



Secretariat of National  
Aboriginal and Islander  
Child Care

## **Genuine Participation of Aboriginal and Torres Strait Islander Peoples in Child Protection Decision-making for Aboriginal and Torres Strait Islander Children A Human Rights Framework**

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A strong voice for our children and families

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SNAICC is the national non-government peak body  
that advocates on behalf of Aboriginal and Torres  
Strait Islander children and families.

## Table of Contents

<b>1. THE SOURCE AND SCOPE OF THE RIGHT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES TO PARTICIPATE IN CHILD PROTECTION DECISION-MAKING FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN.....</b>	<b>4</b>
<b>2. THE RIGHT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE TO PARTICIPATE IN CHILD PROTECTION DECISION-MAKING FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN AUSTRALIAN LAW AND POLICY .....</b>	<b>7</b>
<b>3. IMPLEMENTING THE RIGHT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES TO PARTICIPATE IN CHILD PROTECTION DECISION-MAKING FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN.....</b>	<b>10</b>

## **1. The source and scope of the right of Aboriginal and Torres Strait Islander peoples to participate in child protection decision-making for Aboriginal and Torres Strait Islander children**

The right of Indigenous peoples to participate in matters affecting their lives is strongly established in international law. The many provisions of human rights instruments that reflect and inform that right provide guidance as to the specific elements required for its realisation. This framework defines 'genuine participation' of Aboriginal and Torres Strait Islander peoples in decision-making as participation that is aligned with this well-established body of international law.

The scope and contents of the right has been described most comprehensively within the *Progress report on the study on indigenous peoples and the right to participate in decision-making* of the Expert Mechanism on the Rights of Indigenous peoples. The report concludes, based on the entire body of human rights law, that, '*Indigenous participation in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights.*'<sup>1</sup>

The right emerges primarily from the strong participatory elements of the right of Indigenous peoples to self-determination, which requires the empowerment of Indigenous peoples to have control over the decisions that affect their own lives. This right, as described in the *Universal Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)*, includes subsidiary rights to free pursuit of economic, social and cultural development and autonomy and self-governance in internal and local affairs (articles 3 and 4). The Declaration recognises concurrent rights of Indigenous peoples to pursue self-determination through their own autonomous decision making institutions and processes and through full participation in the life of the State (articles 4 and 5). The Expert Mechanism has identified that more than 20 provisions within the *UNDRIP* affirm aspects of the right of Indigenous peoples to participate in decision-making that affects their lives.<sup>2</sup>

The *UNDRIP* contains important enabling rights for participation that indicate that the core elements of the right to participate of Indigenous peoples include: representative participation of Indigenous peoples through their own procedures and institutions (article 18); and State consultation and cooperation in good faith with those institutions to obtain the free, prior and informed consent of Indigenous peoples for decisions affecting their lives (article 19). The United Nations Special Rapporteur on the Rights of Indigenous Peoples identifies that this special duty of the state to consult with its Indigenous peoples is '*premised on an understanding of Indigenous peoples' relative marginalization and disadvantaged conditions in regard to normal democratic processes*', and '*derives from the overarching right of indigenous peoples to self-determination and from principles of popular sovereignty and government by consent; and it is a corollary of related human rights principles.*'<sup>3</sup>

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<sup>1</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, 2010, Un Doc: A/HRC/15/35, para. 2.

<sup>2</sup> *Ibid*, para. 9.

<sup>3</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 2009, UN Doc: A/HRC/12/34, para. 62.

The *International Convention on the Elimination of Racial Discrimination 1969 (ICERD)* requires that States ensure equality in the enjoyment of rights of all peoples 'without distinction as to race, colour, or national or ethnic origin' (article 5). This includes formal and substantive discrimination, meaning that not only must laws, policies and practices not discriminate on the basis of race, but that positive measures must also be adopted to eliminate discriminatory practices, and the conditions and attitudes which cause or perpetuate discrimination.<sup>4</sup> As the Committee on Economic, Social and Cultural rights describes: '*Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.*'<sup>5</sup> Realising the right to participation thus requires specific attention to barriers to effective participation for Indigenous peoples and consideration of special measures that may be necessary to enable equality in enjoyment of the right to participation. Though it is important to note that participation itself cannot be properly understood as a temporary special measure to address discrimination against Indigenous peoples, but is a distinct right of Indigenous peoples.

