



Secretariat National Aboriginal and Islander Child Care

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

TASMANIA

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

Tasmania ('TAS')

1.1 *Fostering*

Children, Young Persons and Their Families Act 1997 (TAS) (the 'Act')

The relevant principles to be observed are found in s 8 of the Act, with the best interests of the child a paramount consideration. Principles relating to Aboriginal children are detailed in s 9 of the Act. Relevant provisions of the Act include:

3 Interpretation

(1) In this Act, unless the contrary intention appears –

"Aboriginal child" means a child who is an Aboriginal person within the meaning of the *Aboriginal Lands Act 1995*;

4 Meaning of "at risk"

(1) For the purposes of this Act, a child is at risk if –

- (a) the child has been, is being, or is likely to be, abused or neglected; or
- (b) any person with whom the child resides or who has frequent contact with the child (whether the person is or is not a guardian of the child) –

- (i) has threatened to kill or abuse or neglect the child and there is a reasonable likelihood of the threat being carried out; or

- (ii) has killed or abused or neglected some other child or an adult and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person; or

- (ba) the child is an affected child within the meaning of the *Family Violence Act 2004*; or

- (c) the guardians of the child are –

- (i) unable to maintain the child; or

- (ii) unable to exercise adequate supervision and control over the child; or

- (iii) unwilling to maintain the child; or

- (iv) unwilling to exercise adequate supervision and control over the child; or

- (v) dead, have abandoned the child or cannot be found after reasonable inquiry; or

- (vi) are unwilling or unable to prevent the child from suffering abuse or neglect; or

- (d) the child is under 16 years of age and does not, without lawful excuse, attend a school, or other educational or training institution, regularly.

(2) For the purposes of subsection (1), it does not matter whether the conduct that puts a child at risk occurred or, as the case requires, is likely to occur wholly or partly outside Tasmania.

8 Principles to be observed in dealing with children

(1) The administration of this Act is to be founded on the following principles:

- (a) the primary responsibility for a child's care and protection lies with the child's family;
 - (b) a high priority is to be given to supporting and assisting the family to carry out that primary responsibility in preference to commencing proceedings under Division 2 of Part 5;
 - (c) if a family is not able to meet its responsibilities to the child and the child is at risk, the Secretary may accept those responsibilities.
- (2) In any exercise of powers under this Act in relation to a child –
- (a) the best interests of the child must be the paramount consideration; and
 - (b) serious consideration must be given to the desirability of –
 - (i) keeping the child within his or her family; and
 - (ii) preserving and strengthening family relationships between the child and the child's guardians and other family members, whether or not the child is to reside within his or her family; and
 - (iii) not withdrawing the child unnecessarily from the child's familiar environment, culture or neighbourhood; and
 - (iv) not interrupting unnecessarily the child's education or employment; and
 - (v) preserving and enhancing the child's sense of ethnic, religious or cultural identity, and making decisions and orders that are consistent with ethnic traditions or religious or cultural values; and
 - (vi) preserving the child's name; and
 - (vii) not subjecting the child to unnecessary, intrusive or repeated assessments; and
 - (c) the powers, wherever practicable and reasonable, must be exercised in a manner that takes into account the views of all persons concerned with the welfare of the child.
- (3) In any exercise of powers under this Act in relation to a child, if a child is able to form and express views as to his or her ongoing care and protection, those views must be sought and given serious consideration, taking into account the child's age and maturity.
- (4) In any proceeding under this Act that may lead to any separation of a child from his or her family, other than a proceeding under Part 4, the child's family and other persons interested in the child's wellbeing must be given the opportunity to present their views in respect of the child's wellbeing.
- (5) In any proceeding under this Act in relation to a child, the child's family and other persons interested in the child's wellbeing should be provided with information sufficient to enable them to participate fully in the proceeding.
- (6) All proceedings under this Act must be dealt with expeditiously, with due regard to the degree of urgency of each particular case.

9 Principles relating to dealing with Aboriginal children

- (1) A decision or order as to where or with whom an Aboriginal child will reside may not be made under this Act except where a recognised Aboriginal organisation has first been consulted.

(2) In making any decision or order under this Act in relation to an Aboriginal child, a person or the Court must, in addition to complying with the principles set out in section 8 -

(a) have regard to any submissions made by or on behalf of a recognised Aboriginal organisation consulted in relation to the child; and

(b) if a recognised Aboriginal organisation has not made any submissions, have regard to Aboriginal traditions and cultural values (including kinship rules) as generally held by the Aboriginal community; and

(c) have regard to the general principles that an Aboriginal child should remain within the Aboriginal community.

32 Convening family group conference

(1) If a family group conference is to be held, the Secretary must consult with the child and the child's immediate family in relation to the assignment of a facilitator.

(2) After consulting with the child and the child's immediate family, the Secretary must assign a facilitator to convene and facilitate the family group conference.

