Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600
community.affairs.sen@aph.gov.au

Re: Senate Standing Committee on Community Affairs - Out of home care

Dear Secretary,

I refer to the above and thank you for the opportunity for the Aboriginal Child, Family and Community Care State Secretariat (NSW) (AbSec) to provide input into the matter referred by the Senate to the Community Affairs References Committee on 17 July 2014 for inquiry and report.

As per the Committee Administrative Officer's letter to us, dated 25 September, we appreciate the Committee granting an extension to lodge our submission with the Inquiry.

AbSec is an incorporated not-for-profit community organisation primarily funded by the Department of Family and Community Services NSW (FACS), recognised as the peak NSW Aboriginal body. AbSec provides policy advice to government and the care and protection sector on issues affecting Aboriginal children, young people and families involved in child protection and out-of-home care (OOHC) system. We deliver other care and protection and community based initiatives, detailed in our submission.

AbSec welcomes the Senate Inquiry regarding OOHC; our submission includes references to key research and literature and the perspectives of AbSec member agencies. Our perspectives and recommendations focus on particular elements of the Inquiry Terms of Reference, including:

1. Reasons behind the over-representation of Aboriginal children and young people in the NSW care and protection system and implications, with a specific focus in the recommendations on the recent NSW sector reforms
2. Identification of children and young people as being Aboriginal and Torres Strait Islander ('ticking the box'), and around their "de-identification" ('unticking the box')
3. Placement of Aboriginal children and young people in care and protection in NSW, including:
    - The *Aboriginal and Torres Strait Islander Child and Young Person Placement Principles*
    - Permanency planning
    - Remaining connected to family and culture
    - Long term care arrangements, such as guardianship and adoption

In our submission, we raise a range of problems and issues with OOHC, many of which have been raised in numerous inquiries into care and protection across Australian jurisdictions; in this case we relate them to the current landscape in NSW.

In short, we believe that the care and protection sector focus and resourcing needs to start the shift towards family support, early intervention and prevention of the circumstances leading to child abuse and neglect. Moving away from crisis related services towards a system that focuses on appropriate, timely, evidence based, culturally sound early intervention related services and programmes is the what is needed now to arrest. Perceived short cuts such as de-identifying Aboriginal children and "permanency planning" do not address the complex underlying issues behind the ongoing and unacceptable over-representation of Aboriginal children and young people in the care and protection system. They lead only to perpetuation of the cycle of removal, further pain for children and families caught up in the system and significant costs for current and future governments and societies.

For early intervention measures to be as effective as they can be, casework with vulnerable Aboriginal children and families also needs to move towards a self-determination model to properly address over-representation. Our capable workers and knowledgeable community members must be skilled up and empowered so there exists the capacity not only to participate in consultation regarding the care and protection of our children and young people, but to drive decision making.

We would like to extend an invitation to the Committee to visit with an agency to find out first hand, about the incredible work they do in our communities on a daily basis.

We thank you for the opportunity to lodge our submission. Should you require further information, please feel free to contact me on (02) 9559 5299 or via email angela.webb@absec.org.au

Yours sincerely

Angela Webb
Chief Executive
5 December 2014

Encl

1. About AbSec

AbSec is an incorporated not-for-profit community organisation, primarily funded by the Department of Family and Community Services NSW (FaCS) and is recognised as the peak NSW Aboriginal body providing child protection and out-of-home care (OOHC) policy advice to the government and non-government sector. We provide advice on issues affecting Aboriginal families involved in the NSW care and protection system, and on matters relating to service provision by local Aboriginal community controlled organisations (ACCOs) that provide or seek to provide Aboriginal child protection and associated services.

AbSec is responsible for two Keep Them Safe projects; Protecting Aboriginal Children Together (PACT) and Intensive Family Based Services (IFBS). AbSec, in partnership with Families and Community Services (FaCS) coordinates the establishment and development of the projects in NSW.

PACT services aim to incorporate Aboriginal perspectives into child protection, risk and safety assessments, to improve case planning and decision-making, about Aboriginal children and young people who are the subject of a FaCS notification. Based around Victoria's widely respected 'Lakidjeka' model, PACT aims to increase Aboriginal children and young people and their families' access and engagement with supports and programmes, as well as helping Aboriginal children and young people's build up their cultural identity and connections with their community.

Family Group Conferencing (FGC) is a pilot project currently based in Shellharbour, Lismore and Coffs Harbour, bringing together all relevant family members to participate developing plans and strategies to ensure the safety and wellbeing of children and young people within the family group. AbSec works with FaCS' Community Services Centres (CSCs) to introduce the FGC model and strengthen relationships.

The Aboriginal State-wide Foster Care Support Service (ASFCSS) is an AbSec programme that provides a free telephone advice and advocacy service for the carers of Aboriginal children. Until the funding was discontinued in June 2014, AbSec oversaw peer support funding that assisted communities to establish and run local Aboriginal foster carer support groups.

AbSec's Disability Team assists the expansion of capacity in disability service delivery to Aboriginal people, so the sector will be better prepared to provide services upon roll out of the National Disability Insurance Scheme (NDIS). Our team's objective is to help ensure those of our community members with a disability can exert more control and seek out more appropriate options in the provision of support and services.

AbSec also auspices the Stolen Generations Council of NSW & ACT with Federal Government funding made available through FAHCSIA. The Stolen Generations Council provides a telephone assistance and referral service for NSW and ACT members of the Stolen Generations.

2. Background to AbSec response to Senate Inquiry into OOHC Terms of Reference

2.1. Historical context

AbSec acknowledges the effects of traumatic past policies and practices involving the forced removal and separation of multiple generations of Aboriginal and Torres Strait Islander children from their families across the nation. As brought to light through the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Families* (The *National Inquiry)* , the purpose of those systematic policies and practices was assimilation: to "absorb the children into white society, Aboriginality was not positively affirmed…[1]".

By separating Aboriginal children from their families, they could be prevented from growing up in culture, from growing up to become Aboriginal adults, an aim made clear from the earliest days of the Aboriginal Protection:

> In the course of a few years there will be no need for the camps and stations; the old people will have passed away, and their progeny will be absorbed in the industrial classes of the country[2]."

Regardless of the era in which they occurred, removals have been justified as being in 'the best interests of the child'. It could be reasonably expected that removal from parents to an institution or placement in care would result in a safer environment and offer better outcomes for an Aboriginal child or young person than if they grew up with their own parents; this was very often not the case. The systematic removals of Aboriginal children from their families over many generations has left a legacy, well documented in '*Bringing Them Home'*, the report from the *National Inquiry* and in multiple inquiries and government reports:

> Many witnesses to the (*'Bringing Them Home'*) Inquiry spoke of the appalling standards of care in institutions. Former residents told of being cold and hungry, worked too hard but educated too little. They told of brutal punishments, fear of sexual abuse and of the stifling of affectionate relationships. They reported emotional abuse by the denigration of Aboriginality and the denial of family contact...[3]

The effects have manifested across generations of Aboriginal and Torres Strait Islander families, with consequences including on physical and mental health, identity, spirituality and connection with culture, relationships, family structure, parenting skills and social behaviour. Clear connections exist between the policies' effects and other outcomes, such as misuse of alcohol and other drugs, as well as the over-representation of Aboriginal children in care and protection, juvenile justice and criminal justice jurisdictions Australia wide[4][5] [6].

---

[1] HREOC (1997) National Inquiry into the Separation of Aboriginal Torres Strait Islander Children from their Families, Wilson, R. S., & Human Rights 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*/ [Commissioner: Ronald Wilson]. Sydney: Human Rights and Equal Opportunity Commission, p154.

[2] Report by an Aboriginal Protection Board official to the Australasian Catholic Congress, 1909. In: Read, P, Edwards, C, editors (1989). *The Lost Children*. Sydney: Doubleday. 1989.

[3] HREOC (1997), p228.

[4] Calma, T. (2008). *Social justice report 2007*. Sydney: Human Rights and Equal Opportunities Commission.

[5] HREOC (1997), p21.

[6] Stanley J, Tomison AM & Pocock J 2003. Child abuse and neglect in Indigenous Australian communities. Child abuse prevention issues no. 19. Melbourne: Australian Institute of Family Studies

Contrary to the intentions of the architects of systematic forced removals, the "Aboriginal problem" they were trying to quell through separating generation after generation of Aboriginal children from their families was only exacerbated with every generation removed. The harder it is for Aboriginal people removed as children to go back, to find family, to find a place in extended family and community or connection to culture, the more the problems caused by removal, become compounded and embedded.

There is a persistent, underlying blame attributed to Aboriginal families for their parenting failures and inability to keep children safe when States intervene. Our families' entrenched poverty and poor social and health determinants lead to so many removals[7], given Aboriginal children are more often removed for neglect than abuse[8]. Yet the State takes little, if any, responsibility in practice for its own role in those circumstances, and in the perpetuation of the cycle of removal and the destruction of Aboriginal family, community and cultural life.

2.2. Contemporary context (in NSW).

The NSW has in recent years, undergone momentous system reform. The first phase involved the transition of OOHC from the government to the non-government organisation (NGO) sector; the second involves a raft of reforms aimed at improving permanency and outcomes for children and young people.

