



**Secretariat National Aboriginal and Islander Child Care**

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

### **WESTERN 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](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**

## 1 Western Australia ('WA')

### 1.1 Fostering

*Children and Community Services Act 2004 (WA)* (as amended 24 Nov 2010) (the 'Act')

Under this Act, the best interests of the child are of paramount consideration. Section 8 sets out the requirements for determining what is in the best interests of the child and the guiding principles are found in s 9. Division 3 of the Act concerns the principles relating to Aboriginal and Torres Strait Islander children, with the Aboriginal and Torres Strait Island child placement principle outlined in s 12, principle of self-determination in s 13 and principle of community participation in s 14. Care plans are outlined in s 89. Relevant provisions of the Act include:

#### 3 Terms used

In this Act, unless the contrary intention appears —

**Aboriginal person** means a person who is a descendant of Aboriginal people of Australia, and **Aboriginal child** has a corresponding meaning;

### Part 2 — Objects and principles

#### Division 1 — Objects

##### 6 Objects

The objects of this Act are —

- (a) to promote the wellbeing of children, other individuals, families and communities; and
- (b) to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and
- (c) to encourage and support parents, families and communities in carrying out that role; and
- (d) to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care; and
- (e) to protect children from exploitation in employment.

*[Section 6 amended by No. 19 of 2007 s. 64.]*

#### Division 2 — General principles relating to children

##### 7 Principle that best interests of child paramount

In performing a function or exercising a power under this Act in relation to a child, a person or the Court must regard the best interests of the child as the paramount consideration.

## **8 Determining the best interests of a child**

(1) In determining for the purposes of this Act what is in a child's best interests the following matters must be taken into account —

- (a) the need to protect the child from harm;
- (b) the capacity of the child's parents to protect the child from harm;
- (c) the capacity of the child's parents, or of any other person, to provide for the child's needs;
- (d) the nature of the child's relationship with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
- (e) the attitude to the child, and to parental responsibility, demonstrated by the child's parents; (f) any wishes or views expressed by the child, having regard to the child's age and level of understanding in determining the weight to be given to those wishes or views;
- (g) the importance of continuity and stability in the child's living arrangements and the likely effect on the child of disruption of those living arrangements, including separation from —
  - (i) the child's parents;
  - (ii) a sibling or other relative of the child;
  - (iii) a carer or any other person (including a child) with whom the child is, or has recently been, living; or
  - (iv) any other person who is significant in the child's life;
- (h) the need for the child to maintain contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
- (i) the child's age, maturity, sex, sexuality, background and language;
- (j) the child's cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders);
- (k) the child's physical, emotional, intellectual, spiritual, developmental and educational needs;
- (l) any other relevant characteristics of the child;
- (m) the likely effect on the child of any change in the child's circumstances.

(2) Subsection (1) does not limit the matters that may be taken into account in determining what is in the best interests of a child.

## 9 Guiding principles

In the administration of this Act the following principles must be observed —

(a) the principle that the parents, family and community of a child have the primary role in safeguarding and promoting the child's wellbeing;

(b) the principle that the preferred way of safeguarding and promoting a child's wellbeing is to support the child's parents, family and community in the care of the child;

(c) the principle that every child should be cared for and protected from harm;

(d) the principle that every child should live in an environment free from violence;

(e) the principle that every child should have stable, secure and safe relationships and living arrangements;

(f) the principle that intervention action (as defined in section 32(2)) should be taken only in circumstances where there is no other reasonable way to safeguard and promote the child's wellbeing;

(g) the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, the child should be given encouragement and support in maintaining contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;

(h) the principle that decisions about a child should be made promptly having regard to the age, characteristics, circumstances and needs of the child;

(i) the principle that decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child;

(j) the principle that a child's parents and any other people who are significant in the child's life should be given an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the child's life;

(k) the principle that a child's parents and any other people who are significant in the child's life should be given adequate information, in a manner and language that they can understand, about —

(i) decision-making processes under this Act that are likely to have a significant impact on the child's life;

(ii) the outcome of any decision about the child, including an explanation of the reasons for the decision; and

(iii) any relevant complaint or review procedures;

(l) the principle set out in section 10(1).

