

# Submission to Protecting Victoria's Vulnerable Children Inquiry

April 2011

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# Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Protecting Victoria's Vulnerable Children Inquiry.

The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 1995*, the *Racial and Religious Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). Our functions include dispute resolution, providing education about human rights and equality of opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing legal and policy advice. In addition, the Commission has a role in reporting to the Attorney-General on the operation of the Charter and, at the request of public authorities, conducting compliance reviews.

## **The Commission's interest in the Inquiry**

The challenge before the Inquiry is a significant one, made more urgent by continuing allegations of failures by agencies responsible for the care and protection of children.

It is clear from the Victorian Ombudsman's investigations into the statutory child protection system and out-of-home care that despite the considerable efforts of those working in child protection, the system is failing those it has been established to protect. Frustratingly, these problems continue to occur despite having what many consider is world leading child protection legislation and a sound policy approach emphasising prevention and early intervention.

These problems are longstanding and reflect a service system that is under-resourced and crisis driven. Individually, each of the problems identified results in a breach of children's human rights. Cumulatively, they represent serious systems failures with profound implications for the children and families affected and public confidence in the child protection system.

The Commission acknowledges the complexity of the issues faced by front-line workers and policy makers in relation to protecting Victoria's vulnerable children. For the system to deliver the best possible outcomes, it must have adequate resources, support for staff, effective monitoring and accountability, careful screening of out-of-home care providers, including foster carers, and a court system that sensitively deals with these issues when families are in crisis. It must also be able to rely on other parts of government and the service system to fulfil their shared responsibility for the wellbeing of children.

Each of these are complex questions in themselves. Combined they create one of the most vexed areas of public policy and service delivery. Nonetheless, the serious breaches of rights exposed by the Ombudsman and others demand urgent attention.

## **Human rights and the work of this Inquiry**

The Commission does not underestimate the task before the Inquiry and believes strongly that taking a human rights approach in your deliberations will assist in finding workable solutions to the challenges facing the current system. This is for two reasons.

First, compliance with human rights is already the law in Victoria. The Department of Human Services (DHS), family services and out-of-home care providers are legally

obliged to observe the human rights of children and families with whom they have contact. Any breach of a child's rights offends the Charter and international law.

All child protection policy and practice, including the recommendations of this Inquiry, must be measured against the Charter. Specifically, any legislative reforms proposed by this Inquiry will be subject to human rights scrutiny by the Parliament.

Second, the Charter provides clear, considered and principled guidance for public policy and systems reform. It keeps the focus on the experience of children, avoids residualism and supports the policy principles of preventative and strengths based family support and child protection.

Taking a rights-based approach to your deliberations can help to cut through the ambiguity that can result from challenging questions of resources, accountability and transparency. When it is accepted that the child's full range of human rights must be guaranteed then the solutions can be brought more sharply into focus.

As Victoria's human rights agency, the Commission welcomes the opportunity to contribute its expertise to the Inquiry, both regarding human rights compliance and in focusing attention on effective systems reform that will not only better protect children but also allow them to live the best possible lives. This necessarily involves making the shift from a having a child protection 'system', to a system that allows children to enjoy their full range of human rights.

In order to provide that human rights analysis, this submission is in two parts:

- Section 1 focuses on compliance. It provides a human rights analysis of general child protection issues, with specific reference to the Charter and the soon to be enacted Equal Opportunity Act 2010. Relevant international human rights obligations, specifically the *United Nations Convention on the Rights of the Child* are identified in this part of the submission. In particular, we examine the distinction between 'best interests' as a child protection principle, and its full meaning as a human right.
- Section 2 responds to the terms of reference in more detail, applying a human rights methodology to the questions under consideration. The Commission does not provide detailed comments on all the terms of reference. Instead, we provide our insights into key issues that relate to our areas of responsibility under the Charter and Equal Opportunity Act. In particular, we examine issues of cultural competency, drivers of over-representation of children with disability in child protection, and principles for a more rights-consistent approach to child protection legal proceedings.

Recommendations to deliver a stronger, more child-centred and rights focussed system of protection for families and children, consistent with the Charter, are set out immediately below. These are addressed in more detail in the body of the submission.

Throughout this submission, the term 'child' is used to refer to those under 18 years of age. This is consistent with the terminology contained in the Convention on the Rights of the Child and is used for ease of expression. The Commission recognises and respects the distinct needs and experiences of young people.

# Recommendations

We draw two human rights considerations to the attention of the Inquiry. The first is the legal obligation on the part of public authorities to comply with the Charter and other legislation, including the Equal Opportunity Act. The second is addressing issues facing child protection within a human rights framework, including specific protections for particularly vulnerable groups. The recommendations below reflect this distinction, and are cross-referenced to the Inquiry's terms of reference.

## **Legislative changes to improve Charter compliance**

1. That, in order to avoid doubt, the *Disability Act 2006*, the *Mental Health Act 1986* and other Acts guiding the delivery of services be amended to include a provision specifying that when delivering services to children, the best interests of the child are paramount and must be observed at all decision making points [TOR 4].
2. That this provision specifically refers to the right contained in the section 17(2) of the Charter of Human Rights and Responsibilities Act 2006, and the best interest principles contained in section 10(2)-(3) of the *Children, Youth and Families Act 2005* [TOR 4].

## **Promoting Charter compliance in practice**

3. That the DHS Integrated Service Standards include as mandatory, demonstrated compliance with the rights contained in the Charter of Human Rights and Responsibilities Act 2006, including the best interests principle [TOR 7].
4. That the DHS "one human service worker" workforce strategy currently in development, include as a mandatory competency Charter awareness and compliance, including demonstrated adherence to the best interests principle [TOR 7].
5. Building on the success of previous efforts, that the Department of Human Services implement a sustained program of learning and development for human services workers across all domains, on the practical application of the best interests principle. This training should also include specific reference to the Aboriginal Cultural Competency Framework, the CALD competency framework if developed<sup>1</sup>, and the Charter of Human Rights and Responsibilities Act 2006 [TOR 7].

## **Strategies to address the human rights of particularly vulnerable groups, including care leavers**

6. That the Department of Human Services commission the development of a Culturally and Linguistically Diverse Communities (CALD) Cultural Competency Framework which reflects the diversity within and amongst communities, including emerging and newly arrived communities [TOR 1].
7. That when developed, the framework is promoted across the family and children services, child protection and out-of-home care system. This includes the ongoing provision of training on the proposed CALD Framework, the existing Aboriginal Cultural Competency Framework, legal obligations under

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<sup>1</sup> The Commission recommends the development of a CALD Cultural Competency Framework at recommendation 6.

the Charter of Human Rights and Responsibilities Act 2006 and Equal Opportunity Act 2010 positive duty; and the implementation of best interests practice principles as per the Charter and the Children, Youth and Families Act 2005 [TOR 1].

8. That, in order to protect Aboriginal children's cultural rights and to reduce the continuing over-representation of Aboriginal children in child protection, adequate resources are made available for Indigenous specific prevention, early intervention and response, including through Aboriginal family support, children's services, out-of-home care and allied services including Aboriginal controlled legal, family violence and health services [TOR 2].
9. That issues relating to the nexus between disability services and child protection, and the rights of children and parents with disability are prioritised by the Department of Human Services. In particular that:
  - a) concerns expressed by parents of children with disability that they are being forced to relinquish their child into care due to a lack of support and respite services be comprehensively examined and resources made available to prevent such relinquishment
  - b) concerns expressed by parents with intellectual disability that they are subject to unreasonable scrutiny by child protection services be comprehensively examined and protective staff trained on rights consistent practice when working with parents with disability [ToR 2].
10. That section 16(g) of the Children, Youth and Families Act 2005 be amended to allow transition support to be available to young people leaving care up to 25 years of age [TOR 3].
11. That section 16(2) of the Children, Youth and Families Act 2005 be repealed [TOR 3].

### **Role of the Children's Court and human rights**

12. That any new model for child protection legal proceedings:
  - a) clearly reflects the primacy of recognising rights in accordance with the best interests of the child
  - b) ensures that the Children's Court has the discretion and appropriate procedures to afford the right to a fair hearing to a child in child protection proceedings and promote the participation of the child in such proceedings
  - c) ensures cultural competency in all aspects of operations and decision-making [TOR 6].
13. That any new model for child protection legal proceedings and dispute resolution ensures legal advice and representation for all parties throughout the duration of all proceedings, regardless of the complexity of the matter, and that the Children's Court Guidelines incorporate this provision [TOR 6].
14. That the Children, Youth and Families Act 2005 be amended to provide that when a child does not have capacity to express their view in child protection proceedings before the Children's Court, because they are too young to do so or for any other reason, that the Court should appoint a legal representative to advocate for the child and in the child's best interests [TOR 6].
15. That the Children's Court develop and implement guidelines to assist legal representatives to advocate in accordance with the best interests of the child

in these circumstances. That these guidelines should mandate that advocates act consistently with the human rights of the child when representing a child as required under the Charter of Human Rights and Responsibilities Act 2006 [TOR 6].

16. That improvements to Melbourne Children's Court be prioritised in order to ensure compliance with Charter obligations to protect the privacy, and best interests of the child [TOR 6].
17. That detailed and regular training on best interests and human rights decision-making be provided to Children's Court Magistrates and Registrars and legal advocates, and that this training include the Aboriginal Cultural Competency Framework and the CALD Competency Framework [TOR 6].

### **Accountability and transparency**

18. That the *Child Wellbeing and Safety Act 2005* be amended to provide for an independent Child Safety Commissioner, whose functions including the protection and promotion of the rights of Victorian children and young people generally, with a mandate that includes include a specific focus on giving priority to promoting the protection of Victoria's vulnerable children, and whose powers include:
  - a) the power to initiate own motion investigations and inquiries into the child protection and out-of-home care systems
  - b) the power to compel witnesses, production of documents and provision of evidence to effectively investigate matters
  - c) a requirement to report to the Parliament on matters of importance, including the tabling of reports of own motion inquiries and investigations [TOR 8].
19. That any evaluation framework(s) for reforms emerging from this Inquiry include rights and equalities measures, including specific measures around improved life outcomes for children and families in contact with the care system [TOR 8].

# Human rights compliance and child protection

The Commission welcomes the Inquiry's focus on reducing the incidence and negative impact of child neglect and abuse in Victoria, and its adoption of a child-centred approach.

Human rights can help the Inquiry's deliberations and recommendations by providing a robust legal, policy and conceptual framework consistent with a child-centred approach. Such an approach respects and promotes the dignity of children by starting with the understanding that "every child is recognised, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy".<sup>2</sup> This ensures that the child's rights are protected in a legal/compliance sense, and are the first consideration in how the system operates to protect their best interests.

## The Charter of Human Rights and Responsibilities

The primary legislative vehicle for human rights protection in Victoria is the Charter. This sets out the human rights that underpin our child protection system, and all other areas of government that interconnect with children and young people's wellbeing and development. It mandates compliance with internationally accepted rights, but also, if used effectively, guides improvements in the system.

The Charter has relevance to all aspects of child protection, especially:

- the separation of children and families
- child protection legal proceedings
- cultural rights of children and young people in all aspects of family services, out-of-home care and statutory child protection
- the safety and wellbeing of children and young people
- non-discrimination and access to services, including universal and specialist services, to ensure the best start in life.

Relevant Charter rights include:

**Recognition and equality before the law**, which protects the right of all Victorians, including children, to enjoy their human rights free from discrimination.<sup>3</sup>

**Right to life** which, in the context of child protection, may include a positive duty to protect the life of vulnerable children.<sup>4</sup>

**Protection from cruel, inhuman and degrading treatment.**<sup>5</sup> Which is concerned not only with physical integrity, but also with a person's mental integrity and their

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<sup>2</sup> Committee on the Rights of the Child, Fifty-sixth session, *General Comment no.13: Concerning the Right of the Child to Protection from all Forms of Violence* (2011) CRC/C/GC/13.

<sup>3</sup> *Charter of Human Rights and Responsibilities Act 2006* s 8. This is reinforced by the right, without discrimination, of every child to such protection as is in his or her best interests contained in section 17(2) of the Charter.

<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006* s 9. For discussion of the positive duty see Department of Human Services, *Protecting Victoria's Children: Child Protection Practice Manual*, 'Human Rights and Child Protection', Advice No 1568 (31 December 2007).

<http://www.dhs.vic.gov.au/office-for-children/cpmanual/Output%20files/Practice%20context/Output%20files/default.htm> at 7 April 2011.

<sup>5</sup> *Charter of Human Rights and Responsibilities Act 2006* s 10.

inherent dignity as human beings.<sup>6</sup> This right is of particular relevance in out-of-home care, including secure welfare and residential care settings but equally applies to circumstances where the DHS fails to act in the knowledge that a child is subject to such treatment by the family.<sup>7</sup>

**Privacy and reputation**, including protection from arbitrary interference with family life.<sup>8</sup> This right is engaged when a child is removed from the family. In these circumstances, the interference must be lawful and reasonable in the particular circumstances.

**Protection of families.**<sup>9</sup> The Charter recognises that families are the fundamental group unit of society and are entitled to be protected by society and the State.<sup>10</sup> The right to family protection is not only a parental right, but also a right of the child.

