

## Confirming a child's Aboriginality after the decision of Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83 (Hackett)

In May 2020, the NSW Court of Appeal delivered its decision in Hackett. The Court was asked to decide whether a child was an 'Aboriginal child' for the purposes of adoption.

The decision affirms a descent-based definition of an Aboriginal child in the NSW adoption and child protection systems.

### Current practice confirming Aboriginality

In DCJ's current casework practice, a child's Aboriginality is based on their family identifying as Aboriginal. DCJ (or a service provider) does not need to confirm Aboriginality in any additional way.

However, in circumstances where there is uncertainty or disagreement about a child's Aboriginality, confirmation is necessary to:

- inform casework and/or placement decisions
- enable a relevant Court to make appropriate orders.

### The definition of 'Aboriginal child'

The term 'Aboriginal child' refers to:

1. A child who is 'descended from an Aboriginal [person]' who:
  - (a) is a member of the Aboriginal race of Australia and
  - (b) identifies as an Aboriginal person and
  - (c) is accepted by an Aboriginal community as an Aboriginal person.

This is defined in section 4 of the *Aboriginal Land Rights Act 1983* (ALRA) and referenced in section 5 of the *Children and Young Persons (Care and Protection) Act 1998* and in section 4 of the *Adoption Act 2000*.

**OR**

2. A child who is determined by a Court to be 'of Aboriginal descent', that is, descended from the people who lived in Australia before British colonisation.

This is in accordance with the decision in Hackett.

### The implications of the Hackett decision

In Hackett, the Court of Appeal found a child of 'Aboriginal descent' is distinct from a child who 'descended from an Aboriginal [person]'. This means:

- DCJ does not need to confirm a child's relative meets all three requirements of ALRA, including identification and acceptance by the Aboriginal community, to determine that a child is an Aboriginal child.

- Evidence that a child has a relative<sup>1</sup> who is Aboriginal is enough to establish Aboriginal descent.

## How to confirm Aboriginality

If a need for confirmation of Aboriginality is necessary, DCJ makes reasonable inquiries regarding a child's Aboriginality as soon as possible, so decisions can be made in a timely manner having regard to a child's Aboriginality.

Reasonable inquiries may include:

- family group conferencing (FGC) or family led decision making processes
- family finding casework, including discussions with a child's family/kin and community members
- reviewing current and archived records held by DCJ
- consultation with Aboriginal community organisations, DCJ Aboriginal Panels and Aboriginal operational and policy teams
- referrals to external services such as Link Up and the Crown Solicitor's Native Title Team
- requests to external agencies, via Chapter 16A or subpoena, for birth records or Aboriginal protection and welfare records
- searching free external databases such as the Aboriginal and Torres Strait Islander Biographical Index and/or State and Territory library catalogues.

## Further resources

Further guidance on searches and inquiries to establish Aboriginal descent can be found on the [Australian Institute of Aboriginal and Torres Strait Islander Studies](#) website.

Casework mandates and practice advice topics can also be found on Casework Practice site, specifically:

- Aboriginal Case Management Policy (ACMP), [Rules and Practice Guidance](#)
- [Identity and Culture for children in OOHC](#) practice mandate
- [Cultural Practice with Aboriginal communities](#) practice advice
- [Culturally safe practice with Aboriginal families and communities](#) practice advice

Please consult your district's local Child Law Legal Officer should you have any questions relating to confirming a child's Aboriginality.

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<sup>1</sup> A relative who is of Aboriginal descent is an ancestor or person related to the child by blood lineage.