



Children's Matters & Aboriginal & Torres Strait Islander Women

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Kirsty Irving and Shannon Williams, WLS NSW on 15 October 2013. This webinar can be downloaded for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- How the Family Law system considers Aboriginal and Torres Strait Islander culture and kinship obligations when dealing with children's matters?
- What is kinship care? How is it considered in the NSW Care and Protection system when children are placed in out of home care?

Australia's Human Rights Obligations

Convention on the Rights of the Child 1990

- Where a child is to be removed from his/her home, the government must give adequate consideration to benefits of continuity in the child's upbringing & the child's ethnic, religious, cultural, & linguistic background (Art. 20(3)); &
- Indigenous children have the right to enjoy their own culture, to profess & practice their own religion, & use their own language (Art. 30)

The Declaration on the Rights of Indigenous Peoples 2007

Indigenous children have the right to:

- Practice & revitalise cultural traditions & customs (Art. 11); &
- Practice & develop spiritual & religious traditions, customs & ceremonies (Art. 12)

Relevant Statistics

- Aboriginal and Torres Strait Islander children under 15 are more likely than other Australian children to live with one parent (45.3% compared to 17.8%)
- Family law services are reported as being under-utilised by Aboriginal and Torres Strait Islander families.

The most significant reasons are reported as being:

1. A lack of understanding about the family law system amongst Aboriginal and Torres Strait Islander clients; &
2. Resistance to engagement with or fear of family law services

Family Law Council Report (2012) 'Improving the Family Law System for ATSI Clients.'

Family Law

Relevant Legislation:

- *Family Law Act 1975* (Cth), ss **60CC(3)(h)** and **61F**

Separation & Parenting Arrangements:

- Where parents (or extended family members concerned with the child's care, welfare & development) can't agree on childcare arrangements the first step is Family Dispute Resolution (FDR)
- Unless an exception applies, parents must participate in FDR before they can apply to the Court
- If an exception applies an FDR practitioner can issue a certificate explaining why FDR not conducted (eg, domestic violence or because one party failed to attend)



- Once the parent or family member has a certificate from an FDR Practitioner, then they can apply to the Family Court for Parenting Orders.
- When making Parenting Orders, the Judge will base their decision on what is in the **best interests** of the child. To do this, they take into account:
 - **Primary Considerations:** the need to protect child from physical or psychological harm or exposure to abuse, neglect or family violence & the benefit to the child having a meaningful relationship with both parents
 - **Additional Considerations:** are listed in section 60CC(3) of the *Family Law Act* and include, amongst other factors, the views of the child, the nature of the child's relationship with parents or caregivers, efforts made by parents to be involved, parent's attitudes to the child and parenting, family violence etc. Under s 60CC(3)(h) If the child is an Aboriginal child or a Torres Strait Islander child, the court **must** consider:
 - The child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); &
 - The likely impact any proposed parenting order under this Part will have on that right.

Example Case Law Factors:

- ***In the Marriage of B & R (1995) 19 FamLR 594:***
 - Removal of an Aboriginal or Torres Strait Islander child to a white environment is likely to have a devastating effect, especially if brought in that environment & excluded from contact with their family & culture;
 - Aboriginal and Torres Strait Islander children are better able to cope with racial discrimination if they are living within their community, because that community actively reinforces identity, self-esteem & appropriate responses; &
 - Some Aboriginal children, if brought up in ignorance of their Aboriginality, may suffer an identity crisis in adolescence
- ***Donnell v Dovey [2010] FamCAFC 15:***
 - Cases involving Indigenous children no longer decided on the basis of automatic acceptance of "modern Anglo-European notions of social and family organisation"

Section 61F Family Law Act:

- **s 61F(b)** says that where the Court is determining parental responsibility for Aboriginal or Torres Strait Islander children it **must** have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture
- **s 61F(a)** widens the application of this rule and requires Courts to have regard to kinship obligations and child rearing practices in all cases concerning Indigenous children

Care and Protection

Relevant Legislation:

- *Children and Young Persons (Care and protection) Act 1998 (NSW) – Part 2*

Aboriginal Child Placement Principle

- Article 20(3) of CROC is given force through the Aboriginal Child Placement Principle, which directs the priority order for out-of-home care placements for Aboriginal and Torres Strait Islander children.
- Also known as the "**kinship care**" model, the Principle which is included in Part 2 of NSW's Care and Protection Act states that an Aboriginal or Torres Strait Islander child in OOHC should be placed:
 - In the child's extended family and kinship group; or
 - If that is not possible within the child's local Indigenous community; or
 - If that is not possible then with another Aboriginal and Torres Strait Islander outside the community



- Where none of that is possible, the child may be put in non-Indigenous care. If this happens the child must be kept engaged with their Indigenous family, community and culture.
- If one parent is not Aboriginal they can be placed with a non-Aboriginal family member but they must maintain contact with their Aboriginal family, community and culture.

Resources

- Bringing them home: The 'Stolen Children' report (1997)
- Family Law Council Report (2012) 'Improving the Family Law System for ATSI Clients'
- Legal Aid Caring for Kids in Aboriginal Families Factsheet: <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/caring-for-kids-in-aboriginal-families>
- Protecting Aboriginal Children Together (PACT) Factsheet: <http://www.absec.org.au/images/pdf/PACT-FactSheetAug2013.pdf>

Services:

- Aboriginal Legal Services, also have a Care and Protection Law Practice - www.alsnswact.org.au **1800 733 233**
- Women's Legal Services Indigenous Women's Legal Contact Line: **8745 6977 /1800 639 784** - Mon: 10am–12:30pm, Tues: 10am–12:30pm Thur: 10am–12:30pm
- Aboriginal State-wide Foster Carer Support Service: **1800 888 698**