

Child Safety POLICY

Title: Decisions about Aboriginal and Torres Strait Islander children

Policy No: 641-3

Policy Statement:

The Department of Children, Youth Justice and Multicultural Affairs (Child Safety) is committed to the safe care and connection of Aboriginal and Torres Strait Islander children with family, community, culture and country.

Child Safety recognises the right of Aboriginal and Torres Strait Islander peoples to self-determination.

Aboriginal and Torres Strait Islander children and families have expert knowledge about the strengths and challenges that exist in their own families and communities, and they are the primary source of cultural advice to inform decisions that affect them. Child Safety will work in partnership with children and families to enable them to meaningfully participate in decisions that affect them. This includes processes for decision-making being led by family wherever possible. Decisions will be made in accordance with the child placement principle: prevention, participation, placement, partnership and connection.

Child Safety will, in consultation with Aboriginal and Torres Strait Islander children and their families, arrange for an independent Aboriginal or Torres Strait Islander entity for the child to facilitate the child's and family's participation in making decisions that are likely to have a significant impact on the child's life. The independent Aboriginal or Torres Strait Islander entity for a child will be independent from Child Safety decision makers.

Child Safety is committed to respecting, protecting and promoting human rights. Under the *Human Rights Act 2019*, Child Safety has an obligation to act and make decisions in a way that is compatible with human rights and, when making a decision, to give proper consideration to human rights. Child Safety recognises and respects distinct cultural rights of Aboriginal and Torres Strait Islander people.

Principles:

- The safety, wellbeing and best interests of the child, both throughout childhood and the rest of the child's life, are paramount.
- Culture underpins and is integral to the safety and wellbeing of Aboriginal and Torres Strait Islander children.
- Aboriginal and Torres Strait Islander people have the right to self-determination [*Child Protection Act 1999* (CP Act), section 5C(1)(a)].

- For any decisions or actions taken under the CP Act, the child's safety, wellbeing and best interests, both throughout childhood and throughout the child's life, is the paramount consideration (section 5A of the CP Act).
- Children have a right to be protected from harm. A child's family has the primary responsibility for the child's upbringing, protection and development, and the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family. If a child does not have a parent who is able and willing to protect the child, the State is responsible for protecting the child, and, in protecting a child, the State should only take action that is warranted in the circumstances (section 5B(a-e) of the CP Act).
- The long-term effect of a decision on an Aboriginal or Torres Strait Islander child's identity and connection with the child's family and community must be taken into account (section 5C(1)(b) of the CP Act).
- Child Safety staff will act and make decisions in a way that is compatible with human rights and obligations under the *Human Rights Act 2019*.
- In any decisions or actions taken under the CP Act, the five elements of the child placement principle (section 5C(2) of the CP Act) also apply:
 - Aboriginal and Torres Strait Islander children have a right to be brought up within their own family and community (prevention principle)
 - Aboriginal and Torres Strait Islander persons have the right to participate in significant decisions about Aboriginal and Torres Strait Islander children (partnership principle)
 - Aboriginal and Torres Strait Islander children placed in out-of-home care have a right to be placed with a member of their family (placement principle)
 - Aboriginal and Torres Strait Islander children and their parents and family members have a right to participate, and be enabled to participate, in administrative and judicial decision-making processes (participation principle)
 - Aboriginal and Torres Strait Islander children have a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly where a child is in the care of a non-Indigenous person (connection principle).

Objectives:

This policy aims to ensure that:

- Decisions made under the CP Act in relation to Aboriginal and Torres Strait Islander children promote their safe care and connection with family, community, culture and country.
- Aboriginal and Torres Strait Islander children and families are enabled to influence, control, and make and carry out plans about their lives.
- Child Safety services are provided in a way that enables Aboriginal and Torres Strait Islander children, their parents and family members to effectively participate in making significant decisions about the child.
- The primary source of cultural advice about an Aboriginal or Torres Strait Islander child and family, for decision-making by Child Safety, is provided by the child and the child's family.

- Aboriginal and Torres Strait Islander children and families are supported to participate in significant decision-making processes under the CP Act by Aboriginal and Torres Strait Islander people.

Scope:

This policy refers to all decisions made by Child Safety (the chief executive and his/her delegates and authorised officers) under the authority of the CP Act in relation to Aboriginal and Torres Strait Islander children.

