

# Public Submission from the Centre for Multicultural Youth and the Youth Affairs Council of Victoria

To the Criminal Law Review, Department of  
Justice

In response to the:  
Criminal Investigation Powers Bill Exposure  
Draft

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## Contents

About the Youth Affairs Council of Victoria (YACVic) .....	3
About the Centre for Multicultural Youth (CMY).....	3
About the Youth Referral and Independent Person Program (YRIPP).....	3
About this Submission .....	4
Criminal Investigation Powers Bill Exposure Draft.....	4
A human rights framework for investigating alleged offences by children and young people.....	5
Safeguards for the protection of children and young people .....	6
History and Rationale for the emergence of Victoria’s Statewide Independent Person Program.....	8
YRIPP’s experiences of implementation .....	9
The term ‘Independent Person’ .....	10
Role of the Independent Person.....	11
Who Should Perform the Role - Individuals.....	14
The role of parents.....	15
The Draft Bill’s proposal on who should perform the Independent Person role .....	15
Who Should Perform the Role - Agencies.....	16
Broader vulnerability of young people .....	17
‘Incapable Persons’ .....	17
Other comments on the Draft Bill.....	18
Photographs.....	18
Notification of destruction of fingerprints.....	18
The Right to an Interpreter .....	18
Fitness for Interview .....	19
Conclusion.....	19
Recommendations .....	21

## **About the Youth Affairs Council of Victoria (YACVic)**

The Youth Affairs Council of Victoria Inc. (YACVic) is the peak body and leading policy advocate on young people's issues in Victoria. YACVic's vision is for a Victorian Community that values and provides opportunity, participation, justice and equity for all young people. The purpose of the Council is to raise awareness of issues of concern to young people in Victoria and to achieve a more equitable distribution of power and resources to young people, recognising differences between groups of young people in terms of their access to such power and resources. A key part of YACVic's role is to monitor developments in legislative and non-legislative structures impacting on young people.

## **About the Centre for Multicultural Youth (CMY)**

The Centre for Multicultural Youth (CMY) is a Victorian not-for-profit organisation supporting young people from migrant and refugee backgrounds to build better lives in Australia. CMY's offices in Ballarat, Carlton, Dandenong, Morwell and Sunshine serve some of the most diverse and fastest growing areas in Victoria. Through a combination of specialist support, training, research and advocacy, CMY works to remove the barriers young people face as they make Australia their home.

## **About the Youth Referral and Independent Person Program (YRIPP)**

YRIPP delivers a high quality system of adult volunteer "Independent Persons" to attend police interviews with young people in police custody when a parent or guardian is not available. YRIPP also seeks to divert young people from future offending through early intervention at the point of police contact.

CMY and YACVic are the management agencies for the Youth Referral and Independent Person Program (YRIPP). Funded by the Victorian government and established as a small pilot in nine police stations in 2004, YRIPP now operates in 150 police stations across Victoria. YRIPP is a unique partnership between community agencies (also including *UnitingCare*, community legal centres and the Victorian Aboriginal Legal Service) and Victoria Police.

YRIPP provides:

- Volunteer Independent Persons to attend police stations across Victoria within 40 minutes 24/7.
- A comprehensive training program and ongoing support for all volunteer Independent Persons.
- Information about helpful support services for young people.
- Resources about the youth justice system and support services for police and parents.
- Access to 24-hour telephone legal advice for young people in police custody, provided by lawyers from Victoria Legal Aid.

YRIPP provides a single telephone number, 24 hours a day, 7 days a week, for police to access:

- Independent Persons for young people aged 10 – 17, within 40 minutes.
- Legal advice for young people, provided by Victoria Legal Aid lawyers.
- Independent Third Persons for people who have a cognitive impairment, provided by the Office of the Public Advocate.

## About this Submission

This submission is based on:

- The specialist knowledge of CMY and YACVic in relation to issues relating to young people and young people from diverse cultural backgrounds.
- The experiences of the implementation of YRIPP over the past ten years.
- Sally Reid's Churchill Fellowship Report, *Independent Persons or Appropriate Adults? Supporting Young People in Police Interviews* (2007).
- The Victorian Law Reform Commission's Final Report 21, *Supporting Young People in Police Interviews* (2010).
- The Public Submission from the Centre for Multicultural Youth and the Youth Affairs Council of Victoria to the Victorian Law Reform Commission In response to: *Supporting Young People in Police Interviews - Background Paper*.
- An analysis of related legislation and case law across Victoria and interstate.
- Other literature in the area, including the Australian Law Reform Commission's 1997 report 84, *Seen and Heard: Priority for Children in the Legal Process*.

## Criminal Investigation Powers Bill Exposure Draft

CMY and YACVic welcome the Criminal Investigation Powers Bill Exposure Draft (referred to hereafter as the Draft Bill) which aims to simplify and update existing legislation surrounding the investigation process. We recognise the significant undertaking of this task and note that the format of the legislation is considerably more 'user friendly' than relevant sections of the *Crimes Act 1958* (Vic).