**Protection of children**, because “every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child”.<sup>11</sup>

The best interest principle is also reflected in the Children, Youth and Families Act that states that a child’s best interests must be the paramount consideration in decision-making.<sup>12</sup>

Further, the Children, Youth and Families Act provides that “when determining whether a decision or action in is in the best interest of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered”.<sup>13</sup>

The test of a reasonable limitation of a right is contained in section 7(2) of the Charter. In summary, such a limitation must be reasonable, justifiable and proportionate, taking into account the nature of the right, the purpose of the interference, and applying the least restrictive means of limiting the right. Accordingly, interference with privacy, family or the home may be a reasonable limitation of those Charter rights in circumstances where it is necessary to protect a child and there is an unacceptable risk of harm.

**Cultural rights** including the child’s right to practice their religion, enjoy their culture and use his or her language. The distinct cultural rights of Aboriginal people are also protected.<sup>14</sup>

The Children, Youth and Families Act also protects a child’s Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building

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<sup>6</sup> Human Rights Committee, *General Comment 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment* (Art 7), 44th session, UN Doc HRI/GEN/1/Rev 6 (10 March 1992) [2].

<sup>7</sup> Department of Human Services, *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Human Rights and Child Protection’, Advice No 1568 (31 December 2007).

<http://www.dhs.vic.gov.au/office-for-children/cpmanual/Output%20files/Practice%20context/Output%20files/default.htm> at 7 April 2011.

<sup>8</sup> *Charter of Human Rights and Responsibilities Act 2006* s 13.

<sup>9</sup> *Charter of Human Rights and Responsibilities Act 2006* s 17(1).

<sup>10</sup> This contrasts with the *Children, Youth and Families Act 2005* s 10 (3)(a), where it is the “parent and child”, not “family”, that is described as the fundamental group unit of society.

<sup>11</sup> *Charter of Human Rights and Responsibilities Act 2006* s 17(2).

<sup>12</sup> *Children, Youth and Families Act 2005* s 10(1).

<sup>13</sup> *Children, Youth and Families Act 2005* s 10(2). Section 10(3) also sets out in more detail the factors to consider in determining the best interests of the child. These include the need to protect the relationship of the parent and child and to limit interference to that necessary to secure the safety and wellbeing of the child and the need to promote positive relationships between the child, parents, family and other significant persons.

<sup>14</sup> *Charter of Human Rights and Responsibilities Act 2006* s 19.

their connections to their Aboriginal family and community.<sup>15</sup> Unlike the Charter, the Children, Youth and Families Act does not specifically protect the cultural rights of children and young people from CALD communities.

**Fair hearing.**<sup>16</sup> The Charter provides a right to a fair hearing in criminal and civil proceedings. This extends to children's interactions with the Children's Court on child protection matters.<sup>17</sup>

**Right to liberty and security.**<sup>18</sup> The Charter provides protection from arbitrary or unlawful detention. This right is engaged when a warrant is sought in relation to a child in the Family Division of the Children's Court (including a return to placement warrant). It also arises when an out-of-home placement of a child is sought, where a child is placed in a secure welfare facility or where a child is in the custody or under the guardianship of the Secretary, or is detained without warrant under section 172(3) of the Children, Youth and Families Act.

**Right to human treatment when deprived of liberty.**<sup>19</sup> This recognises the special obligations of those who detain people, for example, when a child is placed in secure welfare. The right imposes a positive obligation on public authorities. "It requires Child Protection and community service organisations to protect children from inhumane treatment or indignity imposed by third parties (such as other children or adults) at the [child protection] placement".<sup>20</sup> It also protects against less severe forms of ill-treatment than the prohibition on torture and cruel and degrading treatment.<sup>21</sup>

Public authorities are obliged to act in accordance with protections and rights under the Charter.<sup>22</sup> This includes the DHS and organisations undertaking functions of a public nature on the Department's behalf, including out-of-home care and family service providers.<sup>23</sup>

## The Equal Opportunity Act positive duty

Discrimination based on personal attributes, including age, is unlawful under the Equal Opportunity Act 1995. The law also protects children from discrimination based on other attributes they may have, such as disability, race or religion.<sup>24</sup>

These provisions protect children and families from discrimination in areas of public life including education, health, accommodation and service delivery – which includes family services, out-of-home care and child protection services.

Equality considerations in relation to children are of particular concern to the Commission because:

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<sup>15</sup> *Children, Youth and Families Act 2005* s 10(3).

<sup>16</sup> *Charter of Human Rights and Responsibilities Act 2006* s 24.

<sup>17</sup> *Secretary, Department of Human Services v Catherine Sanding* [2011] VSC 42, unreported, 22 February 2011.

<sup>18</sup> *Charter of Human Rights and Responsibilities Act 2006* s 21(1)-(3).

<sup>19</sup> *Charter of Human Rights and Responsibilities Act 2006* s 22.

<sup>20</sup> Department of Human Services (December 2007), above n 7.

<sup>21</sup> Human Rights Committee, *General Comment 09: Humane Treatment of Persons Deprived of Liberty (Art 10)*, 16th session, UN Doc RI/GEN/1/Rev 6 (30 July 1982) [3].

<sup>22</sup> *Charter of Human Rights and Responsibilities Act 2006* s 38(1). However, this provision does not apply if, as a result of a [Commonwealth or state statutory provision] or otherwise under law, the public authority could not reasonably have acted differently or made a different decision. *Charter of Human Rights and Responsibilities Act 2006* s 38(2).

<sup>23</sup> *Charter of Human Rights and Responsibilities Act 2006* s 4(1)(a).

<sup>24</sup> *Equal Opportunity Act 1995* s 6.

- some population groups are over-represented in child protection matters, which has an impact upon their immediate wellbeing and their future life chances. For example, Indigenous children are 11 times more likely to be in out-of-home care in Victoria than non Indigenous Australians. Further, although seven per cent of Victorian children have a disability, among those children entering out-of-home care for the first time, the prevalence of disability more than doubles to 15.4 per cent.<sup>25</sup>
- some population groups may be at increased risk of entering the child protection system because of barriers to universal or specialist services, for example, children with disability when family respite services are unavailable
- some population groups, including parents with intellectual disability may be more likely to be scrutinised by child protection
- there is a well-established link between discrimination and disadvantage. Discrimination may drive disadvantage that in turn contributes to family and social conditions in which neglect and abuse can occur. Discrimination is also a symptom of the disadvantage that many children and young people experience before, during and after the time they spend in out-of-home care.

The Commission notes that in addition to existing laws, the Equal Opportunity Act 2010 will require organisations to take a proactive approach to preventing discrimination. The Act includes a new positive duty to take reasonable and proportionate measures to eliminate discrimination as far as possible.<sup>26</sup> This duty commences on 1 August 2011.

This shift will have significant and positive repercussions for family and children service organisations, as well as the DHS and other government agencies interacting with child protection and wellbeing issues. Agencies will be required to take reasonable and proportionate steps to eliminate discrimination. For service providers in this area, this will include taking steps to address the structural barriers facing groups with protected attributes seeking to access services and paying particular attention to the needs of vulnerable groups.

## International obligations

The Convention on the Rights of the Child was ratified by Australia in 1990. It sets out obligations under international law to promote and protect the fundamental human rights of children, including principles for child protection. It entitles each person under the age of 18 to the full enjoyment of rights set out within the Convention.

The Convention includes specific rights around removal from family, the right of young people to express views in matters affecting them, including a right to representation, responsibilities of families and special protection when in child protection.<sup>27</sup> A child's rights to family, health, an adequate standard of living and development, education, culture and freedom from maltreatment, abuse and degrading treatment are also protected.<sup>28</sup>

<sup>25</sup> Victorian Child and Adolescent Monitoring System (VCAMS), 20.3 Children in out-of-home care. <http://www.education.vic.gov.au/researchinnovation/vcams/parents/20-3inoutofhomecare.htm> at 16 March 2011.

<sup>26</sup> This obligation is implied in the *Equal Opportunity Act 1995*.

<sup>27</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Arts 9, 12, 18, 20.

<sup>28</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Arts 16, 24, 27, 29, 30, 19, 34, 37.

Australia's ratification of the Convention on the Rights of the Child places a positive legal obligation upon Australia to ensure adherence to these rights and principles within laws, policies and practices. The commitment of all Australian governments to this is also specified in the *Protecting Children is Everyone's Responsibility: National Framework for Protecting Australia's Children 2009–2020* endorsed by the Council of Australian Governments (COAG Framework).<sup>29</sup>

The Victorian Charter's protection of children provision reflects Australia's obligations under the Convention on the Rights of the Child, stating that all actions concerning the child should take full account of his or her best interests.<sup>30</sup> Further, the domestic force of the Charter complements without limiting the rights contained in the Convention on the Rights of the Child and other international human rights treaties.<sup>31</sup>

In addition, the Charter includes a provision whereby international law and the judgements of domestic, foreign and international courts relevant to a human right, may be considered when a statutory provision is interpreted.<sup>32</sup> Thus, the courts may consider the Convention on the Rights of the Child when interpreting the Children, Youth and Families Act or any other legislation.<sup>33</sup>

## Using the Charter and human rights in this Inquiry

The Charter provides a means by which the rights of children and families can be considered and actioned. This is of particular value where common law protections are not well developed, and where a cogent decision-making framework is needed to resolve complex policy questions.

In legal terms, the Charter requires the embedding of human rights across all laws and policies, and a shift towards a more proactive and systematic approach to rights, and so child-centred practice, in the area of child protection.

It sets the minimum standards below which the system must not fall and provides a means to hold the child protection and other intersecting systems to account if they do by demanding explicit consideration of human rights in all decision making. This accountability is multifaceted and includes:

- an obligation on the Parliament to formally consider the consistency of proposed legislation with human rights protected under the Charter<sup>34</sup>
- an obligation on courts and tribunals to consider whether laws are consistent with Charter rights, to interpret laws consistently with Charter rights as far as possible,

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<sup>29</sup> Council of Australian Governments, *Protecting Children is Everyone's Responsibility: National Framework for Protecting Australia's Children 2009–2020* (2009).

<sup>30</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Art 3.

<sup>31</sup> *Charter of Human Rights and Responsibilities Act 2006* s 5. Australia is also state party to a number of key international conventions that protect and promote the rights of families and children including the *International Convention on Civil and Political Rights* and the *International Convention of Economic, Social and Cultural Rights*. These are not discussed in this submission.

<sup>32</sup> *Charter of Human Rights and Responsibilities Act 2006* s 32(2).

<sup>33</sup> The Charter is currently being reviewed. This review is required to include whether the rights in Convention on the Rights of the Child should be specified in the Charter. *Charter of Human Rights and Responsibilities Act 2006* s 44(2)(ii).

<sup>34</sup> *Charter of Human Rights and Responsibilities Act 2006* ss 28, 30.

and to consider international human rights laws and judgements when interpreting Victorian laws<sup>35</sup>

- under section 38 of the Charter, public authorities must act in a way that is compatible with human rights, and give proper consideration to Charter rights when making decisions. This impacts directly upon the policies and practices within the context of authorising legislation, including the Children, Youth and Families Act. If a person considers that this duty has not been met, they may seek relief or a remedy on the basis of the Charter, as long as this is sought as part of existing legal proceedings<sup>36</sup>
- the Charter also empowers the Ombudsman to inquire into or investigate whether any administrative action is incompatible with Charter rights<sup>37</sup>
- further accountability is ensured through the annual reporting by the Commission on the operation of the Charter. This report is made to the Attorney-General and must be tabled in Parliament.<sup>38</sup>

The Charter also provides a way to examine reforms to determine whether they will deliver better outcomes for children. This is not a remote legal obligation but one which, when applied correctly impacts on how services are delivered on the ground. Accordingly, all child protection legislation, policy and practice, including the recommendations of this Inquiry and any possible unintended consequences must be measured against this test.

Although the Charter is the primary means available to the Inquiry for considering human rights in the context of child protection, the Convention on the Rights of the Child may also be a useful tool for examining solutions to current challenges. In doing so, the Inquiry will reap the benefit of two decades of international human rights law and practice around the Convention. This includes specific guidance on child protection and best interests principles recently delivered by the United Nations Committee on the Rights of the Child.<sup>39</sup>

In order to promote children and young people's safety and wellbeing, their right to family, and to reduce the incidence and harm of child abuse and neglect, Charter and Convention rights must be applied across:

- all aspects of the child's life, including access to universal, secondary and primary services<sup>40</sup>
- all service systems, not just child protection
- the legal system, including the Children's Court or any alternative legal arrangements recommended by this Inquiry
- all child protection domains – pre care, in care and post care
- the development of all legislation, policies and services, so that they reflect children and young people's needs and experiences.

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<sup>35</sup> *Charter of Human Rights and Responsibilities Act 2006* s 32

<sup>36</sup> The Charter does not contain an independent cause of action. *Charter of Human Rights and Responsibilities Act 2006* s 39.

<sup>37</sup> *Ombudsman Act 1973* s 13(1A).

<sup>38</sup> *Charter of Human Rights and Responsibilities Act 2006* ss 41,43.

<sup>39</sup> Committee on the Rights of the Child, Fifty-sixth session, *General Comment no.13: Concerning the Right of the Child to Protection from all Forms of Violence* (2011) CRC/C/GC/13.

<sup>40</sup> Throughout this submission, the term 'tertiary' is used to describe the statutory child protection system including out-of-home care.

