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March 2016

Chair
General Purpose Standing Committee No 3
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Chair,

Inquiry into reparations for the Stolen Generations

We welcome the opportunity to make a submission to this Inquiry and thank the Committee for their invitation to give evidence on 10 February 2016.

We do not wish to make any corrections to the transcript of the evidence that we gave at the hearing held on 10 February. Our responses to two questions taken on notice.at the hearing are enclosed separately with this submission.

Introduction and the work of Kingsford Legal Centre

Kingsford Legal Centre (KLC) is one of 42 community legal centres in New South Wales. The Centre provides free legal advice and assistance to people who live, work or study in the municipalities of Randwick and Botany on selected legal problems, and a state wide service on matters of discrimination law. Kingsford Legal Centre also provides an outreach service for Aboriginal clients at La Perouse community.

KLC has provided submissions regarding Stolen Generations issues to other inquiries including:

- The Australian Human Rights inquiry which resulted in Bringing them Home; and
- The Senate Standing Committee on Legal and Constitutional Affairs inquiry into the proposed bill for an Act to provide for ex gratia payments to Stolen Generations of Aboriginal children (2008).

During the 1990s we ran the first Australian litigation on behalf of a member of the Stolen Generations, Joy Williams. We have advised other Aboriginal clients about the availability of compensation for harm caused by their removal from their family.

F8-003 Kingsford Legal Centre | Faculty of Law

UNSW AUSTRALIA | UNSW SYDNEY NSW 2052 AUSTRALIA

T +61 (2) 9385 9566 | F +61 (2) 9385 9583 | ABN 57 195 873 179 | CRICOS Provider Code 00098G

KLC Recommendations

1. Greater efforts should be made to prevent Aboriginal children being placed into out of home care, including increased support for early intervention for Aboriginal families, and greater access to the family law system for Aboriginal families. Increased resources should be available for Aboriginal families for early family law legal advice and representation, as well as early family support.
2. Greater efforts should be made to operationalise the Aboriginal and Torres Strait Islander principles in Chapter 2 Part 2 of the *Children and Young Persons (Care and Protection) Act 1998* by improving data about interactions between FACS and Aboriginal families and their children, conducting a review of compliance with the placement principles and developing a decision making framework for the application of the placement principles, as recommended by AbSec in their submission to the Inquiry.
3. The Inquiry could consider ways in which the Minister for Community Services might be required to report on measures taken under sections 11 and 12 of the *Children and Young Persons (Care and Protection Act) 1998* in order to encourage greater focus by FACS on participation by Aboriginal and Torres Strait Islander families in decision making about their children.
4. The NSW government should establish a reparations tribunal for the Stolen Generations that would provide a range of reparations, including monetary compensation for those who suffered particular harm such as physical or sexual assault or labour exploitation, or who suffered or continue to suffer physical or psychological injury caused by the act of removal.
5. The tribunal should comply with the principles recommended in the Bringing them Home report:
    - The tribunal should be widely publicised.
    - Free legal advice and representation for claimants should be available.
    - There should be no limitation period.
    - The tribunal should make independent decisions and include the participation of Indigenous decision makers.
    - There should be minimum formality and the tribunal should not be bound by the rules of evidence.
    - The tribunal should be culturally appropriate.
6. The definition of Stolen Generations (ie eligibility for reparations) should be expanded to include Aboriginal and Torres Strait Islander children who were removed, or in care, in the 1980's, and who were not placed with immediate or extended family.
7. A committee of Aboriginal people should be appointed to develop detailed guidelines and assessment procedures for the reparations tribunal, including an assessment matrix for monetary compensation.
8. The recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse with respect to redress should be applied to reparations for Stolen Generations:
    - An award of monetary compensation should not be subject to Medicare benefit recovery or affect Centrelink benefits.
    - The reparations scheme should be widely publicised and promoted.
    - Support services and community legal centres should be funded to assist applicants to apply for reparations.

- 'Reasonable likelihood' should be the standard of proof applied to determining applications for monetary compensation.
- The tribunal's processes and time-frames should be transparent and published.

Williams v Minister, Aboriginal Land Rights Act 1983 No 2 [1999] NSWSC 843 (26 August 1999)

The Williams case involved a claim brought by a member of the 'Stolen Generations' against the NSW government. It was the first case of its kind to reach trial in Australia.