We also welcome a number of specific provisions proposed in the Draft Bill such as provisions relating to:

- the new 'forensic relevance' requirements;
- the clarification of use and inadmissibility of fingerprints and the introduction of offences for unauthorised use of fingerprints;
- clarifications around informed consent and providing for the withdrawal of informed consent;
- the requirement for police *always* to inform people about the circumstances of the offence before interviewing, although we believe that this should also be required upon arrest; and
- the requirement for police *always* to make an audio/audio visual recording of the interview.

We have some significant concerns, however, in relation to some parts of the Bill. In particular, we believe that the draft Bill lacks an appropriate framework for children and young people and does not provide adequate safeguards for their protection. Below is an outline of our position in relation to these issues and proposed recommendations that seek to address the specific vulnerabilities and protect the specific rights of children and young people in police custody.

## **A human rights framework for investigating alleged offences by children and young people**

In the Draft Bill, the definition of ‘suspect’ is amended to include those aged 10-17. The Draft Bill is entirely framed within an adult legislative context. It lacks a framework that incorporates the special rights and needs of children and young people accused of breaking the law. Dealing with young people within the proposed legislation ignores international human rights obligations and frameworks.

The proposed legislation for those aged 10-17 years should refer to rights set out in the United Nations Convention on the Rights of the Child (CROC). Key rights include decision making in a child’s best interests and the importance of providing children with relevant information and taking into account their wishes. This also includes a requirement to respond to the causes of young people’s alleged offending, to consider diversion measures in the first instance (eg: police cautions) and to resort to judicial proceedings (charges) only as a last resort (Article 40).

Some of these principles as they apply to the decision to caution or charge a young person are currently set out in the Victoria Police Manual (Guidelines – Disposition of offenders). In our view these principles should be drafted into legislation so as to strengthen consistent usage and enforceability.

The consideration of pre-charge diversion being framed within legislation is particularly pertinent given:

- Ongoing allegations from community groups of inequitable policing practices in relation to particular groups (such as Indigenous young people, refugee young people) as evidenced through such things as the differential use of Victoria Police Cautions.<sup>1</sup>
- The recent bipartisan commitments to developing legislation and supporting programs and systems that divert young people away from the criminal justice system in Victoria.

The Draft Bill provides a key opportunity for the new Labor Government to implement its election commitment to support youth diversion initiative and reduce recidivism in young offenders (2014 Victorian ALP Platform). This would be in line with Australia’s international human rights obligations and should formalise and build upon something that has been a defining police procedure in Victoria for many years. Consideration should be given to extending a scheme for legislated pre-charge diversion to young people aged 18-25 years and other vulnerable groups or those already eligible for adult police diversions eg: drug diversion.

In our view, the parts of the legislation that relate to investigations where children are ‘suspects’ should be set out in the *Children Youth and Families Act 2005* (Vic), which provides a more appropriate framework for the protection of young people’s rights. Alternatively, a child rights framework should be introduced within the proposed legislation.

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<sup>1</sup> VALS, for example, suggests that there is discrimination in police cautioning of young people such that Aboriginal and Torres Strait Islander young people have less access to this option than other young people. See for example VALS’ 2011 submission to the Protecting Victoria’s Vulnerable Young People Inquiry.

Recommendation 1: The parts of the proposed legislation that relate to children or young people aged 10-17 years should sit within legislation that provides an appropriate framework for the protection of children's rights.

Recommendation 2: Part 2.2 of the proposed legislation include a pre-charge decision-making hierarchy requiring police to consider diversion options for children, young people and possibly others prior to issuing a summons or charge.

## Safeguards for the protection of children and young people

Children and young people are recognised both internationally and within Australia as a vulnerable group in need of additional protections when they are in contact with police. The Draft Bill provides inadequate safeguards for the protection of the specific rights of children and young people. We refer here particularly to the proposed definition of Independent Person and Section 31 as detailed below.

**independent person** means, in relation to a person (**person A**)—

- (a) a person nominated by, or acceptable to, person A; or
- (b) if that person is not available, an adult who—
  - (i) is not a police officer or a person otherwise involved in the investigation of the alleged offence; and
  - (ii) if practicable, is of the same sex as person A or, if person A identifies as a member of a particular gender, is of that gender;

### 31 Children and incapable persons

- (1) Subject to section 33, if a person in custody is a child or an incapable person, an investigating official must not question the person or carry out an investigation in which the person participates unless subsection (2) and section 32 are satisfied.
- (2) At any questioning or investigation of a child or incapable person who is in custody, one of the following persons must be present—
  - (a) in the case of a child—
    - (i) a parent or guardian of the child; or
    - (ii) if each parent or the guardian is unavailable or cannot be located or is an incapable person, an independent person;
  - (b) in the case of an incapable person—
    - (i) the spouse or domestic partner of the incapable person; or
    - (ii) if the spouse or domestic partner is unavailable or cannot be located or is also an incapable person, a parent or guardian of the incapable person; or
    - (iii) if the incapable person does not have a spouse or domestic partner, a parent or guardian of the incapable person; or
    - (iv) if each parent or the guardian is unavailable or cannot be located or is also an incapable person, an independent person.