2.2.1. Transition of OOHC from FaCS to the NGO sector.

The NSW Government promoted the first phase transition as an evidenced based measure that would improve outcomes for children and young people in the care and protection system, for example through improved child to caseworker ratios at agencies (compared to FaCS' ratios), and FaCS workers would be freed up to focus on child protection.

AbSec's role in the transition was to work with existing OOHC agencies and with other community organisations and groups to build capacity within the OOHC system, to ensure that a key value underlying the reforms, Guiding Principle 5 in the OOHC transition plan, could be upheld:

> Ultimately, all Aboriginal children and young people in OOHC will be cared for by Aboriginal carers, supported by Aboriginal caseworkers employed by local Aboriginal managed agencies[9]".

As at 30 September, there were 19 118 children and young people in OOHC in NSW, up from 19 032 the previous month, 5 549 of whom were placed in statutory care with a foster or relative/kin care family and of these, 2 444 were Aboriginal children and young people placed with FaCS (55%).

By 31 August 2014, the total number of children placed with an accredited NGO agency increased to 6,973 children and young people, of whom 4 908 had transitioned over from FaCS (amounting to 86% of the "three year transition target" of 5 711 by June 2014). Of these, 1 971 (45% of the total

[7] Australian Institute of Health and Welfare (AIHW) , (2014). *Child protection Australia: 2012–13*. Child Welfare series no.58. Cat. no.CWS 49. Canberra: AIHW, pp23-24 (Fig. 3.5)

[8] Australian Institute of Health and Welfare (2014a). Indigenous child safety. Cat. no. IHW 127. Canberra: AIHW, p10.

[9] Ministerial Advisory Group (MAG) on transition of out-f-home care (OOHC) service provision in NSW to the non-government sector. *OOHC Transition Plan: Stage 1 – The 'who' and the 'when'*, October 2011, MAG Transition Planning Unit, Sydney, p5.

number of Aboriginal children and young people in the Statutory Care population) were Aboriginal children or young people placed with a NGO agency[10].

Before transition, in 2012 there were some seven accredited Aboriginal community controlled agencies providing OOHC in NSW with approximately 350 Aboriginal children and young people in placements under those agencies.

As at November 2014, there are 11 individually accredited Aboriginal community controlled agencies, as well as eight Aboriginal organisations in active partnership[11] with accredited mainstream agencies, with a view to building the Aboriginal organisation's capacity to work towards independent accreditation to deliver effective, sustainable, high quality OOHC services to Aboriginal children and young people.

Over the course of transition, there have been significant achievements across the sector, with improvements for children and young people in care, not least of which are closer relationships between children and young people with their agency caseworkers, improved trust and understanding on the part of carers about the responsibilities of OOHC.

Agencies have also reported issues regarding the direction of OOHC and the adequacy of resourcing to meet children and young people's needs. A key bone of contention with agencies across the sector are contracting and funding models, especially the limitations of the "unit cost" model to meet the needs of children and young people over the full spectrum of care – for example contact and other supports during care, leaving and after care and in relation to residential care.

In particular services providing residential care to Aboriginal young people have spoken of the limitations of the current contracting arrangements, implemented upon commencement of the transition of OOHC from the government to NGO sector. They inform us that the new arrangements have resulted in a removal altogether of the categorisation of those children with the highest possible needs, who cannot live with foster carers or other children and young people. This administrative decision has resulted in a destabilisation for young people in some cases; a high level of resources, for example round the clock staff are needed, yet the current funding framework does not allow for those young people with the highest level of need. Additionally, the new contracting arrangement of funding residential care services for "bed nights", means costs such as breakfasts and fuel to transport young people may not covered in some cases; we are informed that if a young person absconds, the agency is not provided with funding for that bed night – even if staff spent their night searching for the young person.

2.2.2. Care and protection reforms

In 2012, the Minister for Family and Community Services at the time, the Hon. Pru Goward, released a discussion paper containing a range of proposals for a second phase of reform of the care and protection system[12]. The 'over-arching goals' of the second phase of proposals by the Minister were:

- fewer children and young people vulnerable to abuse and neglect
- children and young people at risk of significant harm are safer

[10] Source: http://www.community.nsw.gov.au/docswr/_assets/main/lib100062/jul13-sep14_transition_dashboard_snapshot.pdf, accessed on: 29.11.14 .

[11] SNAICC and AbSec (2013) Opening Doors Through Partnership. Available online at: http://www.snaicc.org.au/_uploads/rsfil/02804.pdf, pp74-76.

[12] Minister for Family and Community Services (2012). *Child Protection: Legislative Reform Proposals – Strengthening Parental Capacity, accountability and outcomes for children and young people in State care*, Community Services, Sydney, NSW

- a better future for children and young people in care
- a capable organisation and service system"[13]

Other key reforms were implemented upon proclamation of the *Child Protection Amendment Act 2014*. These included changes regarding child protection and early intervention, a new hierarchy for the placement of children and young people in care that facilitates OOHC adoption, new long-term guardianship orders that "support permanency and stability for children in relative and kin placements", a new definition of kin and other amendments concerning outcomes for children and young people.

There has been agreement across the sector that improvements were needed; FaCS are also undergoing ongoing extensive consultation and planning around the reforms, such as the range of "Second Road" forums.

From the earliest stages following the release of the Minister's Discussion paper however, range of concerns has been voiced in the sector – including mainstream and Aboriginal stakeholders. Reforms such as set timeframes around decisions about permanent placement and particularly regarding OOHC adoption have been of particular concern. In our submission regarding the Minister's Discussion Paper, AbSec argued there was little relevant evidence base for numerous reforms contained in the Discussion Paper and Amendment Bill, many of which we believe could place further stress on Aboriginal families, on placements and on the system itself.

AbSec appreciates some of the benefits of the reforms such as improving FaCS' accountability in relation to early intervention mechanisms. We maintain however, that some of the reforms will result in a diminishing of children and young people's rights and an erosion of long-term placement stability and permanency, resulting in more children entering the system, or re-entering the system (in the case of guardianship, where supports provided in OOHC are withdrawn and pressure placed on kinship care families) and OOHC adoption breakdown[14].

It is apparent that OOHC placement numbers will indeed be reduced over time through the second phase of reforms. Any reduction will not solely be due to improvement to high quality early intervention and family support programmes or an in increase in access to such services, but through the funnelling of children and young people away from OOHC into guardianship orders and adoption. Significant numbers of eligible carers were automatically transitioned from kinship care arrangements to guardianship on proclamation of the Bill on 29 October, resulting in an immediate reduction in the numbers of children and young people considered to be in OOHC. We do not view this measure as any form of solution to the underlying causes of over-representation of Aboriginal children and their families in the care and protection system.

The Department's stated aim of shifting Aboriginal children away from kinship care and foster care towards guardianship arrangements was to create more certainty and stability for children and young people placed with grandparents or other relatives. Instead, we believe that taking away crucial supports that kinship care families were previously entitled to, will have the opposite effect for many kinship care families will have a destabilising effect. The more services and supports that

[13] Minister for Family and Community Services (2012). *Child Protection: Legislative Reform Proposals-Strengthening Parental Capacity, accountability & outcomes for children and young people in State care*, Community Services, Sydney, NSW.

[14] AbSec Submission in response to Minister for Family and Community Services (2012). *Child Protection: Legislative Reform Proposals – Strengthening Parental Capacity, accountability and outcomes for children and young people in State care*, Community Services, Sydney, NSW, pp28-30 (attached).

are withdrawn, such as assistance with maintaining contact, cultural support, recreational activities or other supports that help keep children and young people on track and connected, the more risk of placement breakdown, mainly due to pressures on children, their families and on carers. AbSec believes the withdrawal of such services and supports will disproportionately affect Aboriginal kinship carers, who are often more disadvantaged than other carers[15]. Additionally, we remain concerned about the removal of provisions for placement monitoring through the transition of OOHC placements to guardianship orders, not least for the safety of children, but also for the upholding of their rights, especially in relation to contact with family and cultural support.

AbSec understands the stress government departments across all jurisdictions are under from their respective treasuries to cut costs. Permanency is a tempting, seemingly straightforward solution however we argue that it simplifies complex issues and focuses on cutting costs, and amounts to a divulging of state responsibility away from the rights of children and young people in need of care and responsibility. Simplistic explanations for complex, system wide problems, such as a lack of carer availability, or too generous timeframes are no substitute for a deeper of examination of the placement system as a whole, "permanency" is not the only answer for drift in care[16].

Reducing immediate costs through measures such as permanency planning may improve key performance indicators in the short term, but in the long term, they will not address the underlying causes behind the over-representation of Aboriginal children and young people in care, and inevitably lead to the creation of an inequitable system as a whole. There is evidence that the "costs of caring" can be reduced significantly if the focus of the whole system shifts to early intervention in the long term. We know through consultation processes such as FaCS' Second Road, that governments are starting to take serious note, it's how such services are conceived, planned, established, delivered and monitored and whether this is done in genuine, meaningful partnership that will be key to their success and sustainability.

AbSec's response to the Senate Terms of Reference centres on three key areas we believe are of most urgency for Aboriginal children and families in NSW:

1. Over-representation of Aboriginal children and young people in the care and protection system.

2. Identification & de-identification of Aboriginal and Torres Strait Islander children and young people in the care and protection system...