In its General Recommendation 23, the Committee on the Elimination of Racial Discrimination specifically recognises the requirement for States to take measures to preserve and respect Indigenous cultures, languages, histories and ways of life.<sup>6</sup> *ICERD* Article 5 notes particularly the obligation to guarantee equality in the enjoyment of rights to participate in public life. Interpreting this provision in the context of Indigenous peoples, the Committee concludes that it requires '*that no decisions directly relating to their rights and interests are taken without their informed consent.*'<sup>7</sup>

The Human Rights Committee identifies that participation of Indigenous peoples in decision-making may further be required to protect the right to enjoyment of culture of Indigenous minority groups recognised in article 27 of the *International Covenant on Civil and Political Rights 1966 (ICCPR)*.<sup>8</sup> The separation of families and communities that occurs through child protection intervention arguably constitutes one of the most significant threats to the collective enjoyment of cultural rights and should invoke such protections. For children, this further invokes their right to enjoyment of culture under article 30 of the *Convention on the Rights of the Child 1989 (CRC)* and impacts on the principle that all actions concerning a child must primarily consider their best interests (article 3). In its General Comment 11, the Committee on the Rights of the Child noted that the best interests principle is conceived

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<sup>4</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the Convention on the Elimination of Racial Discrimination*, 24 September 2009, CERD/C/GC/32, para. 6; Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 8.

<sup>5</sup> Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 8.

<sup>6</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, 1997, UN doc: A/52/18, annex V at 122, para. 4(a).

<sup>7</sup> *Ibid*, para. 4(d).

<sup>8</sup> Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, 1994, UN doc: HRI/GEN/1/Rev.1 at 38, para. 7.

both as an individual and collective right, requiring consideration of how the right relates to collective cultural rights.<sup>9</sup> The Committee describes that:<sup>10</sup>

*When State authorities including legislative bodies seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group...the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way.*

This is particularly relevant in the field of child protection decision-making, having particular regard to the right of children not to be separated from their parents unless to do so is in their best interests (article 9(1)); and the requirement in the *CRC* that all interested parties have the opportunity to participate in proceedings that lead to such separation (article 9(2)). Article 20(3) further recognises the need for due regard to ‘the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’ in making alternative care decisions. It is important to note that this area of decision-making also engages the *CRC* right of children to participate in decisions that affect them in line with their capacity, age and maturity (article 12). Importantly, the Committee on the Rights of the Child has recognised that in the case of children the best interests of the individual child cannot be violated in preference for the rights of the group,<sup>11</sup> and other children’s rights, including the right to be free from abuse and neglect (article 19(1)), remain paramount in child protection decision-making.

The interaction of decisions to remove a child made in his/her best interests with the decision’s specific impact on collective cultural rights highlights that this is an area where decision-making impacts disproportionately on Indigenous peoples. In Australia’s recent history child protection intervention has had a devastating impact in violation of collective enjoyment of cultural rights through the policies and practices that caused the Stolen Generations.<sup>12</sup> Australia’s Indigenous peoples are particularly affected by child protection decision-making owing to the long-term impacts of past policies of forced child removal and their continuing over-representation in the child protection system.<sup>13</sup> The potential for further damage to the connectedness and survival of Aboriginal and Torres Strait Islander cultures, communities and families through child removal reinforces this as a priority area for the promotion and protection of the right of Indigenous peoples to participate in Australia.

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<sup>9</sup> Committee on the Rights of the Child, *General Comment No. 11, Indigenous Children and their Rights under the Convention*, 2009, CRC/C/GC/11, 12 February 2009, para. 31.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 30.

<sup>12</sup> See: Human Rights and Equal Opportunity Commission. (1997). *Bringing them home: Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*, Canberra: Commonwealth of Australia.

<sup>13</sup> see: Australian Institute of Health and Welfare. (2012). *Child Protection Australia 2010-11*. (Child Welfare Series No. 53). Canberra: Author.

## 2. The right of Aboriginal and Torres Strait Islander people to participate in child protection decision-making for Aboriginal and Torres Strait Islander children in Australian law and policy

The importance of the right of Aboriginal and Torres Strait Islander peoples to participate in child protection decision-making has been recognised in Australian law and policy, particularly through the Aboriginal and Torres Strait Islander child placement principle (ATSICPP).<sup>14</sup> This principle aligns with international human rights standards in highlighting the central importance of maintaining connections to family, culture and community in order to advance the best interests of Aboriginal and Torres Strait Islander children. The ATSICPP has been implemented to varying degrees within legislation and policy of different Australian states and territories. Table 1 below shows the alignment between core aspect of the ATSICPP and human rights standards described in section 1.

