The Aboriginal and Torres Strait Islander Child Placement Principle

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What is the ATSICPP?

The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) is a nationally recognised statutory framework that structures the exercise of child protection powers in relation to Aboriginal and Torres Strait Islander children. It emerged in response to documented systemic over-removal of Aboriginal and Torres Strait Islander children and is designed to ensure that welfare decision making properly accounts for kinship systems, cultural identity and connection to Country as legally relevant components of long-term wellbeing.

Conceptually, the ATSICPP comprises of five interrelated elements:

- **Preventing** the need for children to enter out of home care (OOHC) by providing support to families;
- **participation** of Aboriginal and Torres Strait Islander people in decisions affecting their children;
- **partnership** with communities in service design and delivery;
- **priority placement** with family, kin or community; and
- maintenance of cultural, familial and community **connection**.

The ATSICPP does not mandate outcomes. It does not create a veto, prohibit removal, or prevent adoption. Its function is structural: to guide discretion and improve decision quality in high-stakes, potentially irreversible determinations by ensuring that culturally sustaining options are systematically considered. While placement sequencing is an important operational component, it is only one element of a broader framework that emphasises prevention, participation, partnership and connection.[1] Properly understood, the Principle is a decision-structuring safeguard, not a barrier to lawful intervention or permanency.

Operation within Queensland's legal framework

Queensland's child protection framework is structured around the paramountcy of the child's safety, wellbeing and best interests, both through childhood and for the rest of the child's life.[2] The *Adoption Act 2009* adopts the same formulation.[3] The concept of 'best interests' requires evaluative judgment and does not prescribe a single outcome. Parliament may prescribe mandatory considerations that structure its content, particularly where decisions may be irreversible.

In Queensland, the ATSICPP is given legislative effect primarily through section 5C of the *Child Protection Act 1999*. This provision requires decision makers, in relation to Aboriginal and Torres Strait Islander children, to:

- actively consider prevention of removal, including through provision of appropriate support to the child's family to redress the causes of risk or harm;
- prioritise placement with family, kin or community;
- maintain cultural and community connection; and

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1 Arney, F. et al. 2015. *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle Policy and practice considerations*. CFCA Paper No. 34 of 2015.
2 *Child Protection Act 1999*, s 5A.
3 *Adoption Act 2009*, s 6.

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- involve Aboriginal and Torres Strait Islander people in decision making processes.

While the prevention of removal and support for families is articulated in culturally specific terms for Aboriginal and Torres Strait Islander children under section 5C, the Act adopts a family-preservation orientation for all children. Section 5B of the *Child Protection Act 1999* provides that a child's family has primary responsibility for the child's upbringing, protection and development;[4] that the preferred means of ensuring safety is through supporting the family;[5] and that state intervention should be proportionate.[6] Where removal occurs, the Act directs consideration of kinship placement as a first option,[7] maintenance of sibling and family relationships,[8] and preservation of identity, including cultural identity.[9]

The ATSICPP operates within that statutory architecture. It does not displace the general principles in section 5B but particularises their application in the specific context of Aboriginal and Torres Strait Islander children. The distinction is structural rather than preferential. Section 5B articulates high-level considerations of universal application. The ATSICPP converts those general values into structured and reviewable obligations, including active efforts to prevent removal, participation of Aboriginal and Torres Strait Islander representatives, partnership with communities, and an ordered placement preference grounded in cultural continuity.

The rationale for that additional structure is institutional rather than symbolic. History demonstrates that general statutory principles did not, in practice, prevent the disproportionate removal and cultural dislocation of Aboriginal and Torres Strait Islander children. The ATSICPP addresses that demonstrated risk by requiring explicit and systematic consideration of kinship, community and cultural connection in placement and permanency decisions. Section 5B recognises identity as a relevant value while the ATSICPP ensures that cultural continuity is treated as a mandatory and operational consideration. The difference is not one of privilege, but of precision. The Principle ensures that considerations which might otherwise be weighed implicitly or inconsistently are addressed explicitly and systematically.