3. The *Aboriginal and Torres Strait Islander Child and Young Person Placement Principles*

AbSec encourages the Senate Committee to closely examine the recent reforms contained in the *NSW Child Protection Amendment Act 2014*, and consider the lessons that might be drawn for other states from NSW' experience.

[15] McHugh, M. (2002). *The costs of caring : a study of appropriate foster care payments for stable and adequate out of home care in Australia*. NSW Association of Childrens Welfare Agencies Inc.

[16] Stott T, & Gustavsson N (2010), Balancing permanency and stability for youth in foster care. Children and Youth Services Review, *32*, 619-625

3. AbSec response to Senate Inquiry into OOHC Terms of Reference

3.1. Over-representation of Aboriginal children and young people in care and protection

3.1.1. Background

Clearly, both past and contemporary care and protection systems have failed Aboriginal and Torres Strait Islander children and families; a fact borne out by the ongoing, significant over-representation of Aboriginal and Torres Strait Islander throughout the spectrum of protection and care systems across jurisdictions and in societal institutions across the board.

As at 30 June 2014 in NSW, 18,300 children and young people were in OOHC, 35% of whom were Aboriginal and Torres Strait Islander, most of whom (53%) were in relative/kinship care placements and foster care (39%), with three percent in residential care[17].

Nationally, 57.1 per 1000 Aboriginal and Torres Strait Islander children and young people were in care as at 30 June 2013; in NSW the rate was 85.5 per 1,000 in New South Wales. That means that if you are an Aboriginal child or young person in NSW, you are 11.8 times more likely to be removed than other children , who are removed at a rate of 7.2 per 1000 in NSW (and 5.4 per 1000 nationally)[18]. Disproportionately high numbers of Aboriginal and Torres Strait Islander children and young people are preparing to leave care, or who are entitled to after care, yet often have no leaving care plan and have little access to the information and resources they need to support them[19].

The causes for the over-representation of Aboriginal and Torres Strait Islander children and young people in care and protection system jurisdictions across Australia are complex and voices from across the sector have provided a range of explanations.

As made clear in the *Bringing Them Home* report[20], one of the main underlying causes are the remnants from past forced removal policies imposed on Aboriginal and Torres Strait Islander people, including intergenerational trauma arising from forced separations of those children subject to the policies from their families and culture, which has led to the well documented cycle of removal amongst Aboriginal families. With each generation removed, we see the effects are only compounded "…a situation to which four or five generations were exposed, effectively crippling initiatives and self-esteem[21]".

The effects of similarly discriminatory policies targeted at Indigenous peoples internationally align with those in Australia, including exclusion from the political process and market systems, controls around cultural identity, preventing cultural and spiritual practices and resulting in "forced

[17] NSW Department of Family and Community Services. (2014). *Family and Community Services: Annual report 2012-13*. Sydney: NSW FACS.
[18] AIHW (2014), pp51-52.
[19] NSW Ombudsman, *The continuing need to better support young people leaving care,* August 2013, pp24-25.
[20] Human Rights and Equal Opportunity Commission (HREOC). Bringing them home. Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. Canberra: AGPS, 1997
[21] Royal Commission into Aboriginal Deaths in Custody: National Report, Volume 1 (AGPS, 1991), pp 57-58.

relocation and segregation on reserves, inferior education, child abductions, restrictions on civil and political rights and expropriation of land through legislation'[22].

A key finding from Canada's *Royal Commission of Aboriginal Peoples* (1996) was that: "Assimilation policies have done great damage, leaving a legacy of brokenness affecting Aboriginal individuals, families and communities[23]".

One of the most crucial and common effects of the systemic, historical removals was the disempowerment of parents, extended families and communities and the subsequent catastrophic disruption to family systems. Opportunities for grandparents to provide guidance around parenting and form support networks with other extended family members, as is the norm in Aboriginal communities to their own children once they become parents, are lost:

> "Separation of people from families interrupts the flow of knowledge and understanding, with respect to stages of child development and culturally appropriate models of parenting and household management[24]".

The authors behind *Combined Voices Demanding Better Outcomes for Aboriginal and Torres Strait Islander Children* ('Combined Voices') refer to the complexities as "macro" or "micro" social factors". Macro level factors relate to the well documented social, emotional and economic impacts of colonisation including 'land dispossession, forced removal from prescribed areas, regulation of family life, separation of children from their families, unpaid labour, institutional care and racism'[25]. All of which are underlying reasons for the over-representation of Indigenous peoples in welfare systems, compounded by solutions so inadequate or inaccessible to Aboriginal children, young people and their families, they amount to what are essentially structural inequalities.

AbSec member agencies throughout the transition of OOHC for example, argued that although their clients, comprising Aboriginal children and young people in need of care, their families and kinship carers were known to have higher, more complex needs than non-Aboriginal, the agencies were inadequately resourced to provide them with appropriate services (see 2.2.1, above). Even then, Aboriginal community controlled services funded to provide OOHC and unfortunately Aboriginal community controlled early intervention or other wrap around services remain few and far between.

Compounding the lack of access to appropriate services is the reality that:

> "Indigenous children and families are receiving different, and more interventionist treatment. Having come to the attention of statutory authorities, Indigenous children are more likely to be substantiated for abuse or neglect, more likely to be placed on an order, more likely to be placed in OOHC, more likely to stay longer[26]".

[22] Bennett M, Blackstock C and De La Ronde R (2005) *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada* (2nd Edition), p7.
[23] Bennett et al (2005), p9.
[24] (Marion Kickett, WA Health Department, evidence), in: HREOC (1997), p196.
[25] Tilbury, C. (2010) *Addressing the Over-Representation of Aboriginal and Torres Strait Islander Children and Families in Queensland's Child Protection System.* Combined Voices, Brisbane, p9.
[26] Tilbury, C. (2009) The over-representation of indigenous children in the Australian child welfare system. *International Journal of Social Welfare*, 18, 57-64, p62.

The "micro" level factors identified by Combined Voices as influencing over-representation include "bias and inconsistencies in decisions made by the reporters (for example, police, nurses and teachers)"[27] and "those assessing reports about children at risk of harm"[28].

North American research with First Nations' families reinforced perceptions that many Aboriginal people working in the sector hold, that is that: "differences in child-rearing such as more laissez-faire supervision or the involvement of the extended family may be viewed as deficits" (implying the decision makers are unfamiliar with Indigenous parenting norms)[29]. Researchers point to embedded, institutional racism that manifest in culturally based "system biases" including:

> "a lack of cross-cultural competence, culturally inappropriate or inaccessible service delivery; Indigenous families being less likely to have legal representation or advocacy in decisions on removal and placement; and discriminatory practices of child welfare workers also impact on the rates of Indigenous children at different decision making points[30]".

3.1.2. Policy and practice issues

The maintaining of Aboriginal children and young people's safety is highlighted in The National Framework for Protecting Australia's Children 2009-2020, specifically, that they are safe and supported in their own families and communities, with their cultural connections upheld[31].

Combined Voices acknowledged the "stressful and sometimes chaotic nature of child welfare agency practice" as a factor in the over-representation of Aboriginal and Torres Strait Islander children[32]. We know this critical issue feeds in to unacceptable pressures often experienced by the sector workforce, to effects on caseworker wellbeing and to burnout; particularly for Aboriginal caseworkers who themselves may well have a history of removal within their own extended families or communities, and connections with communities within which they work[33]. But a hectic casework environment can also compound inconsistencies in decision making and around the application of critical measures that help uphold the rights of Aboriginal children and prevent their entry to care.

AbSec member agencies providing early intervention related services have reported that decision making around removal of children and permanency can be inconsistent and unpredictable. Our member agencies often speak of goalposts that keep moving, as Aboriginal families work towards creating a secure environment to which children can safely stay or be restored to. This is a common story but we are still unsure why it is so, and what long-term good this odd practice can lead to. Changing expectations without communicating them first to Aboriginal parents and families can cause disheartenment and disempowerment; it can deepen their mistrust of welfare related

---

[27] Tilbury, C (2010), p10.
[28] Lemon, K., D"Andrade, A., and Austin, M.J. (2005). *Understanding and addressing disproportionality in the front end of the child welfare system*. Berkeley: Bay Area Social Services Consortium,: in Tilbury, C (p10).
[29] Earle, K.A., & Cross, A. (2001). *Child abuse and neglect among Indian/Alaska Native Children: An analysis of existing data*. Seattle WA: Casey Family Programs in: Tilbury, C (2010), p10.
[30] Hines, A.M., Lemon, K., Wyatt, P. and Merdinger, J. (2004). Factors related to the disproportionate involvement of children of color in the child welfare system: a review and emerging themes. *Children and Youth Services Review*, 26, 507-527: in Tilbury, C (2010), p10.
[31] Council of Australian Governments (2009), *National Framework for Protecting Australia's Children 2009–2020*, p28 (Outcome 5).
[32] Lemon, K., et al (2005): in Tilbury, C (p10).
[32] Earle, K.A., & Cross, A. (2001). *Child abuse and neglect among Indian/Alaska Native Children: An analysis of existing data*. Seattle WA: Casey Family Programs in: Tilbury, C (2010), p10.
[33] Thomas, (1994), p40 in: HREOC (1997), p378 'Welfare efforts to include the needs of Indigenous clients'

services, prompting families to disengage and stop working with them. This in turn can decrease permanent placement options such as restoration and kinship care, for the child or young person:

> " …assessment must be more than …simple identification of risk and protective factors; it also requires a prospective assessment (and) identify critical problems in the family that can be translated into goals for change. Parents should be clear about the goals and feel supported in their attempt to reach them.
>
> Keeping families involved with the …system simply to "keep a check on them" is counterproductive... Parents will be empowered when the goalposts are clear and don't shift, and when they believe that achieving a goal will be genuinely acknowledged as a meaningful achievement by the child protection system[34]

AbSec and our agencies strongly advocate that all children and young person have a right to be safe and protected from harm – every child or young person has the right to be safe. The elephant in the room is: what constitutes genuine risk in low socio-economic, culturally and linguistically diverse and in Aboriginal families?

