



Secretariat National Aboriginal and Islander Child Care

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

SOUTH AUSTRALIA

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

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

March 2011

1 South Australia ('SA')

1.1 Fostering

Children's Protection Act 1993 (SA) (the 'Act')

The fundamental principles of the Act are set out in s 4, with specific reference to Aboriginal and Torres Strait Islander children in s 4(5)-(6) and s 5. The relevant provisions of the Act include:

3 Objects of Act

The objects of this Act are—

- (a) to ensure that all children are safe from harm; and
- (b) to ensure as far as practicable that all children are cared for in a way that allows them to reach their full potential; and
- (c) to promote caring attitudes and responses towards children among all sections of the community so that the need for appropriate nurture, care and protection (including protection of the child's cultural identity) is understood, risks to a child's wellbeing are quickly identified, and any necessary support, protection or care is promptly provided; and
- (d) to recognise the family as the primary means of providing for the nurture, care and protection of children and to accord a high priority to supporting and assisting the family to carry out its responsibilities to children.

4 Fundamental principles

- (1) Every child has a right to be safe from harm.
- (2) Every child has a right to care in a safe and stable family environment or, if such a family environment cannot for some reason be provided, in some alternative form of care in which the child has every opportunity that can be reasonably provided to develop to his or her full potential.
- (3) In the exercise of powers under this Act, the above principles and the child's wellbeing and best interests are to be the paramount considerations.
- (4) In determining a child's best interests, consideration must be given to the following:
 - (a) the desirability of keeping the child within the child's own family and the undesirability of withdrawing the child unnecessarily from a neighbourhood or environment with which the child has an established sense of connection;
 - (b) the need to preserve and strengthen relationships between the child, the child's parents and grandparents and other members of the child's family (whether or not the child is to reside with those parents, grandparents or other family members);
 - (c) the need to encourage, preserve and enhance the child's sense of racial, ethnic, religious, spiritual and cultural identity and to respect traditions and values of the community into which the child was born;
 - (d) if the child is able to form and express his or her own views as to his or her best interests—those views;

(e) the undesirability of interrupting the child's education or employment unnecessarily.

(5) In relation to an Aboriginal or Torres Strait Islander child, the Aboriginal and Torres Strait Islander Child Placement Principle is to be observed.

(6) A child who is placed or about to be placed in alternative care—

(a) must be provided with—

(i) a nurturing, safe and stable living environment; and

(ii) care that is, as far as practicable, appropriate to the child's needs and culturally appropriate; and

(b) must be allowed to maintain relationships with the child's family (including the child's grandparents) and community, to the extent that such relationships can be maintained without serious risk of harm; and

(c) must be consulted about, and (if the child is reasonably able to do so) take part in making, decisions affecting the child's life, particularly decisions about the child's ongoing care, where the child is to live, contact with the child's family and the child's health and schooling; and

(d) must be given information that is appropriate, having regard to the child's age and ability to understand, about plans and decisions concerning the child's future; and

(e) is entitled to have his or her privacy respected; and

(f) if the child is in alternative care and under the guardianship, or in the custody, of the Minister—is entitled to regular review of the child's circumstances and the arrangements for the child's care.

(7) All proceedings under this Act must be dealt with expeditiously, with due regard to the degree of urgency of each particular case.

5 Provisions relating to dealing with Aboriginal or Torres Strait Islander children

(1) No decision or order may be made under this Act as to where or with whom an Aboriginal or Torres Strait Islander child will reside unless consultation has first been had with a recognised Aboriginal organisation, or a recognised Torres Strait Islander organisation, as the case may require.

(2) A person or court, in making any decision or order under this Act in relation to an Aboriginal or Torres Strait Islander child, must, in addition to complying with the requirements of section 4, have regard -

(a) to the submissions made by or on behalf of a recognised Aboriginal or Torres Strait Islander organisation consulted in relation to the child; and

(b) if there has been no such consultation - to Aboriginal traditions and cultural values (including kinship rules) as generally expressed by the Aboriginal community, or to Torres Strait Islander traditions and cultural values (including kinship rules) as generally expressed by the Torres Strait Islander community, as the case may require; and

(c) to the general principle that an Aboriginal child should be kept within the Aboriginal community and a Torres Strait Islander child should be kept within the Torres Strait Islander community

(3) For the purposes of this Act, a recognised Aboriginal or Torres Strait Islander organisation is an organisation that the Minister, after consulting with the Aboriginal community or a section of the Aboriginal community, or the Torres Strait Islander community or a section of the Torres Strait Islander community,

as the case may require, declares by notice in the Gazette to be a recognised Aboriginal organisation, or a recognised Torres Strait Islander organisation, for the purposes of this Act.

(4) The Minister may, by notice in the Gazette, after consulting with the relevant community or a section of the relevant community, vary or revoke a declaration under subsection (3).

(5) All reasonable endeavours should be made when conducting consultations, negotiations, meetings or proceedings of any kind under this Act involving an Aboriginal person (where a child or not) to do so in a manner and in a venue that is as sympathetic to Aboriginal traditions as is reasonably practicable.

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(7) The Minister will cause discussions to be held from time to time between the Department and the relevant community for the purposes of implementing subsections (5) and (6).

1.2 Adoption

Adoption Act 1988 (SA) (the 'Act')

Under the Act, the welfare of the child is of paramount consideration. The requirements for the adoption of an Aboriginal child are set out in s 11. Relevant provisions of the Act include:

7—General principle

In all proceedings under this Act, the welfare of the child to whom the proceedings relate must be regarded as the paramount consideration.

11 Adoption of Aboriginal child

(1) The Court will not make an order for the adoption of an Aboriginal child unless satisfied that adoption is clearly preferable, in the interest of the child, to any alternative order that may be made under the laws of the State or the Commonwealth.

(2) Subject to subsection (3), an order for the adoption of an Aboriginal child will not be made except in favour of a member of the child's Aboriginal community who has the correct relationship with the child in accordance with Aboriginal customary law or, if there is no such person seeking to adopt the child, some other Aboriginal person.

(3) An order for the adoption of an Aboriginal child may be made in favour of a person who is not an Aboriginal person if the Court is satisfied -

(a) that there are special circumstances justifying the making of the order; and

(b) that the child's cultural identity with the Aboriginal people will not be lost in consequence of the adoption.