# Response to terms of reference

## 1. The factors that increase the risk of abuse or neglect occurring, and effective prevention strategies

The risk factors for families in contact with the child protection system are well known. They include substance dependency, family violence, homelessness, poverty, imprisonment, limited social supports and barriers to parent-child attachment.

Many of these factors are interrelated. Often they are chronic and multi-generational. All are likely to be experienced by those facing discrimination and social exclusion, either as a cause or as an effect.

Eliminating or reducing these factors would significantly drive down the incidence of child abuse and neglect, and reduce the numbers of people entering the tertiary end of the system.

*Families with multiple and complex problems are no longer a marginal group in service delivery. In fact, they have become the primary client group of modern child protection services. The challenge for child protection services is to respond holistically to address inter-related problems, in order to better support families to make and sustain changes to better meet the needs of children.*<sup>41</sup>

This requires a long-term, focused and whole of community and government commitment to reduce the incidence of structural drivers including family violence (a gender discrimination issue) and poverty, as well as changes to the service platform consistent with a rights approach.

### 1.1 Beyond residualism to rights

The COAG Framework referred to above explicitly adopts a public health approach to care and protection, shifting the view of child protection as solely a response to abuse and neglect to promoting the safety and wellbeing of children.<sup>42</sup>

One of the primary drivers underpinning the COAG Framework is a strong focus on prevention, delivered by a coordinated and integrated service system meeting the needs of children and families across the primary, secondary and tertiary services.

The Commission welcomes this approach because “investment in primary prevention programs has the greatest likelihood of preventing progression along the service continuum and sparing children and families from the harmful consequences of abuse and neglect”.<sup>43</sup>

This prevention focus is consistent with the Charter as the bulk of the effort is on supporting the family and child to enjoy their human rights. Properly resourced, planned and accessible interventions will also help to avoid children entering the tertiary end of the system, allowing them to enjoy their right to protection of the family without interference.

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<sup>41</sup> Leah Bromfield, Alister Lamont, Robyn Parker and Briony Horsfall, *Issues for the safety and wellbeing of children in families with multiple and complex problems: The co-occurrence of domestic violence, parental substance misuse, and mental health problems* (2010) Australian Institute of Family Studies Child Abuse Prevention Issues No. 33

<http://www.aifs.gov.au/nch/pubs/issues/issues33/index.html> at 14 March 2011.

<sup>42</sup> Council of Australian Governments, above n 29, 7.

<sup>43</sup> Prue Holzer, *Defining the public health model for the child welfare services context*, National Child Protection Clearinghouse, Australian Institute of Family Studies at [www.aifs.gov.au/nch/pubs/sheets/rs11/rs11.html](http://www.aifs.gov.au/nch/pubs/sheets/rs11/rs11.html) at 8 March 2011.

However, an identified limitation of a public health approach is that it can result in the subjective experiences of individual children being lost.<sup>44</sup> For this reason, a human rights perspective can add value to a public health model and “can enrich public health and protective responses to child abuse and neglect”.<sup>45</sup>

From a human rights perspective, “all children have the right to experience the conditions for optimal health, growth and development, and society has an obligation to ensure that parents have the necessary resources to raise children”.<sup>46</sup> In short, children have the right to the best possible life.

Implicit in this is a human rights approach to what constitutes best interests. This requires reframing the traditional, narrow view of the child’s best interests in child protection or safety terms only, to a more comprehensive approach that considers all the child’s human rights and their interdependence with others, so that best interests are no longer viewed in isolation from the child’s full range of rights.

In policy and practice terms this means shifting from a child protection ‘system’ to a system that protects children.

Taking this approach emphasises every child’s and family’s entitlements to services, including universal services, which by their nature are less likely to be stigmatising or associated with ‘welfare’. It is consistent with a shared responsibility approach for children’s wellbeing, safety and protection, and avoids residualism.

It also emphasises access to specialist support services when, and for as long as, they are needed. On this model, **all** services are designed to improve outcomes for families, children and young people, and not just to prevent the progression to tertiary (statutory child protection) services.

The Commission welcomes the investment made so far in prevention and early intervention. However, we note that currently there are not sufficient services to meet demand.<sup>47</sup>

This shortfall extends beyond family and children services to other upstream areas that create demand for child protection interventions, including disability services for adults and children, family violence services, post release support, housing and homelessness services, mental health and drug and alcohol services. In the absence of sufficient services in these areas, the rights of Victorian families protected by the Charter, including the rights of children who are at risk of harm cannot be realised.

## **1.2 Diversity and prevention**

The Commission is of the strong view that primary, secondary and tertiary strategies must meet the needs and cultural preferences of Indigenous Australian families and children and those from CALD communities.

However, the need to ensure the best outcomes for children goes beyond making modifications or add-ons to the system. Instead, it requires considering how the system as a whole can be more inclusive of Indigenous and CALD cultures and values. This proactive approach goes to ensuring the most effective and rights enabling service system by making the service fit the person, rather than the person fit the service.

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<sup>44</sup> Brigid Jordan and Robyn Sketchley, *A stitch in time saves nine: Preventing and responding to the abuse and neglect of infants* (2009) Australian Institute of Family Studies Child Abuse Prevention Issues No. 30. <http://www.aifs.gov.au/nch/pubs/issues/issues30/issues30.html> at 14 March 2011.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> See e.g. Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (November 2009) 42.

The Commission notes and supports the notion of the protective value of culture, as included in the DHS Aboriginal Cultural Competence Framework. In particular, we agree with the “decisive influence of culture and connection to community in providing services that are in the best interests of Aboriginal children and their families”.<sup>48</sup> We support the approach that, under the best interests principle, a child’s experience be put first and is understood through the lens of age, stage, culture and gender.<sup>49</sup>

The Children, Youth and Families Act includes specific measures that concern Aboriginal children and their families. Amongst other things, the Act safeguards the need to protect and promote the child’s Aboriginal culture and spiritual identity through connection with family and community, recognises the principle of self-determination, requires compliance with the Aboriginal Child Placement Principle and mandates the preparation of cultural plans.<sup>50</sup>

The Commission acknowledges the policy commitments made through *Dardee Boorai: Victorian Charter of Safety and Wellbeing for Aboriginal Children and Young People*.<sup>51</sup> We also acknowledge the work undertaken by the Victorian Aboriginal Child Care Agency in developing the Aboriginal Cultural Competence Framework, to guide community service organisations in the development of cultural competence in management, policy and direct service delivery.<sup>52</sup>

We also note the development of the *Victorian Government Aboriginal Inclusion Framework* to support the engagement of Indigenous Australians with government agencies, including universal services such as health and education.<sup>53</sup>

### 1.3 The need for a CALD cultural competency framework

No similar policy or practice framework to facilitate the observation of cultural rights for CALD children and families currently exists within the child protection and associated service system. The Commission considers that the best interests of CALD children and young people are less likely to be met in the absence of such a framework.

Studies from other jurisdictions have noted that child protection caseworkers are confronted by “increased complexity when working with CALD communities due to the diversity and variation between cultures, ethnicities, religions and race”.<sup>54</sup> There is no reason to expect that primary and secondary services in Victoria are not experiencing the same challenges. Research has also found that culturally sensitive practice requires access to cross cultural awareness training, assessment frameworks and resources on various CALD communities.<sup>55</sup>

Although the Children, Youth and Families Act does not, save for Aboriginal children; specify the importance of cultural identity within best interests principles, the right to culture, including religion and language is clearly protected by the Charter and by

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<sup>48</sup> Department of Human Services, *Aboriginal Cultural Competence Framework* (2008) 15.

<sup>49</sup> Ibid 37.

<sup>50</sup> *Children, Youth and Families Act 2005* ss 10(3), 12-14 and 176.

<sup>51</sup> See <http://www.education.vic.gov.au/about/directions/aboriginalcharter/charter/default.htm> at 21 March 2011.

<sup>52</sup> Department of Human Services (2008), above n 48, 3.

<sup>53</sup> Aboriginal Affairs Victoria, Department of Planning, *Victorian Government Aboriginal Inclusion Framework* (2010).

<sup>54</sup> J Kaur “Developing ‘culturally sensitive’ practice when working with CALD communities in child protection: an Australian exploratory study” *Developing Practice: The Child, Youth and Family Work Journal* no. 23 Autumn/Winter 2009: 23-34.

<sup>55</sup> Ibid.

international law.<sup>56</sup> Further, all Victorian legislation, including the Children, Youth and Families Act, must be interpreted as far as possible in a way that is compatible with Charter rights.

The legal obligation to observe cultural rights applies to all Victorian public authorities. Discrimination, including indirect discrimination based on religion and race, offends the Equal Opportunity Act 1995, which applies to all service delivery agencies, whether statutory, non-statutory and for-profit.

The new Equal Opportunity Act 2010 positive duty requirement applies equally here, in that organisations will have an obligation to take reasonable steps to eliminate discrimination as far as possible. This means that from August 2011, service providers will be required to take a more proactive approach to removing cultural barriers.

The development and implementation of a robust framework for the delivery of culturally appropriate services and strategies across the primary, secondary and tertiary platforms would help services meet their existing legal obligations under the Charter, as well as imminent Equal Opportunity Act 2010 duties. It is also consistent with the stated policy priorities for the Children, Youth and Families division, as outlined in the *Department of Human Services 2010-12 Policy and Funding Plan*.<sup>57</sup>

Embedding CALD specific practice does not necessarily mean that the Children, Youth and Families Act be amended, although that would be an option. A simpler solution would be to develop a CALD cultural competency framework on a similar basis to the existing Aboriginal framework discussed above.

Such a framework should be developed in partnership with affected communities, to reflect the diversity within and between CALD communities, including among emerging and newly arrived communities.<sup>58</sup>

The development of a CALD specific cultural competency framework would necessarily need to be complemented by state wide training in order to achieve Charter and Equal Opportunity Act 2010 compliance. Given the high staff turnover in family services, out-of-home-care and child protection services, this would also provide a useful opportunity to provide complementary training on the best interests principle, the Charter, the Equal Opportunity Act 2010 positive duty and the Aboriginal Cultural Competency Framework. Each of these is a necessary component of rights-consistent practice across the service system. The Commission makes recommendations on this later in this submission.

## Recommendations

- That the Department of Human Services commission the development of a Culturally and Linguistically Diverse Communities Cultural Competency Framework which reflects the diversity within and amongst communities, including emerging and newly arrived communities.
- That when developed, the framework is promoted across the family and children services, child protection and out-of-home care system. This includes the ongoing provision of training on the proposed CALD Framework, the existing Aboriginal Cultural Competency Framework, legal obligations under the Charter of Human

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<sup>56</sup> *Charter of Human Rights and Responsibilities Act 2006* s 19, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Art 30.

<sup>57</sup> Department of Human Services, *Policy and Funding Plan 2010-12*, 16.

<sup>58</sup> The Commission notes that the Department of Human Services has developed protocols for culturally appropriate out-of-home-care placement for unaccompanied refugee minors. These could be incorporated into a broader suite of CALD guidance.

Rights and Responsibilities Act 2006 and Equal Opportunity Act 2010 positive duty; and the implementation of best interests practice principles as per the Charter and the Children, Youth and Families Act 2005.

## **2. Strategies to enhance early identification of, and intervention targeted at, children and families at risk**

By providing the right services at the right time vulnerable families are supported, child abuse and neglect can be prevented, and the effects of trauma and harm can be reduced.<sup>59</sup> The challenge remains however, in ensuring this occurs in practice.

Barriers in accessing specialist adult drug and alcohol, disability, mental health, family violence, homelessness and post release services are well known.<sup>60</sup> While resource levels of these service systems is a matter for government, the Commission is concerned that the ability of people to enjoy the human rights provided through both domestic and international law may be compromised if they cannot gain access to the services they need in a timely manner or for the length of time necessary.

The Commission notes, for example, that currently, most therapeutic interventions for children are not available until they reach the crisis end of the system. We note with concern research indicating that 61 per cent of children in out-of-home care presenting to the Royal Children's Hospital Mental Health Service met the criteria for a major mental health diagnosis. This suggests that intervention is not occurring early enough for these children.<sup>61</sup>

As noted in the COAG Framework, child protection and wellbeing is a shared responsibility.<sup>62</sup> The Commission strongly believes that if all parts of government place more emphasis on family support (thus facilitating placement prevention) and use a rights based approach to delivering their services, we can go some way towards ensuring that fewer children reach the point of needing to come into the statutory child protection system.<sup>63</sup>

### **2.1 The continued over-representation of Aboriginal children**

Aboriginal children are acutely affected by the issues before the Inquiry. The *United Nations Committee on the Rights of the Child: Concluding Observations* on Australia's performance of its obligations under the Convention on the Rights of the Child<sup>64</sup> expressed concern at the over representation of Aboriginal children in out-of-home care. This remains an issue.

Aboriginal children remain over-represented in all areas of the child protection system. In Victoria, Aboriginal children are 9.6 times more likely to be the subject of

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<sup>59</sup> Council of Australian Governments, above n 29, 17.

<sup>60</sup> See .e.g. Victorian, Auditor-General, *Managing Drug and Alcohol Prevention and Treatment Services* (2011) ix, and Victorian Auditor-General, *Responding to Mental Health Crises in the Community* (2009) 1.