Our agencies speak of concerns about casework practices that allow inexperienced workers, often straight out of university assessing Aboriginal families. They often have no connection or knowledge of Aboriginal culture and history; even more often they make judgements without having personally known any Aboriginal families and without knowing what a functional, loving Aboriginal family actually looks like, that is safe for Aboriginal children and young people. For example, a child may not necessarily have two sheets on the bed, but they might be well fed and attending school every day, whilst living within their extended family and taking part in family activities, yet a matter as simple as missing sheets may ring alarm bells for the worker.

Similarly, the various points of contact First Nations children and their families have with Canada's Welfare system, and the respective "laws, rules, regulations and standards" are described as being:

> "..administrated according to the way in which they were applied to non-First Nations communities. Young, inexperienced, non-First Nations social workers applied white values to the poverty-stricken situations of First Nations families[35]"

Such inexperience, or in some cases confusion or ignorance can lead to our children being removed for factors other children might not be removed for, and therefore are a factor in over-representation:

> "the threshold for determining that a child is at risk is related to a range of state-based factors such as …definition(s) of "harm" and procedures for assessing risk. Where it is relatively difficult to argue a child is at risk of "harm", false negatives will be more likely. …if procedures such as structured decision-making tools are risk-aversive, as suggested in the… inquiry into the Queensland Child Protection system, false positives will be more likely[36]".

We agree with the Australian Association of Social Workers (AASW) recommendation that:

---

[34] Harnett, P, Dawe, S (2014), Risky business: how protection workers decide to remove children from their parents, *The Conversation*, 23 October 2014. See: https://theconversation.com/risky-business-how-protection-workers-decide-to-remove-children-from-their-parents-32679, accessed on: 20 November 2014.
[35] (McKenzie and Hudson, 1985, Hudson, 1987) in: Bennett et al (2005), p22.
[36] Harnett et al (2014).

> "…The initial intervention should be underpinned by a dynamic risk-assessment process that includes, but does not solely rely upon forensic or structured decision-making tools[37]".

We also agree with the AASW's suggestion that to improve the capacity and effectiveness of the child protection system, all jurisdictions must review and evaluate the effectiveness of existing assessment frameworks and structured decision-making tools, including regarding their appropriateness for application to Aboriginal families:

> " …assessment should be a dynamic and cyclical process that utilises assessment tools as well as the (child protection worker's) expertise, knowledge and skill... the assessment framework must demonstrate cultural awareness and sensitivity[38]".

AbSec member agencies have in a number of cases reported improved relationships with the Department and with mainstream agencies following the transition of OOHC, through more collaborative mechanisms than previously existed (for example Regional Implementation Groups, or 'RIGS'); they report closer, and more constructive relationships locally.

Such progress is of critical importance as agencies may have important background knowledge of family issues, they may be able to confirm a child's cultural identity or identify safe and suitable placements for Aboriginal children and young people in need of care. Disappointingly, other agencies have also reported feeling such mechanisms, whilst set up in good faith at state level, can in some cases, amount to no more than lip service at the local level.

In those particular cases, the opportunities for collaboration appear good on paper, but even where the programmes and service agreements exist for agencies to collaborate with the Department, in reality their contributions to casework meetings and consultations can be too easily discounted or altogether ignored. They report being excluded outright from decision making regarding early intervention measures in relation to local Aboriginal families and removals.

One of our most pressing concerns regarding decision making about children's best interest is summed up by Combined Voices. They assert that government department verdicts concerning Aboriginal and Torres Strait children and young people's best interests in relation to restoration or placement "minimise the importance of the child's cultural identity to their well-being, which has an impact on rates of placement and length of time in care[39]". Any consideration of the rights of Aboriginal and Torres Strait Islander children and young people's best interests must be well-versed and have respect for culture, especially due to the links between our children's wellbeing in a holistic sense and cultural factors, which we view as protective.

Combined voices attribute over representation as in part due to:

> "…institutional racism or system biases such as a lack of cross-cultural competence, culturally inappropriate or inaccessible service delivery; Indigenous families being less likely

[37] Australian Association of Social Workers (AASW), November 2013, Child Wellbeing and Protection", AASW Position Paper.
[38] AASW (2013), p12.
[39] Bamblett, M., & Lewis, P. (2007). Detoxifying the child and family welfare system for Australian Indigenous Peoples: Self determination, rights and culture as the critical tools. *First Peoples Child and Family Review*, 3(3), 43-56: in Tilbury (2010), p11.

to have legal representation or advocacy in decisions on removal and placement: and discriminatory practices of child welfare workers[40]".

From AbSec's perspective, the reasons for such sidelining are yet to be established; it may also be due to a lack of understanding regarding those service frameworks and the points in the care and protection spectrum where opportunities lie for genuine collaborative decision making; there could be individual management style issues that influence opportunities for meaningful consultation and self-determination, or it may be due to a "street level bureaucrat" type individual interpretation of the service agreements and policies[41]. Whatever the barriers, we hope to work with our agencies and the Department to get to the heart of the issues and move forward to ensure Aboriginal agencies and our mainstream partners uphold the rights of Aboriginal children and young people to access services and all possible prospects of avoiding entering into care.

Meaningful consultation by mainstream workers with Aboriginal services is crucial, along with mechanisms and political will to ensure self-determination and shared casework decision-making. The need for genuine consultation exists across the spectrum of care, from early intervention and restoration, to the proper application of the *Aboriginal and Torres Strait Islander Child and Young Person Placement Principles* and cultural support planning.

To this end AbSec, in consultation with FaCS' Aboriginal Services Branch, developed an Aboriginal Consultation Guide for the use of mainstream organisations and individuals working in the care and protection sector to facilitate improved consultation processes[42]. Whilst there has been positive feedback, we know there is still considerable progress to be made as we update and improve the Guide, and align it with sector reforms.

3.1.3. Recommendations

The discussion above and in the background section was more general in nature, making points on a broad range of factors contributing to over-representation, especially regarding meaningful consultation and appropriate assessment processes and increased resourcing of early intervention and prevention programmes.

Our recommendations regarding addressing over-representation of Aboriginal and Torres Strait Islander children and young people in OOHC focus on practice issues in relation early intervention measures, particularly as they relate to the recent NSW OOHC reforms.

1. The focus of the entire care and protection system needs to move towards early intervention programmes such as family support, PACT, FGC, to help prevent Aboriginal children and young people's entry into care and break the cycle of removal.
2. Aboriginal families sometimes require very little support – for example, help with a few household items, but many require multiple levels of often intensive, effective and culturally sound support.
3. Early intervention measures must be properly planned and implemented, adequately resourced and supported to be sustainable – not short term programmes with fickle funding. A one size fits all approach is inappropriate for Aboriginal children and their families. Early

[40] Hines, A.M. et al (2004): in Tilbury, C (2010), p10.
[41] Scott, P. G. (1997). Assessing Determinants of Bureaucratic Discretion: An Experiment in Street-Level Decision Making. *J Public Adm Res Theory*, 7(1), 35-58.
[42] Aboriginal Child Family and Community Care State Secretariat (2013) Aboriginal Consultation Guide, Sydney NSW. See: http://www.absec.org.au/publications/aboriginal-consultation-guide.html

Intervention programmes should be tailored to meet individual needs, as specific time frames during which change is required can only be determined according to each individual situation.

After building capacity of such services, the option of referral to community initiated, community delivered parenting programmes they should be spotlight to FaCS and agency caseworkers, so they are familiar with such programmes and their capacity to protect children and keep them safe in their family.

4. Such programmes will have the best chance of success with Aboriginal children, young people and their families, if their conception is Aboriginal community driven and their delivery Aboriginal community controlled.
5. To help ensure the ongoing integrity of FGC, certain safeguards should be put in place, including that parents be entitled to obtain legal advice. A range of extended family and community representatives with a significant role in the child's life should be able to have input into the FGC decision making process (as per s11 of the *Care and Protection Act 1998*). More FGC mediators and facilitators are needed in each region, as is a strategy to attract and retain trained Aboriginal mediators and facilitators and to establish training for these positions.