**Table 1 – Supporting the right to participate through the Aboriginal and Torres Strait Islander participation principle<sup>15</sup>**

Aspects of the ATSICPP	Rights standards supported
Priority placement of Aboriginal and Torres Strait Islander children in order, with their Aboriginal and Torres Strait Islander family, community, or other Aboriginal and Torres Strait Islander families, where such placement is safe for the child.	CRC articles 3, 20(3), 30; ICCPR article 27.
Required consultation with Aboriginal and Torres Strait Islander families, communities and organisations about child protection intervention, and child placement and care.	UNDRIP articles 3, 4, 5, 18 and 19; CRC articles 3, 9(2), 30; ICCPR article 27; ICERD article 5.
Support for Aboriginal and Torres Strait Islander children in out-of-home care to maintain connection to family, community and culture, especially children placed with non-Indigenous carers.	CRC articles 3, 20(3), 30; ICCPR article 27.

Despite the promise of the ATSICPP to support aspects of the right to participate in child protection decision making of Aboriginal and Torres Strait Islander peoples, the structures to enable that participation have been limited and inconsistent, and roles for Aboriginal and Torres Strait Islander peoples have been, at best, advisory rather than authoritative in decision-making processes. While the priority of placement options provided by the ATSICPP is relatively consistent in Australian law, requirements to consult with Aboriginal peoples are variable, and accountability for implementing those requirements is regularly lacking. For example, the 2010/11 audit of compliance with the ATSICPP in Queensland revealed that consultation could only be demonstrated in 62% of relevant cases despite the legislative requirement to consult with a recognised Aboriginal and Torres Strait Islander

<sup>14</sup> All Australian states and territories have implemented the Aboriginal and Torres Strait Islander child placement in legislation and policy to varying degrees.

<sup>15</sup> Aspects of the ATSICPP are drawn from the definition of the Principle developed by SNAICC and available in: Department of Human Services (Victoria) (2002), *Aboriginal Child Placement Principle: Guide*. Available at: [http://www.cyf.vic.gov.au/\\_\\_data/assets/pdf\\_file/0019/17083/placement\\_aboriginal\\_cppguide\\_2002.pdf](http://www.cyf.vic.gov.au/__data/assets/pdf_file/0019/17083/placement_aboriginal_cppguide_2002.pdf)

organisation.<sup>16</sup> Evidence given to the 2008 Special Commission of Inquiry into Child Protection services in New South Wales showed that the Department of Community Service could not account in any detailed way for compliance with aspects of the ATSCPP, including the requirement to consult. This led the inquiry to conclude that '*data extraction and analysis is currently not sufficiently sophisticated to report on compliance.*'<sup>17</sup> In the Northern Territory there is no mandatory legislative requirement to consult with Aboriginal and Torres Strait Islander people or organisations.<sup>18</sup> Overall, 31% of Aboriginal and Torres Strait Islander children continue to be placed with non-Indigenous carers.<sup>19</sup> While other factors, including especially a shortage of Aboriginal and Torres Strait Islander carers, are often cited as reasons for non-compliance,<sup>20</sup> the lack of detailed compliance monitoring and data availability means that the extent of and reasons for non-compliance with the ATSCPP are poorly understood.

In some jurisdictions Aboriginal and Torres Strait Islander organisations have legislated and funded roles to be consulted in child protection decision-making, but the nature of that consultation and the extent to which it contributes to genuine participation has received little attention.<sup>21</sup> Family group conferencing processes also support participation of Aboriginal and Torres Strait Islander peoples in child protection decision-making, and are either required or provided for in legislation in four states and both territories.<sup>22</sup> Family group conferencing has been recognised as having potential for empowering families and communities through collaborative processes that enable them to make decisions about the care and protection of their own children.<sup>23</sup> However, the contribution of conferences has been limited by a lack of mandatory requirement to offer them in most jurisdictions and a lack of authority of decisions emerging from them.<sup>24</sup>

The nature of the ATSCPP itself, requiring 'consultation' in the decision-making process, may not go far enough towards enabling participation unless, in practice, that consultation is designed to pursue the objective of genuine participation. The detailed components of the right to participate in child protection decision-making that are elaborated in section 3

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<sup>16</sup> Commission for Children and Young People and Child Guardian. (2012). *Indigenous Child Placement Principle Audit Report 2010/11*, pp. 31-32, available at:

<http://www.ccyipc.qld.gov.au/resources/publications/icpp-2010-11.html>

<sup>17</sup> Wood, J. (2008). *Report of the Special Commission of Inquiry into Child Protection Services in NSW*. Vol 2, p. 427.

<sup>18</sup> See *Care and Protection of Children Act 2007 (NT)*, s12.

<sup>19</sup> Australian Institute of Health and Welfare. (2012). *Child Protection Australia 2010-11*. (Child Welfare Series No. 53). Canberra: Author, 36-37.

<sup>20</sup> See for example: Cummins, P. et al (2012) *Report of the Protecting Victoria's Vulnerable Children Inquiry*, p. 295; Wood, J. (2008). *Report of the Special Commission of Inquiry into Child Protection Services in NSW*. Vol 2, p. 428.

