

# SENATE BILL REPORT

## ESSB 5656

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As Passed Senate, March 5, 2011

**Title:** An act relating to a state Indian child welfare act.

**Brief Description:** Creating a state Indian child welfare act.

**Sponsors:** Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Regala, White, McAuliffe and Kline).

**Brief History:**

**Committee Activity:** Human Services & Corrections: 2/11/11, 2/17/11 [DPS].

Passed Senate: 3/05/11, 46-1.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** That Substitute Senate Bill No. 5656 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Baxter, Carrell, Harper and McAuliffe.

**Staff:** Jennifer Strus (786-7316)

**Background:** The Indian Child Welfare Act (ICWA) is a federal law passed in 1978. ICWA was passed in response to the high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902). ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe. These requirements apply to proceedings under chapters 13.32A, 13.34, and 26.33 RCW.

Indian children involved in state child custody proceedings are covered by ICWA. A person may define his or her identity as Indian but in order for ICWA to apply, the involved child must be an Indian child as defined by the law. ICWA defines an Indian child as “any unmarried person who is under age 18 and is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe” (25 U.S.C. § 1903). Under federal law, individual tribes have the right to determine eligibility, membership, or both. However, in order for ICWA to apply, the child

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must be a member of or eligible for membership in a federally recognized tribe. ICWA does not apply to divorce proceedings, intra-family disputes, juvenile offender proceedings, or cases under tribal court jurisdiction.

All tribes have the right to determine who is a member of their tribe, and different tribes have different requirements for eligibility.

Caseworkers must make several considerations when handling an ICWA case, including (1) providing active efforts to the family, (2) identifying a placement that fits under the ICWA preference provisions, (3) notifying the child's tribe and the child's parents of the child custody proceeding, and (4) working actively to involve the child's tribe and the child's parents in the proceedings.

The child's tribe must have exclusive jurisdiction over the child custody proceeding involving the Indian child who resides on a reservation unless the tribe has consented to state's concurrent jurisdiction, or the tribe expressly declined jurisdiction or the state is exercising emergency jurisdiction. If the court or any party knows or has reason to know that a child is or may be an Indian child, the court or party must notify the parent or Indian custodian and the child's tribe, by registered mail, of any pending proceedings and their right of intervention.

In a child custody proceeding involving an Indian child who is not a resident of the reservation and not a ward of the tribal court, the court must transfer the case to tribal court unless either parent objects or there is good cause not to transfer the case. The tribe may decline jurisdiction.

Before an Indian child can be placed in foster care, the Department of Social and Human Services (DSHS) or a supervising agency must show that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have been unsuccessful. The court cannot order a foster care placement without a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody by the child's parent or Indian custodian is likely to result in serious physical or emotional damage to the child.

A court cannot order the termination of parental rights without a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody by the child's parent or Indian custodian or return of custody to the parent or custodian is likely to result in serious physical or emotional damage to the child.

A court may order the emergency removal of an Indian child, including a child who is a resident of or domiciled on a reservation, to prevent imminent physical damage or harm to the child. The court, DSHS, or supervising agency must terminate the emergency removal or placement of a child when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. The party that obtained emergency removal or placement of the child must immediately initiate a child custody proceeding that complies with ICWA, transfers the child to the jurisdiction of the appropriate tribe, or restores the child to the parent or custodian. An emergency removal or placement of an Indian child must

immediately terminate and the court order approving the removal vacated when the removal or placement is no longer needed to prevent imminent physical damage or harm to the child.

If the petitioner in a child custody proceeding has improperly removed the child from the parent or custodian's custody or has improperly retained custody after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition and immediately return the child to the parent or custodian unless such return would subject the child to substantial and immediate danger or threat of danger.

Under current law, an Indian child must be placed in a foster care home with the following characteristics which must be given preference in the following order:

1. relatives;
2. an Indian family of the same tribe as the child;
3. an Indian family of a Washington Indian tribe of a similar culture to that tribe;
4. any other family which can provide a suitable home for an Indian child, such suitability to be determined through consultation with a local Indian child welfare advisory committee.

**Summary of Engrossed Substitute Bill:** The major provisions of the federal Indian Child Welfare Act (ICWA) are included. Several undefined terms used in ICWA are defined including active efforts, best interests of the Indian child, and qualified expert witnesses. Some of the current practices developed by the Children's Administration and the Tribes are included. The provisions in current law related to placement preferences are removed.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** PRO: A disproportionate number of Indian children are in the child welfare system and many languish in foster care. This bill will help courts to enforce provisions of the federal ICWA. Tribes have the right to decide who is and is not a member of their tribe. This bill clarifies that tribes are the entity that makes the decision. Having a state ICWA was one of the recommendations of the Racial Disproportionality Task Force. The bill provides a strong statutory foundation with which to overcome some of the abuses of the past. This legislation recognizes the unique relationship between children and their tribes. Adoption of this legislation will ensure compliance with the federal ICWA. Was 12 when mother died and her wish was that her mother (grandmother to the children) would raise the children. A state worker tried to remove them from their grandmother. Also received custody of a grandson, but might not have happened because his non-Indian mother did not inform the state of the child's tribal status. Luckily a CPS supervisor recognized the child's last name as a Tulalip name and wanted to know why the tribe was not informed. This bill needs to be passed to protect the Indian children who cannot protect themselves. This bill provides the ability to keep Indians in contact with

family and tribes as part of their lives. The Samish Tribe is on board with the transformation of the child welfare system, and this bill is another piece to assist that transition process.

CON: Have an issue with the section on voluntary placements. The current statute has sufficient authority to determine if the child is Indian. Birth parent preferences are not mentioned in this bill; although, they are in the federal ICWA and BIA Guidelines. When the court has to find good cause to deviate from the preference list, the federal ICWA says that birth parent preference can be the good cause, and this bill does not allow this.

OTHER: Support the intent and policy direction in the bill. Concerned about some of the language that differs from federal ICWA. Children's Administration (CA) has worked with the tribes to follow ICWA and address the overrepresentation of Indian children in the system. CA works in a government to government relationship with the tribes. No issues with the policy but have issues with the mechanics. ICWA principles should be applied from the very beginning of a case. Some tribes do a good job when notified that a possible Indian child might be involved in the child welfare system and some do not do a particularly good job.

**Persons Testifying:** PRO: Liz Mueller, Jamestown S'klallam Tribe; Jamie Edmonds, Colville Tribe; Helen Fenrich, Tulalip Tribes; Rebecca Peck, Samish Indian Nation; Tom Tremaine, NW Justice Project.

CON: Mark Demaray, attorney.

OTHER: Mary Meinig, Office of Family and Children's Ombudsman; Denise Revels Robinson, DSHS; Gary Malkasian, Foster Care Justice Alliance.