

# Foundations of Guardianship

Children and young people (child) need safety, stability, belonging, and connection to thrive and reach their full potential. For most children, this means living at home with their parents. However, when the Children's Court decides that a child cannot be returned home safely within the next two years, they need a permanent home through other means. Guardianship orders are the next most preferred permanency options for all children in out-of-home care (OOHC) because they can support relational, physical, legal and cultural permanency for a child without severing all legal ties between them and their birth parents and siblings.

See [Permanency Support Program: an overview](#) for more information.

Guardianship also allows a child to 'exit' the OOHC system by allocating all aspects of parental responsibility to a guardian or guardians, removing the need for case work from Permanency Support Program (PSP) service providers or the Department of Communities and Justice (DCJ). For example, this means a child doesn't receive monthly home visits, case plan meetings or reviews and does not need to gain DCJ or PSP Service Provider consent for medical treatment and the like.

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Guardianship aims to give a child a more natural childhood, when compared to out-of-home care.

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Achieving guardianship for more children in OOHC is a priority of the PSP.

## A Child and Guardianship

You need to hear and value the child's views when considering guardianship, when assessing for guardianship, and throughout the court process. If a child is aged 12 years or over, they are entitled to have an independent legal representative and must

consent in writing to guardianship. It is important to remember that even when a child wants to be a permanent part of their guardian family, they are also likely to feel some measure of grief and loss for their birth family. You may need to support them to process their feelings.

Children who are the subject of a guardianship order will still have family time (contact) and maintain connections with their parents, family, and other important people in their life as outlined in their care plan or court orders. Children who are Aboriginal or have a multicultural background have the right to maintain connections with their community and culture and must have a cultural plan in place. The cultural plan must outline how these connections will be maintained and by whom.

For more information see: [Foundations of Family Time \(Contact\)](#) and [Cultural Planning in Guardianship](#).

## Who is Guardianship Intended for?

Guardianship orders were introduced as an alternative permanency option to adoption and Parental Responsibility to a Relative (PRR) order, allowing relatives full legal responsibility for a child without changing the legal relationship with their family. However, a guardian does not need to be a relative or kinship carer; they could also be a family friend, an authorised foster carer who has an established relationship with the child or 'other suitable person'. There is no legal definition of who may be a suitable person.

Guardianship orders are for children and carers:

- where the child feels safe and secure with their carer family and want a greater sense of belonging and security
- who want permanency for their child
- who do not want to be in OOHC
- a family life without the support of a caseworker
- who want to maintain the legal relationship between the child and their birth family
- where the carer wants to make all the decisions parents make for their children.

A guardianship order can only be considered when carers have the capacity to meet the long-term needs of a child independently as casework support is not provided after the order is finalised. Guardians will receive an allowance to help them meet the needs of the child in their care. The allowance is paid at the same rate as the [DCJ statutory care allowance](#). Once the guardianship order is made, DCJ is responsible for managing the guardianship allowance and conducting an annual review.

For more information about allowances and annual reviews see: [Financial Support for Guardians](#).

## Guardianship for Aboriginal Children

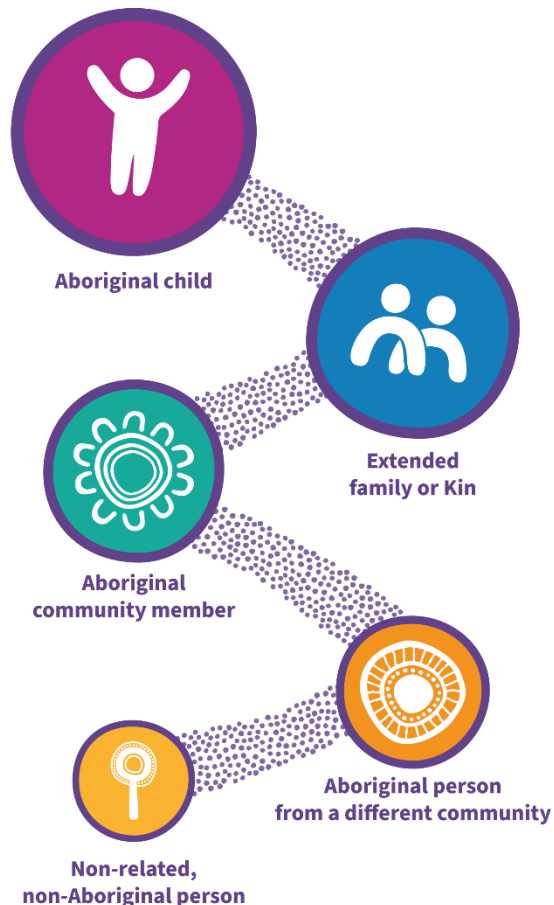
Seeking guardianship orders for an Aboriginal child is part of the [Children and Young Person's \(Care and Protection\) Act 1998](#) and is the next most preferred permanency option for an Aboriginal child removed from their parents, after restoration.