In 2002, John Boersig in his article: *The duty of a 'responsible person' under section 13 of the Children (Criminal Proceedings) Act 1987 (NSW)*, looked at the role of 'responsible persons' in NSW and argued that in understanding the role, we should shift from a paternalistic to a 'rights based' approach which focuses on the child's best interests. The role of the Independent Person should be seen within a human rights framework which takes the vulnerability of children as the starting point. Boersig's position suggests that the mere presence of a support person in a 'watchdog' role is inadequate - the role is a critical and active one.

Section 17(2) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and which is reflective of the International Convention on the Rights of the Child, ratified by Australia in 1990, would appear to compel us in this direction. Section 17(2) states that 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". Like the Convention, the Charter has a focus on the best interests of the child and the importance of family.

The *Charter* imposes a substantive obligation on public authorities such as Victoria Police, to act compatibly with human rights and a procedural obligation to properly consider relevant human rights in decision-making processes. Not doing so will be considered unlawful, unless the public authority 'could not reasonably have acted differently'.

The Australian Law Reform Commission's 1997 report, *Seen and Heard: Priority for Children in the Legal Process* (referred to hereafter as *Seen and Heard*) set down a comprehensive agenda for addressing many of the issues facing young people in their interaction with the legal system and more specifically for this draft legislation, with the police. The report recommended that the Commonwealth develop national standards for juvenile justice to reflect Australia's international human rights obligations. These standards should set the framework, require best practice and establish benchmarks for performance and should in turn be developed into uniform legislative provisions in all states and territories (paragraphs 18.9, 18.10).

YACVic and CMY are in agreement with the notion of the development of national standards relating to youth justice and particularly that they cover the area which *Seen and Heard* describes as "interview friends". Many of the issues outlined in the ALRC report concord with YRIPP's experience of young people in police interviews today. CMY and YACVic continue to support the implementation of many of these recommendations with respect to the police interview process and criminal justice processes more generally.

The Draft Bill attempts to better define section 464(E) of the *Crimes Act 1958 (Vic)*, however the proposed definition for Independent Person and section 31 (refer above) are not based in a human rights framework for young people (notwithstanding the increase in choice able to be exercised by a young person) and fail to adequately take into account:

- the rationale for the emergence of a Statewide Independent Person program in Victoria (YRIPP);
- YRIPP's experiences of implementing this program over the past 10 years; and
- the recommendations of a number of recent reports, as discussed above, and particularly the Victorian Law Reform Commission report, *Supporting Young People in Police Interviews*.

## History and Rationale for the emergence of Victoria's Statewide Independent Person Program

In order to demonstrate the importance of appropriate legislation in the Independent Person area, it is important to look at the history and rationale for the emergence of YRIPP and the program's experiences in the current legislative environment.

Prior to the emergence of YRIPP, in addition to a lack of legislation, there was a lack of regulation around the provision, training and performance of Independent Persons in Victoria and limited and sometimes contradictory guidelines as to their role. As well as committed individuals who performed the role at police stations, local Independent Person programs had emerged over the years to provide this essential service. The system, however, generally relied on the goodwill of individuals, agencies and local groups who often lacked adequate funding to provide Independent Person services and consequently lacked an underpinning infrastructure to support those performing the role. The Independent Person field had consequently been highly ad hoc in terms of:

- individuals' and programs' understanding of the Independent Person role;
- the amount, type and quality of training provided to perform the role;
- the recruitment, screening and deployment of Independent Persons to police stations; and
- local police involvement with and practices relating to Independent Persons.

These factors resulted in significant variations in the service and support provided to young people in police custody.<sup>2</sup>

Some particular concerns by community and Government agencies expressed in 2001/2 in Department of Justice stakeholder consultations<sup>3</sup> included:

- Independent Persons were often people who spent considerable time at the police station doing multiple roles and were very well known to police. Police called them directly to attend the station (if they weren't already in attendance). There were stories of police officers' friends and wives undertaking the role. Regardless of whether this impacted on their actual independence, it certainly impacted on the *perception* of independence by the young people being interviewed.
- the performance of Independent Persons was often ad hoc and potentially undermined the rights of young people (comments by Independent Persons included things like: "just tell the truth and I'll take you home").<sup>4</sup>

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<sup>2</sup> Reid, S. (2007), Independent Persons or Appropriate Adults? *Supporting Young People in Police Interviews*, Churchill Trust.

<sup>3</sup> These consultations were held in the development of the Youth Offending and Violence section of the then Government's Crime and Violence Prevention Strategy, *Safer Streets and Homes* (2002-2005).

<sup>4</sup> In the matter of Gilbert 1994, Justice Hampel excluded evidence after a young person confessed to a very serious offence after the Independent Person told him to "just tell the truth and I'll take you home". This led to Hampel finding that given his age and intellectual capacity, the comment had acted as an inducement for him to answer the questions.

