

Australian Capital Territory

Children and Young People (Aboriginal and Torres Strait Islander Young People) Policy and Procedures 2018 (No.1)

Notifiable instrument NI2018-435

made under the

***Children and Young People Act 2008*, section 143 youth detention policy and operating procedures**

1 Name of instrument

This instrument is the *Children and Young People (Aboriginal and Torres Strait Islander Young People) Policy and Procedures 2018 (No.1)*.

2 Commencement

This instrument is to commence the day after notification.

3 Repeal

NI2015-380 is revoked.

4 Policies and operating procedures

Under section 143 of the *Children and Young People Act 2008*, I make the attached Aboriginal and Torres Strait Islander Young People Policy and Procedures to facilitate the effective and efficient management of detention services for young people.

Bernadette Mitcherson
Director-General
Community Services Directorate
7 August 2018

Aboriginal and Torres Strait Islander Young People Policy and Procedures

1. Introduction and Purpose

The ACT Government, as a member of the Council of Australian Governments, has committed to the National Framework of Principles for Delivering Services to Indigenous Australians (the National Framework), that aims to improve the delivery of services, build greater opportunities and help Indigenous families and individuals to become self-sufficient. All policies and procedures are written with consideration of the recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).

2. Legal Authority and Obligations

- 2.1 The *Children and Young People Act 2008* (the Act) is the primary source of authority for the operations of a detention place. The provisions of the Act must be complied with at all times by staff exercising functions at a detention place and in relation to Aboriginal and Torres Strait Islander young people.
- 2.2 The policies and procedures provide specific directions to implement the provisions of the Act and other relevant legislation, including the *Human Rights Act 2004*.
- 2.3 Human rights that are protected by the *Human Rights Act 2004* and that are relevant to this policy and procedure are:

Section 19 Humane treatment when deprived of liberty

- (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person must be segregated from convicted people, except in exceptional circumstances.
- (3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

Section 20 Children in the criminal process

- (1) An accused child must be segregated from accused adults.
- (2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted.
- (3) A child must be brought to trial as quickly as possible.
- (4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

Section 27 Rights of minorities

- (1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

- 2.4 The following international human rights standards apply in the ACT and are relevant to this policy and procedures:
- (a) United Nations Convention on the Rights of the Child
 - (b) United Nations Standard Minimum Rules for the Administration of Juvenile Justice
 - (c) United Nations Rules for the Protection of Juveniles Deprived of their Liberty Rule 47, 48
 - (d) Standard Minimum Rules for the Treatment of Prisoners
 - (e) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - (f) United Nations Declaration on the Rights of Indigenous People.

3. Authorisations and Delegations

- 3.1 The Manager is responsible for ensuring that all staff working at a detention place receives cultural awareness training. The training will include information on the National Framework, an overview of Bringing Them Home: The Stolen Children Report, and the recommendations of the Royal Commission into Aboriginal Deaths in Custody. This will provide staff with a better understanding of the issues faced by Aboriginal and Torres Strait Islander families.
- 3.2 The Manager is responsible for assisting staff to develop a better understanding of Aboriginal and Torres Strait Islander culture and will coordinate events and activities of cultural significance, including celebrations to promote reconciliation and healing.
- 3.3 Staff must encourage and support Aboriginal and Torres Strait Islander young people to engage with all appropriate program or service opportunities including culturally specific services. It is hoped that these programs and services will provide Indigenous young people with the opportunity to strengthen their links with Aboriginal and Torres Strait Islander communities and their own cultural and spiritual understanding.
- 3.4 Staff must participate in training that aims to improve cultural understanding and service delivery.
- 3.5 All staff are responsible for forming and maintaining positive relationships with young people, particularly those who identify as Aboriginal and/or Torres Strait Islander. All staff should encourage Aboriginal and/or Torres Strait Islander young people to participate fully in educational or vocational programs, counselling, or other activities that will enable the young people to develop in a socially responsible way and enhance and maintain their cultural identity.
- 3.6 This will be achieved through regular contact with the young people, liaison with families, carers and cultural agencies and ensuring the young person's cultural and/or spiritual needs and wishes are met through the case management process.
- 3.7 Staff must consider the content of this policy and procedures, with any other relevant policy and procedures, in relation to any young person who identifies as Aboriginal and/or Torres Strait Islander.

