

CHAPTER 6 ADOPTION OF INDIGENOUS CHILDREN

6.1 The effects of past laws and practices

Aboriginal and Torres Strait Islander children and their families have been adversely affected by child welfare policies in Queensland and Australia for more than a century.

In Queensland, legislative control and intervention commenced with the *Industrial and Reformatory Schools Act 1865* which allowed neglected or destitute children to be removed from the care of their families and placed in a range of institutions. Any child of Aboriginal descent was defined as ‘neglected’ under this Act. The *Aboriginal Protection and Restriction of Sale of Opium Act 1897* introduced the policy of segregation and ‘protection’ of Aboriginal children and resulted in many children being separated from their families and communities.

The *Aboriginal Preservation and Protection Act 1939* established the Office of the Director of Native Affairs. The Director automatically became the guardian of every Aboriginal child under the age of 21 and was able to exercise powers of guardianship when, in his opinion, the parents or relatives of the child were not acting in his/her interests. This meant that Aboriginal families could not act as guardians of their own children entirely as a consequence of their race and the *Torres Strait Islander Act 1939* mirrored these provisions for Torres Strait Islander children and their families. The two Acts were repealed in 1965.

Many children who were removed under these and other Acts were placed in orphanages, in foster care or with non-Indigenous adoptive families. Queensland’s early legislation and associated policies and practices had a devastating impact on Indigenous children and their families. The Human Rights and Equal Opportunity Commission’s Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997) documented the effects and legacy of forcible removal policies on Indigenous communities today.

The removal policy and its effects on communities resulted in a generation of Indigenous children growing up without understanding customary law about raising children and family relationships. Many Indigenous people remain suspicious of adoption as practiced by child welfare authorities and are concerned that adoption may still permanently sever ties between children and their families and communities and result in children losing contact with their heritage.

6.2 Adoption and Indigenous customary laws

6.2.1 Adoption and Aboriginal law

Adoption is an unknown concept in Aboriginal customary law:

*Aboriginal traditional values and law oppose adoption.*²⁸

*The separation of children from birth families and the absolute transfer of parental rights are incompatible with the basic tenets of Aboriginal culture.*²⁹

Traditional arrangements for the care of children are the shared responsibility of the whole extended family, demonstrating the integral significance of kinship in Aboriginal family relationships and networks. Adoption is a culturally-specific practice grounded in western concepts of the nuclear family which is entirely different from the concept of the family in Aboriginal culture and law.

²⁸ “Bringing them Home – The Report” Human Rights and Equal Opportunity Commission Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families 1997

²⁹ Review of the *Adoption of Children Act 1965*, Report No. 81, NSW Law Reform Commission, 1997



6.2.2 Adoption and Torres Strait Islander law

Unlike Aboriginal law, Torres Strait Islander law recognises a form of kinship care which is similar to western style adoption in some aspects. The practice is called “Kupai Omasker” and involves the permanent transfer of parenting responsibilities which *serves to entrench reciprocal obligations within families thereby contributing to social stability*.³⁰ It generally occurs within the extended family but in recent times the practice has extended to include relatives by marriage and close family friends.

Such customary arrangements are not recognised in Australian law. This has caused many problems for Torres Strait Islander families and communities and has been the subject of ongoing discussions between communities and the government. The possible legal recognition of Kupai Omasker is being considered by the Queensland Government outside of this Review, and does not form part of the Review.

6.3 Current law and practice

The impact of earlier policies on Indigenous families and communities is being recognised in child welfare legislation, policy and practice across Australia. The development and application of the Aboriginal and Torres Strait Islander Child Placement Principle in legislation and practice recognises the effect of past removal practices by promoting the placement of Indigenous children within their families and communities.

The Child Placement Principle provides guidelines for the placement of Indigenous children by setting out preferences for placement in priority order:

1. The child should be placed with a member of his/her family.
2. If this is not possible, the child should be placed with a member of his/her community.
3. If neither (1) nor (2) are possible, the child should be placed with a member of another Aboriginal community if the child is Aboriginal, or a member of another Torres Strait Islander community if the child is Torres Strait Islander.
4. Only if none of the above three placements can be made, should the child be placed with a non-Indigenous person.

The Child Placement Principle also requires consultation with the child’s family and community when making placement decisions.

The Child Placement Principle was implemented in child protection and adoption practice in Queensland in 1986 and has been incorporated into the *Child Protection Act 1999* (Qld). All Australian social welfare ministers endorsed the Child Placement

Principle in the adoption context in 1986, along with the view that Aboriginal children should be adopted only in the most exceptional circumstances.