Section 83 operationalises the placement component through a structured order of preference: placement with family members;[10] failing that, a member of the child's community or language group;[11] then another Aboriginal or Torres Strait Islander person;[12] and finally another suitable person, with ongoing obligations to maintain the child's cultural connection.[13]

Although the Act does not prescribe an equivalent cultural hierarchy for non-Indigenous children, the broader statutory framework similarly prioritises family-based care. The paramountcy principle operates alongside additional principles requiring support for children to remain safely within their family[14] and, where removal is necessary, placement in a stable environment with maintenance of family relationships.[15] Section 82 reinforces that orientation by requiring regard to sibling relationships and ongoing family connections in all placements. In this sense, section 83 reflects, in culturally specific form,

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4 *Child Protection Act 1999*, s 5B(b).
5 *Child Protection Act 1999*, s 5B(c).
6 *Child Protection Act 1999*, s 5B(e).
7 *Child Protection Act 1999*, s 5B(h).
8 *Child Protection Act 1999*, ss 5B(i) & (k).
9 *Child Protection Act 1999*, s 5B(l).
10 *Child Protection Act 1999*, s 83(4)(a).
11 *Child Protection Act 1999*, s 83(4)(b).
12 *Child Protection Act 1999*, s 83(4)(c).
13 *Child Protection Act 1999*, s 83(4)(d) & (5).
14 *Child Protection Act 1999*, s 5B(b), (c) & (e).
15 *Child Protection Act 1999*, ss 5B(f), (g), (h), (k) & 82.

a system-wide principle that children should remain within or close to their familial networks wherever safely possible.

The ATSICPP therefore does not confer additional substantive rights. It consolidates and structures protections already embedded in the Act, ensuring that considerations which might otherwise be weighed implicitly are addressed explicitly in a context where the consequences of error are enduring. It operates as a decision-structuring safeguard within the existing statutory framework, not as a separate or preferential regime.

ATSICPP and the paramountcy of best interests

The ATSICPP operates within, not as an exception, to the paramountcy of best interests. Appellate authority confirms that placement principles operate integratively, not hierarchically. In *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2022] NSWCA 170, the NSW Court of Appeal held that Aboriginal placement principles must be applied, but best interests remain paramount where a true conflict arises.[16] The ATSICPP therefore refines and informs the best interests inquiry by identifying the cultural, relational and identity-based factors that are relevant to long-term welfare and stability. Its application does not displace or dilute the primacy of best interests. It operates as a structured means to achieve that end, not as an end in and of itself.

Removing the ATSICPP would not 'restore' best interests. Rather, it would widen the scope for unstructured discretion in determining what best interests require. Without it, a decision maker could satisfy an abstract best interests test while authorising placement that severs a child's connection to family, community and culture. The Principle functions to ensure that those dimensions of wellbeing are expressly and systematically considered within the best interests analysis.

Consistently with Australian jurisprudence recognising Indigenous identity, customary systems and connection to land as legally cognisable, cultural identity is not ancillary to welfare but central to long-term stability and wellbeing.[17] The ATSICPP ensures those legally relevant considerations are brought into view and weighed in a consistent, reviewable way. Its removal would not strengthen the best interests standard; it would treat Aboriginal and Torres Strait Islander children as culturally indistinguishable within a system that has already demonstrated the consequences of that assumption.

Historical and institutional foundations

The ATSICPP developed incrementally through comparative research, intergovernmental policy deliberation, and legislative adoption over several decades. Its conceptual origins were traced by the NSW Law Reform Commission to the United States' *Indian Child Welfare Act*,[18] which itself was enacted in in response to systemic over-removal of Native American children.[19] Analogous principles were

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16 *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2022] NSWCA 170.

17 *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See, for example, *Re Malakhai* [2022] NSWchC 6, where the Children's Court recognised that connection to culture and kinship is directly relevant to a child's long-term welfare. The Court treated cultural placement not as a competing value but as an aspect of what stability and wellbeing mean for an Aboriginal child.

18 *Indian Child Welfare Act 1978* (US) 25 USC §§ 1902, 1915(a).

19 Lock, J. 1997. *The Aboriginal Child Placement Principle*. NSW Law Reform Commission. Paras 3.16 – 3.19.

proposed in Australia as early as 1979 and first legislated in NSW in 1987.[20] All Australian jurisdictions now incorporate a form of the Principle,[21] reflecting sustained institutional acceptance of the need for structured safeguards in decision-making affecting Aboriginal and Torres Strait Islander children.