It would appear that there are many more cases that did not end up in court. When YRIPP first commenced the training of its Independent Persons, there were many Independent Persons who had been doing the role for years. One remarked during a training interview scenario "this is the point at which I always tell the young person to apologise to the police officer".

- the lack of any consistent training for Independent Persons in police and legal processes and a lack of consistent screening of who was performing the role.<sup>5</sup>
- the number of refugee young people who were ending up in court without having understood the process that had “landed them” there.<sup>6</sup> There was seen to be a need for training of Independent Persons in working with this vulnerable group.
- the numbers of refugee and migrant young people being in contact with police and entering the justice system per se and a recognition that for young people, and particularly for vulnerable groups, the point of police interview was a key opportunity to refer young people to appropriate, and culturally appropriate, support services.<sup>7</sup>

In 2003, the Victorian Department of Justice funded the establishment of a pilot Statewide Independent Person program, the Youth Referral and Independent Person Program, under *Safer Streets and Homes*, the then Labor Government’s Crime and Violence Prevention Strategy 2002-2005.

YRIPP’s aims were:

- to work with and improve the existing system of Independent Person support provided to young people in police custody; and
- to divert young people, including refugee, newly arrived and Indigenous young people, from progression to higher levels of the criminal justice system, based on culturally appropriate early intervention and diversion support.

### **YRIPP’s experiences of implementation**

The establishment of YRIPP went some way towards resolving many of the stakeholders’ concerns.

YRIPP:

- has increased and diversified the volunteer base for Independent Persons and provides a single telephone number to access a rostered Independent Person, thereby removing any police selection of Independent Persons;
- provides a role definition for Independent Persons agreed by program stakeholders;
- provides accountability mechanisms aimed at ensuring appropriate performance of the role and processes and procedures for addressing issues arising;
- provides courts, police and lawyers with simple access to paperwork that provides an independent account of the fairness of the police interview process;
- provides volunteer Independent Persons who are screened through national police checks, working with children checks and reference checks;
- provides training and assessment to all volunteers in working with young people, including refugee and migrant and Indigenous young people;
- has valuable data that provides a snapshot of some of the young people aged 10-17 years that have been processed by police in the past 10 years.

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<sup>5</sup> This is particularly relevant in light of a comment made to YRIPP staff by a pre-existing Independent Person when YRIPP first commenced that: “If I want to take the kiddie home, I’ll take the kiddie home”.

<sup>6</sup> This was raised in a consultation with Judge Jennifer Coate, then Chief Magistrate of the Children’s Court.

<sup>7</sup> The Department of Immigration and Indigenous Affairs, Victorian Settlement Planning Committee, Working Group on Youth 2001/2.

Despite these improvements, due to the lack of legislation in the Independent Person area, three key concerns remain in relation to the appropriate support of young people in police interviews and the protection of their rights. These include that:

- All agreements made in relation to the role of Independent Persons are informal protocols without the backing of legislation and therefore are not always enforceable (particularly at the local level).
- There is no requirement for government to provide an Independent Person program and therefore the existence of any safeguard in this area is entirely dependent on the whim of successive governments.
- The current protocols developed between partner agencies do not go far enough to protect young people's rights and to fulfil both Victorian and International human rights obligations.

In 2007, Sally Reid, YRIPP's then manager, undertook a Churchill Fellowship which looked at a similar system of support provided by 'appropriate adults' in the UK. The Churchill report argued that the Victorian law fails to adequately protect young people in police interviews. In particular, the Churchill report found that the ability of an Independent Person to protect the rights and interests of young people in police interviews is hampered in three key ways:

- by the term 'Independent Person' and its interpretation;
- by the lack of legislation and associated guidelines around the role of the Independent Person; and
- by the lack of legislation ascribing responsibility to any particular agency to provide Independent Persons and to particular individuals to perform the Independent Person role.

The findings of this Churchill report are discussed in more detail below. Based on these findings, the partner agencies advocated to the Victorian Law Reform Commission for legislative reform in the Independent Person area. The subsequent reference undertaken by the VLRC into this area, *Supporting Young People in Police Interviews*, produced a range of recommendations in line with the recommendations of the report as well as the views of CMY and YACVic. The recommendations were strongly supported across the youth and legal sectors.

## **The term 'Independent Person'**

There is much ambiguity regarding the term 'Independent Person'. The spirit of Section 464(E) of the *Crimes Act 1958* (Vic) and precedent in Victoria and other Australian jurisdictions (around similar 'interview friend' type roles) is that the person is there *in place of a parent or guardian* and therefore is there *to support the young person*.<sup>8</sup>

In YRIPP's experience, 'independence' is often taken literally, particularly by police, but also by Independent Person volunteers, particularly those who were volunteering prior to the existence of

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<sup>8</sup> This was an interpretation provided by Judge Jennifer Coate (previous President of the Children's Court), at a consultation in relation to YRIPP's inception in 2003.