(3) Except where the facilitator is satisfied that the child is mature enough to make, and has made, an independent decision to waive his or her right to be represented by a suitable person at the family group conference, the facilitator must ensure that a person whom the facilitator considers suitable is representing the child as his or her advocate.

(4) The facilitator –

(a) must consult with the child, the child's guardians and, in the case of an Aboriginal child, with an appropriate recognised Aboriginal organisation as to who should be invited to attend the family group conference and the time and place of the meeting; and

(b) must fix a time and place for the family group conference; and

(c) must issue a notice specifying the time and place of the family group conference.

(5) If reasonably practicable, the time fixed for a family group conference must be within 3 weeks after the Secretary has determined that the conference is to be held.

(6) The facilitator must invite the following persons to attend the family group conference and provide each of them with a copy of the notice issued under subsection (4)(c):

(a) the child;

(b) the guardians of the child;

(c) the child's advocate, if one has been appointed;

(d) an employee of the Department authorised by the Secretary, either generally or in respect of that child, to present a report into the child's circumstances to the conference;

(e) if the conference is convened as a result of an order of the Court, any person whom the order specifies is to be invited.

(7) Despite subsection (6), the facilitator is not required to invite any person specified in that subsection to the family group conference if the attendance of that person at the conference could result in the contravention of a restraint order made under the *Justices Act 1959* or any other order of a court.

(8) Despite subsection (6)(a) and (b), the facilitator is not required to invite the child or any guardian of the child to the family group conference if the facilitator is of the opinion that it would not be in the best interests of the child for the child or that other person to attend.

(9) Despite subsection (6)(a), the facilitator is not required to invite the child to the family group conference if the facilitator is of the opinion that the child is unable to understand or participate in the proceedings of the conference by reason of his or her age or for any other reason.

(10) The facilitator may invite one or more of the following persons to attend the family group conference and provide them with a copy of the notice issued under subsection (4)(c):

(a) members of the child's immediate family whom the facilitator considers should attend;

(b) members of the child's extended family whom the child or the child's guardians have requested the facilitator to invite;

(c) other members of the child's extended family whom the facilitator considers should attend;

(d) any other person who has had a close association with the child and whom the facilitator considers should attend;

(e) any person who has been counselling, advising or aiding the child or the child's guardians and whom the facilitator considers should attend;

(f) if the child is an Aboriginal child, a person nominated by a recognised Aboriginal organisation;

(g) any person who has examined, assessed, counselled or treated the child in the course of the assessment of the child's circumstances and whom the facilitator considers should attend;

(h) if there are concerns about the child's education and the child attends a Government school, a person nominated by the Secretary of the responsible Department in relation to the *Education Act 1994*;

(i) if there are concerns about the child's education and the child attends a non-Government school, a person nominated by the principal of the school;

(j) if there are concerns about the child's education and the child attends the Tasmanian Academy established by the *Education and Training (Tasmanian Academy) Act 2008*, a person nominated by the Tasmanian Academy;

(k) if there are concerns about the child's education and the child attends the Tasmanian Polytechnic established by the *Education and Training (Tasmanian Polytechnic) Act 2008*, a person nominated by the Tasmanian Polytechnic.

(11) In determining whether a person is to be invited or not to be invited to a family group conference under subsection (10), the facilitator must take into account any relevant restraint order made under the *Justices Act 1959* or any other relevant order of a court.

51 Right of other interested persons to be heard

In any proceedings under this Division, on the application of –

(a) a member of a child's family; or

(b) a person who has at any time had care of a child; or

- (c) a person who has counselled, advised or aided a child; or
- (d) if the child is an Aboriginal child, a recognised Aboriginal organisation or a representative of such an organisation; or
- (e) any other person who appears to the Court to have a proper interest in the matter –

the Court may hear submissions and take evidence from the applicant in respect of the child, even though the applicant is not a party to the proceedings.

55 Determining what is child's best interests

(1) In determining what is in the child's best interests, the Court must consider the following matters:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court considers relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's guardians and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from –
 - (i) either of his or her guardians; and
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a guardian and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with each guardian on a regular basis;
- (e) the capacity of each guardian, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex, background and culture (including any need to maintain a connection with the lifestyle, culture and traditions of the Aboriginal community) and any other characteristics of the child that the Court considers relevant;
- (g) the need to protect the child from physical or psychological harm;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's guardians;
- (i) any other fact or circumstance that the Court considers relevant.

(2) If the Court is considering whether to make an order with the consent of all the parties to the proceedings, the Court may, but is not required to, have regard to all or any of the matters set out in subsection (1).

1.2 Adoption

***Adoption Act 1988* (the 'Act')**

There is no specific reference in the Act to Aboriginal or Torres Strait Islander children.

8 Welfare and interests of child to be paramount

In the administration of this Act, the welfare and interests of the child or adopted person concerned shall be regarded as the paramount consideration at all times.