The ATSICPP emerged as a direct legal response to identified systemic failure in child welfare systems. Throughout much of the twentieth century, Aboriginal and Torres Strait Islander children were removed under welfare standards then understood to reflect their best interests. Subsequent inquiries demonstrated that removals often occurred without adequate inquiry into kin or community alternatives, that kinship systems and cultural identity were disregarded, and that welfare standards were applied without cultural context.[22]

The *Bringing Them Home* report identified the risks inherent in unguided discretion operating within dominant cultural assumptions and recommended statutory placement principles as structural safeguards.[23] Earlier, the Australian Law Reform Commission had recognised the juridical significance of Aboriginal and Torres Strait Islander kinship systems and cautioned against legal frameworks that treated those systems as deficient rather than different.[24]

The ATSICPP gives legislative effect to those insights by requiring structured consideration of kinship and community placement as a first resort where safe. It does not exist to remedy past wrongs symbolically; it exists to prevent recurrence of structurally similar outcomes under modern law.

It is important to clarify the scope of the Principle. The question is not whether non-Indigenous carers are capable of providing safe, loving and stable homes. Many do so with dedication and care. The relevant inquiry is whether unnecessary cultural severance should occur where safe, culturally sustaining alternatives are available. Historical experience demonstrates that welfare reasoning detached from cultural continuity can produce profound and enduring harm. The lesson of that history is not that cross-cultural care is inherently harmful, but that decision-making which fails to treat identity, kinship and community connection as integral to wellbeing carries systemic risk. The ATSICPP operates to ensure that such considerations are brought into structured, transparent legal reasoning before irreversible decisions are made. The risk addressed is not only individualised but systemic. Without structured safeguards, broadly framed decision-making frameworks may fail to give adequate weight to kinship systems and cultural continuity, increasing the likelihood of avoidable separation from family and community.

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20 *Children (Care and Protection) Act 1987* (NSW), s 87. Lock, J. 1997. *The Aboriginal Child Placement Principle*. NSW Law Reform Commission. Paras 3.20 – 3.37. See also *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2022] NSWCA 170at [71].

21 *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 11-14; *Children, Youth and Families Act 2005* (Vic), ss 12-14; *Children and Young People (Safety) Act 2017* (SA), s 12; *Children and Community Services Act 2004* (WA), ss 12-14; *Children, Young Persons and Their Families Act 1997* (Tas), ss 10G, 51; *Care and Protection of Children Act 2007* (NT) s 12.

22 Human Rights and Equal Opportunity Commission, 1997. *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, ch 21.

23 Human Rights and Equal Opportunity Commission, 1997. *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, ch 21.

24 Australian Law Reform Commission, 1986. *Recognition of Aboriginal Customary Laws* (ALRC Report No 31), paras 98-99.

Rule of law foundations

The power to remove a child is among the most intrusive powers vested in the State. The legitimacy of that power depends not only on protective outcomes, but on the integrity of the legal framework governing its exercise.

Under established principles of statutory interpretation and administrative law, statutory powers must be exercised for the purposes for which they are conferred and having regard to legally relevant considerations.[25] Parliament is presumed not to abrogate or dilute fundamental rights or established protections without clear intention.[26] The ATSICPP performs precisely that rule of law function. By prescribing mandatory considerations, sequencing requirements and participatory obligations, the ATSICPP constrains discretion, enhances transparency of reasoning, and renders decisions more reviewable against articulated statutory criteria. It does not provide immunity from intervention. It regulates how intervention is structured and justified.

The rule of law does not require identical treatment in materially different circumstances, rather, it requires equal protection of the law. Substantive equality recognises that materially different contexts may warrant differentiated statutory consideration. Indeed, equal treatment in materially unequal circumstances can entrench, rather than remedy, inequality.

