



## Protecting Victoria's Vulnerable Children Inquiry Comments from Youthlaw April 2011

### **About Youthlaw**

Youthlaw is Victoria's state-wide community legal centre for young people under 25 years of age. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

Youthlaw is co-located with seven other youth services as part of Frontyard Youth Services at 19 King St, Melbourne. Young people accessing Frontyard Services are mostly aged between 18 and 25 and are either homeless, experiencing significant family breakdown or deemed to be at risk. While we do not run child protection cases, generally referring them to Victoria Legal Aid, we do have many clients who have experienced the child protection system.

### **About our comments**

Youthlaw makes these comments from a child rights perspective as the specialist community legal centre for children and young people.

Reviews dating back over the last 10 years have articulated a range of commendable recommendations to better protect and enhance the rights of children involved in the care and protection system. However these recommendations have not been backed by appropriate government resourcing. An analysis over 10 years of state budgets by Victorian Council of Social Service (VCOSS)<sup>1</sup> show dramatic real effective increases to spending on prisons (114%) and police (84%) and a far more modest increase to the area of child protection (36%). Such spending flies in the face of a body of evidence that demonstrates reducing child neglect will reduce crime and in turn alleviate the need for additional police and prison spending.

It is our view that this Inquiry, in the absence of a commitment to appropriate resourcing of the current system, will not produce the result sought: an effective, responsive, child and young person focussed and principled child protection system.

Youthlaw defers to the expert submissions of organisations such as Centre for Excellence in Child and Family Welfare and VCOSS with respect to the terms of reference which require a broad examination of the current system and models. Youthlaw endorses the submission of the Federation of Community Legal Centres.

Youthlaw's comments to the Inquiry Panel are mostly contained to the sixth term of reference:  
*"Possible changes to the processes of the courts referencing the recent work of and options put forward by the Victorian Law Reform Commission."*

Youthlaw submitted to the Victorian Law Reform Commission's *Review of Victoria's Child Protection Legislative Arrangements* in April 2010. Given this body of work we feel well placed to recommend various VLRC options and proposals (from their final report "*Protection Applications in the Children's Court*" (June 2010)) to the Inquiry panel members.

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<sup>1</sup> See <http://www.vcooss.org.au/what-we-do/state-budget/2010-11Analysis/overview.htm>

## Youthlaw's comments on options & proposals put forward by the VLRC

### Option 1

#### New System: Processes for Achieving Appropriate Child-Centred Agreements

In general terms Youthlaw endorses Option 1: namely proposals:

*1.1 A graduated range of supported, structured and child-centred agreement-making processes should be the principal means of determining the outcome of child protection matters.*

*1.3 parties involved in family decision-making processes should have access to appropriate legal assistance.*

*1.5 Family group conferences should become the primary decision-making forum in Victoria's child protection system.*

*1.9 Family conference be:*

*a) convened by an independent person*

*b) conducted in an appropriate location*

*c) conducted in accordance with practice standards*

***d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding***

*e) confidential except as provided in (f) or where any person engages in unlawful conduct during a conference*

*f) capable of producing an agreement that may become:*

*(i) a consent order in the Court, or*

*(ii) an agreement or 'care plan' that can be taken into account in any subsequent court proceedings, family group conference or other decision-making process.*

We endorse the implementation of family group conferencing (FGC) as the first step in cases of alleged child abuse, unless there are exceptional circumstances. FGC places the family at the center of the welfare proceedings and empowers them to reach a solution without having to resort to the often lengthy and expensive adversarial court system.

FGC as a model can help ensure that the child's views are considered, and valued as partners in proceedings. It is critically important that children are able to participate or at the very least that their wishes or best interests are made clear when conference participants are making decisions about children. Indeed taking a child's perspective into account helps ascertain their best interests.

In our assessment children should be heard throughout the protection measure process, before making decisions, while it is implemented and also after implementation.

We wholeheartedly endorse the proposals embedding the child's right to participate in administrative and judicial decision making that affects their lives, in particular where:

- a child or young person is capable of forming his or her own views,
- that they can be expressed freely and be given due weight, especially in judicial and administrative proceedings affecting the child or young person;
- their views must be considered and wherever practicable, given effect to unless, by reason of their age or lack of maturity or capacity, it would not be in their best interests;
- children have the right not to express any views or opinions if they make an informed choice not to do so;
- children have the right to be fully informed, in a way they can understand, of any proposed decision or action, which will affect them.

It is critically important that legal advice be provided to a child before the child decides whether or not to participate in a conference. The legal representative should attend the conference to represent the child's interests if the child is too young to participate or wishes the representative to participate on his or her behalf or to assist a child who wishes for additional support during these processes.

In addition to these components we would like to stress that the family conferencing model should also:

- inform children of the process in an accessible way and be support them to decide if they want to be part of process or have someone represent their views - based on their capacity and maturity;
- take into account the particular perspectives and needs of Indigenous children and families and those from non-English speaking backgrounds and ensure that people with disabilities are not effectively excluded from the process, and
- participation by family members and children should be voluntary.