## 10 Principle of child participation

(1) If a decision under this Act is likely to have a significant impact on a child's life then, for the purpose of ensuring that the child is able to participate in the decision-making process, the child should be given —

(a) adequate information, in a manner and language that the child can understand, about —

(i) the decision to be made;

(ii) the reasons for the Department's involvement;

(iii) the ways in which the child can participate in the decision-making process; and

(iv) any relevant complaint or review procedures;

(b) the opportunity to express the child's wishes and views freely, according to the child's abilities;

(c) any assistance that is necessary for the child to express those wishes and views;

(d) adequate information as to how the child's wishes and views will be recorded and taken into account;

(e) adequate information about the decision made and a full explanation of the reasons for the decision; and

(f) an opportunity to respond to the decision made.

(2) In the application of the principle set out in subsection (1), due regard must be had to the age and level of understanding of the child concerned.

(3) Decisions under this Act that are likely to have a significant impact on a child's life include but are not limited to —

(a) decisions about the placement of the child;

(b) decisions in the course of preparing, modifying or reviewing care plans or provisional care plans for the child;

(c) decisions about the provision of social services to the child; and

(d) decisions about contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life.

(4) In subsection (3)(b) —

**care plan** has the meaning given to that term in section 89(1);

*provisional care* plan has the meaning given to that term in section 39(1).

### **Division 3 — Principles relating to Aboriginal and Torres Strait Islander children**

#### **11 Relationship with principles in Division 2**

The principles set out in this Division are in addition to, and do not derogate from, the principles set out in Division 2.

#### **12 Aboriginal and Torres Strait Islander child placement principle**

(1) The objective of the principle in subsection (2) is to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements.

(2) In making a decision under this Act about the placement of an Aboriginal child or a Torres Strait Islander child, a principle to be observed is that any placement of the child must be considered as far as is practicable in the following order of priority —

- (a) placement with a member of the child's family;
- (b) placement with a person who is an Aboriginal person or a Torres Strait Islander in the child's community in accordance with local customary practice;
- (c) placement with a person who is an Aboriginal person or a Torres Strait Islander;
- (d) placement with a person who is not an Aboriginal person or a Torres Strait Islander but who, in the opinion of the CEO, is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family.

#### **13 Principle of self-determination**

In the administration of this Act a principle to be observed is that Aboriginal people and Torres Strait Islanders should be allowed to participate in the protection and care of their children with as much self-determination as possible.

#### **14 Principle of community participation**

In the administration of this Act a principle to be observed is that a kinship group, community or representative organisation of Aboriginal people or Torres Strait Islanders should be given, where appropriate, an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the life of a child who is a member of, or represented by, the group, community or organisation.

### **Part 4 — Protection and care of children**

#### **Division 1 — Introductory matters**

## 28. When child is in need of protection

(1) In this section —

***harm***, in relation to a child, means any detrimental effect of a significant nature on the child's wellbeing;

***neglect*** includes failure by a child's parents to provide, arrange, or allow the provision of —

- (a) adequate care for the child; or
- (b) effective medical, therapeutic or remedial treatment for the child.

(2) For the purposes of this Part a child is in need of protection if —

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

- (i) the parents cannot be found; and
- (ii) no suitable adult relative or other suitable adult can be found who is willing and able to care for the child;

(b) the child's parents are dead or incapacitated and, after reasonable inquiries, no suitable adult relative or other suitable adult can be found who is willing and able to care for the child;

(c) the child has suffered, or is likely to suffer, harm as a result of any one or more of the following —

- (i) physical abuse;
- (ii) sexual abuse;
- (iii) emotional abuse;
- (iv) psychological abuse;
- (v) neglect,

and the child's parents have not protected, or are unlikely or unable to protect, the child from harm, or further harm, of that kind; or

(d) the child has suffered, or is likely to suffer, harm as a result of —

- (i) the child's parents being unable to provide, or arrange the provision of, adequate care for the child; or
- (ii) the child's parents being unable to provide, or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.

## 81 Matters relevant to placement of Aboriginal or Torres Strait Islander children

(1) The CEO must ensure that an officer who is an Aboriginal person or a Torres Strait Islander is involved at all relevant times in the making of a placement arrangement in respect of an Aboriginal child or a Torres Strait Islander child.