As discussed below, Aboriginal and Torres Strait Islander children are profoundly over-represented in the child protection system. That over-representation is a legally and socially relevant difference. Australian law has long recognised that relevant difference may warrant differentiated statutory treatment. For example, native title jurisprudence recognises the juridical significance of traditional laws and customs; and cultural heritage legislation affords distinct protection to Aboriginal cultural sites and objects. In each of these areas, Parliament has acknowledged legally relevant difference to secure equal protection of the law. The ATSICPP reflects the same orthodox legislative technique. It does not create exceptionalism; it gives structured recognition to difference that is already acknowledged in Australian jurisprudence, ensuring that best interests decision making is responsive to the lived and legal realities of Aboriginal and Torres Strait Islander children. Treating them as culturally indistinguishable from non-Indigenous children risks erasing legally relevant difference.

Further, research has documented a divergence between institutional perceptions of fairness and the lived experience of Aboriginal families within child protection systems.[27] In that context, safeguards such as the ATSICPP serve not only a substantive protective function but also a legitimacy function. It structures discretion, mandates participation, and provides transparency against which decisions may be evaluated.[28] Transparency and participation strengthen institutional confidence in coercive systems. Winding back a long-standing safeguard developed in response to documented systemic harm, at a time of continued over-representation, carries significant reputational and legitimacy risks. In addition, in a system dependent upon trust and cooperation from Aboriginal communities, retreat from established protective architecture may undermine engagement and long-term reform objectives.

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25 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

26 *Coco v The Queen* (1994) 179 CLR 427, 437.

27 Libesman, T Gray, P & Gray, K. T*he Shackles of Terra Nullius in Child Protection 'Reforms'* in Legal Education Through an Indigenous Lens pp 53-70.

28 Libesman, T Gray, P & Gray, K. T*he Shackles of Terra Nullius in Child Protection 'Reforms'* in Legal Education Through an Indigenous Lens pp 53-70.

Finally, there is no evidence that the risks the ATSICPP was designed to mitigate have dissipated. In the absence of such evidence, its removal would enlarge discretionary space in decisions of profound and potentially irreversible consequence, increasing the potential for inconsistency, and diminished institutional confidence. Removal of structured statutory guidance would likely increase litigation over the content of 'best interests' rather than reduce it, as parties seek to reintroduce cultural considerations through human rights and common law arguments.

Implementation deficits

Reviews have consistently identified a gap between legislative intent of the ATSICPP and its practical application,[29] including findings that the Principle is not always applied to the standard of 'active efforts.'[30] Implementation challenges include workforce capacity constraints, shortages of Aboriginal carers, inconsistent or cursory family mapping and kin identification processes, and under-resourcing of Aboriginal Community Controlled Organisations.[31] In some cases, kinship suitability assessments have been adversely affected by procedural and regulatory settings, including the operation of the Blue Card screening framework.[32] Recent legislative amendments have sought to address some of these impediments, though effective implementation remains dependent on thorough family mapping processes and adequate resourcing of kinship support.

Oversight bodies have also observed that regulatory frameworks may be neutralised by dominant departmental culture.[33] In other words, the laws and policies that govern decision-making may be diluted in practice where institutional culture, workload pressure or resourcing constraints intervene.

It has also been suggested that decision makers may hesitate to apply the ATSICPP robustly for fear of being perceived as discriminatory. That concern reflects misunderstanding of the statutory framework. The ATSICPP is legislatively mandated. Applying it is compliance with law, not discrimination. Where uncertainty exists, the appropriate response lies in clear departmental direction, decision support templates that evidence 'active efforts', and training that frames ATSICPP as a lawful mandatory consideration.

Together, these findings are implementation deficits rather than design failure. The critical variables are resourcing, capability and compliance. Any removal or dilution of the statutory safeguard provided by the ATSICPP would enlarge discretion without addressing those operational constraints.

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29 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*.

30 Queensland Family and Child Commission, *Principle Focus Report*, pp 6-7, 16 & 18; Libesman, T Gray, P & Gray, K. T*he Shackles of Terra Nullius in Child Protection 'Reforms'* in Legal Education Through an Indigenous Lens pp 53-70.

31 Arney, F. et al. 2015. *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle Policy and practice considerations*. CFCA Paper No. 34 of 2015; SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*.

32 Queensland Family and Child Commission, 2023. *A Thematic Analysis of Provisionally Approved Kinship Carers who Receive a Subsequent Blue Card Negative Notice*.