The *Adoption of Children Act 1964* does not address the specific needs of Indigenous children and does not incorporate the Child Placement Principle. Section 18A gives preference in the placement of “children with an Indigenous or ethnic background” with:

... a prospective adopter who has a similar Indigenous or ethnic background unless such a prospective adopter is not available or the welfare and interests of the child would not be best served by doing so.

³⁰ “Bringing them Home – The Report”

Section 11 of the Regulation sets out the criteria for assessing the suitability of prospective adoptive parents. One criterion is the ability and willingness to understand the child's background and to develop or maintain the child's Indigenous, ethnic or cultural identity.

The Department's administrative policy requires the application of the Child Placement Principle when considering the adoption of an Indigenous child. The policy requires an Aboriginal and Islander Child Care Agency (AICCA) or other appropriate community representative to be involved in decision-making about adoptions. Birth parents are referred to an Indigenous agency for counselling and must be given information about the Child Placement Principle. The policy also requires an AICCA or other appropriate community representative to be involved in assessing prospective adoptive parents.

6.4 Aboriginal and Torres Strait Islander child placement principle

6.4.1 The form of the child placement principle

The Child Placement Principle is current administrative policy in Queensland, New South Wales, Tasmania and Western Australia. A form of the Child Placement Principle is included in the adoption legislation of Victoria, South Australia, the Northern Territory and the Australian Capital Territory. New legislation in New South Wales, which has not yet commenced, also includes the Child Placement Principle.

The *Bringing Them Home Report* found:

Adoption is contrary to Aboriginal custom and inter-racial adoption is known to be contrary to the best interests of Aboriginal children in the great majority of cases. The table ... (Adoptions of Indigenous children by State 1 July 1990-30 June 1995) shows that adoption of Indigenous children has been reduced to or almost to nil in jurisdictions where the Aboriginal Child Placement Principle is entrenched in legislation and welfare departments and adoption agencies are required to work with Aboriginal and Islander child care agencies when placing Indigenous children. Where the Principle finds its only recognition in departmental policy, adoption of Indigenous children continues.³¹

Queensland child protection legislation entrenches the Child Placement Principle. Consultation during the development of the *Child Protection Act 1999* indicated the desirability of including the Principle in the Act. Adoption practice should be consistent with child welfare practice generally, particularly in relation to Indigenous children and families. Accordingly, principles in all child welfare legislation should be consistent.

The Child Placement Principle generally follows the form stated above. However, the Principle as legislated by States and Territories varies.

The most recent adoption legislation in New South Wales sets out the Principle separately for Aboriginal children and for Torres Strait Islander children. The Aboriginal Child Placement Principle requires that:

- (a) first preference for placement is with adoptive parents belonging to the community or one of the communities to which the birth parent or birth parents belong;
- (b) if it is not practicable or in the child's best interests for the child to be placed in accordance with (a), the child is to be placed with adoptive parents from another Aboriginal community;
- (c) if it is not practicable or in the child's best interests for the child to be placed in accordance with (a) or (b), the child is to be placed with non-Aboriginal adoptive parents.

³¹ "Bringing them Home – The Report"



The New South Wales Act also requires:

- the child not to be placed with a non-Aboriginal adoptive parent unless the Court is satisfied the adoptive parent has the capacity to assist the child to develop a healthy and positive cultural identity, to foster links with the child's Aboriginal heritage and to help the child if the child encounters racism or discrimination;
- an Aboriginal child not to be placed for adoption unless the Department is satisfied that an adoption order is clearly preferable in the best interests of the child to any other action that could be taken in relation to the care of the child;
- the Department or agency to make reasonable inquiries as to whether a child is an Aboriginal child.

Where a child has an Aboriginal parent and a non-Aboriginal parent, the Act provides that the child may be placed with the person with whom the best interests of the child will be served. If the child is not placed within an Aboriginal family or community, the Act requires an adoption plan to be made which sets out how the child will have the opportunity to develop an identity with the Aboriginal community to which he/she belongs.

The Act recognises 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).*³²

The Torres Strait Islander Child Placement Principle in the New South Wales Adoption Act requires:

- (a) the first preference for placement of the child is with adoptive parents within the child's extended family (recognising that, unlike Aboriginal customary law, a form of adoption within extended families is an accepted practice within Torres Strait Islander customary law);
- (b) if it is not practicable or in the child's best interests for the child to be placed in accordance with (a), the child is to be placed with adoptive parents from the community or one of the communities to which the birth parent or birth parents belong;
- (c) if it is not practicable or in the child's best interests for the child to be placed in accordance with (a) or (b), the child is to be placed with adoptive parents from another Torres Strait Islander community;
- (d) if it is not practicable or in the child's best interests for the child to be placed in accordance with (a), (b) or (c), the child is to be placed with a non-Torres Strait Islander adoptive parent.