(2) The CEO must consult with an Aboriginal or Torres Strait Islander agency, approved by the CEO for the purposes of this section, regarding the prospective placement of an Aboriginal child or a Torres Strait Islander child.

## 89 Care plan

(1) In this section —

**care plan** means a written plan that —

(a) identifies the needs of the child;

(b) outlines steps or measures to be taken in order to address those needs; and

(c) sets out decisions about the care of the child including —

(i) decisions about placement; and

(ii) decisions about contact between the child and a parent, sibling or other relative of the child or any other person who is significant in the child's life.

(2) As soon as practicable after a child first comes into the CEO's care, the CEO must prepare and implement a care plan for the child.

(3) Subsection (2) does not apply in the case of a child taken into provisional protection and care.

*Note* Section 39 requires the CEO to prepare and implement a provisional care plan for a child taken into provisional protection and care.

(4) The CEO may modify a care plan at any time if the CEO considers that it is appropriate to do so.

(5) Without limiting subsection (4), the CEO must, in the case of a child who is about to leave the CEO's care, modify the care plan for the child so that it —

(a) identifies the needs of the child in preparing to leave the CEO's care and in his or her transition to other living arrangements after leaving the CEO's care; and

(b) outlines steps or measures designed to assist the child to meet those needs.

(6) As soon as practicable after the CEO prepares or modifies a care plan, the CEO must ensure that a copy of the care plan or modification, as the case requires, is given to —

(a) the child;

- (b) each parent of the child;
- (c) any carer of the child; and
- (d) any other person considered by the CEO to have a direct and significant interest in the wellbeing of the child.

Part 4, Division 5, Subdivision 3 - care plans outlines the implementation of care plans under the Act, however there is no provision that is culturally specific.

## 1.2 Adoption

*Adoption Act 1994 (WA) (the 'Act')*

The relevant principles of the Act are detailed in s 3 of the Act. Relevant provisions of the Act include:

### **3 Principles**

(1) The paramount considerations to be taken into account in the administration of this Act are —

- (a) the welfare and best interests of a child who is an adoptee or a prospective adoptee;
- (b) the principle that adoption is a service for a child who is an adoptee or a prospective adoptee; and
- (c) the adoption of a child should occur only in circumstances where there is no other appropriate alternative for the child.

(2) It is acknowledged that adoption is not part of Aboriginal or Torres Strait Island culture and that therefore the adoption of a child who is an Aboriginal person or a Torres Strait Islander should occur only in circumstances where there is no other appropriate alternative for that child.

*[Section 3 inserted by No. 8 of 2003 s. 4.]*

### **4 Terms used**

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

Aboriginal person means a person who is a descendant of Aboriginal people of Australia;

### **16A Matters relevant to the adoption process for Aboriginal or Torres Strait Islander children**

(1) The CEO is to ensure that an officer of the department who is an Aboriginal person or a Torres Strait Islander is involved at all relevant times to assist in the adoption process of a child who is an Aboriginal person or a Torres Strait Islander.

(2) The CEO is to consult with an Aboriginal or Torres Strait Islander agency that is approved by the CEO for the purposes of this section, regarding the prospective adoption of a child who is an Aboriginal person or a Torres Strait Islander.

*[Section 16A inserted by No. 8 of 2003 s. 15; amended by No. 34 of 2004 Sch. 2 cl. 2(8).]*

## **52 Restrictions on placement**

(1) The CEO is not to place a child with a view to the child's adoption unless -

...

(ab) where the child is an Aboriginal or Torres Strait Islander, the placement with the Aboriginal or Torres Strait Islander children - placement for adoption principle as set out in Schedule 2A;

## **Schedule 2A - Aboriginal and Torres Strait Islander children - placement for adoption principle**

The objective of this principle is to maintain a connection with family and culture for children who are Aboriginal persons or Torres Strait Islanders and who are to be placed with a person or persons with a view to adoption by the person or persons.

If there is no appropriate alternative to adoption for the child, the placement of the child for adoption is to be considered in the following order of priority.

1. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander in the child's community in accordance with local customary practice.
2. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander.
3. The child be placed with a person who is not an Aboriginal person or a Torres Strait Islander but who is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, family.

*[Schedule 2A inserted by No. 8 of 2003 s. 85.]*