4. Definitions

Aboriginal person is defined in the dictionary of the *Children and Young People Act 2008* as a person who is a descendant of the Indigenous inhabitants of Australia; who regards himself or herself as an Aboriginal or if the person is a child, is regarded as an Aboriginal by a parent or family member; and is accepted as an Aboriginal by an Aboriginal community.

Accredited person is defined in section 137 of the *Children and Young People Act 2008* and means the young person's Child and Youth Protection Services worker if the Director-General has parental responsibility for the young person, a representative approved by the Manager of an entity providing a service or program to the young person, a lawyer representing the young person, an Official Visitor, a Commissioner exercising functions under the *Human Rights Commission Act 2005*, the Public Advocate and the Ombudsman.

All staff refers to youth workers, authorised persons, other Directorate staff providing services at or visiting a detention place in a work-related capacity and staff of ACT Government agencies providing services to young people in a detention place.

Authorised person is a person who has been delegated a power under the *Children and Young People Act 2008* or another Territory law and is exercising a function under the criminal matters chapters of the *Children and Young People Act 2008*. The positions that have delegations as authorised persons are: Executive Director, Senior Director (A), Director, Child and Youth Protection Services Operations (B), Director, Bimberi (B), Deputy Senior Manager (C), Operations Manager (D), Programs and Services Manager (D), Unit Managers (E), Team Leaders (F), Youth Workers (G), Family Engagement Officer (F), Sports and Recreation Officer (F).

Child means a person who is under 12 years of age (as defined under section 11 of the *Children and Young People Act*).

Child and Youth Protection Service refers to the branch in the Community Services Directorate that is responsible for the Child Protection and Youth Justice functions of the *Children and Young People Act 2008* and related legislation.

Conjoining rooms/ spaces refers to areas that allow young people in these places to have direct access to each other without youth worker assistance. An example is two rooms (or cabins) with a door between them that can be opened by staff between the two rooms.

Detention place means a declared detention place.

Direction means an instruction that may be given by a youth worker under section 146 of the *Children and Young People Act 2008* to a young person about anything related to the criminal matters chapters. A young person must

comply with any direction given to the young person by the Director-General or delegate under section 184 of the *Children and Young People Act 2008*. Non-compliance by a young person with a direction is a behaviour breach and may be dealt with through the Behaviour Management Policy and Procedures or Discipline Policy and Procedures.

Director, Child and Youth Protection Services Operations refers to the responsible senior executive in the Community Services Directorate.

Director, Bimberi refers to the Director of a detention place and the responsible senior executive in the Community Services Directorate.

Director-General means the Director-General of the Community Services Directorate with administrative responsibility for the *Children and Young People Act 2008*, unless otherwise specified in this policy and procedure.

Duty of care refers to the obligation by youth workers to take reasonable care to avoid injury or loss to a person whom it could be reasonably foreseen might be injured by an act or omission.

Family member is defined in section 13 of the *Children and Young People Act 2008* and means the child's or young person's parent, grandparent or step-parent; or son, daughter, stepson or stepdaughter; or sibling; or uncle or aunt; or nephew, niece or cousin. For an Aboriginal or Torres Strait Islander child or young person, a family member includes a person who has responsibility for the child or young person in accordance with the traditions and customs of the child's or young person's Aboriginal or Torres Strait Islander community.

Manager refers to the Director of a detention place during normal business hours, or in the event this person is unavailable, the Deputy Senior Manager, or in the event this person is unavailable, the Operations Manager, or in the event this person is unavailable, a Unit Manager. Outside normal business hours, this refers to the On-call Manager.

Nominated person is a person nominated by a young person aged 18-21 years at the time of admission to whom the Director-General can give notifications under the *Children and Young People Act 2008*. The details of the nominated person must be entered in the Register of Young Detainees.

Parental responsibility is defined at section 15 of the *Children and Young People Act 2008* and means all the duties, powers, responsibilities and authority parents have by law in relation to their children, including daily care and long-term care responsibility for the child or young person. Each parent of a child or young person aged under 18 years has parental responsibility for the child or young person. A person may have or share parental responsibility for a child or young person under a court order under the *Children and Young People Act 2008* or another law or in the circumstances outlined at sections 17 and 18 of the Act.