<sup>61</sup> N Milburn, Royal Children's Hospital Mental Health Service (2005), *Protected and Respected: Addressing the Needs of the Child in Out-of-home Care: The Stargate Early Intervention Program for Children and Young People in Out-of-home Care*, Royal Children's Hospital Mental Health Service.

<sup>62</sup> Council of Australian Governments, above n 29, 7, 15.

<sup>63</sup> The Commission welcomes the new Placement Prevention Pilots introduced under *Directions for Out-of-home Care*. This program facilitates Placement Prevention Coordinators to refer a family who are at risk of having their child(ren) removed to a case worker who undertakes a needs assessment to ensure the right suite of therapeutic services and support are in place to assist the family over a period of up to 12 months.

<sup>64</sup> UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/15/Add.268, 7.

verified notification of abuse, neglect or harm than non-Aboriginal children; 12 times more likely to be on a protection order, and 11 times more likely to be in out-of-home care.<sup>65</sup>

These experiences are compounded by multiple disadvantage, including high rates of family violence,<sup>66</sup> experiences of racism and intergenerational trauma caused by previous policies, including forced removal of children,<sup>67</sup> and the many barriers preventing Indigenous families and children engaging with support services.<sup>68</sup>

The Commission notes and supports the strong legislative emphasis on self-determination and Aboriginal placement principles within the Children, Youth and Families Act, and associated policy frameworks. However, the continued over-representation of Aboriginal children and families in the system suggests that the implementation of these principles remains elusive in the absence of significant improvements in the level of resources available throughout the primary, secondary and tertiary platforms.

We are particularly concerned that adequate resources be available for prevention and early intervention, including through Aboriginal family support, children's services and legal services, as well as allied services such as Aboriginal Controlled Health organisations, family violence prevention services and education support.<sup>69</sup>

## **2.2 Relinquishment of children with disability**

The Commission is concerned that children with disability may enter the statutory child protection system due to lack of adequate respite care services for families.

Properly delivered respite care has the capacity to support families to care for their children well, consistent with a child's best interests and the child's right to protection of the family protected by the Charter and international law.<sup>70</sup> It has the potential to provide stability and safety for children with disability and to prevent family breakdown.

Problems with our current disability respite system identified in research include lack of access, a lack of integration with other supports and a lack of programmatic funding.<sup>71</sup>

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<sup>65</sup> Victorian Child and Adolescent Monitoring System, above n 25. See also Productivity Commission, *Healthy Lives, Overcoming Indigenous Disadvantage Key Indicators 2009* (2010) [4.123].

<sup>66</sup> The Commission notes and supports *Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities*. This is a 10-year plan to guide the Victorian government and community efforts in preventing family violence. [http://www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0018/35523/Final\\_10\\_Year\\_Plan\\_Oct08\\_2nd\\_Edition.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0018/35523/Final_10_Year_Plan_Oct08_2nd_Edition.pdf)

<sup>67</sup> Human Rights and Equal Opportunity Commission, *Bringing them home – National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

<sup>68</sup> S Flaxman, K Muir and I Oprea, 'Indigenous families and children: coordination and provision of services' *Occasional Paper 23, National Evaluation Consortium*, Sydney (2009).

<sup>69</sup> The Commission notes in particular the representations on this issue made by the Victorian Aboriginal Child Care Agency, Victorian Aboriginal Legal Service and the Aboriginal Family Violence Prevention Legal Service in each of their submissions to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements.

<sup>70</sup> *Charter of Human Rights and Responsibilities Act 2006* s 17(1), *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Art 16.

<sup>71</sup> LaTrobe University, *Respite care: the Grassroots of Preventative Care: the Respite Care Scoping Project*, (2010), 13. An older qualitative survey identified that the disability service system fails to appreciate the importance of addressing the need of the whole family including children with disabilities themselves. Importantly, it identified respite as a critical service supporting parents. See

Although there is no publicly accessible data to establish a direct correlation between the lack of access to respite and parents relinquishing their children to statutory child protection, the issue has been raised with the Commission by its Disability Reference Group.<sup>72</sup>

In particular, we note:

*There are some indications that children with a disability may be over-represented in the population of children in out-of-home care. While seven per cent of Victorian children have a disability (ABS 2004, in DHS 2006), unpublished data from the Department of Human Services show that 10 per cent of the current care population enter care with some form of disability or developmental delay. Among those children entering care for the first time in 2007–08 the prevalence of disability was even higher, at 15.4 per cent.*<sup>73</sup>

There has also been anecdotal reporting which has gained media interest. For example, a newspaper report from *The Age* in 2010 stated that there were 40 children with disabilities in the care of state welfare services who had been relinquished by their parents. Disability organisations indicated that parents have to relinquish the care of their children because they get insufficient support in caring for their child. Jo Hine, Deputy Manager of Yooralla commented

*[parents are] exhausted, they feel alone and we find that when parents get to that point, it's not because they no longer love the child or even feel they can provide them with a loving environment. They just physically or emotionally don't have the capacity to continue that relationship in the family structure.*<sup>74</sup>

In another article, Elizabeth McGarry, Chief Executive Officer of the Association of Children with Disability, commented:

*Families who feel the only course of action open to them is to give up the care of their child are at the end of the road...relinquishment often means being confronted by the regulatory environment of [Child Protection and support services]...they've neither abused or neglected their child, yet they find themselves catapulted into a system that was never developed to support the unique situation in which they find themselves.*<sup>75</sup>

The Commission notes the Disability Services Commissioner and the Child Safety Commissioner have been approached by disability service providers with concerns about inadequate service responses to children with a disability in out-of-home care (including respite), including a lack of a coordinated approach.<sup>76</sup>

### **2.2.1 Human rights implications of relinquishment**

As public authorities, DHS and funded disability services are required to act consistently with the Charter. Although the Charter does not include the right to health (which would cover the provision of respite services) it does protect the right *without discrimination* to the protection of families and children. Hence, where a lack of access to respite compromises a family's ability to provide effective ongoing care

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LaTrobe University, *Listen to Us: Supporting Families with Children with Disabilities: Identifying Service responses that Impact on the Risk of Family Breakdown* (2002), 9.

<sup>72</sup> The Disability Reference Group provides advice to the Commission on systemic discrimination and human rights issues. The group includes members who have direct experience of disability, parents of children with disabilities, service providers, and advocates.

<sup>73</sup> Victorian Child and Adolescent Monitoring System, above n 28.

<sup>74</sup> Carol Nader, 'State has 40 Relinquished Children,' *The Age* (Melbourne), 30 September 2010.

<sup>75</sup> Elizabeth McGarry, 'Families of the Disabled Still Wait for a Fair Go,' *National Times*, 30 September 2010.

<sup>76</sup> Disability Services Commissioner, *Annual Report* (2010), 42.

for a child with a disability, the right to family and the protection of the child's best interests is put at risk.

In interpreting the Charter right to protection of families and the best interests of the child, regard must be given to international human rights law. The United Nations Committee on the Rights of the Child comments that a child with a disability living with a carer or parent should receive the support that would enable him or her to continue living with a parent if it is in his or her best interests. The Committee acknowledges the preventative benefits of respite care before crisis point is reached and describes these as critical in maintaining a healthy, cohesive family unit.

*Children with disabilities are best cared for and nurtured within their own family environment, provided the family is adequately cared for...Support services should include different forms of respite care, such as care assistance in the home and day-care facilities directly accessible at community level. Such services enable parents to work, as well as relieve the stress and maintain healthy family environments.*<sup>77</sup>

### **2.2.2 Progress on the issue to date**

The Commission understands that, in response to concerns raised with the Disability Services Commissioner and the Child Safety Commissioner, the DHS is now working with both Commissioners to develop an integrated framework for children and young people with a disability.<sup>78</sup>

The Commission understands that DHS Disability Services has engaged KPMG to develop a state-wide strategic plan to provide clear direction for funded respite and carer supports for the next three years. The discussion paper released by KPMG acknowledges the need for early intervention services that provide support to carers and families of people with disabilities at an early stage to reduce the need for more intensive supports in the future.<sup>79</sup>

The Commission also notes that the DHS *Funding and Policy Plan 2010-12* includes the delivery of an additional 330 community-based respite episodes in 2010–11, and capital funding for a further 15 facility-based respite places in 2010–11, with recurrent funding to be provided for up to 135 additional respite episodes when these facilities are fully operational.<sup>80</sup>

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<sup>77</sup> Committee on the Rights of the Child, *General Comment 9: The Rights of Children with Disabilities*, 27 February 2007, CRC/C/GC/9.

<sup>78</sup> Disability Services Commissioner, above n 76, 42; Office of Child Safety Commissioner, *Annual Report 2009-10* (2010) 14. The Commission also notes the Consortium between the Office of Child Safety Commissioner and La Trobe University (and community organisations) on respite care. The Consortium's achievements include: a literature review, a mapping of respite services in Victoria and three sector policy research forums.

<sup>79</sup> KPMG, *Developing a Strategic Plan for Disability Services Funded Respite and Carer Support Discussion Paper* (2010), 8.

<sup>80</sup> Department of Human Services, above n 57, 23.

While these initiatives and resources are welcome, the Commission considers that work that is more intensive is needed to prevent children with disability entering the statutory child protection system. In addition to necessary service enhancements, the Commission also considers that it would be prudent to more clearly express within disability services legislation the obligation to observe best interests principles, consistent with the Charter. This is discussed further in our response to term of reference 4, later in this submission.

### **3.3 Parents with disability and child protection**

The Commission notes representations made by advocacy organisations during the Commissioner's regional consultations that some parents with disability report over-zealousness on the part of child protection services. They claim that parents with intellectual disability who have appropriate supports in place upon the birth of their child, and who are able to provide a loving and safe environment for their child, nevertheless come to the attention of child protection services.

While these reports are anecdotal, the Commission is concerned that people with disability, in common with all Victorians, enjoy the Charter right to protection of the family.

While "some parents with intellectual disability may neglect their child...it is not clear whether children of parents with intellectual disability are at greater risk than other children, particularly given the variation in the degree of intellectual disability and the impact it may have on children's safety and wellbeing".<sup>81</sup>

We further consider that this issue is worthy of further investigation by the DHS and would welcome the opportunity to work with the Department in this regard.

### **Recommendations**

- That, in order to protect Aboriginal children's cultural rights and to reduce the continuing over-representation of Aboriginal children in child protection, adequate resources are made available for Indigenous specific prevention, early intervention and response, including through Aboriginal family support, children's services, out-of-home care and allied services including Aboriginal controlled legal, family violence and health services.
- That issues relating to the nexus between disability services and child protection, and the rights of children and parents with disability are prioritised by the Department of Human Services. In particular that:
  - a) concerns expressed by parents of children with disability that they are being forced to relinquish their child into care due to a lack of support and respite services be comprehensively examined and resources made available to prevent such relinquishment
  - b) concerns expressed by parents with intellectual disability that they are subject to unreasonable scrutiny by child protection services be comprehensively examined and protective staff trained on rights consistent practice when working with parents with disability.

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<sup>81</sup> Alister Lamont and Leah Bromfield, *Parental intellectual disability and child protection: Key issues* (2009) National Institute of Family Studies NCPC Issues No 31.  
<http://www.aifs.gov.au/nch/pubs/issues/issues31/issues31.html> at 7 April 2011.

### 3. The quality, structure, role and functioning of family services, statutory child protection services and out-of-home care

The Commission recognises the wealth of information and recommendations gathered through previous reviews and inquiries into the Victorian Child Protection system, including the Victorian Ombudsman's own motion investigations into the *Department of Human Services Child Protection Program* (November 2009) and *Child Protection – out-of-home care* (May 2010).

Given the volume and depth of available information and policy advice on these issues, the Commission does not provide detailed comments on all aspects of this term of reference. Instead, we provide our insights into key issues that are relevant to human rights and equal opportunity, where we consider other stakeholders may not comment.

However, as a general observation, the Commission observes that in considering solutions to the challenges identified in this Inquiry, the insights contained in the interim report of the Munro Review of Child Protection in the United Kingdom (Munro Review) are instructive.<sup>82</sup>

As noted by Professor Munro, there is no perfect child protection system. Adopting a purely systems approach risks recreating the problem at hand – where families and children need to fit into a system, rather than having a service platform that meets the individual needs, and so the human rights of each family and child.

Thus, this Inquiry, in common with the Munro review is

*...An opportunity not to set the 'right' system in stone, but to build an adaptive, learning system which can evolve as needs and conditions change. It is only by seeking well balanced flexibility that the system can hope to retain its focus on helping children and families, rather than simply coming to serve its own bureaucratic ends.*<sup>83</sup>

#### 3.1 Statutory Child Protection

##### 3.1.1 Breaches of human rights in the statutory system

The Commission welcomes the fact that the DHS Child Protection Practice Manual highlights the obligation to consider human rights when making decisions and provides guidance on balancing competing rights and determining the best interests of the child.<sup>84</sup> The Commission also notes the significant amount of policy guidance and practice tools provided to promoting the best interests principle across the system.<sup>85</sup>

However, we note with very great concern the findings of the Victorian Ombudsman that "the department is at times not meeting its statutory responsibilities to children at significant risk of harm".<sup>86</sup> The Commission is particularly concerned that the Ombudsman's investigation reviewed a number of cases where the best interests of children were not met and children subject to the department's intervention were

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<sup>82</sup> Eileen Munro, *The Munro Review of Child Protection – Part One: A Systems Analysis* (2010). <http://education.gov.uk/munrodownloads/TheMunroReviewofChildProtection> 17 March 2011.