This policy does not relate to decisions made by the litigation director under the CP Act or the Director for *Child Protection Litigation Act 2016*, or decisions or actions made by the Childrens Court.

Roles and Responsibilities:

- Officers of Child Safety (the chief executive and his/her delegates and authorised officers) make a wide range of decisions under the authority of the CP Act for the care and protection of children.
- The roles and responsibilities of Child Safety staff are outlined in the Child Safety Practice Manual, and associated resources.
- In making decisions about an Aboriginal or Torres Strait Islander child, officers have a responsibility to:
 - consider the long-term effect of the decision on the child's identity and connection with the child's family and community (section 5C(1)(b) of the CP Act)
 - make the decision in a way that upholds the child placement principle (section 5C(2) of the CP Act) and principles about Aboriginal and Torres Strait Islander Children (section 6AA(2) of the CP Act)
 - do so in a way that allows the full participation of the child and the child's family group (section 6AA(5)(a) of the CP Act) and creates a welcoming and culturally safe place for children and families that is appropriate to Aboriginal tradition or Island custom (section 6AA(5)(b) of the CP Act).

Officers are also responsible for:

- making decisions in a way that allows the full participation of the person and the person's family group (section 6AA(5)(a) of the CP Act)
- conducting decision-making processes in a place that is appropriate to Aboriginal tradition or Island custom (section 6AA(5)(b) of the CP Act).

Arranging an independent Aboriginal or Torres Strait Islander entity for the child

Child Safety will arrange for an independent Aboriginal or Torres Strait Islander entity to facilitate their participation in decision-making for any significant decisions.

Child Safety will inform an Aboriginal or Torres Strait Islander child and the child's family of their right to have an independent Aboriginal or Torres Strait Islander entity facilitate their participation when a significant decision is being made, unless exceptional circumstances apply.

Child Safety will work with the child and the child's family to identify a suitable person to undertake the role of independent Aboriginal or Torres Strait Islander entity for the child. With the child's and the family's consent, Child Safety will then arrange for the independent Aboriginal or Torres Strait Islander entity for the child to facilitate their participation in the decision-making process. Before making these arrangements, Child Safety must be satisfied that the nominated entity is suitable to be the independent entity, in accordance with the provisions of section 6 of the CP Act.

Child Safety will ensure that a person who has been asked to be an independent Aboriginal or Torres Strait Islander entity for a child is provided with information to help them understand what is required.

Child Safety may, in consultation with the child and the family, arrange for individual family members to each have a separate independent Aboriginal or Torres Strait Islander entity, where necessary to facilitate each person's participation in making significant decisions.

A child and the child's family may provide advice about the types of decisions in which they want to have an independent Aboriginal or Torres Strait Islander entity facilitate their participation. They may also choose to nominate multiple people to be an independent entity. In this instance, Child Safety may consider their suitability and the child and family may choose which independent entity they want to have facilitate their participation in a particular decision. This may help minimise the need to delay decisions for the purpose of arranging an independent entity. The child or the child's family may update such advice at any time.

Child Safety must make all reasonable efforts to arrange for an independent Aboriginal or Torres Strait Islander entity for the child to help facilitate the child and family's participation in making a significant decision. However, in exceptional circumstances (section 6AA (3) of the CP Act), this is not required if:

- doing so is not practicable because an independent Aboriginal or Torres Strait Islander entity for the child is not available or urgent action is required to protect the child; or
- doing so is likely to have a significant adverse effect on the safety or psychological or emotional wellbeing of the child or any other person; or
- doing so is otherwise not in the child's best interests; or
- the child or the child's family does not consent to Child Safety arranging for an independent Aboriginal or Torres Strait Islander entity for the child to be involved in the decision-making process.

A decision not to arrange an independent Aboriginal or Torres Strait Islander entity for the child to help facilitate the child and family's participation in making a significant decision must be based on verifiable information. If a decision is made not to arrange an independent Aboriginal or Torres Strait Islander entity for the child, the specific circumstances and factors taken into consideration by the delegated decision maker must be documented.

Who is an independent Aboriginal or Torres Strait Islander entity for a child

To be an independent Aboriginal or Torres Strait Islander entity for a child, the entity must be:

- an individual who is an Aboriginal or Torres Strait Islander person or
- a group whose members includes Aboriginal or Torres Strait Islander persons.