<sup>21</sup> No significant evaluations of consultation processes are available. The *Protocol between the Department of Human Services Child Protection Service and the Victorian Aboriginal Child Care Agency (2002)* provides one of the clearest statements of the scope of consultation required. Available at: [http://www.dhs.vic.gov.au/\\_\\_data/assets/pdf\\_file/0010/580906/aboriginal\\_child\\_care\\_protocol-2002.pdf](http://www.dhs.vic.gov.au/__data/assets/pdf_file/0010/580906/aboriginal_child_care_protocol-2002.pdf)

<sup>22</sup> See: Harris, N. (2008). *Family group conferencing in Australia 15 years on*. Issues Paper 27, Child Protection Clearing House, available at: <http://www.aifs.gov.au/nch/pubs/issues/issues27/issues27.html>

<sup>23</sup> See for example: Cummins, P. et al (2012) *Report of the Protecting Victoria's Vulnerable Children Inquiry*, p. 304.

<sup>24</sup> Harris, N. (2008). *Family group conferencing in Australia 15 years on*. Issues Paper 27, Child Protection Clearing House, pp.13-14, available at: <http://www.aifs.gov.au/nch/pubs/issues/issues27/issues27.htm>



below provide a basis for testing the extent to which the ATSCPP and current measures to implement it enable genuine participation of Aboriginal and Torres Strait Islander peoples in child protection decision-making.

### 3. Implementing the right of Aboriginal and Torres Strait Islander peoples to participate in child protection decision-making for Aboriginal and Torres Strait Islander children.

The international human rights standards discussed in section 1 above indicate a number of core components of participation in child protection decision-making that is aligned with the human rights of Aboriginal and Torres Strait Islander peoples. These are described and aligned with relevant human rights standards in Table 2 below.

**Table 2 – Core components of the right of Aboriginal and Torres Strait Islander peoples to participate in child protection decision-making**

Component	Rights standards alignment
Genuine participation requires representative consultation with affected Aboriginal and Torres Strait Islander peoples through their own procedures and institutions	UNDRIP articles 3, 4 and 18
Genuine participation requires consultation in good faith with affected Aboriginal and Torres Strait Islander peoples	UNDRIP article 19
Genuine participation requires that decisions are made with the free, prior and informed consent of affected Aboriginal and Torres Strait Islander peoples	UNDRIP article 19; ICERD article 5
Genuine participation prioritises, promotes and safeguards the collective cultural rights of Aboriginal and Torres Strait Islander peoples	ICCPR article 27; CRC articles 3, 9(1), 20(3) and 27; UNDRIP especially articles 11-13
Genuine participation recognises the rights of affected Aboriginal and Torres Strait Islander children to participate in child protection decision-making	CRC articles 9(2) and 12

The Australian Human Rights Commission has undertaken significant work to detail constituent elements and practical measures required to realise the right of Aboriginal and Torres Strait Islander participation in decision-making that affects their lives. This work is represented in three core documents upon which this participation framework draws strongly:

- *Principles for effective consultation and engagement*<sup>25</sup>
- *Elements of a common understanding of free, prior and informed consent*<sup>26</sup>

<sup>25</sup> Calma, T. (2009). *Native title report 2009*, Appendix 3, Sydney: Australian Human Rights Commission.

- *Features of a meaningful and effective consultation process*<sup>27</sup>

Collectively these documents provide clear guidance on human rights standards for enabling genuine participation of Aboriginal and Torres Strait Islander peoples. The principles and practices they identify as important to genuine participation are incorporated in Tables 3-7 below which describe the detailed elements of each identified participation component.

In the context of child protection decision-making the jurisprudence of the United Nations Committee on the Rights of the Child provides further significant guidance on participatory elements of relevant rights within the *Convention on the Rights of the Child 1989 (CRC)* and informs the elements described in Tables 3-7 below. They draw particularly on the Committee’s General Comment 11 on the rights of Indigenous children.

Realising the rights of Aboriginal and Torres Strait Islander peoples to participate in child protection decisions further requires access to effective remedies in the case of violations of those rights in line with article 40 of the *United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)* and as has been recognised as implicit in the *CRC*.<sup>28</sup> While aspects of accountability are considered within the different components below, Indigenous peoples must have access to adequate processes and procedures to seek redress where *any* of the components are not adhered to by the State, including reparations for breaches of the rights.