<sup>83</sup> Ibid 20.

<sup>84</sup> Department of Human Services (2007) above n 7.

<sup>85</sup> These include the Department of Human Services *Best Interests Framework for Vulnerable Children and Youth* (2007) and Department of Human Services *Best Interests Case Practice Model* (2008).

<sup>86</sup> Victorian Ombudsman (2009), above n 47, 82.

subsequently left at risk. This offends the Children, Youth and Families Act, the Charter and obligations under international law.

It is clear from the Ombudsman's investigation that despite the considerable commitment and efforts of DHS staff and leadership, the statutory system is "struggling to meet its operational responsibilities".<sup>87</sup>

This manifests in a number of serious failures including an unacceptable number of unallocated cases.<sup>88</sup> It also results in an inability to respond to cumulative harm, inadequate supervision of staff, failure to comply with best interest case planning, failure to complete stability plans and cultural plans.<sup>89</sup> Further deficiencies noted by the Ombudsman include a failure to meet internal and legal obligations, non-compliance with supervision standards, failure to comply with Children's Court orders, as well as serious information privacy concerns.<sup>90</sup>

Individually, each of these represents a failure to work in the child's best interests and to comply with Charter obligations. Cumulatively, they represent significant systems failure with profound implications for the children and families affected.

### **3.1.2 Geographic inequities across the statutory child protection system**

While demand pressures mean that the system is struggling across the state, we are concerned that there are significant geographic variations in the availability, timeliness and effectiveness of statutory child protection interventions.

The Commission understands that geographic inequities exist across the system, including in Child FIRST intake.<sup>91</sup> Inequities also exist in family services, out-of-home care and in other service systems that drive upstream demand for child protection, such as disability, homelessness, drug and alcohol, teenage parenting and mental health services. This is especially felt in outer metropolitan and regional locations where there are significant concentrations of disadvantaged communities.<sup>92</sup>

Within statutory child protection, there are particularly high proportions of unallocated client cases in some regions.<sup>93</sup> We are also very concerned that the threshold of risk to children that triggers an intervention varies across the state according to local departmental office's ability to respond.<sup>94</sup>

Failure to allocate cases, or applying a too high threshold of risk necessarily means that there are a substantial number of vulnerable children without a child protection worker to respond, leaving them at significant risk of harm, and consequently at risk of a breach of their human rights.

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<sup>87</sup> Ibid 9.

<sup>88</sup> At 19 June 2009, 22.6 per cent of all child protection cases were not allocated. Ibid.

<sup>89</sup> Ibid 9-14. The Victorian Aboriginal Child Care Agency informed the Ombudsman that only 20 per cent of Aboriginal children requiring a cultural plan had one developed. Ibid 76.

<sup>90</sup> Ibid 9-14.

<sup>91</sup> See e.g. Centre for Excellence in Child and Family Welfare, *Submission to Victorian Law Reform Commission reference: Protection Applications in the Children's Court*, 5.

[http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/c/b/cb877c00422c7b c28b35ebf0cfbbc0c/Submission\\_30\\_Centre\\_for\\_Excellence\\_in\\_Child\\_and\\_Family\\_Welfare\\_Inc\\_01-04-10.pdf](http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/c/b/cb877c00422c7b c28b35ebf0cfbbc0c/Submission_30_Centre_for_Excellence_in_Child_and_Family_Welfare_Inc_01-04-10.pdf) at 17 March 2011.

<sup>92</sup> For a more detailed discussion of these issues, see Parliament of Victoria, Rural and Regional Committee, *Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional Victoria* (2010).

<sup>93</sup> For example, at 19 June 2009, 59 per cent of client cases in Gippsland and 31 per cent of case in Grampians were unallocated. Victorian Ombudsman (2009), above n 47, 25.

<sup>94</sup> Ibid 10-11.

We further note the findings of the Ombudsman that some regions have a level of demand for child protection services they could not meet even if they were fully staffed.<sup>95</sup>

The Commission recognises that resource allocation, workforce planning and development, and service prioritisation is a matter for government. We also welcome the electoral commitments made to improving the child protection system. However, we would observe that preservation of a child's human rights should not be determined by postcode.

### **3.2 Out-of-home care**

The Commission notes that the Australian Government has recently introduced *National Standards for Out-of-Home Care* to commence from July 2011.<sup>96</sup> The standards are intended to enhance outcomes for children in access to health, education and training and planning for transition from care. Whilst the development of these standards is a commendable step, a stronger, rights-based framework with provision for implementation, accountability and the participation of children in care throughout all decision-making stages of the process is also required.

#### **3.2.1 Human rights breaches caused by inappropriate placement and lack of oversight**

Evidence presented to the Victorian Ombudsman has established that the human rights of children in out-of-home care have been seriously breached.

In the first instance, these breaches arise from children being placed in a harmful environment, in which their rights to protection, security of the person and freedom from degrading treatment are clearly compromised. The Commission is particularly concerned that children in out-of-home care have been:

- sexually assaulted, and that sexual exploitation (including prostitution) is a significant issue
- subjected to physical assault and abuse;
- placed in care arrangements where required carer screening and assessment processes and checks had not been completed, with significant differences in the robustness of screening across the state magnified by workload issues for staff, and scarce placement options
- left in placements after physical harm is substantiated, and where the DHS has failed to take appropriate action against carers after abuse has been substantiated.<sup>97</sup>

While these are obvious examples of very serious breaches of human rights, the Ombudsman identified further interferences with rights. These include breaches of cultural rights – and specifically, that the Aboriginal Child Placement Principle is not being adhered to, despite being clearly required under the Children, Youth and Families Act and associated policy.

The Commission also remains concerned that homelessness services are at times, used as a form of de-facto out-of-home care for children under 16 years of age. The Commission is aware that the DHS and Child Safety Commissioner are working with the homelessness sector to develop protocols to manage this issue.<sup>98</sup> This is

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<sup>95</sup> Ibid 10.

<sup>96</sup> [http://www.fahcsia.gov.au/sa/families/pubs/std\\_out\\_of\\_home\\_care/Pages/default.aspx](http://www.fahcsia.gov.au/sa/families/pubs/std_out_of_home_care/Pages/default.aspx) at 4 April 2011.

<sup>97</sup> Victorian Ombudsman, *Own motion investigation into Child Protection – out-of-home care* (2010) 8-12.

<sup>98</sup> Office of Child Safety Commissioner, *Annual Report 2009-10* (2010) 14.

welcome, however, as a matter of principle it is unlikely to be in the best interests of unaccompanied children to be in a homelessness system which is not designed or funded to provide the care needed by children.

### 3.2.2 Inappropriate placement of children with disability

It is also of great concern that due to a lack of options, children are at times placed in residential care when it is understood that this is not in their best interests.<sup>99</sup> Further, the over-representation in residential care of children with an intellectual disability, or other form of disability such as mental illness, may also amount to systemic discrimination.

This is of particular concern for children with disability and children with complex needs, when as noted by the Ombudsman, allegations of abuse are significantly higher in this form of placement.<sup>100</sup> Such abuse, if substantiated offends the right to liberty and security of the person, as well as the right to protection that all children enjoy.

Human rights breaches in care largely result from inappropriate placement, subsequent lack of oversight of care, a lack of stability, and the failure to meet the best interests test. DHS acknowledges that this occurs because of a lack of capacity within the system.<sup>101</sup> Clearly, increasing case complexity, and increasing demand for out-of-home care, largely caused by children remaining in care for longer are contributing to stress on the system.<sup>102</sup> However, a child's human rights cannot be compromised because of system demands.<sup>103</sup>

### 3.2.3 Sibling separation and the right to family

Siblings in care are separated at a much higher rate in Victoria than elsewhere. Recent research by Anglicare found that 84 per cent of surveyed children in foster care who had a sibling were separated from at least one sibling. Four out of ten were separated from all their siblings. Only 16 per cent were placed with all their siblings – compared with an 'intact' rate of 40 to 46 per cent in comparable overseas studies<sup>104</sup> and 74 per cent in Queensland.<sup>105</sup>

Sibling separation will generally not be in a child's best interests, as recognised by the Children, Youth and Families Act and the DHS *Best Interests Planning for Children in Out-of-home Care Guidance* (2007). Sibling separation offends the Charter's protection of the family, unless it is established that the decision has been made as a positive choice in order to serve the child's best interests.<sup>106</sup>

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<sup>99</sup> Victorian Ombudsman (2010), above n 97, 14.

<sup>100</sup> While only seven per cent of the out-of-home care population were in residential care in 2006-07, 35 per cent of abuse in care allegations related to this placement type. Ibid.

<sup>101</sup> Ibid 13.

<sup>102</sup> A significant number of children also come back into the system on repeat presentations. The Centre for Excellence in Child and Family Welfare reports that 46 per cent of children entering care are re-entries to care. See Centre for Excellence in Child and Family Welfare, above n 91, 4.

<sup>103</sup> The Commission notes and supports the recommendations made by the Ombudsman in his own motion investigations into the child protection and out-of-home care systems. The Commission also welcomes the acceptance of all but one of these recommendations by DHS.

<sup>104</sup> Sarah Wise, *All Together Now: Research examining the separation of siblings in out-of-home-care* (2011) 5.

<sup>105</sup> In Queensland, of those children who have a sibling and are placed in out-of-home care, 74 per cent are placed with at least one sibling, 26 per cent are not placed with any sibling. [www.childsafety.qld.gov.au/performance.child-protection/quality/placement-siblings.html](http://www.childsafety.qld.gov.au/performance.child-protection/quality/placement-siblings.html) at 4 April 2011.

<sup>106</sup> The limitation of rights test would need to be applied to each case, consistent with section 7(2) of the Charter.

However, the Victorian Ombudsman's report and the Anglicare findings suggest that positive choice reasons are not the major driver of the high rates of sibling separation in Victorian out-of-home care. Rather, the situation reflects a lack of capacity to accommodate siblings in one home, particularly because of challenges in funding foster carers able to care for multiple children. Disturbingly, this situation may also be driving groups of siblings into residential care or contingency arrangements in motel rooms.<sup>107</sup>

### 3.3 Transition from care

#### 3.3.1 Human rights concerns

As noted by the CREATE Foundation “many acute issues must be addressed within the system, but it is how effectively the vulnerable young people in care transition to become valued and productive members of the community that is the benchmark of success”.<sup>108</sup>

Unfortunately, those leaving care continue to experience poorer outcomes across a range of social indices including health, education, and employment. Further, care leavers experience higher levels of chronic housing instability, with a disproportionately large number later becoming entrenched in the homeless population.<sup>109</sup>

A similar nexus between the child protection, juvenile justice and adult criminal justice systems exists.<sup>110</sup> For example, a DHS survey of 128 young people in custody found that 46 per cent had current or previous child protection involvement.<sup>111</sup>

Another recent survey of care leavers found that one in four had contact with the juvenile justice system.<sup>112</sup> While the *Parliamentary Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People* found that young people transitioning from out-of-home are likely to have experienced many of the risk factors associated with exposure to the justice system including not completing school, intergenerational disadvantage, history of abuse or trauma and substance dependency.<sup>113</sup>

Individuals' life outcomes are necessarily influenced by their experiences of care, especially instability in placement, which in turn impacts upon connectivity with education, a sense of belonging and the certainty in relationships that most Victorians take for granted. They are also known to be influenced by the nature and quality of support received during their transition from care.

“Gradual transitions that are planned and properly managed, and involve sufficient preparation for independent living are recognised as protective factors in outcomes

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<sup>107</sup> Sarah Wise, above n 104, 13.

<sup>108</sup> Joseph McDowell, *CREATE Report Card: Transitioning from Care in Australia* (2009), 7.

<sup>109</sup> One study found that 48 per cent of Victorian care leavers surveyed became homeless within 12 months of leaving care. Joseph McDowell, “Experiences of Leaving Care in Australia” (2010) 23 *Parity* 12, 12.

<sup>110</sup> The Commission notes and is particularly concerned by the over-representation of Aboriginal children in both the child protection and juvenile justice systems. See e.g. Australian Institute of Criminology, ‘Juveniles in detention in Australia, 1981 – 2008’, AIC Monitoring Report Number 12 (2010), 11; SCRGSP (Steering Committee for the Review of Government Service Provision), *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission (2009), 28.

<sup>111</sup> Department of Human Services *Youth Parole Board and Youth Residential Board Annual Report 2008-2009* (2009) 11.

<sup>112</sup> Guy Johnson et al, *Pathways from out-of-home care* (2010) Australian Institute of Housing and Urban Research, 18.

<sup>113</sup> Drugs and Crime Prevention Committee, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism in Young People*, Parl Paper No 218 (2009) 50.

for care leavers”.<sup>114</sup> However, for transition planning to be successful, several conditions are necessary.<sup>115</sup>

First, the plans must be completed. The Commission notes that the DHS Secretary issued *Guidance on Planning for Leaving Care* in September 2009 and that DHS has stated that all care leavers have a plan. Disturbingly, however, a study of care leavers in that same year found that only 28 per cent of Victorian care leavers participating in that survey said they had one.<sup>116</sup>

Second, the young person must be able to participate fully in the development of the plan if it is to have any chance of success. Again, recent research of care leavers suggests that this is not always the case, despite young people having a right to participate in decisions effecting them being recognised as part of the best interests of the child guaranteed by Convention on the Rights of the Child, the Charter and the Children, Youth and Families Act.<sup>117</sup> Further, while the depth and thoroughness of the Victorian leaving care plans is very welcome, this can also mean they are dense and complex. Arguably, a summary, more user-friendly plan should be available to the young person.