YRIPP, to mean 'independent of all parties to the police interview' and even 'independent of the young person'. In practice, therefore, if an independent person, in looking out for the best interests of a young person, suggests that the young person receive legal advice (as a parent would have no hesitation in doing), the Independent Person is accused of overstepping the boundaries of their role. Even the informal protocols developed by the partner agencies with Victoria Police do not overcome this situation as the agreement reached went only as far as Independent Persons providing *information* to young people rather than being able to provide any advice in their best interests. This is despite the legal precedent discussed in the next section. The term Independent Person causes role confusion in Victoria at the local level and hampers the performance of the role in accordance with the spirit of the legislation.

The name also creates problems for YRIPP internally as a program. YRIPP refers young people to health and welfare support services after the police interview (which would appear to be closely aligned to the spirit of the Charter and our international obligations in relation to diversion). Some Independent Persons who have been doing the role since before YRIPP's inception feel that Independent Persons referring young people to health and welfare support services is not appropriate as 'once we get involved in the young person's affairs, we are no longer *independent*'.<sup>9</sup>

The Draft Bill retains the name Independent Person and thereby goes no way to resolving the issues arising in relation to the name. A more appropriate name such as 'support person', as recommended by the Victorian Law Reform Commission and in line with several other Australian jurisdictions, would eliminate confusion and facilitate better protection of the rights of vulnerable young people in police interviews.

**Recommendation 3: That the name 'independent person' be changed to 'support person'.**

## **Role of the Independent Person**

In 1997, the Australian Law Reform Commission's report, *Seen and Heard*, looked at the role of the 'interview friend' in Australian jurisdictions. Amongst its recommendations were that national standards for juvenile justice be developed which include the following:

*'...the function, responsibilities and powers of the interview friend should be defined by statute. The definition should encompass the interview friend's role in providing comfort, support and protection for the young person as well as ensuring the young person is aware of his or her legal rights. The interview friend should not be a substitute for legal advice or representation.'* (Recommendation 212)

CMY and YACVic believe that the legislation should go further than ensuring young people are *aware* of their rights to ensuring that young people are supported to *exercise* those rights, should they choose to. The 2006 judgement of Justice Bell in the matter of *Toomalatai* supports this. Justice Bell quotes a NSW Supreme court decision by Justice Hidden where he states that:

*'The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of police. That protective purpose can only*

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<sup>9</sup> This is despite the provision within section 346(8) of the *Children Youth and Families Act 2005* that states that *an independent person... may take steps to facilitate the granting of bail, for example by arranging accommodation.*

*be met by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice ...Further, within appropriate limits, the adult might assist a timid or inarticulate child to frame his or her answer to the allegation'. (In H (A Child), Hidden J as cited in DPP v Toomalatai [2006] VSC 256 (15 May 2006)*

Although this case was in NSW, Bell states that this is equally applicable to Independent Persons carrying out the role in Victoria stating that the role envisaged is *active* not simply that of an observer. CMY and YACVic are broadly in agreement with this position.<sup>10</sup>

Similarly, Justice Hampel ruled in the Victorian Supreme Court case of R v Gilbert 1994 (unreported) that the Independent Person must be more than just the presence of an “appropriate adult”: “The purposes of his presence are first to advise the person being questioned and to observe whether the interview is being conducted properly and fairly and secondly, to facilitate communication with the person being interviewed”.

A Victorian Judge, when judging a civil case against police for assaulting a young Aboriginal man in 2000, drew attention to the Independent Persons duty to act in the case of an allegation relating to police misconduct.

*It would seem to me that [the Independent Person] had a very poor understanding of just what his role was as that independent person. Had he done what I perceive to be at least his moral, if not his legal duty, to report that complaint to an appropriate senior officer other than the alleged perpetrators, then this matter may not have attracted the angst that it has. (Judge Campbell, County Court of Victoria, Damages list, 31 May 2004).*

This is particularly concerning in the absence of a definition around what is, in fact, appropriate performance of the role. Judge Campbell’s decision is particularly difficult for YRIPP’s management agencies because it would appear to suggest an obligation on Independent Persons to perform their role in a certain way without providing legislative backing for them to perform it in this way. This is necessary for Independent Persons to point to when at the police station to back up their actions in what, even for them, may be an intimidating environment.

The above also raises another area that the YRIPP partnership continually experiences difficulties. This is in terms of what to do in relation to young people’s allegations of police misconduct. There are many conflicting issues here, for example, the tension between an Independent Person respecting the wishes of a young person who doesn’t want their allegation followed up, versus a duty of care to report the alleged misconduct to allow appropriate follow up. These are issues that require legislative guidance rather than decisions being made according to the whim of program operators.

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<sup>10</sup> It should be noted, however, that CMY and YACVic would not support Independent Persons helping children frame their answers to allegations. We believe that this would comprise legal advice for which the Independent Person is unqualified. Instead we would support a situation where an Independent Person encouraged a young person to receive legal advice and facilitated this process. This should extend to overriding a young person’s wishes and calling a lawyer for them where the Independent Person believes this is in the young person’s best interests.

The current legislative vacuum in these areas also leaves agencies like CMY and YACVic with concerns about potential liability in situations where they have trained and provided Independent Persons whose actions are then potentially seen as inappropriate by a court.