Our client, Joy Williams, claimed damages for negligence, breach of fiduciary duty, breach of statutory duty and trespass on the part of the Aborigines Welfare Board. We argued that Joy Williams suffered severe injury as a result of the failure of the Board to fulfil duties that it owed to her as a ward under the *Aborigines Welfare Act* and under the general law.

Ms Williams was removed from her mother shortly after birth and was placed in two children's homes while she was a child. She was at Bomaderry Children's Home until age four and then transferred to Lutanda Children's Home. The application for transfer stated the reason for her admission as 'to take the child from the association of Aborigines as she is a fair skinned child'.

Ms Williams claimed that having being placed in these homes, she was deprived of a maternal attachment figure, suffered depression, and was subjected to abuse and neglect. She alleged that her disturbed behaviour should have been apparent to the Board and it should have taken steps to refer her to a child guidance clinic. Once Ms Wiliams was admitted to Lutanda Children's Home, the Board made no further inquiries about her progress. Left untreated, her mental health was severely affected. By the time she left the home she had developed a psychiatric illness known as borderline personality disorder and soon afterwards became addicted to drugs and, later, alcohol.

The case ran between 1989 and 2001. The first landmark in the litigation came in 1993 when the Court of Appeal allowed an extension of the limitation period in which to take legal action. In 1999 the matter went to trial in the NSW Supreme Court where the plaintiff was unsuccessful. A subsequent appeal in August 2000 was also unsuccessful.

The NSW Supreme Court found that Ms William's claim failed because the law did not recognise that the Minister or the Aborigines Welfare Board had a duty of care to her, there was no trespass because her mother consented to the Board taking custody of Ms Williams and there was no negligence by the Board.

The court concluded that the way that Ms Williams was treated in the two homes was not wrong by the standards of the day. Both the trial judge and the appeal judges were also reluctant to impose any legal duties upon the Board to look after children in our client's position which would leave the Board open to a claim for damages.

An application was subsequently made to the High Court for special leave to appeal on the ground the Supreme Court judges were wrong in their assessment of her treatment and behaviour as a child, and that the Board, as an arm of the state, was under a legal

duty to take active steps to look after the wellbeing of children in its care. The application for leave to appeal was heard in June 2001, however, was unsuccessful.

Problems with litigation

This case clearly demonstrates the challenges for members of the Stolen Generations in bringing litigation. Because of the very history of removal and institutionalisation, and abuse which may occur during institutionalisation, claimants are likely to be psychologically damaged. It illustrates the difficulty with fitting the experiences and harm experienced by members of the Stolen Generations into the categories that are recognised by the law. Many claimants will not be able to frame a claim under the existing law that applies to personal injury claims because it is unlikely that a claimant could successfully frame a claim for negligence or breach of statutory or fiduciary duty.

Pursuing a claim for harm for forced removal through the civil courts is uncertain, subject to significant delay and can result in inconsistent outcomes depending on the facts of each case and the evidence that is available to a claimant.

Bringing legal action so many years after events have occurred means that gathering sufficient evidence to meet the standards required in court proceedings is extremely difficult. The omissions which lead to Ms Williams' psychological injury occurred over an extensive period from 1942 to 1960. Survivors of child abuse are unlikely to disclose the abuse for many years which means that it unlikely that there will be any records to provide supporting evidence of the abuse. The Royal Commission into Institutional Responses to Child Sexual Abuse has concluded that adult disclosure of child sexual abuse is often delayed by over 20 years.[1]

Joy Williams was unable to give oral evidence in her case because she was in hospital at the time of the trial. Due to the mental and emotional harm experienced by claimants who have been removed there is a risk that their evidence will not be considered to be credible.

The cost of litigating is also very high when each step of the way is challenged and appealed. The costs of both the claimant, funded by Legal Aid and represented by a community legal centre, as well as the costs of the State of NSW would have more than adequately been the foundation for a State compensation scheme.

Despite the outcomes in the Williams case Bringing them Home argues that statutory boards which took specific responsibility for Aboriginal children (such as the NSW Aborigine Welfare Board) did have a statutory and fiduciary duty to children in their care, and identified three ways in which those boards failed in their guardianship duties to children because:

- they failed to provide contemporary standards of care to Indigenous children when such standards of care were provided to non-Indigenous children in similar circumstances;
- they failed to protect the children from harm; and

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, Interim Report June 2014, 158.

