



Torres Strait Islander Traditional Adoption



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Legal information on Torres Strait Islander Traditional Adoption

If you are the giving or receiving parent in a Torres Strait Islander Traditional Adoption, or you were Traditionally Adopted, this fact sheet gives you information on the legal status of the Traditional Adoption and information on common legal issues that may arise.

This fact sheet outlines:

- What is Torres Strait Islander Traditional Adoption?
- Traditional Adoption and the law
- Rights and responsibilities of parents
- Applying for Parenting Orders
- Changing the name of a Traditionally Adopted child and Birth Certificates
- Succession – what happens when a person passes away

ATSILS is a non-profit, Aboriginal and Torres Strait Islander community-based organisation with 26 locations across Queensland. We provide innovative and culturally competent legal services covering criminal, civil and family law areas.



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1. What is Torres Strait Islander Traditional Adoption?

Torres Strait Islander Traditional Adoption (also called “Traditional Adoption”, “Island Adoption”, “Customary Adoption” and “Kupai Omasker”) is a custom widespread throughout Torres Strait Islander communities, including those who live in the Torres Strait and amongst Torres Strait Islander families on the mainland.

Traditional Adoption involves the transfer of a child from the biological (birth) parent(s) (the “giving parents”) to another person or couple (the “receiving parents”) to “grow up”.

Traditional Adoption usually occurs within the extended family.

Both the giving and receiving parents agree to the adoption.

The transfer is permanent, meaning the receiving parents take full responsibility for raising the child as their own.

Usually, the child who has been Traditionally Adopted is not told who his/her biological parents are until he/she is an adult, or when the receiving parents decide to do so under certain cultural protocols.

Traditional Adoption is different to temporary arrangements like foster or kinship care. In those situations, the child will likely be returned to his/her biological parents after a period of time.

2. Traditional Adoption and the law

In Queensland, the *Adoption Act 2009* and the *Adoption Regulations 2009* apply to the legal adoption of children for Queensland residents.

The law sets out very detailed criteria that must be followed by anybody seeking to adopt a child and generally an Adoption Order is not made by the Courts if family or kin are available to care for the child. Therefore, the Queensland legal system does not currently recognise Traditional Adoption as a “legal” adoption.

This means a child who has been Traditionally Adopted has not been legally adopted at law.

3. Rights and responsibilities of parents

As Traditional Adoption is not legally recognised, the receiving parents do not have any legal status in the eyes of the law.

Nevertheless, the receiving parents still have rights and responsibilities towards the Traditionally Adopted child. A person who cares for a child is responsible for their day-to-day care and welfare.

Receiving parents are able to perform tasks and duties that parents would normally do, including:

- Have the Traditionally Adopted child listed as a dependent on a Medicare card.
- Take the child to health and medical appointments.
- Receive social security payments for the child such as parenting or Family Tax Benefit.
- Enrol the child at child care / school and be listed as a contact person.

Depending on the receiving parents’ employer, a person may not be eligible for workplace parental leave entitlements unless the Traditional Adoption has been legally recognised via Parenting Orders through the Family Court (see below at **4. Applying for Parenting Orders**).

Although the intention of Traditional Adoption is for the family who receives the child to care permanently for that child, there are times when the child is not adequately cared for by the receiving parents or there is a dispute over the intention of the initial agreement, for instance, whether it was temporary or permanent.





Misunderstanding and disagreement over the care arrangements of a child who has been subject to a Traditional Adoption has been the cause of problems and insecurity at law for both the giving and receiving parents. In this situation, it is advisable to contact ATSILS for legal advice.

4. Applying for Parenting Orders

Giving and/or receiving parents may wish to make the Traditional Adoption of a child as legally secure and enforceable as possible. In some circumstances there may end up being a dispute between the giving and receiving parents. In these situations, giving parents, receiving parents and in some circumstances, other extended family members and important persons in the child's life, may apply to the Family Law Courts for Parenting Orders.