Notwithstanding all of the above, the Independent Person role as outlined in the Victoria Police manual remains to:

- *provide emotional support to the child*
- *ensure the child's evidence is accurately recorded*
- *be able to present an independent account of the interview at any court proceedings*<sup>11</sup>

The Victorian Law Reform Commission notes that:

*2.62 The manual does not refer to the active roles of protecting against unfair or oppressive behaviour and advising the child of his or her rights. In Toomalatai,<sup>12</sup> Justice Bell described the independent person's role as being active and involved, whereas the Victoria Police Manual characterises the role in observational, evidentiary terms.<sup>13</sup>*

CMY and YACVic believe that as per the Appropriate Adult role in the UK, the role of the Independent Person should be an interventionist one. For example, in the UK, an Appropriate Adult can not only advise a young person to seek legal advice but they can over-ride a young person's wishes and call a solicitor on their behalf. This is something a parent/guardian would have no hesitation in doing if it were in the best interests of the child.

The Draft Bill does not define the Independent Person's role at all and therefore does not go any way to resolving any of the issues outlined above. The role should be defined and should be an active one with key functions set down as per the Victorian Law Reform Commission's recommendations 11-15. There should also be a clear role for Independent Persons in responding to allegations of police misconduct developed by the Children's Commissioner with the Chief Commissioner of Police (VLRC recommendations 22-23).

**Recommendation 4: That the role of the parent, carer or independent person be defined in line with the VLRC's recommendations (11-15) to ensure active support of the young person through the process.**

**Recommendation 5: That clarification be provided to Independent Persons in how to respond to young people's allegations of police misconduct through the implementation of the VLRC's recommendations 22 and 23.**

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<sup>11</sup> Victoria Police, Victoria Police Manual: Procedures and Guidelines, 'Interviewing Specific Categories of Person'.

<sup>12</sup> Toomalatai (2006) 13 VR 319, 336 [86].

<sup>13</sup> Victoria Police, Victoria Police Manual: Procedures and Guidelines, 'Interviewing Specific Categories of Person'.

## Who Should Perform the Role - Individuals<sup>14</sup>

The third area identified above as requiring attention in legislation relates to who should perform the Independent Person role. The above demonstrates that in order to ensure that the role is performed appropriately and with the highest regard for the young person's legal and human rights and personal safety, the Independent Person role should be performed by fully screened and trained adults who are provided to police rather than being selected by police to perform the role.

Training should include training in the police arrest, charge and interview process and legal issues associated with the role as well as training in working with young people. Training should also include training in working with refugee and migrant young people. Seen and Heard identifies a range of issues that confront young people from non English speaking backgrounds in the justice process (for example inadequate and inappropriately targeted information concerning law, procedures, rights and obligations, legal and correctional institutions inadequately dealing with their particular needs and problems, problematic relations with police, inadequate research and evaluation of multicultural issues in the juvenile justice area). The report also identifies a range of issues confronting Indigenous young people in the process and the consequent need for specialised training for those working with these groups in the justice system and providing additional assistance in understanding rights. Seen and Heard states:

- *4.58 Many Indigenous children come from rural and remote areas and are affected by the same problems as other rural and remote children in their contact with legal processes.[114] Many have difficulties similar to those facing children of non-English speaking background, due to language and/or cultural barriers. For Indigenous children these problems may be exacerbated by an expectation that they speak 'standard' English or that their mannerisms and understandings are the same as those of other Australian English speakers.[115]*
- *4.59 In addition, the difficulties that commonly arise in all children's involvement in legal processes, including barriers to access, lack of understanding, marginalisation and agency complexities, affect Indigenous children on a greater scale. Indigenous children are vastly over-represented in those legal processes that have links with adverse outcomes and other legal processes.[116] Statistics from New South Wales indicate that Indigenous children are over-represented in exclusion and suspension proceedings.[117] In the care and protection system, they are over-represented in each stage of the process, from notification to substantiation to placement away from home.[118] They are over-represented in each stage of juvenile justice processes, from charges, arrest and appearances in court to the more serious sentences.[119] The extensive contact by Indigenous children with these legal processes is of great concern to the Inquiry.*
- *4.60 The operation of legal processes, particularly those involved in the care and protection and juvenile justice systems, must also be viewed against past practices which have discriminated against Indigenous peoples. The forced separation of Aboriginal children from their families has caused widespread breakdown of family relationships and structures and loss of personal, family and cultural identity among Indigenous people. Past assimilation policies and practices which tore apart families and communities continue to have a negative impact on individuals, families and communities.[120]*

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<sup>14</sup> Significant parts of sections 1, 2, 3a and 3b are taken from Reid, S. (2007), Independent Persons or Appropriate Adults? *Supporting Young People in Police Interviews*, Churchill Trust.

This concurs with the knowledge and experiences of the partner agencies and emphasises the importance of training in cultural diversity issues for Independent Persons, something YRIPP has been implementing for 10 years for those Independent Persons who perform the role through YRIPP<sup>15</sup>.