In addition, the entity must:

- provide services to Aboriginal or Torres Strait Islander persons (this could include an entity funded by Child Safety), or
- be a representative of the child's community or language group, or
- be a person who:
 - is of significance to the child or child's family, and
 - is a suitable person for associating on a daily basis with the child, and
 - has appropriate authority to speak about Aboriginal or Torres Strait Islander culture in relation to the child or the child's family, and
 - is not an officer or employee of Child Safety.

In addition, the entity must be a suitable person to be an independent Aboriginal or Torres Strait Islander entity for the child (refer to Suitable person below).

Child Safety will rely on the advice of the child and family to determine whether the nominated person is representative of the child's community or language group, of significance to the child or child's family and has appropriate authority to speak about Aboriginal or Torres Strait Islander culture in relation to the child or the child's family.

Suitable person

To be a suitable person to be an independent Aboriginal or Torres Strait Islander entity, the entity must not pose a risk to children's safety or to the safety of the particular child.

Child Safety will consider information provided by the child or the family about the person's suitability to be an independent Aboriginal or Torres Strait Islander entity for the child, information provided by the nominated person, if applicable, and information kept by Child Safety. In considering the information Child Safety will have regard to:

- whether the entity is someone who can be an independent entity (section 6 of the CP Act)
- whether the child and family believe the person has the capacity and capability to facilitate their involvement in decision-making
- whether there is a conflict of interest that could influence or adversely impact on the entity's ability to independently facilitate the child or family's participation in decision-making*
- the decision being made or court process and relevant circumstances
- whether the entity poses a risk to children's safety or the child's safety.

*For example, it would be a conflict of interest for a person to be the independent Aboriginal or Torres Strait Islander entity facilitating the child's and family's participation in a significant decision if the person has made application to the Childrens Court to take part in proceedings.

A child, family member or person who has been nominated to be an independent Aboriginal or Torres Strait Islander entity for a child can use Child Safety's complaints management process if dissatisfied with a decision Child Safety has made regarding the nominated person's suitability to be the independent entity.

Significant decisions

A significant decision is a decision that is likely to have a significant impact on a child's life (Schedule 3 of the CP Act). Whether a decision is likely to have a significant impact on a child's life will depend on the specific circumstances, however the following decisions are to be considered significant for all children:

- a decision about how to keep a child safe (safety planning during an investigation and assessment)
- a decision about whether a child is a child in need of protection
- a decision about what type of ongoing intervention will be undertaken with a family
- a decision to refer a matter to the litigation director about an application for a child protection order for the child
- a decision about where or with whom a child, subject to a child protection care agreement, assessment order or child protection order granting custody or guardianship to the chief executive, will live (section 83(2) of the CP Act).

Other decisions

In addition to facilitating participation in significant decisions, the child or the child's family may choose to have an independent Aboriginal or Torres Strait Islander entity facilitate their participation in any decision under the CP Act where they consider it would help them participate in the decision-making process.

Role of an independent Aboriginal or Torres Strait Islander entity for a child

The role of an independent Aboriginal or Torres Strait Islander entity for a child is to facilitate the child's and family's participation in the decision-making process for significant decisions.

How the entity facilitates the child's and family's involvement in a decision-making process will depend on the significant decision being made, the child's and family's wishes about how the entity facilitates their participation, the entity's relationship with the child and family and the entity's own circumstances. Facilitation may involve:

- being part of meetings the child and family have with Child Safety, and helping the child and the family feel supported to ensure everything that they wish to say has been shared
- helping the child and family to ask questions, make suggestions and understand information and discussions about the decision being considered

- helping the child and family to consider what information about Aboriginal tradition or Island custom, or other cultural information, needs to be considered in the decision-making process, and helping the family to share that information
- providing additional contextual information regarding Aboriginal tradition or Island custom, the family group and their community to support the child's and family's input, and helping Child Safety to understand this information
- helping the child and family explain any personal or cultural factors that may impact on the child or family's capacity to fully participate in discussions, decisions or proposed actions
- observing discussions to ensure the child's and family's voices are heard, and encouraging participatory processes.