**Table 3 – Genuine participation requires representative consultation with affected Aboriginal and Torres Strait Islander peoples through their own procedures and institutions**

Elements of representative consultation	Description	Key questions for application in child protection decision-making
Aboriginal and Torres Strait Islander peoples select their own representatives in consultation processes.	<i>Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.</i> <sup>29</sup>	<ul style="list-style-type: none"> <li>▪ Are consulted people identified or appointed by Aboriginal and Torres Strait Islander community-controlled organisations or through other community-based decision-making processes?</li> <li>▪ Do local Aboriginal and Torres Strait Islander communities have a role in</li> </ul>

<sup>26</sup> Calma, T. (2010). *Native title report 2010*, Appendix 3, Sydney: Australian Human Rights Commission.

<sup>27</sup> Ibid, Appendix 4.

<sup>28</sup> Committee on the Rights of the Child, *General Comment 5: General measure of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* CRC/GC/2003/5, 27 November 2003, para. 24.

<sup>29</sup> Calma, T. (2010). *Native title report 2010*, Appendix 3, Sydney: Australian Human Rights Commission, p. 110.

		<p>determining which organisations will represent them in the decision-making processes?</p> <ul style="list-style-type: none"> <li>Do decision-makers consistently consult with specified representative organisations, or do they make their own choices about which Aboriginal and Torres Strait Islander people to consult with?</li> </ul>
<p>Consulted people should be broadly representative of the affected community.</p>	<p><i>Ensure that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.</i><sup>30</sup></p>	<ul style="list-style-type: none"> <li>Who are the relevant people and/or organisations within Aboriginal and Torres Strait Islander communities to participate in child protection decision-making?</li> <li>How are these groups identified and included?</li> <li>What community structures exist or are required to enable representative participation?</li> </ul>
<p>Consulted people should be representative of the <b>specific</b> affected community.</p>	<p><i>Recognise the diversity of Aboriginal and Torres Strait Islander communities. Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.</i><sup>31</sup></p>	<ul style="list-style-type: none"> <li>Are consulted individuals or organisations required to have cultural and community connections to the child's specific community?</li> <li>Are there a sufficient number of organisations in enough locations with a role in the decision-making process to be representative of specific communities?</li> <li>Is each child's extended family included in consultations?</li> </ul>
<p>Respect for local Aboriginal and Torres Strait Islander decision-making processes</p>	<p>Consultation must show respect, and provide time and space, for local Aboriginal and Torres Strait Islander decision-making processes. Local knowledge must be valued and utilised.<sup>32</sup></p>	<ul style="list-style-type: none"> <li>Do Aboriginal and Torres Strait Islander individuals and organisations have a culturally safe space to provide input based on their own culture, knowledge and decision-making processes?</li> <li>Are Aboriginal and Torres Strait Islander professionals that participate in decision-making supported within organisations that utilise local Aboriginal and Torres Strait Islander cultural knowledge and decision-making processes?</li> </ul>

<sup>30</sup> Calma, T. (2009). *Native title report 2009*, Appendix 3, Sydney: Australian Human Rights Commission, p. 204.

<sup>31</sup> Ibid, p. 203.

<sup>32</sup> Ibid, p. 204.

**Table 4 – Genuine participation requires consultation in good faith with affected Aboriginal and Torres Strait Islander peoples**

Elements of consultation in good faith	Description	Key questions for application in child protection decision-making
Consultation is in the nature of negotiations	Consultation must go beyond information provision. Government positions should not be predetermined and decision-makers must be <i>'willing and flexible enough to accommodate the concerns of Aboriginal and Torres Strait Islander peoples'</i> , and work towards agreement. <sup>33</sup>	<ul style="list-style-type: none"> <li>▪ Are decision-makers obliged to take account of or act on the views of consulted Aboriginal and Torres Strait Islander individuals or organisations?</li> <li>▪ What is required and what approach is taken in practice where the views of decision-makers and consulted peoples differ?</li> <li>▪ Is there any recourse if decision-makers take no account of views of persons consulted?</li> </ul>
Consultations begin early and are ongoing	Aboriginal and Torres Strait Islander peoples must be involved from the beginning of the decision-making process and throughout, as well as in the evaluation of outcomes of the decision-making process. <sup>34</sup>	<ul style="list-style-type: none"> <li>▪ At what stages of child protection notification, intervention, and placement decision-making do Aboriginal and Torres Strait Islander peoples have input? When is input first requested?</li> <li>▪ Are all relevant decision-makers obliged to consult (eg. government child protection workers, courts, out-of-home care service providers)?</li> <li>▪ Are adequate measures in place to ensure that Aboriginal and Torres Strait Islander children notified to child protection services are identified as Aboriginal and Torres Strait Islander?</li> <li>▪ Does the role of Aboriginal and Torres Strait Islander organisations and individuals extend beyond <i>initial</i> placement decisions to planning for ongoing cultural care and potential reunification of children with their families?</li> <li>▪ Do decision-makers and consulted Aboriginal and Torres Strait Islander organisation and individuals undertake shared evaluation and review of the consultation process and outcomes including: appropriateness of removal decisions; appropriate risk management and safety of the child; appropriate placement; quality and implementation of cultural support plans; overall compliance with the ATSICPP.</li> </ul>

<sup>33</sup> Calma, T. (2010). *Native title report 2010*, Appendix 4, Sydney: Australian Human Rights Commission, p. 111.