Register of Young Detainees means the register that must be kept by the Director-General under section 185 of the *Children and Young People Act 2008*. The details of every young person who is admitted to a detention place must be recorded on the register at induction. The register comprises of the young person's individual Bimberi Client residential file and information stored electronically on the Youth Justice Information System (YJIS).

Significant person for a child or young person is defined in section 14 of the *Children and Young People Act 2008* and means a person (other than a family member) who the child or young person, a family member of the child or young person or the Manager considers is significant in the child or young person's life.

Staff refers to youth workers and other authorised persons.

Torres Strait Islander person is defined in the dictionary of the *Children and Young People Act 2008* as a person who is a descendant of the Indigenous inhabitants of the Torres Strait Islands; who regards himself or herself as a Torres Strait Islander or if the person is a child, is regarded as a Torres Strait Islander by a parent or family member; and is accepted as a Torres Strait Islander by a Torres Strait Islander community.

Young person is defined at section 12 of the *Children and Young People Act 2008* and means a person who is aged 12 years and older, but under 21 years, who is required to be held in the Director-General's custody. A young person who is 21 years or older cannot be detained at a detention place. Young person means the same thing as young detainee, and young person aged 18-21 years means the same things adult young detainee, in the *Children and Young People Act 2008*.

Youth worker is defined at section 96 of the *Children and Young People Act 2008* and means an authorised person to whom the Director-General has delegated functions of a youth worker under the criminal matters chapters. The positions that have delegation as a youth worker for the policies and procedures are: Director, Bimberi (B), Deputy Senior Manager (C), Operations Manager (D), Programs and Services Manager (D), Unit Managers (E), Team Leaders (F), Youth Workers (G), Family Engagement Officer (F), Sports and Recreation Officer. Youth worker means the same as youth detention officer in the *Children and Young People Act 2008*.

5. Principles

Legislative Principles

5.1 The Act sets out the principles that must be considered by all decision-makers making decisions under this policy and procedure.

Section 8 Best interests of children and young people paramount consideration

- (1) In making a decision under this Act in relation to a particular child or young person, the decision-maker must regard the best interests of the child or young person as the paramount consideration.
- (2) In making a decision under this Act otherwise than in relation to a particular child or young person, the decision-maker must consider the best interests of children and young people.

Section 9 Principles applying to Act

- (1) In making a decision under this Act in relation to a child or young person, a decision-maker must have regard to the following principles where relevant, except when it is, or would be, contrary to the best interests of a child or young person:
 - (a) the child or young person's sense of racial, ethnic, religious, individual or cultural identity should be preserved and enhanced
 - (b) the child or young person's education, training or lawful employment should be encouraged and continued without unnecessary interruption
 - (c) the child or young person's age, maturity, developmental capacity, sex, background and other relevant characteristics should be considered
 - (d) delay in decision-making processes under the Act should be avoided because delay is likely to prejudice the child or young person's wellbeing.
- (2) A decision-maker exercising a function under this Act must, where practicable and appropriate, have qualifications, experience or skills suitable to apply the principles in subsection (1) in making decisions under the Act in relation to children and young people.

Section 10 Aboriginal and Torres Strait Islander principle

- (1) In making a decision under this Act in relation to an Aboriginal or Torres Strait Islander child or young person, in addition to the matters in section 8 and section 9, the decision-maker must take into account the following:
 - (a) the need for the child or young person to maintain a connection with the lifestyle, culture and traditions of the child's or young person's Aboriginal or Torres Strait Islander community
 - (b) submissions about the child or young person made by or on behalf of any Aboriginal or Torres Strait Islander people or organisations identified by the Director-General as providing ongoing support services to the child or young person or the child or young person's family
 - (c) Aboriginal and Torres Strait Islander traditions and cultural values (including kinship rules) as identified by reference to the child or young person's family and kinship relationships and the community with which the child or young person has the strongest affiliation.

