



Secretariat National Aboriginal and Islander Child Care

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

VICTORIA

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 Victoria ('VIC')

1.1 Fostering

Children, Youth and Families Act 2005 (VIC) (the 'Act')

The best interests of the child are paramount under this Act, with the relevant considerations that must be given outlined in s 10 and 11 of the Act. Additional decision making principles for Aboriginal children are outlined in s 12 of the Act, specifically s 12(c), which states that 'an Aboriginal agency must first be consulted and the Aboriginal Child Placement Principle must be applied' prior to the placement of the child. The Aboriginal Child Placement Principle is outlined in s 13 of the Act, with further principles for the placement of an Aboriginal child in s 14 of the Act. Section 176 of the Act outlines the cultural plan requirements for an Aboriginal child. Relevant provisions of the Act include:

1 Purposes

The main purposes of this Act are—

- (a) to provide for community services to support children and families; and
- (b) to provide for the protection of children; and
- (c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and
- (d) to continue The Children's Court of Victoria as a specialist court dealing with matters relating to children.

3 Definitions

(1) In this Act—

Aboriginal agency means an organisation declared to be an Aboriginal agency under section 6;

Aboriginal person means a person who—

- (a) is descended from an Aborigine or Torres Strait Islander; and
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community;

PART 1.2—PRINCIPLES

Division 2—Best interests principles

10 Best interests principles

(1) For the purposes of this Act the best interests of the child must always be paramount.

(2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

(3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—

(a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;

(b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;

(c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;

(d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;

(e) the effects of cumulative patterns of harm on a child's safety and development;

(f) the desirability of continuity and stability in the child's care;

(g) that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child;

(h) if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child, before any other placement option is considered;

(i) the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;

(j) the capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child;

(k) access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child;

(l) the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;

Division 3—Decision-making principles

11 Decision-making principles

In making a decision or taking an action in relation to a child, the Secretary or a community service must also give consideration to the following principles—

- (a) the child's parent should be assisted and supported in reaching decisions and taking actions to promote the child's safety and wellbeing;
- (b) where a child is placed in out of home care, the child's care giver should be consulted as part of the decision-making process and given an opportunity to contribute to the process;
- (c) the decision-making process should be fair and transparent;
- (d) the views of all persons who are directly involved in the decision should be taken into account;
- (e) decisions are to be reached by collaboration and consensus, wherever practicable;
- (f) the child and all relevant family members (except if their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process;

Division 4—Additional Decision-making Principles for Aboriginal Children

12 Additional decision-making principles

(1) In recognition of the principle of Aboriginal self-management and self-determination, in making a decision or taking an action in relation to an Aboriginal child, the Secretary or a community service must also give consideration to the following principles—

- (a) in making a decision or taking an action in relation to an Aboriginal child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;
- (b) a decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency and, wherever possible, attended by—
 - (i) the child; and
 - (ii) the child's parent; and
 - (iii) members of the extended family of the child; and
 - (iv) other appropriate members of the Aboriginal community as determined by the child's parent;
- (c) in making a decision to place an Aboriginal child in out of home care, an Aboriginal agency must first be consulted and the Aboriginal Child Placement Principle must be applied.

(2) The requirement under subsection (1)(c) to consult with an Aboriginal agency does not apply to the making of a decision or the taking of an action under Part 3.5.

(3) In this section **Aboriginal organisation** means an organisation that is managed by Aboriginal persons and that carries on its activities for the benefit of Aboriginal persons.

13 Aboriginal Child Placement Principle

(1) For the purposes of this Act the Aboriginal Child Placement Principle is that if it is in the best interests of an Aboriginal child to be placed in out of home care, in making that placement, regard must be had—

- (a) to the advice of the relevant Aboriginal agency; and
- (b) to the criteria in sub-section (2); and
- (c) to the principles in section 14.

(2) The criteria are—

(a) as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives;

(b) if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with—

- (i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family;
- (ii) an Aboriginal family from another Aboriginal community;
- (iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family;

(c) any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.

