

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 relative¹ 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.

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