Third, leaving care plans and subsequent support must meet the individual needs of the young person in order to satisfy the best interests principle, and so their right to protection. This includes recognising the distinct needs of Aboriginal and CALD young people, consistent with rights under the Charter, and with anti-discrimination provisions of the Equal Opportunity Act 1995.<sup>118</sup>

Similarly, the Commission is concerned that the specific needs of care leavers with disability are recognised and met, noting the establishment of a specific support program in NSW targeting young people with disability leaving care.<sup>119</sup>

Person-centred transition planning also needs to focus on those who leave care early, who have often had poor experiences in care, and/or have complex needs. A transition planning program that identifies those at risk of leaving care early rather than assuming a fixed date of leaving care (which may be unpredictable) would help to ensure the life chances of those leaving early are significantly improved.<sup>120</sup>

Although not all care leavers are the same, research indicates financial support for young people, housing, relationships, education, life skills, identity; youth participation and emotional healing are all important aspects of leaving care programs. Each of these goes to rights protected by domestic and/or international law. All are vital to ensuring the best possible start in life for young people who have already had a traumatic childhood and adolescence.<sup>121</sup>

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<sup>114</sup> Claire Lushey and Debi Maskell-Graham, “Care Leavers and homelessness in England: Protective Factors” (2010) 23 *Parity* 22, 22-23.

<sup>115</sup> Guy Johnson, “Transition Planning: Three Policy Issues” (2010) 23 *Parity* 19, 19.

<sup>116</sup> Joseph McDowell, above n 108, 63.

<sup>117</sup> “There was a strong sentiment that their plan was simply developed to tick the boxes — a bureaucratic requirement rather than a meaningful resource designed to overcome the structural disadvantages they faced” Guy Johnson (2010), above n 115, 19.

<sup>118</sup> The Commission notes and welcomes the Leaving Care Housing and Support Initiative in conjunction with the Victorian Aboriginal Child Care Agency that provides a service in the three DHS regions with the greatest number of Indigenous young people.

<sup>119</sup> Robyn Edwards, “Nobody Knows: Young People with Disability Leaving Care” (2010) 23 *Parity* 20, 20-21.

<sup>120</sup> Guy Johnson (2010) above n 115, 19.

<sup>121</sup> Robyn Edwards, *Literature Review: Young People with Disability Leaving Care in NSW, Final report for NSW Ageing, Disability and Home Care* (2010) Social Policy Research Centre.

### 3.3.2 Transition from care policy

The Commission notes and welcomes funding commitments under the *Victorian Leaving Care Initiative 2008*. Additional brokerage funding is also acknowledged.

The Commission notes and welcomes the Victorian Government's election commitments to invest in during care and post care support, including through flexible brokerage funding for education, health and employment.

The Commission notes the significant policy interest in transition planning and support at both a state and federal level. We note the experience in Western Australia where three principles, all of which go to human rights (child participation, self-determination, community participation) underpin the Leaving Care Policy.

We also note that the Western Australian policy sets criteria for determining when the process of leaving care can be considered as finalised, including that the goals set out in the leaving care plan have been achieved and the long-term placement arrangement is likely to be sustained, or that the young person turns 25 years of age.<sup>122</sup> We consider these should be a minimum standard for monitoring and evaluating individual transition from care plans.<sup>123</sup>

We also note the attention to these issues internationally, particularly in the United Kingdom where new approaches are being trialled and evaluated including Right2BCared4,<sup>124</sup> and the Staying Put 18+ Family Placement Program.<sup>125</sup>

### 3.2.3 Reforming the legislative framework to achieve better leaving care outcomes

The Commission welcomes the election commitment to amend the Children, Youth and Families Act to permit transition support for young people in out-of-home care to continue up to the age of 25 if needed.<sup>126</sup>

The development of this legislative amendment also provides a good opportunity to correct an existing anomaly in the Children, Youth and Families Act.

Currently, although the Act sets out the DHS Secretary's responsibilities regarding the provision or arrangement of services to assist transition from care, this does not confer legal rights or entitlements at law.<sup>127</sup>

It is hard to reconcile in human rights terms how a system predicated on the best interests principle would deny care leavers access to the basic things that any other good parent would ensure their child had before leaving home. A more rights enabling approach would involve adopting the legal principles contained in the Convention on the Rights of the Child and other human rights instruments protecting

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<sup>122</sup> Discussed in Joseph McDowell, above n 108, 22.

<sup>123</sup> The Commission notes election commitments for additional resources for research into the impacts of out-of-home-care, arguably this could be used to develop a robust suite of life outcome indicators to be measured on an aggregated basis across the system, and for all individual care leavers.

<sup>124</sup> [www.lboro.ac.uk/research/ccfr/Research/Outcomes%20for%vulnerable%20children/Right2BCared4.htm](http://www.lboro.ac.uk/research/ccfr/Research/Outcomes%20for%vulnerable%20children/Right2BCared4.htm) at 21 March 2011

<sup>125</sup> [www.lboro.ac.uk/research/ccfr/Research/Outcomes%20for%vulnerable%20children/Right2BCared4.htm](http://www.lboro.ac.uk/research/ccfr/Research/Outcomes%20for%vulnerable%20children/Right2BCared4.htm) at 21 March 2011.

<sup>126</sup> Research and leading practice in international and inter-state jurisdictions indicates extending support for longer when necessary, better reflects the needs of some young people leaving care and mirrors broader societal patterns.

<sup>127</sup> *Children, Youth and Families Act 2005* s 16(2).

economic and social rights, and working towards progressively realising these rights.<sup>128</sup>

This approach would ensure the appropriate targeting of support, while also promoting the practical help and support necessary for care leavers to avoid patterns of disadvantage noted across all the research.

## Recommendations

- That section 16(g) of the Children, Youth and Families Act 2005 be amended to allow transition support to be available to young people leaving care up to 25 years of age.
- That section 16(2) of the Children, Youth and Families Act 2005 be repealed.

## 4. Interaction of departments and agencies, the courts and service providers

The Commission does not provide detailed comments on this term of reference. Instead, we provide our insights into key issues that are of concern to us from a human rights and equal opportunity perspective, where we consider other stakeholders may not comment.<sup>129</sup>

### 4.1 Embedding the best interest principle in law and practice

The best interests principle is a sound one, grounded in international and domestic human rights law. It is recognised internationally as leading policy and practice. It underpins both Victorian and national policy around child protection and wellbeing, and is a legal obligation under the Charter.

The challenge remains however to strengthen the principle in practice. So that ensuring the best interests of the child it is the natural way of doing things across all aspects of government and community services engagement with children and young people, not just in child protection.

The Commission submits that the best interests principle already binds DHS and its service providers, because of their legal obligation to comply with the Charter and in particular to consider human rights in all their actions and decisions.<sup>130</sup> Further, all legislation must be interpreted consistently with the Charter, as far as possible. This includes the child's right to protection and to act in their best interests.<sup>131</sup>

However, in practice this may seem opaque to front-line workers. As noted in the KPMG interim evaluation of the child and family services reforms "the best interests framework is not commonly understood across the universal and secondary services sector".<sup>132</sup>

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<sup>128</sup> For a discussion of the principle of progressive realisation of rights see John Tobin, *Economic, social and cultural rights and the Charter of Human Rights and Responsibilities – A Framework for discussion* (2010) Victorian Equal Opportunity and Human Rights Commission 6-7.

<sup>129</sup> The Commission notes the work of the Children Services Coordination Board. We further note DHS internal protocols between DHS Children, Youth and Families Division and: (a) Disability Services, (b) Mental Health, (c) Alcohol and Drugs Services, (d) and Youth Justice. The Commission also notes formal protocols to assist young people between DHS and (a) Victoria Police, (b) Department of Education and Early Childhood, Development, (c) Victorian Aboriginal Child Care Agency, (d) Centrelink, and the (e) Commonwealth Youth Protocol.

<sup>130</sup> *Charter of Human Rights and Responsibilities Act 2006* s 38.

<sup>131</sup> *Charter of Human Rights and Responsibilities Act 2006* s 32(1)

<sup>132</sup> Department of Human Services, *Every Child, Every Chance: Evaluation of the Child and Family Services Reforms Interim Report 1* (2009) report prepared by KPMG, 46.

Although front-line workers across human services have clear legal obligations under the Charter, there may be value in further reinforcing the best interests principle. For example, the inclusion of avoidance of doubt provisions in relevant legislation may be a useful means of ensuring that those who do not work daily in child and family services meet their existing Charter obligation to observe each child's right to have their best interests considered as paramount.

Earlier in this submission, the Commission raised significant concerns that a lack of family respite services may be contributing to children with disability entering the child protection system. This is an example of legislation that intersects with children's rights, which could be amended to avoid any doubt that the best interests principle applies, thereby reinforcing the existing binding legal obligation under the Charter.

The Commission notes that the Minister for Mental Health is currently consulting with the community on whether to incorporate features of the Convention on the Rights of the Child, including the best interest principle, in the upcoming reforms to the Mental Health Act 1986.

### **Recommendations**

- That, in order to avoid doubt, the Disability Act 2006, the Mental Health Act 1986 and other Acts guiding the delivery of services be amended to include a provision specifying that the best interests of the child are paramount and must be observed at all decision making points.
- That this provision specifically refers to the right contained in the section 17(2) of the Charter of Rights and Responsibilities Act 2006, and the best interests principles contained in section 10(2)-(3) of the Children, Youth and Families Act 2005.

## **5. Appropriate roles and responsibilities of government and non-government organisations**

The Commission makes no comment on this term of reference except to note that the Charter binds all statutory and funded providers of child and family services.

If for profit providers entered this service system, the Charter binds them as deliverers of services on behalf of the State of Victoria.<sup>133</sup>

## **6. Possible changes to the processes of the courts**

The Commission notes the report of the Victorian Law Reform Commission (VLRC).<sup>134</sup> We do not state any preference for the models proposed in that report, however any new option or model adopted for child protection proceedings in Victoria must:

- clearly reflect the primacy of recognising rights in accordance with the best interests of the child
- ensure that the Court has the discretion and appropriate procedures to afford the right to a fair hearing to a child in child protection proceedings
- ensure cultural competency in all aspects of operations and decision-making.

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<sup>133</sup> *Charter of Human Rights and Responsibilities Act 2006* s 4 (1)(c).

<sup>134</sup> Victorian Law Reform Commission, *Protection Applications in the Children's Court Final Report No 19* (2010).

## 6.1 Right to a fair hearing

The recent decision of the Supreme Court in *Secretary to the Department of Human Services v Sanding* confirmed that a child welfare proceeding is a civil proceeding to which the Charter applies.<sup>135</sup>

In that case, Justice Bell confirmed that the flexible procedural discretion of the Children's Court is qualified by the requirement to ensure protection of the best interest of the child, the principles of natural justice and the right to a fair hearing under section 24(1) of the Charter.<sup>136</sup> The decision also confirmed that the "first and paramount" consideration for the Children's Court was ensuring the best interests of the child, noting that all other considerations were subordinate.<sup>137</sup>

The decision discussed that affording a fair hearing to a child in a child protection proceedings will depend on:

- the capacity of the child
- the nature of the proceeding
- the issues and stake; and
- the circumstances of the case.

The Court confirmed that the rules of natural justice and the human right to a fair hearing require the Children's Court to adopt procedures which are appropriate in the circumstances, having regard to the best interests of the child first, and a balanced consideration of other interests.<sup>138</sup>

### 6.1.1 Legal representation and the right to a fair hearing

The right to a fair hearing contained in section 24(1) of the Charter includes the right to be able to access Court proceedings. In some circumstances, this may require that legal aid be provided to parties to proceedings. The principle of equality of arms requires that there be a fair balance between the opportunities afforded to the parties involved in litigation. Even though not properly categorised as litigious proceedings, the principle of equality of arms will apply to Children's Court proceedings.

All parties to protection application to proceedings should have the option of obtaining legal advice prior to Court appearances. All parties should also have the option of legal representation for all proceedings throughout the life of a child protection matter (including Court appearances, Dispute Resolution Conferences<sup>139</sup> and New Model Conferences)<sup>140</sup> to ensure that any agreement reached is consistent with the best interests of the child.<sup>141</sup>

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<sup>135</sup> *Secretary, Department of Human Services v Catherine Sanding* [2011] VSC 42, unreported, 22 February 2011.

<sup>136</sup> *Secretary, Department of Human Services v Catherine Sanding* [2011] VSC 42, unreported, 22 February 2011 [152], [166] – [167], [204]–[207].

<sup>137</sup> *Secretary, Department of Human Services v Catherine Sanding* [2011] VSC 42, unreported, 22 February 2011 [151].

<sup>138</sup> *Secretary, Department of Human Services v Catherine Sanding* [2011] VSC 42, unreported, 22 February 2011 [152].