   The step to refer matters to FGC should be integrated into FaCS' database - the KiDs system - as a mandatory field; therefore it could not be skipped as an obligatory phase in casework procedures.
6. The birth of an infant in circumstances that may present a risk to the child should trigger further, appropriate assessment of the safety of the child and of parenting capacity. Any early intervention and prevention measures imposed in relation to a child should provide a genuine opportunity for further engagement and support to parents, not cut them off and automatically remove their children.
7. Any agreements set in place with parents as a part of early intervention and prevention measures, should focus on the safety of the child or young person and place responsibility on all parties to act on the problem. Agreements should address the actual risks of harm to the child or young person and operate within a hierarchy so that consequences of any breaches by parents are proportionate, rather than result in an automatic escalation to court. For example, parental disengagement could result in FaCS conducting a safety assessment for the children, as opposed to establishing rebuttable presumption that escalates to a court situation. Agreements should be linked to any court orders and to anticipated outcomes.
8. Parents must be set up not to fail, but provided every chance to succeed in caring for their child safely at home. For instance they should be referred to specific, appropriate and accessible programs through FaCS, the Department of Health, etc to ensure all concerns are addressed *prior* to the birth of the child in the case of unborn children, and to ensure the child has every opportunity to grow up safe and well with their own family.
9. Punitive measures set in place for parents' failure to comply with measures such as parenting capacity orders will be limited in their effectiveness in Aboriginal communities. Culturally sound programmes such as Family Group Conferencing should be introduced as early as possible. These would be more effective where there are concerns for the safety and wellbeing of children and young people.

If such orders were to be introduced at early intervention stages then they must be relevant, able to be genuinely understood by parents, and provide opportunities for families to participate and make changes. They should not be punitive in nature, particularly where there are no reciprocal obligations on other parties.

Where such measures fail, then to ensure the safety of the child or young person it may be necessary to escalate intervention.

- Consequences should include:
  - Risk assessment
  - Engagement of FGC or similar appropriate measure should be introduced into process as early as possible (if not already involved)
- Consequences should not:
  - Immediate presume that child or young person is in need of care.
  - Be disproportionate in nature; they should not result in enforceability to the same degree that measures by the court would, for example, there should not be a rebuttable presumption attached to an early intervention agreement.

10. Parents in vulnerable families must be assured of physical, social and cultural access to services. During drawing up of the agreement, CSCs must take a role in identification of, and referral to programmes and services, as well as meeting attendance costs.

11. Many Aboriginal parents are uncomfortable attending mainstream groups, which may be inappropriate culturally in terms of parenting styles. Broader, more appropriate offerings must be made available than mainstream, generic courses such as Positive Parenting Program (Triple P). Our agencies have reported a number of mainstream Triple P's as unsuitable for Aboriginal families; their effectiveness has also been questioned in recent international studies[43].

12. We agree that some early intervention measures, such as Parenting Responsibility Contract (PRC) could be improved by extending timeframes, where it is in the best interests of the child and their family, for example to allow parents adequate time to attend therapeutic treatments or abstain from substance misuse. We do not agree to extensions in cases where there are no reasonable grounds or where that extension does not have the child or young person's safety as the main consideration.

This is particularly so in cases where the goalposts appear to have changed, despite parents adhering to undertakings throughout a PRC, resulting in increased risk of the permanent removal of a child due to legislated timeframes for decision making around permanency. Either way, the onus should be on the Department to provide evidence that the extension is justified.

13. AbSec does not support the application of measures such as Parenting Responsibility Contracts (PRCs) in early intervention context, where a child or young person is not at risk of harm, prior to commencing care proceedings.

14. Where PRCs do exist in an early intervention context, to minimise the risk of increasing numbers of Aboriginal children in care, the Department should be accountable at all stages in the process.

Breaches must be initiated only on reasonable grounds.

[43] Wilson, P. et al. (2012). How evidence-based is an 'evidence-based parenting program'? A PRISMA systematic review and meta-analysis of Triple P. *BMC Medicine, 10*(1), 130.

The consequences of any breach must be useful and a genuine tool to engage parents. The consequences of any breaches should be graded according to the:

- potential impact on the safety and wellbeing of the child or young person
- stage at which any breach occurs in the child protection continuum/hierarchy

Close consultation with local Aboriginal agencies or appropriate services are critical to implementing an appropriate agreement. FGC/ Alternative Dispute Resolution (ADR) would be more appropriate at this point, rather than progressing matters to court.

Any PRC breaches issued must be subject to a level of scrutiny by an independent body to ensure transparency and the accountability of all parties involved.

15. To help ensure the best interests of children and young people in care arrangements that may need to be made, parties involved in culturally sound programmes in the early intervention context (such as FGC) should be required to use the opportunity to share information about the child's family, kin and cultural connections and background (including a genogram or family tree). Taking the opportunity to gather such critical information at this stage also helps ensure compliance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles, should it become necessary.

3. 2. Identification & de-identification of Aboriginal and Torres Strait Islander children and young people in the care and protection system.

3.2.1. Background

The issues of Aboriginality and identity lay at the heart of past forcible removal policies and continue to underlie some of the most critical problems facing Aboriginal children and young people and their families in the contemporary care and protection system. If anyone in the sector wants to understand why their Aboriginal colleagues and community members remain hyper vigilant about the proper identification of Aboriginal children from the earliest stages of their contact with the care and protection system and about the de-identification of children and young people, they need only look as far as the *Bringing Them Home* report.

As stated earlier, the intent behind systematic policies and practices separating Aboriginal and Torres Strait Islander children from their families was to prevent them from growing up to become Aboriginal adults, even though the justification provided to this day was because removals were deemed to be in the best interests of children.

The 'welfare' had the authority to remove children from their families without proving neglect in a court, under the *Aborigines Protection Amending Act 1915.*

> No court hearings were necessary; the manager of an Aboriginal station, or a policeman on a reserve or in a town might simply order them removed. The racial intention was obvious enough for all prepared to see, and some managers cut a long story short when they came to that part of the committal notice, 'Reason for Board taking control of the child'. They simply wrote, 'For being Aboriginal' [44]".

The clear implication, as pointed out by Link-Up (NSW) in *Bringing Them Home*, was that being a child in an Aboriginal family was a problem and children removed under that Act, needed to be saved or prevented from 'growing up to be Aboriginal', so that:

[44] Read, P (1981) p6 in: HREOC (1997), p35.

> "In the course of a few years there will be no need for the camps and stations; the old people will have passed away, and their progeny will be absorbed in the industrial classes of the country[45]".

At the time of HREOC's *National Inquiry*, Link-Up asserted that the problematisation of Aboriginality still persisted, in that "non-Aboriginals continue to feel that Aboriginal adults are 'hopeless' and cannot be changed, but Aboriginal children 'have a chance'"[46]. These perceptions are a hangover from the Aboriginal Welfare Board days that unfortunately persist in pockets of society and consequently, the care and protection sector today:

> "…from the earliest days of invasion and colonisation white people have grappled with the issue (of what constitutes Aboriginality and identity), and constructed and applied definitions of Aboriginality to primarily serve their own purpose and to marginalise and oppress Aboriginal peoples[47]".

Even as Aboriginal people, identity and confirmation of Aboriginality are issues we struggle with both individually at internal levels and within our communities today.

The NSW Aboriginal Education Consultative Group (AECG) Inc.'s relatively recent report into Aboriginality and identity stated:

> "…there is widespread community concern with the current method (as defined in the NSW Aboriginal Land Rights Act 1983) utilised to deal with the complex issue of Aboriginality and identity… the majority of… respondents were concerned with... the lack of consistent application of the definition and the level of apparent indifference that some non-Aboriginal people applied during their involvement in applying the three pronged definition[48]".

3.2.2. Policy and practice issues

The proper identification of Aboriginal children and young people ('ticking the box') and their de-identification ('unticking the box') in the care and protection system is one of the most pressing practice issues faced today by those Aboriginal children and young people, their families, carers, communities and those who work in the NSW care and protection sector.

We know there are many dedicated and passionate mainstream caseworkers throughout the government and NGO sectors who deserve recognition, because they get it right on a daily basis and diligently ensure Aboriginal children and young people are properly identified at intake, or as early as possible during their time in care, and maintain their culture through solid cultural support planning. Their work deserves better recognition and celebration for its long term benefits.

Aboriginal children in today's system who have not been identified and consequently have inadequate or no cultural support planning, are paying the price now for the "well intentioned" welfare officers of their parents and grandparents, and for those from the not too distant past, who thought not ticking the box, or unticking it was a shortcut, the easy way out.

Instead, cutting corners in identification and cultural support planning for Aboriginal children and young people represents short term gain for long term pain, resulting an ache with a sense of sharp

[45] Report by an Aboriginal Protection Board official to the Australasian Catholic Congress, 1909. In: Read P, Edwards C, editors. *The Lost Children*. Sydney: Doubleday, 1989

[46] (Link-Up (NSW) submission 186 page 85), in: HREOC (1997), p

[47] Aboriginal Education Consultative Group (AECG) Inc., (2011), Aboriginality and Identity: Perspectives, Practices and Policies, p5.