The Act also requires:

- the child not to be placed with a non-Torres Strait Islander adoptive parent unless the Court is satisfied the adoptive parent has the capacity to assist the child to develop a healthy and positive cultural identity, to foster links with the child's Torres Strait Islander heritage and to help the child if he/she encounters racism or discrimination; and
- the Department or agency to make reasonable inquiries as to whether a child is a Torres Strait Islander child.

Where an Indigenous child is to be adopted by non-Indigenous parents, the New South Wales legislation also requires an adoption plan to provide for the child to have the opportunity to develop an identity with the Indigenous community to which he/she belongs.

Victoria's legislation has a similar Child Placement Principle and also requires the approval of a placement with a non-Aboriginal adoptive family by a gazetted Aboriginal agency. The Court must also take into account the wishes of the birth parent/s and an adoption order can be made on condition that the birth parent/s and other family and community members have a right of ongoing contact with the child.

³² *Adoption Act 2000* (NSW), subsection 35(1)

In South Australia, an adoption order must be made in favour of a member of the child's Aboriginal community who has the correct relationship with the child. If this is not possible, then the order must be made in favour of another Aboriginal person. An adoption order can only be made in favour of a non-Aboriginal person if there are special circumstances and the child's cultural identity will not be lost as a consequence of the adoption.

In the Australian Capital Territory, the Court cannot make an adoption order unless it is satisfied that:

- it is not practicable for the child to remain with the child's parents or a responsible person who is a member of the child's community; and
- the choice of adoptive parent has been made having regard to the desirability of the child being in the custody of a member of an Aboriginal community and of the child having contact with the birth parents, extended family, any responsible person for the child and the community of which the child is a member.

In the Northern Territory, the Court must be satisfied that every effort has been made to arrange appropriate custody:

- within the child's extended family; or
- if this cannot be arranged, with Aboriginal people who have the correct relationships with the child in accordance with customary law.

Efforts must include consultation with birth parents, persons responsible for the welfare of the child under Aboriginal customary law and the child's community. If the above custody is not possible or not in the interests of the child, the Court must:

- give preference to Aboriginal adoption applicant/s;
- consider placement of the child in geographical proximity to the child's family; and
- consider the undertakings of applicants to encourage contact between the child and his/her kin and culture.

Should the Indigenous Child Placement Principle be included in Queensland's adoption legislation?

Should it take a different form for Torres Strait Islander children and for Aboriginal children?

Should an adoption plan be required if an Indigenous child is to be adopted by a non-Indigenous parent?



6.5 Identification of Indigenous children

Non-Indigenous definitions of Indigenous people have caused much trauma and resentment in the past. These definitions involved differentiating people on the basis of their degree of Aboriginality and are now unacceptable.

The definition adopted by the Commonwealth in the early 1970s defines an Aborigine as a person of Aboriginal descent, who identifies as an Aborigine and who is accepted as such by the community in which he or she lives.

This definition may prove problematic for young children in the adoption context. Firstly, self-identification is impossible for a baby or very young child. Substitution of self-identification for identification by the birth parent is also problematic where the birth parent does not know of the child's Indigenous ancestry or chooses not to declare it. Acceptance by the community may also be problematic if the community is unaware of the birth of the child either because the parent withholds that information or the parent has lost contact with his/her community.

Departmental policy establishing the Child Placement Principle defines an Aboriginal person as “a person who is of Aboriginal descent” and a Torres Strait Islander as “a person who is of Torres Strait Islander descent”.

The *Acts Interpretation Act 1954* (Qld) which provides definitions for common terms used in Queensland legislation contains the following definitions:

Aborigine means a person of the Aboriginal race of Australia.

Torres Strait Islander means a person who is a descendent of an Indigenous inhabitant of the Torres Strait Islands.

6.5.1 Identifying children as Aboriginal or Torres Strait Islander

Regardless of the definition used, practical difficulties will still arise in identifying whether a child is Aboriginal or Torres Strait Islander. Current practice is to ask birth parents about their history including their cultural background and to request permission to speak with other members of the family. Failure to identify and inform children of their Indigenous background may cause significant distress and identity confusion later in life, however, privacy issues would prevent a more broad-ranging inquiry about each child whose parent is considering adoption. Legislation could entrench the obligation of the Department to take reasonable steps to establish whether or not a child is Indigenous.

How should an “Aboriginal child” be defined and identified?

How should a “Torres Strait Islander child” be defined and identified?