- they failed to involve Indigenous parents in decision-making about their children.[2]

Some claimants may be able to seek a recognition payment (and other benefits including counselling) for harm caused by child abuse under the NSW *Victims Rights and Support Act 2014.*

However the availability of monetary compensation under this scheme is very limited and not tailored to the experiences of the stolen generations:

- While an application for a recognition payment for child sexual abuse can be made at any time, an application for child abuse or domestic violence must be made within 10 years (for a child within 10 years of turning 18 years). Claimants who were not sexually abused as a child would not be able to apply to the scheme.
- The maximum recognition payment available for repeated child sexual abuse is $10 000. For other types of abuse the maximum payment available is $5000 or $1500 (depending on the seriousness of the act and injury).
- A recognition payment is limited to harm caused by a violent act that occurs during the commission of a criminal offence (such as assault, cause bodily or grievous harm, or a sexual offence). A recognition payment would not be available for removal, or failure to maintain contact with family. Additionally a recognition payment does not provide recognition for the rupture with community and culture which those in the stolen generation experienced.
- An application for a recognition payment must be supported by evidence – a report to the police or a government agency regarding the act of violence; and a medical or counselling report verifying that the person has suffered an injury as a result of the act of violence.

KLC Recommendations to the Inquiry

Establishment of a tribunal to determine reparations, including monetary compensation

KLC recommends that the NSW government should establish a statutory reparations scheme because the existing options for monetary compensation (a claim for personal injury, or a recognition payment under the Victims Rights and Support Act 2013) have either failed to provide, or are unlikely to provide monetary compensation for members of the Stolen Generation.

The tribunal should comply the principles that were recommended by Bringing Them Home:

- A tribunal should be widely publicised.
- Free legal advice and representation for claimants should be available.
- There should be no limitation period.

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[2] Human Rights and Equal Opportunity Commission 'Bringing them home' Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families April 1997, 260.

- The tribunal should make independent decisions and include the participation of Indigenous decision makers.
- There should be minimum formality and the tribunal should not be bound by the rules of evidence.
- The tribunal should be culturally appropriate.[3]

KLC supports the model for a reparations tribunal proposed by the Public Interest Clearing House (PIAC) including the proposal that monetary compensation be available to people who can prove that they suffered particular harm such as physical or sexual assault or labour exploitation, or who suffered or continue to suffer physical or psychological injury which was caused by the act of removal.

KLC also supports the recommendation made by Redfern Legal Centre to expand the definition of 'Stolen Generation' (ie eligibility for reparations) to include Aboriginal or Torres Strait Islander children who were removed, or in care in the 1980s, and who were not placed with immediate or extended family.

The advantages of a specialised reparations tribunal are:

- Decisions made by a tribunal are transparent and outcomes are more predictable. Applicants can make an informed decision about whether to make an application.
- A tribunal can apply and acquire specialised knowledge to determine applications and regarding the needs of claimants;
- A tribunal can develop processes to minimise trauma for claimants and adopt a multidisciplinary approach to support the needs of claimants ;
- The rules and processes of a tribunal can be effectively communicated to potential claimants.
- A tribunal structure can allow for participation by Aboriginal decision makers with knowledge about Stolen Generations and the impact of inter-generational trauma.
- An independent specialised tribunal is more likely to have credibility with potential claimants, their families and communities, and be able to overcome concerns and anxieties that claimants are likely to have about divulging deeply personal information, or having 'to tell their story again'.

It is particularly important that the body determining reparations should be distanced from the government because of the role of the state in forced removals of Aboriginal children.

Some international examples

The Irish Residential Institutions Redress Scheme was established in Ireland by the *Residential Institutions Redress Act 2002* as part of the Irish government's response to child abuse in institutions.

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[3] Human Rights and Equal Opportunity Commission 'Bringing them home' Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families April 1997, recommendation 17.