### **The role of parents**

YRIPP estimates that two thirds of police interviews with young people in Victoria are done in the presence of parents. Parents have no training in police processes, the legal system, rights, etc. Where a parent is in attendance, it is important that they be made aware of their role in supporting their child through the interview process. YRIPP has provided all police stations with a multilingual brochure that police may provide to parents to help them to understand their role in relation to the police interview process. It is unclear, however, how often this brochure is provided to parents and whether it is a useful tool for parents. YRIPP is currently reviewing its effectiveness and whether there are more effective strategies available.

CMY and YACVic support the VLRC's recommendation 12 that before questioning a young person, the investigating official must provide the parent, guardian or support person with information clearly articulating the role. This information could take the form of a short film that may avoid literacy issues for particular groups of refugee background communities.

CMY and YACVic also note the importance of the availability of Independent Persons for interviews, even in some situations where parents are also present. This is particularly the case where parents do not feel comfortable with the process or are from Indigenous or refugee backgrounds and is in line with VLRC recommendations 4 and 5.

**Recommendation 6: That as per VLRC recommendation 6, the role of Independent Person be performed by fully screened and trained persons drawn by police without preference.**

**Recommendation 7: That training for Independent Persons include not only relevant police and legal issues but also training in working with young people including those from refugee, migrant and Indigenous backgrounds.**

**Recommendation 8: That VLRC recommendations 4,5 and 12 be implemented to ensure that parents are appropriately supported in their role in their child's interview.**

### **The Draft Bill's proposal on who should perform the Independent Person role**

YACVic and CMY recognise that in suggesting that the Independent Person be nominated by or acceptable to the young person, the Draft Bill's definition does accord with one area of our international obligations, that is in terms of taking into account young people's wishes. We believe, however, that in order to protect young people's best interests, this decision can only be made where the choice is within the context of people trained in the role and therefore looking after their

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<sup>15</sup> The involvement of the Centre for Multicultural Youth and the Victorian Aboriginal Legal Service in the program's training programs has been key to ensuring the program is tailored appropriately to refugee, migrant and Indigenous young people while also being appropriate for Victorian young people more generally.

rights. While it would be appropriate for the definition to include that the Independent Person be 'acceptable to' the young person, this should be only as a right of veto over an Independent Person provided to them by the registered service.

The draft Bill provides that the Independent Person should be "not a police officer or a person otherwise involved in the investigation of the alleged offence". This fails to provide any legislative underpinning for the notion that Independent Persons should be drawn without preference by police (because the reality is that in most cases requiring an Independent Person, the young person may not have anybody to attend and it would be left to the police to find somebody). In addition, the meaning of 'involved in the investigation' is unclear and fails to clarify the situation for some groups for example people acting in the dual role of bail justices and Independent person (as still occurs on occasion).

In addition, under part (b)(ii) of the definition, there is a requirement to gender match the Independent Person with the young person. This would create an unnecessary and costly administrative burden for police and programs providing support people for these interviews.

## **Who Should Perform the Role - Agencies**

Not only should Independent Persons be screened and trained but they should be persons officially recognised in the role. The term 'accredited', 'registered' or simply 'recognised' could be used in the proposed legislation. These individuals should be supported by and accountable to a nominated agency. Section 38 of the *Crime and Disorder Act 1998* (UK), for example, puts a statutory obligation on local authorities and others, through Youth Offending Teams, to ensure "the provision of persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers". There is no similar provision in Victoria's legislation.

CMY and YACVic are in agreement with the Victorian Law Reform Commission's recommendations 16-21 that put the responsibility with the Child Safety Commissioner's office<sup>16</sup>, alongside the Chief Commissioner of Police, to prepare procedures for the attendance of support persons. Also, we agree that the Children's Commissioner should monitor the scheme's operations and for the Department of Justice to be responsible for the administration of the scheme, including the devising and conducting of training programs, the accreditation of support persons and the devising of minimum standards (in liaison with the Public Advocate where support relates to young people with cognitive impairments). Putting the responsibility on the Department would not preclude Government subcontracting this service if appropriate. Furthermore, we support the VLRC's recommendations in relation to the requirement for support persons to be present as well as the process for securing support persons and the consequences of failing to provide a support person.

**Recommendation 9: That the VLRC's recommendations 16-21 in relation to the development of a framework for an Independent Person scheme and administration of the scheme be implemented.**

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<sup>16</sup> Presumably this would transfer now to the Victorian Children's Commissioner.

## **Broader vulnerability of young people**

CMY and YACVic strongly recommends broadening the scope of any legislative change by exploring the viability of providing Independent Persons (Support Persons) for all young people. A broader definition of youth vulnerability should be included in the legislation, for example all young suspects, victims and witnesses. Victims and witnesses require support through the process and support is prescribed within Victoria Police operational procedures however as their support currently does not fall under 464(E) of the *Crimes Act 1958* (Vic), they do not receive Independent Persons through YRIPP.