[48] AECG (2011), p12.

isolation borne almost entirely by the child or young person. They may not even be aware of the source of their confusion and pain if they were never identified properly in the first place, never followed up, or if they were de-identified at an early stage. Until that is, they're able to get to the bottom of the truth of who they are, what their place is in family and where they're from. AbSec is aware of recent cases that have potential to result in a range of ongoing social and emotional problems for children and young people, and complex casework issues down the track, including where:

- A child in need of an OOHC placement was identified by their own family as being Aboriginal, but this was ignored by the CSC handling the matter. Thankfully, the Department was instructed by the Children's Court to identify the child as Aboriginal. Once the matter was made final however, the child was de-identified anyway and remains in the long-term care of non-Aboriginal foster carers
- A grandmother who lived overseas provided confirmation of her Aboriginality, however the Department still de-identified her grandchild, justifying their actions by blaming her daughter's own identity issues. Suitable, safe placements with a network of extended Aboriginal family members were subsequently ignored
- A sibling group has a mother who identifies as Aboriginal (which was disputed by a relative). Some of the siblings are identified as Aboriginal, some were identified and then de-identified and subsequently removed from the waiting list for Aboriginal carers with an Aboriginal agency, over to the care of non-Aboriginal carers with a mainstream agency. It is unknown whether the youngest sibling has been identified as Aboriginal or not at this time. The chances of the de-identified and unknown siblings being placed according to s13 and for the siblings being placed all together, geographically closer, or to have ongoing contact with each other are significantly diminished[49]

Anecdotally, we understand Aboriginal parents who are incarcerated, or who have identity issues of their own or have difficulty locating proof of Aboriginality due to their own removal from family as children, seem to be particularly vulnerable to having their own children de-identified if they are removed. The lack of any meaningful cultural support plan for children and young people only exacerbates the chances of de-identification occurring.

The outcome is a perpetuation of the cycle of removal Aboriginal children and separation from siblings and other extended family members, ensuring future generations of their own children and grannies will also be at risk of separation and the ongoing effects only intensified, rather than ameliorated, with every generation removed:

> In the context of [high] adult mortality and high incidences of imprisonment, other social problems and a generally hostile environment, we have to ensure not only that our children are taken care of, but that they also grow up with a strong belief in themselves and their people. We do this because they are the inheritors of this land, they are its guardians and we must bring them up with the same values and attitudes that we have tried to uphold [50]".

[49] NB: *NB: this matter, which illustrates a range of casework practice and management related issues, was recently brought to the Department's attention.
[50] Butler, B (1989), p29, in: HREOC (1997), p513.

In the contemporary casework setting "several jurisdictions have introduced measures to improve the identification of indigenous clients, there is a significant proportion of children whose indigenous status in unknown or not recorded (in the first place)"[51].

To our knowledge and as at the time of writing this submission, NSW FaCS had no state-wide policy documents or casework practice guidelines regarding the identification and de-identification of children and young people who are Aboriginal.

As we understand it, there is no mechanism currently in FACS database (known as 'KiDS') to enforce casework follow up if the box is not ticked; that is, if the caseworker is not immediately sure if a child is Aboriginal or not, and decides not to 'tick the box'. If the caseworker does 'tick the box', then we understand the KiDS system requires extra steps to be taken to locate a suitable placement as per *s13* of the *NSW Care and Protection Act 1998*, the *Aboriginal and Torres Strait Islander Child and Young Person Placement Principles* (see below for a discussion regarding the interpretation and implementation of *s13*).

What we do know is that if there are any questions around their Aboriginality, a child or young person chances of being properly identified or, conversely, of not being de-identified are enhanced if they have a particularly strong, connected family, or committed caseworkers and casework managers, carers and/or well informed magistrate or independent children's lawyer or other advocates throughout and following the court process.

Whilst we know there are many dedicated caseworkers who are working hard to ensure children are properly identified and their cultural identity upheld, there appears to be little or no accountability for any casework practice inadequacies or failures in this area. This is despite the potential long-term costs and lifelong consequences for Aboriginal children who are not identified at intake or during their time in care, or those who are de-identified.

Failure to identify, as well as de-identification both lead to a range of consequences for the placement of Aboriginal children and young people, for casework practice and allocation of appropriate ongoing supports and resources. The greatest fear AbSec holds is that such practices can, and do, lead to entry of Aboriginal children into long term foster care, guardianship or adoption by non-Aboriginal carers – particular in light of the recent OOHC reforms. Anecdotally, we are aware of numerous cases where a child's Aboriginality is not discovered until adoption proceedings commence.

Placement decisions that are made based on a failure to properly identify an Aboriginal child are extremely difficult, if not impossible to reverse. Even where a child's Aboriginality is uncovered relatively early after placement, they are rarely, if ever, moved back to family or other Aboriginal carers due to the preference for Attachment Theory over other principles and values.

Additionally, AbSec is of the belief that the current process for de-identification of children in care by any government Department or level of bureaucracy poses a fundamental conflict of interest, not least because of the driving role of government in past practices of systemic removal: They are not in any moral or cultural position to say who is Aboriginal and who is not - it is not their place. We support the views of participants in the AECG's project:

[51] Australian Institute of Health and Welfare (AIHW), (2007a), in: Tilbury C. (2009), p58.

> "There was an overwhelming view that non-Aboriginal people had no role in determining Aboriginality and that government and their agencies should immediately move to adopt a policy position to reinforce this view[52]".

However the input, support, co-operation and will to accept and enact community/sector driven consultation and decisions is certainly required of government in order to resolve this issue.

AbSec understands at least one FaCS district recently implemented protocols that prohibit the de-identification or changing of aspects of a child's cultural identity without the District Director's sign off; we welcome this development. We also understand a background/issues paper regarding de-identification is currently being drafted that has the potential to inform practice.

However as can be seen above, the issue needs input from a range of sectors and areas of expertise and community experience; inquiry needs to be sector driven and co-operation and solutions community/cross-sector generated. For example, the AECG project participants highlighted *purpose* of identifying as vital to:

> "…determining Aboriginality and identity. A distinction between those who search for *affirmation*, whereby a claimant is simply seeking to have their Aboriginality and identity affirmed for the primary purpose of celebrating heritage and ancestry and those who seek *confirmation* of their Aboriginality and identity for the purpose of a perceived benefit should be a clearly defined component of the process of determining Aboriginality and identity[53].

How would a typical case involving a child or young person in care be resolved in a spiritual, practical, legal and administrative sense and in a way that can be applied consistently for all Aboriginal children and young people in care, or leaving care? Aboriginal and Torres Strait Islander children and young people in care need both affirmation *and* confirmation.

For example an Aboriginal young person in her early 20's may have recently left the long term care of non-Aboriginal carers, wishing to connect for the first time with her extended family and culture. She may also seek confirmation of her Aboriginality in order to apply for assistance to apply to TAFE? Clearly such matters require careful consideration and final decision making from Aboriginal community members and experts across the board, as discussed above.

Lakidjeka's manual provides a number of service principles that direct child and family welfare practice in the Victorian Aboriginal Child Care Agency (VACCA). We believe these provide a strong, rights based foundation from which discussions in NSW could be grounded:

- An Aboriginal child's cultural identity is fundamental to the child/young person's overall well-being
- Children are the responsibility of the Aboriginal community and have a strong contribution to make to their communities
- Aboriginal children need to identify as Aboriginal without fear, or questioning and be able to maintain connections to their land and country
- Aboriginal children need to maintain their strong kinship ties and social obligations
- Aboriginal children need to receive information in a culturally, sensitive, relevant and accessible manner

[52] AECG (2011), p12.
[53] AECG (2011), p12.

Issues around identity and Aboriginality for children and young people in care will only become more complex if the Aboriginal community don't come together in good will, to start carefully, systematically and consistently addressing them now, particularly in light of recent NSW OOHC reforms that focus on expediency and permanency.

3.2.3. Recommendations

1. Moratorium on the de-identification of Aboriginal and Torres Strait Islander children and young people in care until the procedures for dealing with complex cases involving a child's identity are developed, as per below. Model for moratorium to be developed/agreed to between key Aboriginal community organisations/peaks and FaCS.

2. Interim arrangements put in place until procedures are developed for dealing with identification and de-identification (as per 3, below) for any complex cases involving questions about cultural identity. Model to be developed as per 1, above.

3. To avoid repeating poor practices and systems of the past, a model for identification and de-identification and related practice needs to be developed by Aboriginal people and organisations that, at a minimum, applies:

- clear, rights based principles. Safeguards must be implemented to ensure child's rights under the *Convention on the Rights of the Child* are upheld
- clear procedures for determining the identity of a child or young person in care
- clear procedures for confirming Aboriginality
- clear procedures for the de-identification of any child or young person in care – including excluding government agency staff de-identification of children
- consistently high standards in consultation and casework practice
- cross sector co-operation to facilitate improved identification. For example MOUs within and between Aboriginal peak organisations, and relevant government agencies or institutes. These could improve caseworker access to mechanisms and expertise that properly identify children and young people in need of care, for example family history tracing or other research, or to a local Aboriginal organisation for cultural guidance or confirmation of Aboriginality.
- Protocols for government and non-government agencies to guide procedures, in cases where a child's Aboriginality is discovered during the adoption process
- clear, simple pathways outside the court process to resolve problems and grievances
- monitoring, review and accountability for all stages of decision making regarding cultural identity
- scope for reversing placement or practice decisions made on the basis of inadequate information or poor casework practice

4. Peak/community driven solutions to all of the above should inform sector wide practice and policy. To this end, AbSec will facilitate a roundtable discussion in 2015 with invited experts to begin developing solutions and a model (as per 3) for the identification and de-identification of children and young people in the care and protection system. The roundtable will bring together a range of leaders with expertise in various fields and in community, such as in historical forced removal policies and their effects, Aboriginal family history and family tracing, reunification and counselling (including Bringing Them Home), representatives of Aboriginal peak organisations, the legal and justice sector, human rights and children's rights in particular and care leavers and in casework policy and implementation.