Under the Act an independent board must award compensation when a claimant can demonstrate 'to the satisfaction of the Board' that he or she had been a child in an institution, and suffered an injury consistent with abuse which occurred in the institution.[4]

As part of the establishment phase of the scheme the Minister responsible for the Act was required to appoint a committee of legal and medical specialists to provide advice about the amount of awards, categories for awards as well as general advice and recommendations for awards. The report of the committee had to be publicly released and the Minister was required to take the recommendations made by the committee into account in making regulations for the Act.[5]

KLC recommends that this approach could be adapted to a NSW tribunal to provide for a committee of Aboriginal people to develop detailed guidelines and assessment procedures for the reparations tribunal, including an assessment matrix for monetary compensation.

The Canadian national government made an agreement in 2006 with churches and Aboriginal groups representing former students of the schools which provided for reparations for former students of Indian Residential Schools (the Indian Residential Schools Settlement Agreement).

The agreement was a response by the Canadian national government to a number of court claims brought by former students who experienced abuse at the schools.

The settlement agreement provided for:

- common experience payments for former students;
- individualised financial compensation for survivors of serious sexual, physical or psychological abuse, and in some cases compensation for loss of income;
- health and healing projects;
- a truth and reconciliation commission;
- community events and a research centre; and
- memorials and commemorative events.

Former residents who had not opted out of the settlement agreement could make an application (those survivors who opted out preserved their right to take independent legal action) for common purpose payments or individualised compensation.

The common experience payment was $10 000 for the first year at a school and $3000 for every subsequent year and was available to all former students. An applicant did not have to prove harm for a common experience payment. A common purpose payment was intended to recognise collective harm, as well as loss of culture and family life.

An applicant for an individualised payment for serious sexual, physical or psychological abuse was required to submit a written application, and most claims were then determined at a hearing. The maximum available was $275 000, with an additional

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[4] Residential Institutions Redress Act 2002 section 7. The Act and other information regarding the board is available at www.rirb.ie

[5] Residential Institutions Redress Act 2002 sections 16, 17.

$250 000 available for actual income loss. The assessment of compensation was based on a points system with points allocated according to the type of abuse experienced by the applicant, and the impact of the abuse on the applicant.

One significant limitation of the agreement is that it did not cover former students who attended schools that were funded by the provinces.

The strength of the approach taken in Canada is that it provided a range of individual and group benefits, not limited to individual financial compensation.

Another lesson that can be drawn from the Indian Residential Schools Settlement Agreement is that the assessment criteria for financial compensation should be developed in consultation with Aboriginal people, and that information about assessment criteria should be presented clearly and sensitively.[6]

The Grandview Agreement in Ontario Canada negotiated between the government and a group of survivors of institutional child abuse also provides some useful learning.[7] The agreement provided for group, general and individual benefits were available. Individual benefits included financial compensation, financial advice, education and training assistance, counselling or therapy and an individual apology.

Written applications for redress were initially assessed by a team seconded from the Criminal Injuries Compensation Board. Applications were determined by six independent assessors on the basis of the written applications and oral hearings. The assessors had broad experience in work on violence against women, and a specialist Aboriginal assessor was also appointed. The oral hearing was private and applicants were encouraged to tell their story in the way that suited them. The hearing procedure was flexible and developed by the assessors. The assessor determined financial compensation on the basis of a matrix (which was part of the negotiated agreement) and provided written decision and written reasons for their decision. The hearing was not public. The standard of proof applied was the balance of probabilities.

One feature of the Grandview Agreement that should inform a NSW reparations tribunal is the importance of developing processes that will protect applicants (as far as possible) from re-traumatisation or further harm.

Australian Royal Commission recommendations

The Royal Commission into Institutional Responses to Child Sexual Abuse has made recommendations for a redress scheme for survivors of institutional child sexual abuse based on significant consultation and research.[8] KLC supports the submission by PIAC

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[6] Linda Popic 'Compensating Canada's 'Stolen Generations'' [2008] IndigLawB; (2008) 7(2) Indigenous Law Bulletine 14.

[7] Reg Graycar and Jane Wangmann Redress Packages for institutional child abuse: Exploring the Grandview agreement as a case study in 'alternative' dispute resolution, The University of Sydney Laws School Legal Issues Research Paper No 07/50 July 2007, available at http://ssrn.com/abstract=1001148.

[8] Royal Commission into Institutionalised Responses to Child Sexual Abuse, Redress and civil litigation report, September 2015.

that monetary compensation awarded by a Stolen Generations tribunal should be in line with monetary payments recommended by the Royal Commission.

KLC submits that the conclusions and recommendations of the Royal Commission should also be used to inform the establishment of a NSW Stolen Generations Tribunal.