In facilitating the child's and family's participation, it is not the role of the independent Aboriginal or Torres Strait Islander entity for the child to:

- speak on behalf of the child or family, except by agreement with the child or family and only to convey information that the child or family wishes to have shared
- prevent the child or family from sharing information with Child Safety
- provide their own opinion about the decision the child, family and Child Safety are making (for example, supporting a particular outcome for the decision, independent from the child or family's view).

An independent Aboriginal or Torres Strait Islander entity for the child can provide his or her views about Aboriginal tradition or Island custom in relation to the child and the child placement principles in relation to the child if the Childrens Court wants to inform itself about these matters when exercising a power under the CP Act relating to an Aboriginal or Torres Strait Islander child.

Costs

Child Safety staff will work with the independent Aboriginal or Torres Strait Islander entity for the child and the child and their family to make arrangements for the independent entity to attend meetings in the most appropriate way to facilitate the child's and family's participation. This may include making reasonable travel arrangements for an independent entity to attend in person, or the use of tele-conferencing, video-conferencing or similar.

Child Safety will discuss practical assistance that may be required to enable the person to facilitate the child's and family's participation in decision-making with the independent Aboriginal or Torres Strait Islander entity and the family, where required. Assistance may be available either from local Aboriginal or Torres Strait Islander community agencies or from Child Safety. Assistance may include reasonable out-of-pocket travel costs and meal or accommodation expenses incurred when performing the role.

Information sharing and confidentiality

Child Safety and the independent Aboriginal or Torres Strait Islander entity for a child may share information with each other (section 159MD of the CP Act) to help the independent entity facilitate the child's or family's participation in decision-making, planning, or providing services to the child or child's family. The child's or family's consent to share the relevant information should be sought unless doing so could jeopardise the safety or wellbeing of a person or the person is unable to consent.

Child Safety may, for example, contact the independent Aboriginal or Torres Strait Islander entity for a child to provide updated information about the date, time or location of a Family Group Meeting, if the child and their family has previously stated that they would like the independent entity to be involved in the meeting.

A person who is an independent Aboriginal or Torres Strait Islander entity for a child is bound by the confidentiality provisions of the CP Act (Chapter 6, Part 6). Child Safety is responsible, when making arrangements for an independent Aboriginal or Torres Strait Islander entity for a child, to inform the person of their responsibilities in relation to confidentiality.

Working collaboratively with the litigation director in relation to an independent Aboriginal and Torres Strait Islander entity for a child

Child Safety will provide the litigation director with information about having complied with the requirement to arrange for an independent Aboriginal or Torres Strait Islander entity for the child, or whether the requirement does not apply.

Child Safety will advise the litigation director of an entity's suitability to be an independent Aboriginal or Torres Strait Islander entity for a child to enable the litigation director to arrange for an independent Aboriginal or Torres Strait Islander entity to facilitate their participation in significant decisions made by the litigation director.

Family-led decision making processes

The CP Act provides for family group meetings to facilitate family-based responses to children's protection and care needs, and to ensure an inclusive process for planning and making decisions relating to children's wellbeing and protection and care needs (section 51G of the CP Act). A family group meeting may be convened by a delegated officer of Child Safety or by a private convenor, and may be for the purpose of case planning or other matters relating to a child's wellbeing and protection and care needs (section 51H-51I of the CP Act).

Family group meetings and other family meetings will be family-led processes as far as possible. For Aboriginal and Torres Strait Islander children, this may involve an Aboriginal or Torres Strait Islander service funded to provide private convenor services (such as the Family Participation Program), to facilitate the decision-making process. This may occur at any stage of Child Safety intervention, including during an investigation and assessment. During family-led processes, families will take the lead in determining who attends, where meetings are held and in developing plans that address the significant decision under consideration and which are owned and supported by the family and community.

Child Safety will arrange for family-led decision making, when it is practicable and in the best interests of the child:

- when deciding the outcome of an investigation and assessment, where an outcome of 'child in need of protection' is likely, and, if appropriate, the type of ongoing intervention required to provide for the child's protection and care, and
- when developing a case plan.

Family-led decision making processes may be used for a range of purposes, including to:

- engage with families to collaboratively identify and address safety concerns, with the intent of arriving at alternatives to statutory protection, or identifying strategies to minimise the degree and length of any necessary intervention
- keep children connected with family, community and culture
- identify alternatives to placement in out-of-home care and/or culturally appropriate placement options in line with the child placement principle
- identify the action or order that would best achieve permanency for a child
- develop quality case plans, including cultural support plans and transition plans.