33 Queensland Family and Child Commission, *Principle Focus Report*, pp 6-7, 16 & 18.

Cultural continuity and native title

Continuing connection with family, community and culture is central to the wellbeing of Aboriginal and Torres Strait Islander children. It also has legal significance beyond child protection. In *Mabo v Queensland (No 2)* (1992) 175 CLR 1, the High Court recognised that native title depends upon maintenance of traditional connection to land in accordance with laws and customs. Brennan J observed that the foundation of native title may disappear "when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs."[34]

While adoption does not extinguish native title as a matter of law, systemic weakening of kinship and community continuity may contribute to evidentiary fragility in future native title claims.[35] The ATSICPP operates as a safeguard against unnecessary severance that may contribute to such erosion.

Out of home care data and structural drivers

As at 2023–24, Aboriginal and Torres Strait Islander children comprise approximately 9.4% of Queensland's child population (0–17 years) yet represent approximately 46% of children in OOHC. They are 8.6 times more likely to be in OOHC than non-Indigenous children.[36] This level of over-representation reflects structural and systemic drivers rather than legislative design.

Entry rates and duration in care remain significant drivers. Between 2020 and 2024, admission rates for Aboriginal and Torres Strait Islander children increased modestly (from approximately 12.4 to 12.9 per 1,000), while non-Indigenous admission rates remained comparatively stable (approximately 1.6 to 1.5 per 1,000).[37] Duration in care compounds this effect. Even small increases in average time spent in care materially inflate the total OOHC because the system operates cumulatively. Once children remain longer in care, overall population growth follows.[38] In addition, structural pressures including poverty, housing instability, service access, workforce constraints, and reduced early intervention investment, continue to drive both entry and duration.

Approximately 57.9% of Aboriginal and Torres Strait Islander children in OOHC in Queensland are subject to long-term guardianship or third-party parental responsibility orders.[39] Adoption of Aboriginal and Torres Strait Islander children remains low in absolute numbers.[40] Reunification outcomes, where achieved, are frequently stable in the short to medium term. In 2022–23, approximately 6.6% of Aboriginal and Torres Strait Islander children exited care through reunification, and approximately 85% of

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34 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at 66 per Brennan J.

35 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

36 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*, p 4.

37 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*, p 8.

38 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*; Queensland Family and Child Commission, Principle Focus Report, p 12.

39 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*, p 23.

40 Family Matters, *The Continuing Over-representation of Aboriginal Children in Care* (2023) Victorian Commission for Children and Young People, *Always Was, Always Will Be Koori Children* (2023)

those reunified did not return to care within 12 months.[41] This suggests that where reunification is achieved, it is frequently durable.

Resource allocation trends further illuminate system pressures. Between 2020 and 2024, the proportion of total child protection expenditure allocated to Intensive and Family Support Services declined from approximately 14.2% to 10.4%, while OOHC expenditure increased.[42] Despite Aboriginal and Torres Strait Islander children comprising 46% of children in care, approximately 4.2% of total child protection expenditure was directed to Aboriginal Community Controlled Organisations.[43] These figures indicate a system increasingly weighted toward downstream care expenditure rather than upstream prevention and family support.

The evidence therefore identifies entry rates, duration in care, structural disadvantage and reduced investment in early intervention as primary drivers of system growth. It does not demonstrate that the ATSICPP materially impedes permanency or adoption. Adoption from care is rare nationally, including for non-Indigenous children. The QFCC has emphasised that even appropriate responses implemented today will take years to reverse cumulative duration effects.[44]

Adoption and consent

Statutory framework

Under the *Adoption Act 2009*, adoption of a child (including a child subject to care and protection orders) requires the consent of each parent who has parental responsibility, unless the Supreme Court dispenses with that consent pursuant to statutory criteria. This includes where a parent cannot be located, lacks capacity, has abandoned the child, or is not meaningfully exercising parental responsibility.[45] In every case, the Court must also be satisfied that adoption is in the child's best interests.