In particular the following recommendations of the Royal Commission should be applied:

- an award of monetary compensation should not be subject to Medicare benefit recovery or affect Centrelink benefits (Recommendations 20 and 21);
- the reparations scheme should be widely publicised and promoted (Recommendation 49);
- support services and community legal centres should be funded to assist applicants to apply for reparations (Recommendation 52);
- 'reasonable likelihood' should be the standard of proof applied to determining applications for monetary compensation (Recommendation 57); and
- the tribunal's processes and time-frames should be transparent and published (Recommendation 69).

Guarantee against repetition

KLC is concerned about the rate at which Aboriginal and Torres Strait Islander children enter the child protection system in NSW and believes that greater effort and resources should be directed at preventing children entering into that system.

KLC supports the comments and recommendations made by Women's Legal Services NSW to this Inquiry.

Increased resources should be available for Aboriginal families for early family law legal advice and representation in family law matters, as well as family support. Early family law advice, and assistance with family law proceedings will mean that legal arrangements could be made to ensure the safety of Aboriginal children without them having to go into the out of home care system.

Greater efforts should be made to operationalise the principles in Chapter 2 Part 2 of the *Children and Young Persons (Care and Protection) Act 1998*. The principles regarding Aboriginal and Torres Strait Islander participation in decision making and self-determination contained in sections 11 and 12 of the Act also provide an opportunity for the Minister to establish some clear programs and guidelines in this area.

KLC does not provide legal advice or casework on family law or child protection law. However the KLC Aboriginal Access Worker works with Grandmothers Against Removals (GMAR) on a voluntary basis. GMAR was established because of concerns about FACS' communication with extended family members whose children were at risk of being removed under the *Children and Young Persons (Care and Protection) Act 1998*, or whose children had been removed under the Act, and the failure by FACS to adequately engage with Aboriginal and Torres Strait Islander families regarding placement and other significant decisions about children. GMAR members identified a tendency by FACS to vilify family members, rather than respecting the support and advice that family members can offer. Such an attitude affects the ability of FACS to communicate with families as intended by the placement principles.

Lack of resources for early intervention may be another reason why families are not consulted about children at risk of removal under the legislation. GMAR is concerned about a gross imbalance between resources that are put into surveillance of families, and removal of children, and the resources that are earmarked for early intervention.

KLC supports the recommendations made by the Aboriginal Child Family and Community Care State Secretariat (AbSec) to this inquiry (submission number 14) regarding the application of the placement principles. In particular KLC supports the recommendations made by AbSec to improve transparency of data about interactions between FACS and Aboriginal families and children, to review compliance with the placement principles and to develop a decision making framework for the application of the principles.

As well as the placement principles contained in Chapter 2 Part 2 of the Act also contains principles about participation by Aboriginal and Torres Strait Islander families in decision making by FACS about children.

Under section 12 of the Act Aboriginal and Torres Strait Islander families must be given an opportunity to participate in decisions about placement of children and other significant decisions by *means approved by the Minister*..

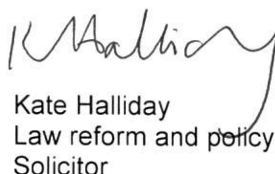
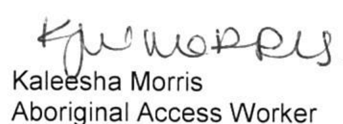
Section 11 of the Act allows the Minister to *approve opportunities* for Aboriginal families to participate in decision making about placement of children and other significant decisions.

KLC recommends that this Inquiry could consider ways in which the Minister for Community Services might be required to report on measures taken under sections 11 and 12 of the *Children and Young Persons (Care and Protection) Act 1998* to encourage greater focus by FACS on participation by Aboriginal and Torres Strait Islander families in decision making about their children.

Thank you for the opportunity to make this submission and if you have any questions about it, please do not hesitate to contact any of the authors on ph. 9385 9566.

Yours faithfully,

KINGSFORD LEGAL CENTRE

Anna Cody
Director

Kate Halliday
Law reform and policy Solicitor

Kaleesha Morris
Aboriginal Access Worker

Kingsford Legal Centre – hearing date 10 February 2016

Question on notice 1

The Hon Shaoquett Moselmane: Professor Cody mentioned the Canadian experience. Can we draw any information from the Canadian experience about the success of the tribunal in assessing reparations? Would you tell the Committee about that?

