

Child Safety POLICY

Title: Decisions about Aboriginal and Torres Strait Islander children

Policy No: 641-5

Policy Statement:

The Department of Families, Seniors, Disability and 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. This includes the child or young person's rights and decision to advise of their cultural identity, as known and recognised by their family and community.

Child Safety will work in partnership with children and families to enable them to meaningfully participate in decisions that affect them. Including processes for decision-making being led by family wherever possible.

Child Safety will make active efforts to apply the [Aboriginal and Torres Strait Islander Child Placement Principle](#) when making significant decisions about an Aboriginal and Torres Strait Islander child.

Child Safety will, in consultation, and with the consent of, Aboriginal and Torres Strait Islander children and their families, arrange for an independent Aboriginal or Torres Strait Islander entity to help 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. Early identification of children's Aboriginal and Torres Strait Islander cultural identity ensures culturally safe support, case planning and care arrangements.



- Aboriginal and Torres Strait Islander people have the right to self-determination (*Child Protection Act 1999* (the Act), section 5C(1)(a)).
- For any decisions or actions taken under the 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 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 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 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*.
- Active efforts will be made to apply the [Aboriginal and Torres Strait Islander Child Placement Principle](#) when making a significant decision about an Aboriginal or Torres Strait Islander child (section 5F(2)(a) of the Act). Active efforts will also be made to apply the Aboriginal and Torres Strait Islander Child Placement Principle when exercising any power or making any decision about an Aboriginal and Torres Strait Islander under the Act.
- Active efforts to apply the Aboriginal and Torres Strait Islander Child Placement Principle mean purposeful, thorough and timely efforts (section 5F(6) of the Act).

Objectives:

This policy aims to ensure that:

- Active efforts will be made to ensure decisions made under the Act in relation to Aboriginal and Torres Strait Islander Child Placement Principle (prevention, partnership, placement, participation and connection) outlined in section 5C of the Act to all processes, decisions and actions for an Aboriginal or Torres Strait Islander child.
- Aboriginal and Torres Strait Islander children and families are enabled to influence, control, 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. This includes cultural identity and correctly recording the child and family's cultural identity, as decided by the child and the child's family.
- Aboriginal and Torres Strait Islander children and families are provided with genuine opportunities to have their voices heard and considered and they are supported to meaningfully participate in decisions that affect or may affect them.

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 Act in relation to Aboriginal and Torres Strait Islander children.

This policy does not relate to decisions made by the litigation director under the Act or the Director under the *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 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 Act)
 - make active efforts to ensure decision are made in a way that uphold the rights of children, their families and Aboriginal and Torres Strait Islander peoples in the Aboriginal and Torres Strait Islander Child Placement Principle (section 5C (2) of the Act) and the principles about Aboriginal and Torres Strait Islander Children (section 5F of the Act)
 - do so in a way that allows the full participation of the child and the child's family group (section 5F of the Act) and creates a welcoming and culturally safe place for children and families that is appropriate to Aboriginal tradition or Island custom (section 5F of the 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 5F of the Act)
- conducting decision-making processes in a place that is appropriate to Aboriginal tradition or Island custom (section 5F of the Act).

Cultural identity of an Aboriginal or Torres Strait Islander child

Aboriginal and Torres Strait Islander peoples are diverse, and individuals and communities choose to define and express their identity in a multitude of ways. The predominant definition (described below), and adopted by all Commonwealth departments, is known as the three-part definition.¹

The Aboriginal and/or Torres Strait Islander status of children is determined by self-identification or by the parent, relatives or other kin. For the purposes of identifying a child's cultural status, an Aboriginal or Torres Strait Islander person is someone who:

- is of Aboriginal or Torres Strait Islander descent
- identifies as an Aboriginal person or Torres Strait Islander, and/or

¹ According to Korff (2018) while this definition is commonly accepted, it is important to note that it is a governmental definition, rather than a community-based one. Nonetheless, it provides useful guidance for practitioners.

- is accepted as such by the Aboriginal or Torres Strait Islander community in which they live or have lived.

Self-identification by a child or the child's family is the only requirement for practitioners to begin applying the Aboriginal and Torres Strait Islander Child Placement Principles in their work with children and families.

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

Before a significant decision is made, 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 the significant decision, unless exceptional circumstances apply
- that Child Safety can arrange for an independent Aboriginal or Torres Strait Islander entity to help facilitate their participation if they consent to the involvement of an independent person.

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 11A of the 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.

If a child or their family consent to the involvement of an independent Aboriginal or Torres Strait Islander entity, 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 5F of the 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.

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 11A of the 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 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 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 Act where they consider it would help them participate in the decision-making process. This includes recording the child and their family's cultural information in client management systems. It is at the discretion of the child and their family, whether cultural information be included, changed or removed.

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 include any of the following relevant activities (section 5H(3) of the Act):

- facilitating the participation of the child, and the child's family, in a decision-making process
- attending, and participating in a case planning meeting for the child
- participating in the review and preparation of a revised case plan for the child
- otherwise participating in a family group meeting for the child

- attending a court ordered conference, under chapter 2, part 5, division 2, related to the child.

By being part of meetings, the entity can help:

- the child and the family feel supported to ensure everything that they wish to say has been shared
- the child and family to ask questions, make suggestions and understand information and discussions about the decision being considered
- 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 help the family to share that information
- provide 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 help Child Safety to understand this information
- 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
- ensure the child's and family's voices are heard and encourage 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 Aboriginal and Torres Strait Islander Child Placement Principle in relation to the child if the Children's Court wants to inform itself about these matters when exercising a power under the 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 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 Chapter 6, Part 6 of the Act). 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 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 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 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 Aboriginal and Torres Strait Islander 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 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 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 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 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 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 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 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.

Records File No.: Not applicable

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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

641-4 Decisions about Aboriginal and Torres Strait Islander children

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