<sup>34</sup> *Ibid*, p. 112.

**Table 5 – Genuine participation requires that decisions are made with the free, prior and informed consent of affected Aboriginal and Torres Strait Islander peoples**

Elements of free, prior and informed consent	Description	Key questions for application in child protection decision-making
Consultation aims to obtain consent or agreement of affected Aboriginal and Torres Strait Islander peoples	<i>In all cases, States should engage in '[a] good faith effort towards consensual decision-making'.<sup>35</sup> Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.<sup>36</sup></i>	<ul style="list-style-type: none"> <li>▪ Do consulted Aboriginal and Torres Strait Islander individuals and organisations, and government child protection decision-makers work in partnership to reach agreement on what is in the best interests of the child?</li> <li>▪ What processes are in place to support fair and equal agreement making between the parties?</li> <li>▪ Are there conflicts in the interests and objectives of Aboriginal and Torres Strait Islander peoples and government child protection services that obstruct consensual decision-making?</li> </ul>
Consultation process is the product of consensus	<i>The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on indigenous peoples. A consultation process should itself be the product of consensus.<sup>37</sup></i>	<ul style="list-style-type: none"> <li>▪ Is the process for consultation agreed between Aboriginal and Torres Strait Islander organisations and individuals and government child protection services?</li> <li>▪ Are there agreed protocols that reflect how consultation should be and/or is undertaken?</li> <li>▪ Is responsibility and accountability for initiating, undertaking and participating in consultation agreed and appropriately shared between the parties?</li> </ul>
Aboriginal and Torres Strait Islander peoples have access to financial, technical and other assistance	<i>Without adequate resources to attend meetings, take proposals back to their communities or access appropriate expert advice, Aboriginal and Torres Strait Islander peoples cannot possibly be</i>	<ul style="list-style-type: none"> <li>▪ Are Aboriginal and Torres Strait Islander individuals or organisations adequately resourced to participate effectively in child protection decisions?</li> <li>▪ Is there adequate Aboriginal and Torres Strait Islander workforce capacity for participation in child protection decisions? What is needed to develop this?</li> </ul>

<sup>35</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 2009, UN Doc: A/HRC/12/34, para. 48.

<sup>36</sup> Ibid.

<sup>37</sup> Calma, T. (2010). *Native title report 2010*, Appendix 4, Sydney: Australian Human Rights Commission, p. 111.

	<i>expected to consent to or comment on any proposal in a fully informed manner.</i> <sup>38</sup>	<ul style="list-style-type: none"> <li>What expert knowledge and skills do Aboriginal and Torres Strait Islander peoples need to participate effectively in child protection decision-making?</li> </ul>
Aboriginal and Torres Strait Islander peoples are not pressured into making a decision	<i>Governments should not use coercion or manipulation to gain consent. In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes.</i> <sup>39</sup>	<ul style="list-style-type: none"> <li>Are Aboriginal and Torres Strait Islander people consulted free to express a genuinely independent view? Are there any potentially negative consequences of refusing to agree with government position? Is there legitimate fear of such consequences?</li> <li>Do power dynamics between decision-makers and consulted people affect the free expression of views?</li> </ul>
Aboriginal and Torres Strait Islander peoples have adequate time to consider the impact of a decision	<i>Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner.</i> <sup>40</sup>	<ul style="list-style-type: none"> <li>What time is provided for consideration of a decision and provision of advice by Aboriginal and Torres Strait Islander peoples?</li> <li>What are the impacts of emergency and urgent decision-making in child protection on effective participation of Aboriginal and Torres Strait Islander peoples?</li> <li>What resources and support are needed to ensure Aboriginal and Torres Strait Islander peoples can be available and ready to participate in time-pressured child protection decisions?</li> </ul>
Governments provide all relevant information in an accessible way	<i>To ensure that Aboriginal and Torres Strait Islander peoples are able to exercise their rights to participate in decision-making in a fully informed way, governments must provide full and accurate information about the proposed measure and its potential impact. This information needs to be clear, accessible and easy to understand.</i> <sup>41</sup>	<ul style="list-style-type: none"> <li>Can and do government child protection services share all relevant case information with consulted Aboriginal and Torres Strait Islander organisations and individuals?</li> <li>Does legislation enable sharing of information with consulted Aboriginal and Torres Strait Islander organisations and individuals?</li> <li>What procedures are in place to enable the free sharing of information? Are information systems aligned to facilitate sharing?</li> <li>Is there a limit to what information can and should be shared by government child protection services?</li> </ul>

<sup>38</sup> Ibid, p. 112.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, p. 113.