The Canadian national government made an agreement in 2006 with churches and Aboriginal groups representing former students of the schools which provided for reparations for former students of Indian Residential Schools (the Indian Residential Schools Settlement Agreement).

The agreement was a response by the Canadian national government to a number of court claims brought by former students who experienced abuse at the schools.

The settlement agreement provided for:

- common experience payments for former students;
- individualised financial compensation for survivors of serious sexual, physical or psychological abuse, and in some cases compensation for loss of income;
- health and healing projects;
- a truth and reconciliation commission;
- community events and a research centre; and
- memorials and commemorative events.

Former residents who had not opted out of the settlement agreement could make an application (those survivors who opted out preserved their right to take independent legal action) for common purpose payments or individualised compensation.

The common experience payment was based on $10 000 for the first year at a school and $3000 for every subsequent year and was available to all former students. An applicant did not have to prove harm for a common experience payment. A common purpose payment was intended to recognise collective harm, as well as loss of culture and family life.

An applicant for the individual payments for serious sexual, physical or psychological abuse was required to submit a written application, and most claims were determined at a hearing. The maximum available was $275 000, with an additional $250 000 available for actual income loss. The assessment of compensation was based on a points system with points allocated according to the type of abuse experienced by the applicant, and the impact of the abuse on the applicant.

One significant limitation of the agreement is that it did not cover former students who attended schools that were funded by the provinces.

The strength of the approach taken in Canada is that it provided a range of individual and group benefits, not limited to individual financial compensation.

Another lesson that can be drawn from the Indian Residential Schools Settlement Agreement is that assessment criteria for financial compensation should be developed in consultation with Aboriginal people, and that information about assessment criteria should be presented clearly and sensitively.

Kingsford Legal Centre – hearing date 10 February 2016

Question on notice 2

The Hon Natasha Maclaren-Jones: I have a question which I am happy for you to take on notice in relation to placements. I am interested to know more about the current principles under the care Act and the placement of Aboriginal and Torres Strait Islander children. The Committee has heard evidence that although the principle is that priority should go to extended family that is not actually the case on the ground. I am interested to know more about what is causing that but also what recommendations you would have to remedy that issue – if it is particular barriers on the ground or if it is a bigger problem.

Kingsford Legal Centre does not provide legal advice or casework on family law or child protection law.

However the KLC Aboriginal Access Worker works with Grandmothers Against Removals (GMAR) on a voluntary basis. GMAR was established because of concerns about FACS' communication with extended family members whose children were at risk of being removed under the Children and Young Persons (Care and Protection) Act 1998, or whose children had been removed under the Act, and the failure by FACS to adequately engage with Aboriginal and Torres Strait Islander families regarding placement and other significant decisions about children. GMAR members identified a tendency by FACS to vilify family members, rather than respecting the support and advice that family members can offer. Such an attitude affects the ability of FACS to communicate with families as intended as intended by the placement principles.

Lack of resources for early intervention may be another reason why families are not consulted about children at risk of removal under the legislation. GMAR is concerned about a gross imbalance between resources that are put into surveillance of families, and removal of children, and the resources that are earmarked for early intervention.

KLC supports the recommendations made by the Aboriginal Child Family and Community Care State Secretariat (AbSec) to this inquiry (submission number 14) regarding the application of the placement principles. In particular KLC supports the recommendations made by AbSec to improve transparency of data about interactions between FACS and Aboriginal families and children, to review compliance with the placement principles and to develop decision making framework for the application of the principles.

The principles contained in the Act also provide for participation by Aboriginal and Torres Strait Islander families in decision making by FACS about children.

Under section 12 of the Act Aboriginal and Torres Strait Islander families must be given an opportunity to participate in decisions about placement of children and other significant decisions by *means approved by the Minister*..

Section 11 of the Act allows the Minister to *approve opportunities* for Aboriginal families to participate in decision making about placement of children and other significant decisions.

KLC submits that the Committee could consider ways in which the Minister for Community Services reports on matters in section 11 and 12 of the Children and Young Persons (Care and Protection) Act 1998 to encourage greater focus by FACS on participation by Aboriginal and Torres Strait Islander families in decision making about their children.