The Act proceeds on the premise that adoption permanently and irrevocably alters a child's legal identity. An adoption order transfers parental responsibility to adoptive parents; extinguishes the legal relationship between the child and their birth parents; affects inheritance, identity documentation and family status; and creates a new legal lineage. Unlike guardianship or long-term care, adoption is not temporary or delegable; it is a total and enduring transfer of parentage.

For that reason, parental consent is a central statutory safeguard. Queensland law also requires counselling prior to consent and provides limited revocation periods.[46] These protections reflect deliberate legislative calibration of state power in light of historical experience.

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41 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*, p 23.

42 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*, p 10.

43 SNAICC, 2025. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle – Queensland 2025*, p 4.

44 Queensland Family and Child Commission, *Principle Focus Report.*

45 *Adoption Act 2009*, s 39.

46 *Adoption Act 2009*, ss 20 & 21.

Historical foundations

The requirement of parental consent has long been a foundational feature of adoption law in Australia. Between the 1950s and early 1970s, large numbers of children, particularly those born to unmarried mothers, were placed for adoption in circumstances later documented as involving systemic pressure, misinformation, moral coercion and inadequate procedural safeguards. Although formal consent documents were often signed, subsequent parliamentary inquiry and academic scholarship concluded that consent was frequently neither fully informed nor freely given.[47] The 2012 Senate inquiry into former forced adoption policies[48] and subsequent national and state apologies acknowledged systemic failures to safeguard parental autonomy and recognise the lifelong consequences of permanent legal severance.[49]

The consent framework in the Adoption Act embodies institutional memory of past injustice and operates as a structural constraint on irreversible state action. Across Australia, parental consent remains a central safeguard in care-based adoption.[50] No jurisdiction has adopted a general model permitting routine adoption from care without parental consent merely because a child is subject to long-term protection orders. Where adoption numbers have increased modestly (for example, following NSW reforms in 2014),[51] those increases occurred within retained consent-dispensation frameworks and were accompanied by significant policy scrutiny, ongoing research and debate about the role of adoption in permanency planning.[52]

Structural function of consent

The consent requirement performs two related functions. First, it protects parental procedural rights in decisions that permanently sever legal relationships. Second, it operates as a threshold constraint on the use of adoption as a child protection mechanism. The fact that a child has been removed for safety reasons does not, of itself, justify permanent transfer of legal identity. Consent ensures that adoption is not a routine or automatic consequence of child protection intervention.

Removing parental consent as a prerequisite to adoption would require amendment of core provisions of the *Adoption Act 2009*. This could occur either by abolishing consent as a statutory condition for children subject to specified child protection orders, or by substantially broadening the Court's power under

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47 Senate Community Affairs References Committee, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Report, February 2012); Australian Institute of Family Studies, *Forced Adoption National Practice Principles* (2016).

48 S Gair, S. 2012. *Re-writing Australia's History of Forced Adoption*; Higgins, D. et al, 2014. *Forced Adoption Support Services Scoping Study*.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2744 (Julia Gillard, Prime Minister) (National Apology for Forced Adoptions); Queensland, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Annastacia Palaszczuk, Premier) (Apology for Forced Adoption Practices).

50 *Adoption Act 2000* (NSW), s 52; *Adoption Act 1984* (Vic), s 33; *Adoption Act 1988* (SA), s 15; *Adoption Act 1994* (WA), s 17; *Adoption Act 1988* (Tas), s 29; *Adoption of Children Act 1994* (NT), s 27; *Adoption Act 1993* (ACT), s 26.

51 Luu, B., Collings, S., Wright, A.C., Pope, S., & Spencer, M. 2018. *Open adoption of children in NSW out-of-home care: Foster carers' perceptions about the motivations and barriers*. Sydney, Australia: Institute of Open Adoption Studies, The University of Sydney.

52 Ross, N. & Cashmore, J. 2016. *Adoption Reforms New South Wales Style: A Comparative Look*. 30(1) Australian Journal of Family Law 51.

section 39 so that adoption could be ordered solely on best interests grounds once defined permanency criteria are met (for example, a specified period on long-term guardianship).

Either pathway would recalibrate Queensland's adoption architecture. Permanent legal severance would become available without parental agreement in a significantly wider range of cases. The system would shift from one in which irreversible severance requires consent or tightly confined judicial justification, to one in which a welfare determination alone may suffice.