Section 94 Youth justice principles

- (1) For the criminal matters chapters, in deciding what is in the best interests of a child or young person, a decision-maker must consider each of the following matters that is relevant:

- (a) if a child or young person does something that is contrary to law, he or she should be encouraged to accept responsibility for the behaviour and be held accountable
- (b) a child or young person should be dealt with in a way that acknowledges his or her needs and that will provide the opportunity to develop in socially responsible ways
- (c) a child or young person should be consulted about, and be given the opportunity to take part in making, decisions that affect the child or young person, to the maximum extent possible taking into consideration their age, maturity and developmental capacity
- (d) if practicable and appropriate, decisions about an Aboriginal and Torres Strait Islander child or young person should be made in a way that involves their community
- (e) if a child or young person is charged with an offence, he or she should have prompt access to legal assistance, and any legal proceeding relating to the offence should begin as soon as possible
- (f) a child or young person may only be detained in custody for an offence (whether on arrest, on remand or under sentence) as a last resort and for the minimum time necessary
- (g) children and young people should be dealt with in the criminal law system in a way consistent with their age, maturity and developmental capacity and have at least the same rights and protection before the law as would adults in similar circumstances
- (h) on and after conviction, it is a high priority to give a child or young person the opportunity to re-enter the community
- (i) it is a high priority that intervention with children or young people must promote their rehabilitation, and must be balanced with the rights of any victim of the child or young person's offence and the interests of the community.
- (2) The decision-maker may also consider any other relevant matter.
- (3) The youth justice principles are intended to be interpreted consistently with relevant human rights instruments and jurisprudence (e.g. the *Convention on the Rights of the Child*).
- (4) A reference in subsection (1) to a young person includes a reference to a person who is at least 18 years old but is being dealt with in relation to an offence committed, or alleged to have been committed, when he or she was under 18 years old.

Operational Principles

5.2 The following considerations inform this policy and procedure:

- (a) this policy and procedures aims to widen the scope of rehabilitative and supportive programs and practices available to Aboriginal and Torres Strait Islander young people. Program and service delivery responses for Aboriginal and/or Torres Strait Islander young people should be inclusive of, but not limited to, culturally specific programs and services
- (b) Aboriginal and Torres Strait Islander people are over-represented in custody
- (c) Aboriginal and Torres Strait Islander people have a unique world view and values system and a right to express and exercise their culture(s). There are complex underlying issues stemming from the consequences

of history and the general level of socio-economic disadvantage within Aboriginal and Torres Strait Islander communities that contributes to Aboriginal and Torres Strait Islander people's contact with justice systems. Issues surrounding the loss of identity, poverty, poor health and education outcomes, and the inter-generational consequences of the 'stolen generation' are some of the issues affecting Aboriginal and Torres Strait Islander people on a daily basis.

6. Policy and Procedure

Working with Aboriginal and Torres Strait Islander Young People

- 6.1 All staff working at a detention place should undertake their duties, particularly as they relate to Aboriginal and/or Torres Strait Islander young people in a manner that reflects and acknowledges:
- (a) the principles above
 - (b) that each and every staff member is part of a collective effort across the service system to address the over-representation of Aboriginal and/or Torres Strait Islander people in detention and can play an important role in empowering young people to take control of their lives
 - (c) that the behaviour of staff and their treatment of young people must contribute in a positive way to addressing the over-representation of Aboriginal and/or Torres Strait Islander people in custody and is reflective and consistent with the spirit of the considerations outlined in this policy and procedure.
- 6.2 All staff must be mindful of:
- (a) the history of removal by child welfare agencies in Australia of Indigenous children from their families thereby creating a 'stolen generation' and the possible impact this may have on children and young people in detention, their families and grandparents
 - (b) the impact that detention and separation can have, including feelings of shame and guilt and disruption to the family unit, that may be associated with being placed in custody or having a family member detained. Additional support from Child and Youth Protection Services may be appropriate at the time of admission
 - (c) specific health considerations of Aboriginal and/or Torres Strait Islander young people
 - (d) the need to place Aboriginal and/or Torres Strait Islander young people with other Aboriginal and/or Torres Strait Islander young people, or with another young person that they know, wherever possible (e.g. the use of conjoining rooms) can be positively considered for Aboriginal and/or Torres Strait Islander young people
 - (e) the importance of kin, including extended family relationships and the wider community (e.g. when staff are seeking to contact an emergency contact, or support person for a young person, they must give appropriate consideration of the relationship between kin; family and kinship obligations, including attendance at funerals and events which have cultural or spiritual significance; considerations for special purpose leave must take into consideration the importance of kin or the cultural/spiritual significance of the event)