(3) The requirements under subsection (1)(a) to have regard to the advice of the relevant Aboriginal agency and under subsection (2)(b) to consult with the relevant Aboriginal agency do not apply to the making of a decision or the taking of an action under Part 3.5.

14 Further principles for placement of Aboriginal child

Self-identification and expressed wishes of child

(1) In determining where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child.

Child with parents from different Aboriginal communities

(2) If a child has parents from different Aboriginal communities, the order of placement set out in sections 13(2)(b)(i) and 13(2)(b)(ii) applies but consideration should also be given to the child's own sense of belonging.

(3) If a child with parents from different Aboriginal communities is placed with one parent's family or community, arrangements must be made to ensure that the

child has the opportunity for continuing contact with his or her other parent's family, community and culture.

Child with one Aboriginal parent and one non-Aboriginal parent

(4) If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed.

Placement of child in care of a non-Aboriginal person

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

Cultural plan means a cultural plan prepared under section 176

162 When is a child in need of protection?

(1) For the purposes of this Act a child is in need of protection if any of the following grounds exist—

(a) the child has been abandoned by his or her parents and after reasonable inquiries—

(i) the parents cannot be found; and

(ii) no other suitable person can be found who is willing and able to care for the child;

(b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

(c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.

(2) For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.

176 Cultural plan for Aboriginal child

- (1) The Secretary must prepare a cultural plan for each Aboriginal child placed in out of home care under a guardianship to Secretary order or long-term guardianship to Secretary order.
- (2) A cultural plan must set out how the Aboriginal child placed in out of home care is to remain connected to his or her Aboriginal community and to his or her Aboriginal culture.
- (3) For the purposes of subsection (2), a child's Aboriginal community is—
- (a) the Aboriginal community to which the child has a sense of belonging, if this can be ascertained by the Secretary; or
 - (b) if paragraph (a) does not apply, the Aboriginal community in which the child has primarily lived; or
 - (c) if paragraphs (a) and (b) do not apply, the Aboriginal community of the child's parent or grandparent.
- (4) The Secretary must monitor compliance by the carer of a child with the cultural plan prepared for a child.

PART 1.2—PERMANENT CARE ORDERS

323 Restrictions on the making of a permanent care order in respect of an Aboriginal child

The Court must not make a permanent care order to place an Aboriginal child solely with a non-Aboriginal person or persons unless—

- (a) the disposition report states that—
 - (i) no suitable placement can be found with an Aboriginal person or persons; and
 - (ii) the decision to seek the order has been made in consultation with the child, where appropriate; and
 - (iii) the Secretary is satisfied that the order sought will accord with the Aboriginal Child Placement Principle; and
- (b) the Court has received a report from an Aboriginal agency that recommends the making of the order; and
- (c) if the Court so requires, a cultural plan has been prepared for the child.

1.2 Adoption

Adoption Act 1984 (VIC) (the 'Act')

The welfare and interest of the child are of paramount consideration in the administration of this Act. The requirements concerning the adoption of an Aboriginal child are set out in s 50 of the Act. Relevant provisions of the Act include:

4 Definitions

(1) In this Act, unless inconsistent with the context or subject-matter—

Aborigine means a person who—

- (a) is descended from an Aborigine or Torres Strait Islander;
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community;

9 Welfare and interests of child to be paramount

In the administration of this Act, the welfare and interests of the child concerned shall be regarded as the paramount consideration.

37 Consent subject to conditions

(1) A consent by a parent to the adoption of a child in which the wish is expressed under section 50 that the child be adopted within the Aboriginal community may be made subject to a condition that that parent, and such relative of the child as are specified in the consent and members of the Aboriginal community to which the child belongs have a right of access in accordance with the prescribed terms to the child.

50 Adoption of Aboriginal child

(1) The provision of this section are enacted in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements.