<sup>139</sup> The Children's Court Guidelines state that "The DRC process is assisted where protective workers: are legally represented or have the necessary authority to negotiate a range of possible outcomes, and make decisions that would lead to settlement". See [http://www.childrenscourt.vic.gov.au/ca256902000fe154/lookup/guidelines\\_for\\_dispute\\_resolution\\_conferences/\\$file/guidelines\\_for\\_dispute\\_resolution\\_conferences.pdf](http://www.childrenscourt.vic.gov.au/ca256902000fe154/lookup/guidelines_for_dispute_resolution_conferences/$file/guidelines_for_dispute_resolution_conferences.pdf) at 7 April 2011.

<sup>140</sup> The Children's Court Guidelines for New Model Conferences state that DHS must be legally represented, or have legal representation during the final phase of the conference to assist with negotiation and drafting of minutes. The guidelines also state that DHS lawyers do not need to be present or available for the entire period of the Conference (whereas this is a requirement on the other

Access to culturally appropriate advice and representation, where cultural issues and holistic service delivery are at the forefront of advocacy, should be also guaranteed.<sup>142</sup> This is of particular importance to Aboriginal children and families, but also to those from CALD backgrounds. Guaranteeing such access will necessarily involve the necessary resources to ensure legal advice and representation is available and timely.

### **6.1.2 Initiating proceedings in the Children's Court**

Any person that intends to lodge a protection application in the Children's Court, including a DHS employee, should have the option of receiving legal advice prior to filing the application. The legal advice should include advice on the merits of the application, the Court process and proceedings and on the possible outcomes of the protection application.

Section 38 of the Charter requires public authorities to act consistently with the Charter. Consequently, prior to lodging a protection application in the Children's Court, DHS will need to consider whether lodging the application is in the best interests of the child and whether lodging the protection application is consistent with all the rights protected in the Charter.

Under the Children, Youth and Families Act, DHS will also have to consider whether to lodge a protection application with or without notice. DHS must consider the rights protected in the Charter, and consider which option will be the least restrictive on the rights of the child.

The Commission notes that some guidance on these issues is contained in the DHS Child Protection Policy Manual. However, this could be strengthened through more detailed guidance for DHS child protection workers to assist them to appropriately consider the human rights implications of their decision to initiate proceedings, and the human rights impact of the decision to issue a protection application with or without notice. Such guidance also needs to be monitored for compliance, and supported by regular training.

### **6.1.3 Legal representation for DHS**

The VLRC has said that it believes that "the Department's in-house lawyers sometimes feel under pressure to present arguments in Children's Court proceedings that have little merit".<sup>143</sup> The VLRC noted that this is of particular concern in regional offices.<sup>144</sup>

The VLRC further notes that in the rural regions, rural child protection workers are "sometimes both applicant in the application and representative of the department before the Court".<sup>145</sup>

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parties).

[http://www.childrencourt.vic.gov.au/CA256902000FE154/Lookup/Guidelines\\_for\\_Dispute\\_Resolution\\_Conferences/\\$file/Guidelines\\_for\\_New\\_Model\\_Conferences\\_%202011\\_9\\_Feb\\_2011.pdf](http://www.childrencourt.vic.gov.au/CA256902000FE154/Lookup/Guidelines_for_Dispute_Resolution_Conferences/$file/Guidelines_for_New_Model_Conferences_%202011_9_Feb_2011.pdf) at 7 April 2011.

<sup>141</sup> The Commission understands that legal representation is rarely made available for child protection workers at Dispute Resolution Conferences and is only made available throughout the duration of New Model Conferences for more complex matters.

<sup>142</sup> As recommended by the Aboriginal Family Violence Prevention Legal Service. See Aboriginal Family Violence Prevention Legal Service, *Submission to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements* (2010) 4.

<sup>143</sup> Victorian Law Reform Commission, above n 134, 397.

<sup>144</sup> The Commission also notes the finding that solicitors in the rural regions often spend considerable time travelling to sub-offices and Courts. Ibid 388. The distance to Court may also affect the ability of children to be directly involved in Children's Court proceedings (where they wish to be involved).

<sup>145</sup> Ibid.

The Commission is concerned that insufficient legal support is provided for DHS protective workers.<sup>146</sup> This may compromise the ability for the department, the Court and all parties to a protection application to make decisions and recommendations that accord with the best interests of the child.

Given these observations, we are concerned that the current model of in-house representation for DHS protective workers may result in the unintended consequence of the Department acting in a manner that is not in the best interests of the child, or that has failed to consider the human rights implications of a particular disposition or strategic decision.

Independent legal assessment of evidence and frank advice about the merits and human rights implications of particular cases would provide a more robust system within which DHS is able to consider the human rights implications related to any particular matter. The serious nature of child protection proceedings, and the potential consequences of a breach of the human rights of a child, provides justification for independent advice and representation for DHS protective workers.

This, in common with access to quality advice and representation for all parties, may act as an additional safeguard to the rights of the child. By allowing an independent legal expert to determine whether a proposed course of action will limit a human right, and whether that limitation is justified in accordance with section 7(2) of the Charter.

#### **6.1.5 Legal representation for children**

The Convention on the Rights of the Child confirms that children benefit from rights, even though they may lack capacity to make what adults consider reasoned decisions. However, where children do have the capacity to provide legal instructions based on their wishes, children should be considered autonomous decisions makers who are able to be active participants in matters affecting them.<sup>147</sup>

The Children's Court should ensure that separate legal representation is made available for children throughout all stages of child protection proceedings (including for Dispute Resolution Conferences). Currently a child who is a party to proceedings in the Children's Court will generally be provided with legal representation if they are mature enough to give instructions or if the Court considers that exceptional circumstances exist.<sup>148</sup>

Taking a human rights approach, the test for whether a child is able to provide instructions is one of capacity, taking into account their age as well as their level of maturity. The age of the child should not be the sole determinant of whether a child has capacity to consider legal advice and provide legal instructions. Currently in practice, a child seven years or older is usually considered to have sufficient maturity to instruct a lawyer by Victoria Legal Aid and by the Children's Court.<sup>149</sup> This is inconsistent with an approach that recognises the full, autonomous rights of children.

Nor should a child without capacity because of age or other reason, be denied access to legal assistance. Instead, the Children, Youth and Families Act should

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<sup>146</sup> Ombudsman's Comment. Ibid.

<sup>147</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Art 12.

<sup>148</sup> Section 525(4) of the *Children, Youth and Families Act 2005* provides "If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained".

<sup>149</sup> Victorian Law Reform Commission, above n 134, 478.

stipulate that in these circumstances, the Court must appoint a legal representative to advocate for the child, and in the child's best interests. This would mean that rather than operating on a traditional instructions model, a best interest model of representation is adopted.

To facilitate this, guidelines should be developed to assist legal representatives to advocate in accordance with the best interests of the child in these circumstances. These guidelines should mandate that advocates for children act consistently with the human rights of the child when representing a child.

Where a child does have capacity to provide their instructions to a legal representative, the Court should appoint a legal representative to the child, who should convey to the Court the wishes of the child, consistent with the child's right to autonomous decision-making on matters affecting them. The Court may then make an assessment of what is in the best interests of the child.

Thus, an instructions model should always be the model of legal representation for a child who has capacity to provide instructions, unless the child has indicated a desire not to participate in proceedings by instructing a legal practitioner. A child should not have to indicate an unwillingness to be represented on a best interests' basis, as recommended in proposal 2.16 of the VLRC, in order for a child to be represented on an instructions model.

Children's representatives in the Children's Court should receive appropriate training to provide them with the skills required to determine the maturity and cognitive development of a child, and arm them with appropriate interviewing techniques to achieve this. Legal Aid grants in Family Division proceedings should be restricted to lawyers that have received specific training as a qualified child representative for the purpose of child protection matters.

## **6.2 The physical environment of the Melbourne Children's Court**

The VLRC and others have noted problems arising from the environment of the Melbourne Children's Court. The VLRC report contains wide acknowledgement from the parties consulted that the "Children's Court is not a good place for a child".<sup>150</sup>

The current environment at Melbourne Children's Court is inconsistent with the right to privacy and the right of protection for families and children, in particular the obligation to ensure that the best interests of the child are protected.<sup>151</sup>

The Commission is of the strong view that improvements to Melbourne Children's Court should be prioritised.

## **6.3 Cultural competency in legal proceedings**

The Commission notes that the Aboriginal and Torres Strait Islander community's role in decision-making has been formalised in the Children, Youth and Families Act through Aboriginal Family Decision Making (ADFM).<sup>152</sup> However, we are concerned that both the Victorian Aboriginal Legal Service and the Aboriginal Family Violence Legal Project report that ADFM is currently underutilised due to a lack of available convenors, unwillingness of DHS to participate and general under-resourcing of Aboriginal provisions in the Children, Youth and Families Act.<sup>153</sup>

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<sup>150</sup> Ibid 354.

<sup>151</sup> *Charter of Human Rights and Responsibilities Act 2006* ss 13, 17.

<sup>152</sup> *Children, Youth and Families Act 2005* s12(b).

<sup>153</sup> Aboriginal Family Violence Prevention Legal Service, above n 142, 24. See also Victorian Aboriginal Legal Service, *Submission to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements* (2010) 17-18.

The Commission further notes that the Department of Justice Courts and Tribunals Unit is inquiring into options for improving the cultural responsiveness of Family Division of the Children's Court. The Commission looks forward to the release of that review's recommendations.

The Charter requires that any future model of child protection legal proceedings, include dispute resolution models culturally sensitive, consistent with the child and family's cultural rights.<sup>154</sup> We therefore encourage the Inquiry to hear directly from Aboriginal communities and organisations on the best means to ensure a culturally appropriate model of legal proceedings.

The Commission notes the advice of the Victorian Aboriginal Legal Service that "culturally appropriate dispute resolution practices will differ from one Aboriginal and Torres Strait Islander community to the next".<sup>155</sup>

In particular, the Commission notes and supports the recommendation of the Victorian Aboriginal Child Care Agency for the implementation of Aboriginal cultural competence standards (as articulated in the Aboriginal Cultural Competence Framework) for all DHS Child Protection staff, lawyers and Magistrates of the Children's Court to ensure a culturally responsive service.<sup>156</sup> Specifically, this should include training on the framework for all court staff, lawyers and magistrates working in child protection proceedings before the Court. Such training would need to be developed in partnership with the Aboriginal community and representative organisations.

#### **6.4 Promoting a culture of human rights in proceedings**

The Commission acknowledges the extremely stressful nature of the work of all persons that work in the Family Division of the Children's Court. For example:

- child protection workers undertake their jobs with limited resources whilst being exposed to often distressing situations
- solicitors in child protection proceedings have an increasing case load and have indicated that they work in less than desirable working conditions, adding to the stress of the participants in child protection proceedings<sup>157</sup>
- inter-professional collaboration is challenging within the context of legal proceedings and associated pressures to negotiate and settle matters where possible, in limited periods. These matters are often complex and will have serious ramifications on the human rights of a child.

All of these factors, and others, combine and have the potential to result in decision-makers, parties to the proceedings and legal advisors not having the access to the information available to ensure proper consideration of what is in the best interests of the child.

Adopting a human rights based approach to decision-making and the development of a human rights culture in the Family Division of the Children's Court will help to ensure that decisions are made in accordance with the best interests of the child at all times.

It is critical that training on human rights and the Charter is provided for all persons involved in protection application proceedings, at all levels, to foster accountability

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<sup>154</sup> *Charter of Human Rights and Responsibilities Act 2006* s19.

<sup>155</sup> Victorian Aboriginal Legal Service, *Submission to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements* (2010), 12.

<sup>156</sup> Victorian Aboriginal Child Care Agency *Submission to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements* (2010) 3.

<sup>157</sup> Victorian Law Reform Commission, above n 134, 84.

and to ensure appropriate consideration at all levels of the Court's operation of what is in the best interests of a child. The Commission notes in particular the role of the Judicial College in the development and delivery of training for judicial members.

## **Recommendations**

- That any new model for child protection legal proceedings:
  - a) clearly reflects the primacy of recognising rights in accordance with the best interests of the child
  - b) ensures that the Children's Court has the discretion and appropriate procedures to afford the right to a fair hearing to a child in child protection proceedings and promote the participation of the child in such proceedings
  - c) ensures cultural competency in all aspects of operations and decision-making.
- That any new model for child protection legal proceedings and dispute resolution ensures legal advice and representation for all parties throughout the duration of all proceedings, regardless of the complexity of the matter, and that the Children's Court Guidelines incorporate this provision.
- That the Children, Youth and Families Act 2005 be amended to provide that when a child does not have capacity to express their view in child protection proceedings before the Children's Court, because they are too young to do so or for any other reason, that the Court should appoint a legal representative to advocate for the child and in the child's best interests.
- That the Children's Court develop and implement guidelines to assist legal representatives to advocate in accordance with the best interests of the child in these circumstances. That these guidelines should mandate that advocates act consistently with the human rights of the child when representing a child as required under the Charter of Human Rights and Responsibilities Act 2006.
- That improvements to Melbourne Children's Court be prioritised in order to ensure compliance with Charter obligations to protect the privacy, and best interests of the child.
- That detailed and regular training on best interests and human rights decision-making be provided to Children's Court Magistrates and Registrars and legal advocates, and that this training include the Aboriginal Cultural Competency Framework and the CALD Competency Framework.<sup>158</sup>

## **7. Measures to enhance the government's ability to plan for future demand and ensure a workforce that delivers services of a high quality to children and families**

The Commission does not provide detailed comments on this term of reference. Instead, we provide our insights on issues that are of concern to us in relation to human rights and equal opportunity.