## **Option 2**

### **New System: Enhanced Court Practices and Processes**

Youthlaw supports the following proposals

*2.15 Every child who is the subject of a protection application should be a party to the proceedings.*

*2.16 Every child who is a party to a protection application should be legally represented in a manner that takes account of the level of maturity and understanding of that particular child. Two distinct models of representation—‘best interests’ and ‘instructions’—should be available. The two roles and the circumstances of appointment for one or the other (or in rare cases both) should be clearly defined by guidelines. Children represented on an instructions model should:*

- a) have capacity to instruct a legal practitioner, and*
- b) indicate a desire to participate in proceedings by instructing a legal practitioner, and*
- c) indicate an unwillingness to be represented on a ‘best interests’ basis.*

*2.17 Section 522(1)(c) of the Children, Youth and Families Act 2005 (Vic) should be amended to ensure that a child is given the opportunity to participate directly in proceedings if the child expresses a wish to do so, having regard to his or her maturity and understanding.*

Youthlaw is of the view that the Children’s Court must ensure the legal representation of a child who is mature enough to give instructions. A legal practitioner representing a child in any proceeding in the Court must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

We have expressed concerns that in the present system in the majority of cases of children less than seven years do not have separate legal representation in matters before the Family Division of the Children’s Court. We are of the view that in assessing a child’s maturity and capacity to give instructions, age should not be the sole criterion, rather the ability of the individual child to understand and assess the implications of the matter in question.

**We recommend measures should be taken to ensure that the views of younger children be considered in accordance with the maturity of the individual child by specially trained social workers or other professionals.**

Youthlaw supports the right of all children assessed as lacking capacity to give instructions to be afforded separate legal representation applying a best interest's model. This is similar to the Child Representative model in the Family Court where the imperative of the Court is to have regard to the need for children to be represented, whatever their age. Indeed the younger the child the more likely it may be that the child may require representation.

Youthlaw wholeheartedly support proposal which would bring the definition of child in line with other Australian jurisdictions and international obligations under CROC.

*2.22 The definition of 'child' in section 3 of the Children, Youth and Families Act 2005 (Vic) should be amended so that it is possible to make a protection application for any child under the age of 18 years.*

Sadly we are aware of many situations where abused 17 year olds are not being afforded protection by the Victorian child protection system.

### **Option 3**

**The Office of the Children and Youth Advocate (OCYA):**

**A New Multi -Disciplinary Body to Advance the Interests of Children & Young People**

Although Youthlaw is attracted, in principle, to the idea of setting up an independent body like OCYA, acting for children, however we acknowledge this would be an incredibly resource intensive initiative.

We are of the view that a combination of the proposals we endorsed in **Option 2** together with the introduction of a number of other supports will achieve the same goal: ensure the best interests of children and young people are paramount in child protection processes. The supports required are:

a. Access to information

There is an obligation on the decision maker to give the child sufficient and accessible information about child protection proceedings. As affirmed by the Child Rights Committee:

*..all children involved in judicial and administrative proceedings must be informed in a child friendly manner about their right to be heard, modalities of doing so and other aspects of the proceedings..<sup>20</sup>*

In this regard we recommend giving children access to a dedicated court worker who can explain and navigate them through the court processes.

b. Professional support for children

As mentioned in Option 1 and 2 every child who is a party to a protection application should be legally represented in a manner that takes account of the level of maturity and understanding of that particular child. With appropriate resourcing we believe Victoria Legal Aid, Youth Services is very well placed to provide this representation, under either the instructional or best interest model. However in some instances, namely very young children (i.e. 7 years and under) this may require specially trained social workers or other professionals to help ensure that the views of the child are considered in accordance with the maturity of the individual child.

## **Option 4**

### **Victorian Government Solicitor Representing the Department of Human Services**

Youth supports proposals in this option and agrees that VGSO is the most appropriate body to conduct child protection cases on behalf of the state in the Children's Court.

## **Option 5**

### **Broadening the role of the Child Safety Commissioner**

Youthlaw is generally supportive of Option 5 and broadening the role of the Child Safety Commissioner in similar terms as outlined in proposal 5.1<sup>2</sup>

However our preferred model is for an independent commission as previously proposed by the Youth Affairs Council of Victoria (YACVic) in its 2001 paper *Are you Listening to us?* This paper presented a tailor-made Victorian model for a Victorian Children and Young People's Commission which was embedded in a rights framework as articulated by the CROC. The proposal was supported by a coalition of 45 organisations/individuals, including YACVic, the Law Institute of Victoria, Youthlaw, Defence for Children International - Australia, the Victorian Council of Social Service and the Children's Welfare Association of Victoria.

In 2011 YACVic and VCOSS have undertaken a campaign renewing the call for an independent Victorian child rights commissioner.

In addition to the functions recommended in proposal 5.1 the preferred model would include general functions to:

- promote the participation of children and young people in relevant decision making forums;
- promote, commission, undertake and publish research on matters relating to the rights of children and young people.

In terms of monitoring, the Commissioner's proposed powers would include:

- review laws, policies, practices and programs relating to the rights of children and young people and compliance with the CROC;
- initiate and conduct inquiries into and make recommendations to Parliament and any body or person, on any matter, including any enactment or law or any practice or procedure, relating to the welfare of children and young people;
- provide information, referral and assistance to complainants (but not handle individual complaints); and
- apply for standing before the court in special selected cases involving the rights of children and young people.

If you have any queries or require any further information please contact

**Tiffany Overall** Co-Director of Youthlaw, 19 King Street, Melbourne 3000, telephone: 03 9611 2422, email: [tiffany@youthlaw.asn.au](mailto:tiffany@youthlaw.asn.au)

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<sup>2</sup> *The Child Safety Commissioner should have the following additional functions:*

- a) *to oversee and review the child protection system*
- b) *to investigate and report to the Minister about the operation of the Children, Youth and Families Act 2005 (Vic)*
- c) *to advocate for children across government and throughout the community*
- d) *to liaise with the Aboriginal community in order to ensure that the Commissioner is able to effectively advocate for Aboriginal children*
- e) *to promote awareness of children's and young people's rights*
- f) *to report to Parliament on an annual basis and when reporting to the Minister about the operation of the Children, Youth and Families Act 2005 (Vic)*
- g) *to consult children about the performance of the Commissioner's functions.*