5. As per Recommendation 6 in AECG's project report, AbSec could, based on the outcomes from (3) and (4) above:

> "…negotiate with other members of the NSW Coalition of Aboriginal Peak Organisations (CAPO) negotiate and develop a process to standardise the procedures for establishing Aboriginality and identity in NSW[54].

6. Pending outcomes from previous steps, AbSec negotiates with relevant government departments to review policies and procedures in relation to facilitating the proper identification of Aboriginal children and preventing de-identification, as per procedures and recommendations developed in (3) and (4), above.

3.3. The *Aboriginal and Torres Strait Islander Child and Young Person Placement Principles*

3.3.1. Background.

The wellbeing of Aboriginal children and young people is very much linked to knowing where they belong - in family and community, geographically, culturally and spiritually. This is reflected in the *Section 13* of *the Children and Young Persons (Care and Protection) Act 1998,* the *Aboriginal and Torres Strait Islander Children and Young Person Placement Principles* (the *Principles*), in that they recognise the importance for Aboriginal children's identity of being cared for in their own families and communities, a belief also thought to be of benefit for the ongoing survival of communities.

An Aboriginal child's rights, wellbeing and social and emotional stability are tied in with those of their families and not divisible from that of their family, belonging is critical foundation for them to be able to "grow up strong".

> "For the Aboriginal child growing up in a racist society, what is most needed is a supportive environment where a child can identify as an Aboriginal and get emotional support from other blacks. The supportive environment that blacks provide cannot be assessed by whites and is not quantifiable or laid down in terms of neat identifiable criteria.
>
> Aboriginal people maintain that they are uniquely qualified to provide assistance in the care of children. They have experienced racism, conflicts in identity between black and white and have an understanding of Aboriginal life-styles"[55].

The *Principles* provide the legal framework for placement in the NSW care jurisdiction. Aboriginal and Torres Strait Islander children and young people placed according to *s13 (1)* of the *Principles*, should be placed as follows:

- within family or kinship group "as recognised by the Aboriginal and Torres Strait Islander community to which the child or young person belongs"
- then with a member of the Aboriginal and Torres Strait Islander community to which the child belongs
- then with a member of some other Aboriginal and Torres Strait Islander family near where the child lives
- and finally, if none of the above options are "practicable", then "a suitable person approved by the Director-General after consultation" with extended family or kin and Aboriginal welfare organisations appropriate to the child or young person[56]

[54] AECG (2011), p 14
[55] Sommerlad, E. (1976) Homes for Blacks, in Picton, First Australian Conference on Adoption Proceedings, pp163-164
[56] Children and Young Persons (Care and Protection) Act 1998 No 157

Whilst the *Principles* set out a hierarchy of placement options from which casework decisions regarding appropriate placement of our children are made, they are not just about where children and young people are placed:

> "The history and intention of the Child Placement Principle is about keeping Aboriginal and Torres Strait Islander children connected to their family, community, culture and country[57]"

A child focused system from AbSec's perspective, recognises our children's need to maintain their identity and connections and not have these crucial elements their wellbeing skipped over in the placement process. Critically important, systemic issues need to be properly addressed in order for this to begin to happen more consistently across the sector.

3.3.2. Policy and practice issues

The *National Inquiry* clearly identified a fundamental barrier to effective application of the *Principles* that continues to cause concern in the sector today, that is, their implementation in practice:

> "(Although) Welfare departments… recognise the Aboriginal Child Placement Principle, they fail to consult adequately, if at all, with Indigenous families and communities and their organisations. Welfare departments frequently fail to acknowledge anything of value which Indigenous families could offer children and fail to address children's well-being on Indigenous terms[58]".

Such concerns are still voiced by our agencies today, as described above. AbSec's focus regarding the *Principles* in this submission is on how they relate to NSW' recent OOHC reforms, including:

i. Definitions
ii. *Section 10A* Permanent Placement Principles[59] and permanency planning
iii. Consultation and cultural support planning
iv. *Section 13* counting rules

i. Child Protection Amendment Act 2014, S3, Definitions.

The *Child Protection Amendment Act 2014* introduced new definitions of 'kin' and 'relative'. These amendments were not contained in any of the proposals contained in Minister Goward's discussion paper regarding the second phase of OOHC reforms[60], which is unfortunate, as they deserved extensive cross-sector and community consultation, given the potential implications not only for the implementation of the *Principles* but in relation to other aspects of the *Act*.

The Care and Protection Act 1998 s3, Definitions now contains the following descriptions:

> ***"kin*** of a child or young person means a person who shares a cultural, tribal or community connection with the child or young person that is recognised by that child or young person's family or community"
>
> "… ***relative…*** means any of the following:
>
> (e) in the case of a child or young person who is an Aboriginal or Torres Strait Islander—a person who is part of the extended family or kin of the child or young person".

---

[57] Tilbury, C (2013) *Aboriginal & Torres Strait Islander Child Placement Principle: Aims & core elements,* Melbourne: SNAICC, p7
[58] HREOC (1997), p395
[59] Children and Young Persons (Care and Protection) Act 1998. See: http://www.austlii.edu.au/au/legis/nsw/consol_act/caypapa1998442/s10a.html,
[60] Minister for Family and Community Services (2012)

AbSec agrees that a definition of kin for Aboriginal children should include Aboriginal community members who may be non-blood relatives who have *meaningful* connection to a child or young person. However the new definition falls short, in that it does not:

- delineate between Aboriginal and non-Aboriginal community members (in the case of Aboriginal children and young people)
- include clarification of term "recognised by that child or young person's family or community"

The definition of 'relative' has expanded; it now includes 'kin'. The definition of 'kin' also (amongst other relationships) includes a 'community member'. However 'community member' (in the definition) is not limited to an Aboriginal community member. Applying this definition, any community member could potentially be defined as kin and therefore a relative of an Aboriginal and Torres Strait Islander child or young person. That is, a 'community member' could conceivably be considered 'kin' under the new definition and therefore defined as a 'relative'.

The definition of 'kin' and therefore other definitions upon which 'kin' is based, may be too open to interpretation at casework practice and management level, as well as at Children's Court level. There exists the real risk that definitions may not ultimately be applied as per the spirit and objects of *s13* and there are obvious implications, for long term placement of Aboriginal children in care.

ii. s10A (3) Permanent Placement Principles and permanency planning.

The new hierarchy for placement of children contained in *s10A (3)*[61], contains the terms "if it is practicable" and "if it is not practicable" in each progressive stage of placement options. AbSec understands it is not possible to define 'practicable' in the legislation. However, a lack of clarity regarding interpretation of "not practicable" represents significant current practice issues. It is unclear what will constitute proper evidence regarding "practicable" and "not practicable"; the Department need only state that placement with family is "not practical" (i.e. as there's no "suitable" kin/Aboriginal placement available).

As *s13* is applied subject to the objects and principles of the Act, placement with a non-Aboriginal carer may still occur. If carers apply to adopt, the Department is able to state they have complied with *s13* in the placement of that child or young person and application for orders for adoption. Additionally, there are no provisions in the new Permanent Placement Principles ('Placement Principles') contained in *s10A* preventing the adoption of Aboriginal children from OOHC.

[61] The *s10A (3)*"permanent placement principles" are as follows:

(a) if it is practicable and in the best interests of a child or young person, the 1st preference for permanent placement of the child or young person is for (them) to be restored to the care of his or her parent… or parents so as to preserve the family relationship,

(b) if it is not practicable or in the best interests of the child or young person to be placed in accordance with (a), the 2nd preference for permanent placement… is guardianship of a relative, kin or other suitable person,

(c) if it is not practicable or in the best interests of the child or young person to be placed in accordance with (a) or (b), the next preference is (except in the case of an Aboriginal or Torres Strait Islander child or young person) for the child or young person to be adopted,

(d) if it is not practicable or in the best interests of the child or young person to be placed in accordance with (a), (b) or (c), the last preference is for the child or young person to be placed under the parental responsibility of the Minister under this Act or any other law,

(e) if it is not practicable or in the best interests of an Aboriginal or Torres Strait Islander child or young person to be placed in accordance with (a), (b) or (d), the last preference is for the child or young person to be adopted.

There remain uncertainties around the interpretation of *s10A (3*), and how the new hierarchy works in conjunction with the *Principles*. There are no provisions in the new legislation to prevent placement of an Aboriginal or Torres Strait Islander child or young person in long term care with non-Aboriginal carers who are not family members

AbSec remains opposed to the legislating of tight timeframes in *s83 5* and *5a* after interim orders for decision making regarding restoration (6 months for children less than 2 years of age and 12 months for children or young people aged 2 years or more).

AbSec views the imposed timeframes as a needless intrusion into the court system that already allowed judicial discretion on the critical matter of restoration of children to their families. Discretion should remain with the judiciary to ensure that the each individual child's needs take precedence; there are allowances for judicial discretion in *(5A)*, however the caseworkers and agencies will no doubt have those timeframes at the forefront during restoration attempts as they attempt restoration, whilst at the same time seeking suitable placements according to the new Placement Principles.