<p>Free, prior and informed consent is verified and open to review</p>	<p><i>Mechanisms and procedures should be established to verify free, prior and informed consent...[and] inter alia, mechanisms of oversight and redress, including the creation of national ones.</i><sup>42</sup></p>	<ul style="list-style-type: none"> <li>▪ Are decision-makers accountable for complying with requirements to consult? What happens if there is non-compliance?</li> <li>▪ Are decision-makers required to demonstrate how they have taken account of or incorporated the views of consulted Aboriginal and Torres Strait Islander organisations or individuals?</li> <li>▪ Are there agreed and shared processes for assessing and reviewing decisions between decision-makers and consulted Aboriginal and Torres Strait Islander organisations or individuals?</li> <li>▪ Is the effectiveness and success of consultation processes regularly evaluated?</li> <li>▪ Are there accessible mechanisms for Aboriginal and Torres Strait Islander peoples to appeal a decision made?</li> </ul>
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**Table 6 – Genuine participation safeguards, prioritises and promotes the collective cultural rights of Aboriginal and Torres Strait Islander peoples**

<b>Elements of collective cultural rights protection and promotion in decision-making</b>	<b>Description</b>	<b>Key questions for application in child protection decision-making</b>
<p>Aboriginal and Torres Strait Islander peoples provide input on the nature and importance of culture in decisions that affect their collective enjoyment of cultural rights.</p>	<p><i>With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples...The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of</i></p>	<ul style="list-style-type: none"> <li>▪ Do Aboriginal and Torres Strait Islander peoples have the opportunity to provide adequate information to decision-makers about the cultural needs of Aboriginal and Torres Strait Islander children, and how best to meet them?</li> <li>▪ Are there processes in place and implemented to assess a child’s cultural rights and needs?</li> <li>▪ Are decision-makers aware of and committed to protecting cultural rights of Aboriginal and Torres Strait Islander children and their peoples?</li> <li>▪ Are additional measures needed to increase the cultural competence of decision-makers for making the best decisions for Aboriginal and Torres Strait</li> </ul>

<sup>42</sup> Calma, T. (2010). *Native title report 2010*, Appendix 3, Sydney: Australian Human Rights Commission, p. 110.



	<p><i>minority communities in decisions which affect them.</i><sup>43</sup></p> <p><i>When State authorities including legislative bodies seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group...The indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way.</i><sup>44</sup></p>	Islander children?
<p>Aboriginal and Torres Strait Islander peoples are consulted on measures to support and maintain connection to cultural identity for Aboriginal and Torres Strait Islander children.</p>	<p><i>Specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.</i></p> <p><i>Specifically, if an indigenous child is placed in care outside their community, the State party should take special measures to ensure that the child can maintain his or her cultural identity.</i><sup>45</sup></p>	<ul style="list-style-type: none"> <li>▪ Does the decision-making process overall aim to implement the Aboriginal and Torres Strait Islander child placement principle?</li> <li>▪ Are adequate measures in place to ensure that Aboriginal and Torres Strait Islander children notified to child protection services are identified as Aboriginal and Torres Strait Islander?</li> <li>▪ Do Aboriginal and Torres Strait Islander organisations and individuals provide cultural input throughout the decision-making process from notification to ongoing cultural care and potential reunification?</li> <li>▪ What special measures are in place to ensure cultural identity is maintained? Are these enforceable?</li> <li>▪ Do Aboriginal and Torres Strait Islander families and communities have an ongoing role to support each child’s cultural connection and identity?</li> </ul>

<sup>43</sup> Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, 1994, UN doc: HRI/GEN/1/Rev.1 at 38, para. 7.

<sup>44</sup> Committee on the Rights of the Child, *General Comment No. 11, Indigenous Children and their Rights under the Convention*, 2009, CRC/C/GC/11, 12 February 2009, para. 30-31.

