her views,
- (e) appropriate counselling when the child's consent is required to his or her adoption.

(2) In the application of this principle, due regard must be had to the age and developmental capacity of the child.

(3) Decisions about the adoption of a child that have a significant impact on the life of the child include, but are not limited to, decisions relating to the following:

- (a) the placement for adoption of the child,
- (b) the development of any adoption plan concerning the child and the views of the child's parents about the plan,
- (c) an application for an order for the adoption of the child,
- (d) contact with birth parents or others connected with the child.

#### **24 Who can be adopted?**

(1) An adoption order may be made in relation to a child who:

- (a) was less than 18 years of age on the date on which the application for the order was made, or
- (b) was 18 or more years of age on that date and was cared for by the applicant or applicants for the order.

(2) For the purposes of subsection (1) (b), a child was cared for if the child:

- (a) has been cared for by the applicant or applicants, or by the applicant and a deceased spouse of the applicant, as his or her or their child prior to reaching the age of 18 years, or
- (b) has, as a ward within the meaning of the *Children (Care and Protection) Act 1987* or a person under the parental responsibility of the Minister administering the *Children and Young Persons (Care and Protection) Act 1998*, been in the care responsibility of the applicant or applicants or of the applicant and a deceased spouse of the applicant.

*Note Spouse* is defined in the Dictionary.

#### **33 Aboriginal participation in decision making**

(1) The Director-General or appropriate principal officer must ensure that the following are consulted about the placement of an Aboriginal child:

- (a) a person approved in accordance with section 195, or
- (b) a person nominated by the child's parents, extended family or kinship group, as recognised by the Aboriginal community to which the child belongs, or by that community, with expertise in relation to the adoption or substitute care of Aboriginal children.

(2) In addition, the Director-General or appropriate principal officer must ensure that the placement of the child is made in consultation with a local, community-based and relevant Aboriginal organisation.

### **34 Application of Aboriginal child placement principles**

(1) The Director-General or appropriate principal officer is to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal child.

(2) The Aboriginal child placement principles are to be applied in placing a child that the Director-General or principal officer is satisfied is an Aboriginal child for adoption.

### **35 Aboriginal child placement principles**

#### **(1) General principle**

It is a principle to be applied in the administration of this Act that Aboriginal people should be given the opportunity to participate with as much self-determination as possible in decisions relating to the placement for adoption of Aboriginal children (which is a concept that is absent in customary Aboriginal child care arrangements).

#### **(2) The general order for placement**

The Aboriginal child placement principles are as follows:

(a) The first preference for placement of an Aboriginal child is for the child to be placed for adoption with a prospective adoptive parent or parents belonging to the Aboriginal community, or one of the communities, to which the birth parent or birth parents of the child belongs.

(b) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a), the child is to be placed with a prospective adoptive parent or parents from another Aboriginal community.

(c) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a) or (b), the child is to be placed with a non-Aboriginal prospective adoptive parent or parents.

#### **(3) Placement of child with person who is not Aboriginal**

An Aboriginal child is not to be placed with a non-Aboriginal prospective adoptive parent unless the Court is satisfied that the prospective adoptive parent:

(a) has the capacity to assist the child to develop a healthy and positive cultural identity, and

(b) has knowledge of or is willing to learn about, and teach the child about, the child's Aboriginal heritage and to foster links with that heritage in the child's upbringing, and

(c) has the capacity to help the child if the child encounters racism or discrimination in the wider community,

and that the Aboriginal child placement principles have been properly applied.

*Note* Placement with a non-Aboriginal prospective adoptive parent requires an application to the Court for a preliminary hearing—see section 80.

**(4) Child with one Aboriginal parent and one non-Aboriginal parent**

If a child has one Aboriginal parent and one non-Aboriginal parent, the child may be placed with the person with whom the best interests of the child will be served having regard to the objects of this Act.

(5) If a child to whom subsection (4) applies:

(a) is placed with a person who is not within an Aboriginal family or community, an adoption plan must provide for the child to have the opportunity to develop an identity with the Aboriginal community to which the child belongs, or

(b) is placed with a person who is within an Aboriginal community, an adoption plan must provide for the child to have the opportunity to develop an identity with the non-Aboriginal community to which the child belongs.

**36 Alternatives to placement for adoption to be considered**

An Aboriginal child is not to be placed for adoption unless the Director-General is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the care of the child.

*Note* Examples of other action that may be taken by law are the making of a care order under the *Children and Young Persons (Care and Protection) Act 1998* or a parenting order under the *Family Law Act 1975* of the Commonwealth.

**37 Torres Strait Islander participation in decision making**

(1) The Director-General or appropriate principal officer must ensure that the following are consulted about the placement of a Torres Strait Islander child:

(a) a person approved in accordance with section 196, or

(b) a person nominated by the child's parents, extended family or kinship group, as recognised by the Torres Strait Islander community to which the child belongs, or by that community, with expertise in relation to the adoption or substitute care of Torres Strait Islander children.