Child Safety will remain responsible for making decisions about the child's protection and care needs in accordance with its functions and obligations under the CP Act.

The recommended outcome of a family-led decision making process will be considered by Child Safety in making the decisions related to the process. This may include a decision about whether a child is a child in need of protection, the type of ongoing intervention that may be required to provide for the child's protection and care, and, if appropriate referral to the litigation director for a child protection order.

The child or their family may nominate an independent Aboriginal or Torres Strait Islander entity for the child to facilitate their meaningful participation in the family-led decision making process. Where this occurs, it would be a conflict of interest for the person performing the role of convenor of the family group meeting to also act as an independent Aboriginal or Torres Strait Islander entity for the child, facilitating the child's or their family's participation in the decision-making process.

Requirements for placing an Aboriginal or Torres Strait Islander child in care (section 83 of the CP Act)

In making a decision about the person in whose care an Aboriginal or Torres Strait Islander child will be placed (under section 82 of the CP Act), Child Safety must, if practicable, place the child with a member of the child's family group.

The child's family group (defined in Schedule 3 of the CP Act) includes:

- members of the child's extended family
- members of the child's clan, tribe or similar, if the child belongs to such a group
- anyone else recognised by the above as belonging to the child's family.

If it is not practicable to place the child in the care of a member of the child's family group, the child must be placed with an Aboriginal or Torres Strait Islander person who is compatible with the child's community or language group.

If it is not practicable to place the child in the care of a person mentioned above, the child must be placed with another Aboriginal or Torres Strait Islander person.

If it is not practicable to place the child in the care of a person mentioned above, the child must be placed with a person who lives near the child's family, community or language group; and has a demonstrated capacity for ensuring the child's continuity of connection to kin, country and culture.

Child Safety must give proper consideration to the views of the child and the child's family about where and with whom the child will live and ensure the decision provides for the optimal retention of the child's relationships with family members and other people of significance to the child under Aboriginal tradition or Island custom.

Requirements for determining how to best achieve permanency for an Aboriginal or Torres Strait Islander child

Decisions about the action or order that would best achieve permanency for a specific Aboriginal or Torres Strait Islander child will consider:

- what long-term effect a decision will have on the Aboriginal or Torres Strait Islander child's identity and connection with the child's family and community, section 5BA of the CP Act
- the five core elements of the [Aboriginal and Torres Strait Islander Child Placement principle](#)
- the child's views and the views of their parents and family
- whether an independent person helped facilitate the child and the child's family participation in decision making and planning
- whether the child and family were provided with an opportunity to participate in a family-led decision making process to help identify the best way to achieve permanency for the child
- the extent to which active efforts have been made to apply the Aboriginal and Torres Strait Islander Child Placement Principle when working with the child and their family
- requirements of section 5BA (4) of the CP Act:
 - the principle that the first preference is for the child to be cared for by the child's family;
 - the principle that the second preference is for the child to be cared for under the guardianship of a person who is a member of the child's family, other than a parent of the child, or another suitable person;
 - the principle that the third preference is for the child to be cared for under the guardianship of the chief executive; and
 - the principle that the last preference is for the child to be adopted under the *Adoption Act 2009*.

The order of preferences for achieving permanency will be considered in context with the requirements of sections 5BA and 5C of the CP Act and the child's specific needs. The order of preferences will not be the sole consideration for deciding how to achieve permanency for a child.

Child Safety will assess the comparative benefits and disadvantages associated with each option to identify the option that best addresses the child's specific needs, is most consistent with the five core elements of the Aboriginal and Torres Strait Islander Child Placement Principle and best fulfils rights and obligations under the *Human Rights Act 2019*.

Authority:

Child Protection Act 1999

Director of Child Protection Litigation Act 2016

Delegations:

Refer to instruments of delegation for delegations relevant to decisions for Aboriginal and Torres Strait Islander children.

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Office: Office of the Chief Practitioner
Help Contact: Child Protection Practice

Links:

Procedures

Child Safety Practice Manual

Related Legislation

Human Rights Act 2019

Related Policies

Case planning (263)

Participation of children and young people in decision-making (369)

Rescinded Policies

Decisions about Aboriginal and Torres Strait Islander children and young people (641-2)

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