Legislated timeframes do not take into account delays due to:

- Lack of access to suitable services, such as therapeutic programmes, that are timely and culturally sound
- Delays in court proceedings due to untimely provision of evidence from the Department
- The historical context that created Aboriginal peoples' deep mistrust of the Department. This lack of confidence in the system deters and even prevents Aboriginal parents from engaging with or accessing the system and related services. They are further disadvantaged through what becomes an inequitable system, in that Aboriginal parents may not engage in the system as early other parents might

A focus on expediency risks over-riding emphasis on a child's other needs, individual circumstances and best interests and also a possibility that children could be restored too early, increasing risk of their re-entry to care, or that they miss out on a restoration with family altogether.

We are also concerned to hear how the Department intends to enshrine restoration as the first option in the new hierarchy and set it up to succeed, i.e., provide appropriate, accessible, culturally sound resources for restoration. Where there is more attention paid to locating prospective adoptive parents, then family support and provision of appropriate, culturally sound restoration programmes that can keep children at home safely, may suffer. Greater burdens will be placed on the system and as a result, there will be an increase of Aboriginal children and young people entering and remaining in care and protection, perpetuating the cycle of removal in the long term, rather than a lowering of rates of removal and placement in care – one of the key stated aims of the reforms.

AbSec believes that resources should be distributed equally between restoration and locating prospective adoptive parents/long term placement under concurrent planning.

Additionally, regardless of placement type, there is always the risk of placement breakdown, particularly for older children and those with high needs, and particularly in the case of inexperienced carers who are new to providing OOHC. .

Guardianship orders have been promoted as being more appropriate permanent placements than adoption for Aboriginal kinship care families – and they are, given the child or young person's ties to their family are not legally severed, as they are in adoption.

However upon proclamation of the *Child Protection Amendment Act 2014,* there has been a focus in NSW on moving children and young people away from OOHC towards guardianship (see discussion above in 2.2.2), that has raised a number of serious concerns across the care and protection jurisdiction.

If a guardianship order is made there is no mechanism for monitoring the placement in order to determine if the needs of the child or young person are being met (including regarding cultural support and contact). In this sense guardianship orders are inappropriate due to the risk of kinship family stress they could pose and subsequent placement breakdown.

There are no reporting provisions once this order is made, i.e. no provision for an update report, no provision for supervision of a placement for a period of time, no provision for undertakings from carers – only provision for an annual report from carers to confirm the placement for financial purposes. We see the withdrawing of placement support as a risk for the child and kinship care family, that in some cases may result in placement breakdown and re-entry of the child to care.

Aboriginal peoples' rejection of the concept of adoption has been well known for some time. Yet it is entirely feasible that under the reforms there will be an increased risk of Aboriginal children or young people ending up subject to guardianship or adoption orders with non-Aboriginal, non-related carers.

> Adoption is alien to our way of life. It is a legal status which has the effect of artificially and suddenly severing all that is part of a child with itself. To us this is something that cannot happen even though it has been done[62].

iii. Consultation and cultural support planning

In relation to permanent placement there are general references in *s13*, for example 'meeting the needs of the child'. However there is no specific legislative requirement for a cultural support plan to be developed for an Aboriginal or Torres Strait Islander child or young person who enters, or who is already living in care.

Where a child or young person is placed in accordance with the *Principles* under *s13 (1) (d)* – i.e., in any suitable approved placement, there is no obligation to continue to pursue or investigate a culturally appropriate placement for a child or young person at any point in the future.

There is provision under *s13 (6) Placement of child or young person in care of person who is not an Aboriginal and Torres Strait Islander* for Aboriginal children and young people to remain in "continuing contact (with)…. His or her Aboriginal and Torres Strait Islander family, community and culture", however this section of the legislation is rarely, if ever, acknowledged.

iv. Counting rules

Nationally, 68% of Aboriginal and Torres Strait Islander children in OOHC are placed with relatives or kin, other Aboriginal and Torres Strait Islander carers or in residential care with an Aboriginal organisation[63"], that percentage rises to 81.7% in NSW64.

[62] Butler, B (1989), p28, in: HREOC (1997), p405.
[63] AIHW (2014), p52.
[64] AIHW (2014), p102

Clarification is needed around how counting rules are applied to the *Principles* are applied. AbSec believes there are fundamental differences in how the principles are counted as having been satisfied between Aboriginal and mainstream members of the sector. The *Principles* can technically be viewed as having been satisfied, even if a child or young person ends up in a placement with non-Aboriginal foster carer to whom they are not related; yet this is a scenario we would describe as not satisfying the Principles.

3.3.3. Recommendations

1. Re *s3* if the *Care and Protection Act 1998, 'Definitions',*

1.1. See the definition of kin contained in s13as a guide ("Kinship group as recognised by community to which the child or young person belongs)

1.2. Ensure key parties are provided opportunity to contribute to discussion, to confer (where possible) and agree re crucial definitions affecting Aboriginal children in care, such as 'kin' and 'relative', through meaningful consultation such as roundtables with experts and in the field, community or consumer representatives, Aboriginal agency representatives.

1.3. Careful Implementation planning with the key stakeholders is needed regarding practice issues around placement with kin under the new definitions, to avoid any placement that adheres to the legislation according to the new *s3 Definitions,* but goes against the spirit of *s13*.

2. Re: *s10A (3)* the *Permanent Placement Principles.*

2.1. The search for a culturally appropriate placement for an Aboriginal and Torres Strait Islander child or young person should be ongoing. The *Principles* should contain a provision to ensure the search for a suitable placement does not cease, just because early placement options considered during application of *s13* are exhausted at the time the matter is before the Court. If it is not possible to legislate this step in the *s13* hierarchy, then it could be inserted in regulations and/or casework practice guidelines. For example:

> "*s13* must be applied on an ongoing basis if an Aboriginal kinship or community placement can't immediately be found at the time of orders".

2.2 Careful, collaborative implementation planning is needed to address practice issues related to the new hierarchy and regarding Recommendation 2.1. Planning should include establishing practices and strategies that help prevent unintended consequence of the reforms, such as guardianship or adoption of Aboriginal child or young person made to non-Aboriginal carers.

2.3. AbSec remains concerned that restoration measures that apply concurrent planning are properly resourced, to help set up a child's return safely home, as well as ensuring an equitable placement system.

2.4. The long waiting lists for effective, culturally sound programmes must be taken into account in decision making regarding restoration and permanency.

2.5. Realistic goals (that remain static and clear to parents) and timeframes must be set in relation to restoration, that are appropriate to the family's circumstances.

2.6. Any potential non-Aboriginal carer identified through concurrent planning mechanisms who is not a relative of a child, must have previous experience providing foster or kinship care to

children, and especially to older children and young people, preferably other than those they are applying to adopt.

2.7. Research and evaluation regarding permanency planning, bonding and attachment must take into account cultural experiences and perspectives. Decision making regarding permanency for Aboriginal children for example, should take into account Cultural Attachment Theory as well as mainstream attachment theories.

2.8. Examinations of stability for Aboriginal children and young people in care should take into account normal and traditional parenting practices – for example, consideration given to a "village" model of care. This could involve multiple placement assessments and authorisations that wrap around one set of siblings who are removed from parents, so that the siblings remain safe, stable, supported and connected within their own extended family, perhaps residing mostly with nan, but able to safely move to respite or holiday care that has already been assessed for suitability, with aunts and uncles – just as they would have, had they been able to remain safely with parents.

3. Re: cultural support planning.

3.1. *Section 10A (3), the Principles,* should contain a provision for general cultural support planning. For example:

> "A relevant, approved cultural care plan must be developed after consultation with:
> **(i)** members of the child or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
> **(ii)** Such Aboriginal or Torres Strait Islander organisations as appropriate to the child or young person."

3.2. The *Principles* should also contain a provision for cultural support planning specific to placement type. For example:

> ***S13*** **(3)** "where the child's parents are from different tribal groups, cultural care planning is needed for the group with which the child or young person is not residing in/connected with through their placement, and
> ***S13 (4)*** "where the child is placed with a non-Aboriginal parent or relative, cultural care planning is needed for the Aboriginal parent's side of family"

3.4. As at proclamation of the *Child Protection Amendment Act 2014* on 29 October, a cultural support plan drafted over the last year by the NSW/ACT Aboriginal Legal Service's Care and Protection Unit, in collaboration with AbSec, the Children's Court and FaCS, had not yet been inserted into the draft Care Plan document for use in the court setting, as agreed. AbSec asserts the plan should be trialled as soon as possible to ensure cultural support plans are drafted at consistently high levels across the state and included with other information critical to the child or young person's care plan.

3.5. Detailed, sector driven implementation planning is needed regarding interpretation and practice issues pertaining to *s13*, as they relate to the reforms. Planning should include key stakeholders, such as peak organisations (as identified by key Aboriginal stakeholders). AbSec intends to call a roundtable meeting that incudes key Aboriginal stakeholders, experts in the field (child and family, therapeutic, legal etc) as well as community advocates regarding issues in relation to application and implementation of *s13*. Matters requiring discussion and consensus across the sector include:

i. Interpretation of what satisfaction of s13 *(1)* means
ii. Agreement on how to ensure implementation of other elements of *s13,* including *s13 (6) Placement of child or young person in care of person who is not an Aboriginal and Torres Strait Islander*
iii. Counting rules
iv. Agreed minimum standard casework practice guidelines
v. Monitoring and clear, community accessible processes for recourse, where s13 has been improperly implemented in casework practice.
vi. Practice guidelines and/or regulations regarding implementation of *s13* in conjunction with the new Permanent Placement Principles.