However, the NSW Child, Family and Community Peak Aboriginal Corporation (AbSec), is opposed to guardianship orders for Aboriginal children. This is because of worries about whether these types of orders uphold the rights of Aboriginal children and support them to thrive. Some Non-Government Organisations (NGOs,) including some Aboriginal community-controlled organisations share AbSec's views, in some or all circumstances.

It's important for caseworkers to keep an open mind when it comes to guardianship for Aboriginal children. Each child is unique, and their situations will differ.

Guardianship for an Aboriginal child may be in the child's best interests, especially when the guardian is a member of family or kin and it's a decision led by the family.

When determining whether guardianship is the most suitable permanent option for an Aboriginal child, the Children's Court must have regard to the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles as outlined in section 13 of the [Children and Young Persons \(Care and Protection\) Act 1998](#) and illustrated in the image below.



For Aboriginal children if the person who expresses an interest in a guardianship order is:

- not a relative or kin, they should be an Aboriginal person to be considered as a 'suitable person' for the purposes of a guardianship order
- a non-related and non-Aboriginal person, then a comprehensive Cultural Plan must be completed, and DCJ Executive District Director approval is needed to proceed with the guardianship court application.

For more information see: [Guardianship and Aboriginal Children](#).

## Legal Framework for Guardianship

### Permanent Placement Principles

When considering if guardianship is the most suitable permanency option for a child you must first consider the permanency hierarchy mandated by the Permanent Placement Principles in section 10A of [Children and Young Persons \(Care and Protection\) Act 1998](#). The permanency hierarchy stipulates the order in which permanency goals should be considered for children in OOHC. There are different hierarchies for Aboriginal children and non-Aboriginal children.

**Permanency Hierarchy**  
for Aboriginal and Torres Strait Islander children



**Permanency Hierarchy**  
for non-Aboriginal and Torres Strait Islander children



Once a child is in OOHC, guardianship is the second most preferred goal for all children, after restoration.

## Guardianship Orders

A magistrate's ability to make a guardianship order is mandated under section 79A of the [Children and Young Persons \(Care and Protection\) Act 1998](#) (the Care Act). Guardianship orders were incorporated into the Care Act in 2014.

A guardianship order is a final order and expires when the child reaches 18 years of age, or the Children's Court changes the order. The guardian/s take on full parental responsibility of the child, making all decisions about their care until they reach 18 years of age and can legally make decisions for themselves. Under guardianship orders, a child is not in OOHC anymore.

Guardianship orders can be made when the Children's Court is satisfied that:

- there is no real possibility of a child returning to the care of their parents
- parties have sought legal advice, in the case of guardianship by consent
- the prospective guardian will provide a safe, nurturing, stable and secure environment for the child now and into the future
- if the child is Aboriginal, their permanent placement under a guardianship order satisfies the Aboriginal and Torres Strait Islander Child and Young Person Placement principles

- the child gives written consent if they are 12 years of age or older and capable of giving consent.

For more information see: [Guardianship Orders.](#)

### Guardianship Orders Can be Made by Consent

In 2019, amendments were made to the Care Act which allow guardianship orders by consent. In situations where both parents agree that a guardianship order is the best possible outcome for their child when they can't be in their care, and DCJ and the Court support the nominated guardian, the Children's Court can grant a guardianship order without the need for a hearing. In these cases, the Court will no longer need to rule that there is no realistic possibility of restoration.

Guardianship orders by consent can empower families by enabling them to decide who should raise their child when they recognise that they aren't able to.

For more information see: DCJ factsheet on [Guardianship by Consent.](#)