If applied universally, such reform would lower the procedural threshold for permanent legal severance and increase the capacity to convert long-term guardianship into adoption. It would expand the circumstances in which the state may extinguish parental status without parental agreement. In a domain involving irreversible alteration of legal status and identity, structural safeguards perform an important law reform function. They constrain discretionary power at the point of where legal consequences are permanent. In addition, any race-specific removal of consent protections would raise serious equality and human rights concerns.

In that context, the ATSICPP assumes heightened structural importance. Where the threshold for legal severance is lowered, the role of legislatively mandated safeguards requiring active consideration of kinship, community and cultural continuity correspondingly increases. The Principle would operate as one of the remaining structured constraints ensuring that culturally sustaining alternatives are genuinely examined before permanent legal severance occurs.

Weakening both consent protections and the ATSICPP would significantly expand discretionary space at the precise point where consequences for identity and connection are most profound. That combination would increase the vulnerability of cultural continuity to discretionary weighting within a general best interests analysis and heighten the risk of disproportionate legal severance affecting Aboriginal and Torres Strait Islander children.

Child wellbeing, stability and systemic risk

Reform discourse often assumes that increased adoption will produce greater stability and reduce system cost. The available evidence is more nuanced.

Placement instability is strongly associated with adverse mental health, educational and justice outcomes.[53] Stability is critical. However, legal permanence is not synonymous with relational permanence. Australian longitudinal research examining children in OOHC has focused on permanency outcomes broadly, and has not established adoption as uniformly associated with better wellbeing than other stable permanency arrangements, including guardianship. For some children, particularly those with complex needs or requiring ongoing case management, a long-term placement in OOHC may constitute an appropriate and stable permanency outcome.[54]

The CREATE Foundation and the ACT Human Rights Commission have cautioned that adoption is not a panacea for instability. Adoption permanently transfers parentage; it is not simply a child protection tool.

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53 AIHW, 2023. *Permanency outcomes for children in out-of-home care: indicators*. https://www.aihw.gov.au/reports/child-protection/permanency-outcomes-children-indicators/contents/why-is-permanency-important.

54 AIHW, 2023. *Permanency outcomes for children in out-of-home care: indicators*. https://www.aihw.gov.au/reports/child-protection/permanency-outcomes-children-indicators/contents/why-is-permanency-important.

Broadening the circumstances in which consent may be dispensed within the absence of strong empirical justification risks conflating administrative efficiency with irreversible legal severance.[55]

Sibling relationships present an additional systemic consideration. National data from the Australian Institute of Health and Welfare indicate that approximately one-third to two-fifths of children in OOHC who have siblings are not placed with all their siblings. Research consistently recognises sibling relationships as protective factors that mitigate trauma, support identity formation and provide continuity within the care experience.[56] Adoption, unless carefully structured, may exacerbate separation by extinguishing enforceable legal relationships and converting structured contact into informal arrangements.

Increased reliance on adoption may therefore convert supervised and reviewable contact into private arrangements and reduce ongoing oversight. Adoption and certain permanent orders may also reduce departmental involvement and structured supports for children with complex trauma-related needs. Without sustained post-order support, disruption risk increases. Adoption is not cost-free permanence; reform may shift rather than resolve systemic risk.

Human rights and proportionality

Any repeal or dilution of parental consent in the *Adoption Act 2009* and the ATSICPP in the *Child Protection Act 1999* engages protected rights under the *Human Rights Act 2019*.

Permanent legal severance without parental agreement is a profound interference with family integrity. Removal or substantial dilution of parental consent would directly engage the right to protection of families;[57] children's rights to preserve identity and family relations;[58] and equality before the law.[59]

Repeal or material weakening of the ATSICPP would engage overlapping human rights considerations. The ATSICPP gives legislative expression to the cultural rights of Aboriginal and Torres Strait Islander peoples under section 27 of the Act, including the right to maintain kinship ties and distinctive cultural relationships. It also gives practical effect to children's rights under section 28 to preserve their identity, including nationality, name and family relations. Removing the ATSICPP would diminish structured statutory protection for those rights in decision-making concerning removal and placement.