<sup>45</sup> *Ibid*, para. 48

<p>Aboriginal and Torres Strait Islander peoples are consulted on measures to safeguard the integrity of their families and communities, including through culturally competent family support, education and health service provision.</p>	<p><i>States parties should ensure effective measures are implemented to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities.</i><sup>46</sup></p> <p><i>Maintaining the best interests of the child and the integrity of indigenous families and communities should be primary considerations in development, social services, health and education programmes affecting indigenous children.</i><sup>47</sup></p> <p><i>In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.</i><sup>48</sup></p>	<ul style="list-style-type: none"> <li>▪ Do Aboriginal and Torres Strait Islander communities and organisations have a role in the design, development and delivery of services that respond in culturally competent ways to the needs of Aboriginal and Torres Strait Islander children and families?</li> <li>▪ Do Aboriginal and Torres Strait Islander communities, organisations, and state, territory and national representative bodies have a role in policy development that seeks to ensure adequate, quality and culturally competent services for Aboriginal and Torres Strait Islander children and families?</li> <li>▪ Are standards of cultural competence, developed in consultation with Aboriginal and Torres Strait Islander peoples, applied to all services for Aboriginal and Torres Strait Islander children and families?</li> <li>▪ Are adequate measures taken to provide services that are accessible for and meet the needs of particularly vulnerable Aboriginal and Torres Strait Islander children and families? Do those children and families have a voice in service development and delivery?</li> </ul>
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<sup>46</sup> Ibid, para. 46

<sup>47</sup> Ibid, para. 47.

<sup>48</sup> Ibid, para. 48.

**Table 7 – Genuine participation recognises the rights of affected Aboriginal and Torres Strait Islander children to participate in child protection decision-making**

Elements of child participation	Description	Key questions for application in child protection decision-making
Children participate in decisions that affect them in line with their capacity, age and maturity	<i>The State party has the obligation to respect the child's right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation is to be respected in any judicial or administrative proceeding.</i> <sup>49</sup>	<ul style="list-style-type: none"> <li>▪ To what extent is child participation enabled and appropriate based on age and development for Aboriginal and Torres Strait Islander children in child protection decision-making?</li> <li>▪ Do Aboriginal and Torres Strait Islander children have a voice in court proceeding regarding their protection?</li> <li>▪ Do Aboriginal and Torres Strait Islander children contribute to planning for their ongoing cultural, community and family connections?</li> <li>▪ What are the implications of conflict between the views of Aboriginal and Torres Strait Islander children, and what is needed to ensure their safety, or to support their connection to family, community and culture?</li> <li>▪ Are Aboriginal and Torres Strait Islander children provided with sufficient information to enable informed participation in child protection proceedings?</li> </ul>
Children have access to culturally appropriate participation processes, including culturally competent representatives and interpreters	<i>Taking into account the obstacles which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one's opinion.</i> <sup>50</sup>	<ul style="list-style-type: none"> <li>▪ Do Aboriginal and Torres Strait Islander children have the support and/or representation of culturally competent professionals, including Aboriginal and Torres Strait Islander organisations and professionals in child protection proceedings?</li> <li>▪ Do Aboriginal and Torres Strait Islander children who speak primarily in their Aboriginal or Torres Strait Islander language have access to interpreters in proceedings?</li> </ul>
Children are informed of their right to be free from abuse and have easy access to individuals	<i>Effective inclusion of children in protective measures requires that children be informed about their right to be heard and to grow up free</i>	<ul style="list-style-type: none"> <li>▪ Are Aboriginal and Torres Strait Islander children aware of their rights to be heard and to be free from abuse? Are there sufficient programs in place to educate Aboriginal and Torres Strait Islander children about their rights?</li> </ul>

<sup>49</sup> Ibid, para. 38.

<sup>50</sup> Ibid.

and organisation to report abuse	<i>from all forms of physical and psychological violence. States parties should oblige all children's institutions to establish easy access to individuals or organizations to which they can report in confidence and safety, including through telephone helplines, and to provide places where children can contribute their experience and views on combating violence against children.</i> <sup>51</sup>	<ul style="list-style-type: none"> <li>▪ Do Aboriginal and Torres Strait Islander children have access to services and supports that enable them to report threats to their safety generally and when they are in out-of-home care?</li> </ul>
Children have access to adequate redress where their right to participate is violated	<i>Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.</i> <sup>52</sup>	<ul style="list-style-type: none"> <li>▪ Are Aboriginal and Torres Strait Islander children in out-of-home care provided with adequate information about their case, including reasons for removal, placement and family contact arrangements?</li> <li>▪ Are Aboriginal and Torres Strait Islander children in out-of-home care provided with information about their rights and ways that they can seek redress for violations?</li> <li>▪ Do Aboriginal and Torres Strait Islander children in out-of-home care have ready access to independent advocates and complaints procedures to seek redress for violations of their rights?</li> </ul>

<sup>51</sup> Ibid, para. 120.

<sup>52</sup> Committee on the Rights of the Child, *General Comment 5: General measure of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* CRC/GC/2003/5, 27 November 2003, para. 24.