(2) Where -

(a) consent is given to the adoption of a child by a parent -

(i) who is an Aborigine; or

(ii) who is not an Aborigine but, in the instrument of consent, states the belief that the other parent is an Aborigine -

and who, in the instrument of consent, expresses the wish that the child be adopted within the Aboriginal community; or

(b) the Court has dispensed with the consent of the parents and the Secretary or principal officer of an approved agency believes on reasonable grounds that the child has been accepted by an Aboriginal community as an Aborigine and so informs the Court -

the Court shall not make an order for the adopted of the child unless the Court is satisfied as to the matters referred to in section 15 and, where a parent has given consent, is satisfied that the parent has received, or has in writing expressed the wish not to receive, counselling from an Aboriginal agency and -

(c) that the proposed adoptive parents are members, or at least one of the proposed adoptive parents is a member, of the Aboriginal community to which a parent who gave consent belongs;

(d) that a person of a class referred to in paragraph (c) is not reasonably available as an adoptive parent and that the proposed adoptive parents,

or at least one of the proposed adoptive parents, is a member of an Aboriginal community; or

(e) that a person of a class referred to in paragraph (c) or (d) is not reasonably available as an adoptive parent and that the proposed adoptive parents are persons approved by or on behalf of the Secretary or the principal officer of an approved agency and by an Aboriginal agency as suitable persons to adopt an Aboriginal child.

(3) In this section, **Aboriginal agency** means an organisation declared by Order of the Governor in Council published in the Government Gazette to be an Aboriginal agency in accordance with subsection (4).

(4) An organisation shall not be declared under subsection (3) to be an Aboriginal agency unless the Secretary is satisfied that the organisation is managed by Aborigines, that its activities are carried on for the benefit of Aborigines and that it has experience in child and family welfare matters and the declaration includes a statement to that effect.

(5) The Governor in Council may, by Order published in the Government Gazette, revoke or vary an order made under subsection (3).

59 Certain adoption orders subject to condition

Where the consent of a parent to the adoption of an Aboriginal child was given subject to a condition in accordance with section 37, the adoption order may, subject to and in accordance with consents given to the adoption, be made subject to a condition that a parent or the parents, relatives of the child and members of the Aboriginal community to which the child belongs have such right to have access to the child as specified in the order.

70 Registration of orders

(1) The prescribed officer of the Court shall cause a memorandum, in accordance with the prescribed form, of each adoption order to be sent to the Registrar who shall register the adoption-

(a) by endorsing on the memorandum, an official number and placing the memorandum in a Register of Adoptions kept by the Registrar; and

(b) by making an entry in the Adopted Children Register kept by the Registrar of the prescribed particulars ascertained from the memorandum.

(2) Where an order for the adoption of a child to whom section 50 applies is made, the prescribed officer of the Court shall cause to be sent to the Registrar a memorandum giving the name of the Aboriginal agency (if any) concerned in the arrangements for the adoption and stating that the provisions of section 114 apply.

(3) The prescribed officer of the Court shall cause a copy of each order for the discharge of an adoption order to be sent to the Registrar who shall, where the order is for the discharge of an adoption order that has been registered in the Register of Adoptions, register the order-

(a) by placing it with the adoption order to which it relates in the Register of Adoptions kept by the Registrar; and

(b) by making a notation of the discharge in the entry in the Adopted Children Register kept by the Registrar and, where the order relates to a person whose birth is registered in Victoria, in the entry in the Register of Births relating to the birth.

114 Registrar to give notices concerning Aboriginal children

(1) Where a memorandum was sent to the Registrar under section 70(2) in relation to the adoption of a child, the Registrar shall, on or within the period of 28 days after the adopted child attains the age of twelve years, give notice in writing—

(a) to the Aboriginal agency (if any) named in the memorandum or, where it has ceased to exist, to such other agency (if any) as is prescribed for the purposes of this section; and

(b) to the Secretary—

stating that the adopted child has attained the age of twelve years.

(2) Where the Secretary receives a notice under subsection (1), the Secretary shall take reasonable steps to ensure that notice is given—

(a) to the adopted child; and

(b) to the adoptive parents of the adopted child or, where they cannot be found, to some other person in whose care the child is for the time being—

to the effect that the adopted child may be entitled to certain rights and privileges that exist for the benefit of the child.