Even though a legal Adoption Order under the *Adoption Act 2009* cannot be made (see above at **2. Traditional Adoption and the law**), the Family Law Courts are able to make Parenting Orders pursuant to the *Family Law Act 1975* for Torres Strait Islander children who have been Traditionally Adopted.

Parenting Orders are a set of orders made by the Court about parenting arrangements for a child. When Parenting Orders are made, each person affected by the order must follow it.

Traditional Adoption can be lawfully confirmed through Parenting Orders, however Parenting Orders are not a formal adoption at law.

Parenting Orders are made for a child under the age of 18 years. If a Traditional Adoption arrangement is made prior to the birth of a child, an application for Parenting Orders to the Family Law Courts cannot be filed until after the child has been born.

Parenting Orders expire upon the child turning the age of 18 years.

Parenting Orders are not permanent as they can be changed at a later date should circumstances change.

Parenting Orders may include orders regarding:

- Who the child is to live with.
- How much time the child will spend with his/her parents or other family members, such as his/her biological parent/s.
- Who is responsible for "growing up" the child, including financial responsibilities or making major decisions about the child's upbringing, like schooling, medical care or any other aspect of their care, welfare or development.
- Allowing a person to change the child's name.
- Allowing a person to apply for a passport for the child.
- Authorising a person to take the child overseas.

Parenting Orders by law cannot require the names of the child's giving parents to be removed from the child's birth certificate, nor the receiving parents' names to be entered. The birth certificate of a child who has been Traditionally Adopted will therefore list the names of the giving parents, not the receiving parents.

If an application is made for a Parenting Order, the Family Law Courts will not make Parenting Orders in Traditional Adoption matters automatically. An application must be lodged by the Applicant (person/s applying for the Parenting Orders) and the Respondents (person/s who have a legal interest or significant involvement with the child) must be served. The application will be heard before a Judge and parties may be required to attend Court mentions, Family Report Interviews and/or hearings, as required.

5. Changing the name of a child on his/her Birth Certificate

A Traditionally Adopted child becomes a full member of his/her new family and usually takes on the family surname. Torres Strait Islander practices have always understood this as an oral arrangement by the community and there was no need to write it down. The child simply was called by his/her new name and the Torres Strait Islander community acknowledged this.

However, only the giving parent's details can be recorded on the child's birth registration forms / Birth Certificate.





As Birth Certificates are used to prove one's identity, a Traditionally Adopted child may find out that the name he/she has been using and the identity of his/her parents are not what they thought it was.

This occurs when a Birth Certificate must be produced for such things as schools, sporting clubs and driver licences. This may lead to the receiving parents having to tell their Traditionally Adopted child that he/she was adopted earlier than they would like.

The only way a Traditionally Adopted child's name may be changed on their birth certificate is if the biological parent/s recorded on the birth certificate sign an 'Application to change a child's name' or there is a Court Order that allows the receiving parent/s to sign the relevant forms to change the child's name.

An Application to change a child's name is submitted to the Registry of Births, Deaths and Marriages. If a child is over 12 years of age, they must also provide signed consent that they agree to the name change.

Once a person turns 18 years of age he/she can make his/her own choice about their legal name. An adult may make an application to the Registry of Births, Deaths and Marriages to change part or all of his/her name.

6. Succession – what happens when a person passes away

If a receiving parent has a Traditionally Adopted child in the family and dies without a Will, the Traditionally Adopted child is not eligible for any inheritance when the deceased's estate is administered because the laws of Queensland dictate how the estate will be distributed. This is called the rules of intestacy (dying without a Will). Similarly, if a giving parent passes away without a Will, a child who was Traditionally Adopted out of the family may be eligible for inheritance, something that the giving parent might not have wanted.

Having a written, valid Will in place is important for a person to ensure that their estate (assets / liabilities) are distributed according to their wishes when they pass way.

Contact ATSILS

We can be contacted toll free on **1800 012 255**, 24 hours a day, 7 days a week. We have 26 offices located across Queensland so you will be put in touch with the closest regional office that is able assist you with your legal needs.

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