### **7.1 Participation of children and young people in system design and reform**

The Commission believes very strongly that good child protection maintains clear focus on children's best interests throughout. Central to achieving this is the genuine

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<sup>158</sup> The Commission has recommended the development of a CALD Cultural Competency Framework at recommendation 6.

and active participation of children, young people and their families in the decisions that affect them. This applies equally at an individual case level, and in service system and design.

Participation goes to achieving the best outcomes for children, but also to building an adaptive, learning and flexible system. Importantly, it also fulfils the right to participation that children enjoy under the Charter and the Convention on the Rights of the Child.<sup>159</sup>

Upholding children's right to participate in decisions that affect them is a "key signal of valuing and supporting children".<sup>160</sup> The Commission therefore welcomes the Inquiry's efforts to enable children and young people to participate in the Inquiry, so that their views are taken into account.

We also welcome the Inquiry's' recognition of the sensitivity with which participation needs to be managed, in order to avoid re-trauma and harm. We encourage this approach to continue beyond the life of this Inquiry so that the people most affected by the issue have a substantial – and sensitively handled – involvement in the detailed implementation of reforms.

## **7.2 Embedding best interests principles in practice through workforce planning and development**

The Commission notes that the Munro Review found that a learning rather than a compliance culture is needed to progress the best interests of children and maximise the best outcomes for the system as a whole.

*A good child protection system should be concerned with the child's journey through the system from needing to receiving help, keeping a clear focus on children's best interests throughout. This includes developing the expertise and the organisational environment that helps professionals working with children, young people and families to provide more effective help.*<sup>161</sup>

This learning culture is needed both within and between agencies across the primary, secondary and tertiary systems. The Commission would encourage this approach.

The Commission notes the current development by the DHS of *Integrated Human Services Standards* whereby existing child and family, disability, family violence and homelessness standards are consolidated into one overarching framework. We also note that, once implemented, these standards must be met by agencies in order to receive funding from DHS and comply with relevant accreditation systems.

This provides an ideal opportunity to further embed best interests practice and standards into the non-government human services system<sup>162</sup> in a way that promotes continuous quality improvement rather than mere compliance, and which is subject to regular monitoring. It will also support continuous improvement in the implementation of all Charter rights, including but not limited to the best interests/right to protection.

The Commission further notes the ongoing development of a 'one human services worker' workforce-planning model by DHS, and the development of the *Community Sector Workforce Capability Framework* by the Office of the Community Sector.<sup>163</sup>

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<sup>159</sup> *Charter of Human Rights and Responsibilities Act 2006* s 18 and *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Art 12.

<sup>160</sup> Council of Australian Governments, above n 29, 15.

<sup>161</sup> Eileen Munro, above n 82, 12.

<sup>162</sup> The Commission notes that health services are subject to a different accreditation system.

<sup>163</sup> <http://www.dpcd.vic.gov.au/communitydevelopment/community-sector/capability-framework> at 21 March 2011.

These efforts provide a significant opportunity to mandate knowledge about the practical application of the best interest principles, and children's rights generally, across the human services system.

The Commission submits that for these mechanisms to be of practical benefit, they need to be supported by learning and development, both in formal education settings (including universities and TAFE) and through ongoing learning and development across the statutory and non-government sectors.

The Commission notes that DHS has previously rolled out comprehensive training on the best interests principles as part of the implementation of the Children, Youth and Families Act. The Commission understands this training and associated policy and practice guidance was well received and very useful for front-line workers, both in children and family services, and associated systems including mental health, and drug and alcohol services. The value of this learning for allied systems in contributing to a shared responsibility approach cannot be underestimated.

The Commission commends that effort. However, for its value to be fully realised such investment must be sustained, particularly given the staff turnover issues present across the human services system.

## **Recommendations**

- That the DHS Integrated Service Standards include mandatory, demonstrated compliance with the rights contained in the Charter of Human Rights and Responsibilities Act 2006, including the best interests principle.
- That the DHS 'one human service worker' workforce strategy currently in development include mandatory Charter awareness and compliance, including demonstrated adherence to the best interests principle.
- Building on the success of previous efforts, that the Department of Human Services implement a sustained program of learning and development on the practical application of the best interests principle for human services workers across all domains. This training should also include specific reference to the Aboriginal Cultural Competency Framework, the CALD competency framework (if developed) and the Charter of Human Rights and Responsibilities Act 2006.

## **8. Oversight and transparency**

The Commission notes that any institutional framework recommended by the Inquiry will need to reflect a positive focus on rights, at both a systemic and individual level.

### **8.1 The role of the Child Safety Commissioner**

The Commission shares the concerns of the Ombudsman that the Child Safety Commissioner must rely on the DHS and other agencies to perform his functions, reports directly to the Minister and does not have the power to table a special report to Parliament on issues arising from his functions.<sup>164</sup> On any measure, this does not meet a test of independence and transparency required for such an important role. Nor does it support the active protection of rights of children.

A human rights and child-centred approach demands independent and comprehensive oversight of child protection and out-of-home care. Using a 'rights first' approach, such oversight would also include promoting and enhancing children and young people's rights within the system more generally.

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<sup>164</sup> Victorian Ombudsman (2010), above n 97, 121-122. We also note the current absence of a community visitor scheme for residential care but understand that funding has now been made available for such a scheme. We welcome that commitment.

The Commission therefore welcomes the Victorian Government's election commitment to legislate to provide for independence for the Child Safety Commissioner, so that he may investigate and make recommendations to protect vulnerable Victorian children without waiting for direction from government.

We consider this commitment could be enhanced by empowering the Child Safety Commissioner to protect and promote the rights of Victorian children and young people generally, with a mandate that includes include a specific focus on giving priority to promoting the protection of Victoria's vulnerable children (as does the NSW Commission for Children and Young People).<sup>165</sup>

To achieve the requisite level of transparency, any changes to the functions of the Child Safety Commissioner must ensure he or she has the necessary resources and powers to initiate own motion investigations and inquiries, and to compel the production of documents and provision of evidence to investigate matters effectively. We further consider it appropriate that the Child Safety Commissioner be empowered to report to Parliament on matters of importance, consistent with approaches in other jurisdictions.

## **8.2 Ensuring reforms arising from this Inquiry produce better outcomes**

### **8.2.1 Sound policy requires sound implementation**

Based on evidence provided to the Ombudsman and other research undertaken in the field, it appears that the policy aim of keeping the child protection system focused on prevention and early intervention is not yet realised. This creates a tension where overflow of demand for DHS child protection is positioning secondary and intake services including Child FIRST as a "de-facto child protection program. Child FIRST is also experiencing a level of demand that it cannot satisfy".<sup>166</sup> At the same time, the lack of true early intervention results in children's and family's circumstances worsening to the point where statutory intervention is required.

Some of this derives from current approaches to resource allocation and planning.<sup>167</sup> It also derives from workforce development and planning across all human services. Overcoming the issues will require transparency and accountability in the child protection system itself.

The Commission notes and supports the recommendations made by the Ombudsman in his own motion investigations into the DHS Child Protection Program and out-of-home Care. The Commission also welcomes the acceptance of all but one of these recommendations by DHS.

The challenge in finding solutions to these issues is that the legal and policy platform under which DHS operates is reasonably sound when reviewed against the Charter, the Children, Youth and Families Act and the COAG Framework. As noted by the Ombudsman "Victoria is considered a leader in terms of its policy framework".<sup>168</sup>

However, the task of finding a practical means to ensure every child's best interests, and observing their rights in all their engagements with all parts of the system, remains.

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<sup>165</sup> *Commission for Children and Young People Act 1998* (NSW) s 12.

<sup>166</sup> Victorian Ombudsman (2009), above n 47, 42.

<sup>167</sup> The Commission notes the policy directions and additional resources allocated under *Directions for Out-of-Home-Care 2009*. We seek clarification of the status of this policy, noting the Ombudsman's intentions to monitor outcomes of children in and leaving care. Victorian Ombudsman (2010), above n 98, 31.

<sup>168</sup> Victorian Ombudsman (2009), above n 97, 8.

### **8.2.2 Using available human rights tools**

The Commission encourages this Inquiry to consider available means of ensuring that any future reforms are closely monitored and evaluated for their success in achieving:

- a more robust, transparent and child-focused system
- better life outcomes for children and young people
- ongoing human rights compliance.

The Commission would welcome the opportunity to work with the Victorian Government to ensure that the policy and practice changes arising from this Inquiry are implemented consistently with the Charter, Equal Opportunity Act 1995 and the Equal Opportunity Act 2010.

In addition, given the regional variations in human rights compliance noted by the Ombudsman, the Inquiry may also consider it appropriate to encourage the DHS to embark on regular and systematic human rights audits of child protection and out-of-home care practices on a regional basis.

### **8.2.3 Evaluation frameworks**

Regardless of the model adopted to ensure oversight and transparency within the system, the true measure of success or failure will be the results it delivers for children and families.

The Commission notes that the agreed progress measures under the COAG Framework primarily address indicators for reductions in child abuse and neglect over time.<sup>169</sup> These measures are welcome.

However, given the link between disadvantage and discrimination, we consider that further emphasis on gathering and publishing outcomes during and after transition from care should also be a priority.

This would include ensuring that any evaluation framework(s) for reforms emerging from this Inquiry include specific inclusion of rights and equalities measures. It would also require specific measures around improved life outcomes for children and families in contact with the care system.

These could include measures such as:

- an improvement in education outcomes for children in care
- improvements in health outcomes for children in care
- a decrease in the rate of relinquishment of children with disability into the care system
- a decrease in the proportion of children in care entering the youth and adult justice systems, and a reduction in homelessness amongst care leavers.

All of which would require improved data collection and transparency. This would have the benefit of promoting interagency collaboration by sharing and matching data to improve understanding of the impact of contact with the child protection system on universal programs. This in turn could assist in developing better-informed initiatives targeted to children and families using multiple systems.

This comprehensive information can inform:

- coordination of primary, secondary and tertiary services

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<sup>169</sup> Council of Australian Governments, above n 29, 11.

- development of tools for targeting the right type, duration, and intensity of services for each family
- realignment of systems centred on prevention and early intervention.

Information on some of these indicators may be available through the existing Victorian Child and Adolescent Monitoring System data set through the child protection data set and across housing, health, education, and disability and justice data sets.

Given the relatively small number of young people who leave care each year (approximately 430 per annum) it should also be possible to capture aggregated data on care outcomes.

In considering the monitoring of care experiences and outcomes, the Commission would particularly encourage the analysis of such measures across equity groups – such as Aboriginal or CALD children in care, and children with disability. This will also assist the DHS and out-of-home care providers to plan and monitor compliance with the Equal Opportunity Act 2010 positive duty to eliminate discrimination as far as possible.

## Recommendations

- That the Child Wellbeing and Safety Act 2005 be amended to provide for an independent Child Safety Commissioner, whose functions including the protection and promotion of the rights of Victorian children and young people generally, with a mandate that includes include a specific focus on giving priority to promoting the protection of Victoria's vulnerable children, and whose powers include:
  - a) the power to initiate own motion investigations and inquiries into the child protection and out-of-home care systems
  - b) the power to compel witnesses, production of documents and provision of evidence to effectively investigate matters
  - c) a requirement to report to the Parliament on matters of importance, including the tabling of reports of own motion inquiries and investigations.
- That any evaluation framework(s) for reforms emerging from this Inquiry include rights and equalities measures, including specific measures around improved life outcomes for children and families in contact with the care system.

## Conclusion

In making this submission, the Commission is mindful that the Inquiry will receive many detailed submissions with many worthy recommendations, and has refrained from providing detailed comment on all possible issues or making large numbers of recommendations.

However, we wish to reiterate our very deep concern about the Ombudsman's findings in regard to statutory child protection and out-of-home care, and in particular his findings that children and young people's human rights are being breached.

The Charter provides clear guidance for government policy and practice, including our child protection system. It provides an authoritative reference point for legislators,

policy makers, decision makers and service providers in how they go about their day-to-day business.

It contains important overarching principles to guide and inform what family and child services should look like, how the work is best approached and how challenges are faced. It prevents ambiguity in what organisations and individual practitioners are trying to achieve and how services meet (or do not meet), the needs of children and young people.

A rights perspective can help keep the focus on the experience of children, which is consistent with a child-centred approach, avoids residualism, and meets the policy principles of the COAG Framework and previous reforms to child protection in Victoria.<sup>170</sup>

Fundamentally, improving the outcomes for children and families exposed to the child protection system will require a shift from child welfare to a child rights system. The legal and policy platform for such a system is largely in place, through the Children, Youth and Families Act, the Charter and the various policies that support those Acts.

DHS's stated focus on early intervention, the best interest principle, Aboriginal placement principle and cultural competency framework and a commitment to integrated service planning and delivery are all sound policy. These need to be protected, strengthened and resourced.

## **Contact**

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<sup>170</sup> Council of Australian Governments, above n 29, 8.