- (f) the importance of expression of culture such as food, customs, spirituality, celebrations, ceremonies and arts and dance (e.g. where possible the Aboriginal and Torres Strait Islander Cultural Area at a detention place should be used for cultural specific activities)
- (g) recognition and acceptance that Aboriginal and Torres Strait Islander societies are neither static nor homogeneous (e.g. staff should be aware that appropriate cultural response, including through cultural planning as part of a young person's case management plan, for different families/communities may not be the same).

Identification

- 6.3 Staff must never assume the nationality and/or cultural background of a young person based on their appearance or other reason. Staff must ask every young person about their nationality and/or cultural identity.
- 6.4 Organisations transferring children or young people into the custody of a detention place may provide information on their nationality and/or cultural background. Even when such information is provided, staff must still ensure they ask and confirm the nationality and/or cultural identity of every young person.
- 6.5 Personal information obtained from a young person must be recorded on all relevant files. This information is to be used to ensure that the young person is managed with respect to their cultural needs and obtains appropriate help and support during their period in detention.

Notification and Access to Child and Youth Protection Services

- 6.6 As soon as possible after the admission of an Aboriginal and/or Torres Strait Islander young person, Child and Youth Protection Services must be notified. The introduction of the young person to a case manager must be arranged as soon as it is reasonable to do so and no later than by the end of the next normal business day after the young person's admission. Staff must advise the young person that this will occur and if there is any delay, also advise the young person of the delay and reasons for it, and talk to the young person about any other support that could be provided during this delay.
- 6.7 Child and Youth Protection Services staff must make necessary arrangements to provide assistance to the young person, and must ensure they obtain the informed consent from any Aboriginal and/or Torres Strait Islander young person prior to contacting or notifying relevant agencies or individuals. Staff must familiarise themselves with the young person's case management plan including aspects of cultural planning.

Provision of Information, Review of Decisions and Complaints

- 6.8 Staff must ensure young people, people with parental responsibility, nominated persons, family and visitors are provided with information about matters that affect them in a timely manner and in a manner that is likely to be understood.
- 6.9 A young person, person with parental responsibility, nominated person, family and visitors are able to request a review of a decision or make a complaint about something that happens at a detention place to a

youth worker, Manager, the ACT Public Advocate, the Children, Youth and Families Complaints Unit, or the Supreme Court under the *Administrative Decisions (Judicial Review) Act 1989*.

- 6.10 Staff must ensure that the Complaints Management Policy and Procedures is followed.

Records and Reporting

- 6.11 Once established, the cultural background of the young person must be clearly documented on all official files relating to the young person.
- 6.12 Any actions taken under this policy and procedures must be recorded according to the requirements set out in the Records and Reporting Policy and Procedures.
- 6.13 All staff are mandated reporters under the *Children and Young People Act 2008*. A report must be made to Child and Youth Protection Services if staff reasonably believe that a young person who is aged under 18 years has experienced or is experiencing sexual abuse or non-accidental physical injury by any person.

7. Forms and Templates

NA

8. Related Policies and Procedures

Policies and Procedures under the *Children and Young People Act 2008*

Admission and Classification Policy and Procedures

Complaints Management Policy and Procedures

Death in Custody Policy and Procedures

Records and Reporting Policy and Procedures

Policies and Procedures in Child and Youth Protection Services

Reconciliation Statement of Commitment

Single Case Management Policy and Procedures

9. Further References

National Framework of Principles for Government Service Delivery to Indigenous Australians - July 2012

http://www.federalfinancialrelations.gov.au/content/national_agreements.aspx

Bringing them home: The 'Stolen Children' report (1997)

http://www.hreoc.gov.au/social_justice/bth_report/index.html

Royal Commission into Aboriginal Deaths in Custody, available at

<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>

10. Review

- 10.1 This policy and procedure will be reviewed at least once every two years.