Under section 13 of the Act, any limit on these rights must be reasonable and demonstrably justified. This requires identification of a sufficiently important objective; a rational connection between reform and that objective; and consideration of whether less restrictive alternatives are reasonably available.

In the case of consent reform, the proportionality inquiry would need to demonstrate that expanded adoption powers are necessary to achieve a child protection objective that cannot be achieved through existing permanency mechanisms, including long-term guardianship. In the case of repeal of the ATSICPP, justification would require demonstrating that removal of decision making safeguards is necessary to advance child safety in a manner that cannot be achieved while preserving structured consideration of kinship and cultural continuity.

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55 CREATE Foundation, 2019. *Submission to ACT Government. Adoption Reform: Dispensing with Consent*. ACT Human Rights Commission. 2019. *Response to the Discussion Paper – 'Dispensing with Consent'.*

56 Australian Institute of Health and Welfare, *Child Protection Australia 2022–23.*

57 *Human Rights Act 2019*, s 26.

58 *Human Rights Act 2019,* s 28.

59 *Human Rights Act 2019*, s 15.

Available evidence indicates that OOHC growth is driven by distinct but interacting factors. Structural disadvantage and reduced early intervention investment contribute to higher entry rates. Duration in care is influenced by system capacity factors, including insufficient investment in reunification support, barriers to families stabilising from AOD, domestic violence, homelessness or poverty, and limited time or resourcing for comprehensive kin identification and assessment. These drivers operate upstream and at the level of service delivery. They are analytically separate from legislative placement sequencing or consent thresholds.

Less restrictive alternatives including strengthened early intervention, targeted reunification support, and improved kin identification and implementation remain available. In the absence of demonstrable necessity, reforms that expand state authority at the point of irreversible legal severance or reduce structured protection of cultural continuity would raise substantial proportionality concerns.

National coherence and international consistency

Every Australian jurisdiction retains a statutory Aboriginal and Torres Strait Islander child placement framework. Its institutional consolidation has been reinforced through successive intergovernmental child protection frameworks. Under the Third Action Plan (2015–2018) of the *National Framework for Protecting Australia's Children 2009–2020*, all jurisdictions committed not only to continuing implementation of the ATSICPP but to adopting a broader definition encompassing the five interrelated domains (prevention, partnership, placement, participation and connection). That commitment was reaffirmed and strengthened under the successor national framework, *Safe and Supported 2021–2031*,[60] with agreement across jurisdictions to progress legislative reform embedding all five elements of the Principle.

The ATSICPP therefore reflects sustained national acceptance at the legislative and intergovernmental level, of the need for structured safeguards in decision-making affecting Aboriginal and Torres Strait Islander children.

Similarly, parental consent remains a central structural safeguard in adoption legislation across Australia. No jurisdiction has adopted a general model permitting routine adoption from care without parental consent merely because a child is subject to long-term protection orders. While some jurisdictions have refined permanency pathways, consent-dispensation frameworks have been retained as a threshold constraint on irreversible legal severance. This reflects a nationally consistent understanding that adoption permanently alters legal identity and therefore requires heightened procedural safeguards.

Removal of either the ATSICPP or core consent architecture would represent a significant departure from a harmonised national framework developed over decades in response to documented systemic harm. In a system reliant upon intergovernmental coordination, judicial consistency and community trust, retreat from established safeguards carries institutional and reputational consequences.

Australia has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* and is a party to the *Convention on the Rights of the Child* both of which recognise the right of Indigenous children to maintain culture and community connections and emphasise protection against arbitrary separation from parents. Under *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273,

60 *Safe and Supported: The National Framework for Protecting Australia's Children 2021–2031*, is a 10-year strategy co-designed by the Australian Government, state and territory governments, Aboriginal and Torres Strait Islander representatives and the broader non-government sector.

such instruments may inform statutory interpretation and legitimate expectations in administrative decision making.[61]

Dilution of the ATSICPP or parental consent protections would place Queensland outside the nationally consistent legislative framework adopted across all Australian jurisdictions, create tension with Australia's endorsed international standards, and risk undermining coherence, interpretive stability and institutional legitimacy in child protection law.

61 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.