(2) In addition, the Director-General or appropriate principal officer must ensure that the placement of the child is made in consultation with a local, community-based and relevant Torres Strait Islander organisation.

**38 Application of Torres Strait Islander child placement principles**

(1) The Director-General or appropriate principal officer is to make reasonable inquiries as to whether a child to be placed for adoption is a Torres Strait Islander child.

(2) The Torres Strait Islander child placement principles are to be applied in placing a child that the Director-General or principal officer is satisfied is a Torres Strait Islander for adoption.

### **39 Torres Strait Islander child placement principles**

#### **(1) The general order for placement**

The Torres Strait Islander child placement principles are as follows:

(a) The first preference for placement of a Torres Strait Islander child is for the child to be placed for adoption with a prospective adoptive parent or parents within the child's extended family.

(b) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a), the child is to be placed with a prospective adoptive parent or parents within the community, or one of the communities, to which the birth parent or birth parents of the child belongs.

(c) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a) or (b), the child is to be placed with a prospective adoptive parent or parents from another Torres Strait Islander community.

(d) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a), (b) or (c), the child is to be placed with a non-Torres Strait Islander prospective adoptive parent or parents.

(2) A Torres Strait Islander child is not to be placed with a prospective adoptive parent who is not a Torres Strait Islander unless the Court is satisfied that the prospective parent:

(a) has the capacity to assist the child to develop a healthy and positive cultural identity, and

(b) is willing to learn about, and teach the child about, the child's Torres Strait Islander heritage and foster links with that heritage in the child's upbringing, and

(c) has the capacity to help the child if the child encounters racism or discrimination in the wider community,

and that the Torres Strait Islander child placement principles have been properly applied.

*Note* Placement with a non-Torres Strait Islander prospective adoptive parent requires an application to the Court for a preliminary hearing—see section 80.

#### **(3) Child with one Torres Strait Islander parent and one non-Torres Strait Islander parent**

If a child has one Torres Strait Islander parent and one non-Torres Strait Islander parent, the child may be placed with the person with whom the best interests of the child will be served having regard to the objects of this Act.

(4) If a child to whom subsection (3) applies:

(a) is placed with a person who is not within a Torres Strait Islander family or community, an adoption plan must provide for the child to have the opportunity to develop an identity with the Torres Strait Islander community to which the child belongs, or

(b) is placed with a person who is within a Torres Strait Islander community, an adoption plan must provide for the child to have the opportunity to develop an identity with the non-Torres Strait Islander community to which the child belongs.

#### **64 Consent to adoption of Aboriginal child**

(1) Before a person gives consent to the adoption of an Aboriginal child:

(a) he or she is to be given adoption counselling by a person approved in accordance with section 195, or

(b) if he or she is offered, but refuses, adoption counselling by such a person he or she must:

(i) be provided by the Director-General or appropriate principal officer with written information on Aboriginal customs and culture and any other matters the Director-General or principal officer considers would have been raised by the person, and

(ii) sign an acknowledgement that he or she has read (or, if he or she cannot read, had read to) and understood the information.

(2) A person who refuses adoption counselling cannot consent to the adoption until at least 7 days after being given the information referred to in subsection (1) (b).

(3) In this section:

***adoption counselling*** means consultation that includes consideration of the possibility of a child being cared for in accordance with Aboriginal customs and culture.

#### **65 Consent to adoption of Torres Strait Islander child**

(1) Before a person gives consent to the adoption of a Torres Strait Islander child:

(a) he or she must receive adoption counselling from a person approved in accordance with section 196, or

(b) if he or she has been offered, but has refused, adoption counselling by such a person he or she must:

(i) be provided by the Director-General or appropriate principal officer with written information on Torres Strait Islander customs and culture and on any other matters that the

Director-General or principal officer considers would have been raised by the person, and

(ii) sign an acknowledgement that he or she has read (or, if he or she cannot read, had read to) and understood the information.

(2) A person who refuses adoption counselling cannot consent to the adoption until at least 7 days after being given the information referred to in subsection (1) (b).

(3) In this section:

***adoption counselling*** means consultation that includes consideration of the possibility of a child being cared for in accordance with Torres Strait Islander customs and culture.

### **195 Consultation with Aboriginal persons**

(1) The Director-General may approve an Aboriginal person as a person who may provide advice and assistance to Aboriginal families or kinship groups in relation to care options for Aboriginal children for the purposes of this Act.

(2) The Director-General must not approve a person under this section unless the Director-General is satisfied that the person has relevant experience in working with Aboriginal children, whether or not in connection with their families or kinship groups.