Should legislation require the Chief Executive to take reasonable steps to establish whether or not a child is from an Indigenous background? What steps would be reasonable?

6.6 Aboriginal and Torres Strait Islander involvement in the adoption process

6.6.1 Consultation with agencies

As noted above, the Child Placement Principle generally requires consultation with Indigenous agencies or representatives. The *Adoption Act 2000* (NSW) requires consultation with the relevant Aboriginal or Torres Strait Islander adoption consultative organisation, or with a person nominated by the child's parents, extended family, kinship group or community, who has expertise in adoption or substitute care for Aboriginal or Torres Strait Islander children. It also requires that birth parents be offered counselling by an Aboriginal or Torres Strait Islander adoption consultative organisation when considering the adoption of their child.

Similarly, Victoria's legislation requires consultation with an Aboriginal agency and offering birth parent/s counselling by an Aboriginal agency. Victoria's legislation goes further than New South Wales' in requiring the approval of the Aboriginal agency for an adoption by non-Aboriginal adoptive parents. This provision was noted with approval in the *Bringing them Home Report*.

South Australia's legislation also requires consultation with Aboriginal organisations before placing an Aboriginal child with prospective adoptive parents. The Regulations require the birth parent/s' counsellor to inform them of available specialised counselling by Aboriginal agencies. In the Australian Capital Territory and the Northern Territory, consultation with birth parents, persons with responsibility for the child's welfare under Aboriginal customary law and the community is required when placing Aboriginal children for adoption.

Under the *Child Protection Act 1999* (Qld), the Department of Families is required to consult with the recognised Aboriginal and Torres Strait Islander agency responsible for the child prior to any decision being made under the Act about an Aboriginal or Torres Strait Islander child. Aboriginal and Islander Child Care Agencies, where they exist in communities, are among the recognised agencies for the purpose of the Act. The Act also requires the Department or the Children's Court, when exercising a power under the Act in relation to an Aboriginal or Torres Strait Islander children, to consider the views of the recognised agency. If not practical to obtain the agency's views, the views of the community to which the child belongs must be obtained.

It would be incongruent for new Queensland adoption legislation to omit provisions requiring consultation with appropriate Indigenous agencies and the child's community/ies. The advice of these agencies would be essential in ensuring the appropriate application of the Child Placement Principle regarding individual children. Empowering appropriate agencies to approve placements of Indigenous children with non-Indigenous adoptive parents could also be considered.

Over what matters and at what stages during the adoption process should consultation occur with Indigenous communities and agencies? Should a requirement for consultation be included in legislation?

Should Queensland legislation require Indigenous agencies to approve the placement of an Indigenous child with non-Indigenous adoptive parents, as some other States do?



6.6.2 Counselling

As stated above, a number of other States' legislation require parents of Indigenous children to be counselled by, or to be offered counselling by, Indigenous agencies in relation to adoption and other options for the care of their children. Such a requirement ensures Indigenous parents to receive information in a culturally appropriate way and non-Indigenous parents to receive accurate information about the child's cultural identity and belonging.

Although the requirement for counselling forms part of the Department's policy in relation to the Child Placement Principle, there is no requirement in the *Adoption of Children Act 1964*.

Should Queensland legislation require counselling by an Indigenous agency to be offered and/or provided to parents of an Indigenous child considering adoption for the child?

6.6.3 Selection of adoptive parents

Assessment guidelines for Indigenous prospective adoptive parents are applied flexibly by departmental policy because of the special cultural needs of Indigenous children. Under the Act, an Indigenous child requiring an adoption is considered to be a child with special needs.

The assessment of prospective adoptive parents for children with special needs under the Act is undertaken in regard to whether the welfare and interests of the child would be promoted by making an adoption order in favour of the applicants. This contrasts with the assessment requirements for prospective adoptive parents of children who do not have special needs, which are that the applicant be of good repute and a fit and proper person to become a prospective adoptive parent.

Assessment of Indigenous applicants requires the professionals involved to be able to communicate with Indigenous people sensitively and appropriately, and to know and understand Indigenous child rearing practices and the communities to which the applicants belong. This may mean that persons engaged to undertake the assessments are Indigenous or that local Indigenous agencies should be consulted and involved in the assessment process.

Should legislation contain specific guidance for the assessment of Indigenous prospective adoptive parents such as assessment guidelines requiring consideration of a person's:

- *character, repute and standing in the Indigenous community;*
- *links with the child's community; and/or*
- *capacity to assist the child develop or maintain his/her Indigenous background?*

Should the assessment of Indigenous prospective adoptive parents be undertaken by and/or in consultation with a suitably qualified and experienced Indigenous person or in consultation with an Indigenous agency?