YRIPP has been working with police and Victims Services in the Department of Justice to develop a system for support for young people who are victims and witnesses of alleged offending. Staff from Victims Assistance and Counselling Programs are now available to perform the Independent Person role for young people who are victims or witnesses of alleged crime. Whilst YRIPP still receives requests from Victoria Police to perform the Independent Person role for victims and witnesses, we understand that the VSA's are developing a communications strategy with police to address this.

**Recommendation 10: That all young people under 18 receive the support of an Independent Person, whether they be a victim, witness or suspect.**

### **'Incapable Persons'**

We welcome attempts to legislate for people with cognitive impairments as another group who have long been recognised as a group needing additional safeguards in the investigation process. This is in line with our recommendations to the VLRC during their consultation on the *Supporting Young People in Police Interviews* reference.

CMY and YACVic recommended broadening the scope of any legislative change by exploring the viability of providing Support Persons for all vulnerable people in police custody, not just young people (for example people with a cognitive disability or mental health issue, Indigenous people, refugees and others with similar vulnerabilities) as per the UK model. This approach is broader than is currently proposed in the Draft Bill but would ensure a more consistent and uniform response to all those in custody who are vulnerable.

Furthermore, due to the difficulties police often have in determining whether a young person has a cognitive impairment, all young people under 18 should receive a support person with specialised training in providing service to young people with cognitive impairments or mental health issues.

However, we have concerns around the definition of 'incapable person'. The definition stating that the person is "incapable of understanding the general nature and effect of" the various procedures that follow is actually a description of somebody who should not be considered "fit for interview" at all, regardless of the presence of a support person. The definition ignores the significant body of evidence developed over many years in this area as well as the good practice in existence and the recommendations of the Office of the Public Advocate.

Instead, we would concur with OPA's view that the protections should be provided for people with potentially reduced decision making capacity to assist the person with a cognitive impairment or mental health issue to access the information relating to their legal rights.

Obviously all of the things mentioned in the young people area (appropriate name, definition of a role, appropriate training, ascribing the responsibility of the role to an agency etc) would be equally applicable to support persons present for people with cognitive impairments or people with other vulnerabilities.

**Recommendation 11: That the scope of legislation relating to Independent Persons be broadened to include all vulnerable people in police custody.**

## **Other comments on the Draft Bill**

### **Photographs**

While the provision relating to photographs clearly does not apply to "mug shots", the youth sector and those involved in the management and administration of YRIPP and Victoria Police are all unclear about rights in relation to photographing of suspects. Currently it is common practice for police to photograph young people, even when they only receive a Victoria Police Caution. The Draft Bill represents an opportunity to clarify the situation in terms of young people's rights here to resolve conflict at the local level.

**Recommendation 12: That the proposed legislation clarify the situation in relation to young people's rights vis-a-vis 'mug shots'.**

### **Notification of destruction of fingerprints**

The notification of destruction of fingerprints should not just be upon request. It is unlikely that a young person would be confident enough to make this request however their concern over whether the police still have their fingerprints may remain real.

**Recommendation 13: That the notification of destruction of fingerprints continue to happen as a matter of course.**

### **The Right to an Interpreter**

The Draft Bill presents an opportunity to improve on this section. In particular, Section 27 states that an interpreter can be accessed "If a person in custody does not have a knowledge of the English language that is sufficient to understand the questioning". A person for whom English is their second language might be able to understand the questioning without their English being fluent enough to respond to the questioning. The wording of the provision that relates to people with a physical disability being "unable to communicate with reasonable fluency in the English language" should be extended to those without a sufficient knowledge of the English language.

**Recommendation 14: That the wording of Section 27 relating to people with a physical disability being "unable to communicate with reasonable fluency in the English language" be extended to those without a sufficient knowledge of the English language, rather than this latter group being required only to "understand the questioning".**

## **Fitness for Interview**

We welcome section 48 in terms of requiring the suspect to be “fit for questioning”, although it is unclear why this would not relate to all suspects being questioned by police as opposed to *only* suspects already in custody for other offences.

**Recommendation 15:** That a new section be created replicating the section 48 definition of “fit for questioning” and that police be unable to interview a suspect if a police member deems that they are unfit for interview.

## **Conclusion**

Dealing with young people within the proposed legislation ignores international human rights obligations and standards and Victorian legislation which requires that children be dealt with in a special youth framework with provisions appropriate to their age. The proposed legislation should refer to rights set out in the United Nations Convention on the Rights of the Child (CROC) that are to a limited extent set out in Victoria’s Charter of Human Rights and Responsibilities and the Children Youth and Families Act. Children and young people are widely recognised as a vulnerable group in need of additional protections when they are in contact with police and this needs to be adequately reflected in relevant legislation.

The draft Bill provides inadequate safeguards for the protection of the specific rights of children and young people. Appropriate safeguards should be inserted including full implementation of the Victorian Law Reform Commission’s recommendations in their report ‘Supporting Young People in Police Interviews as well as safeguards for broader areas of vulnerability as detailed above.

The VLRC report is comprehensive and was prepared following significant community consultation. Its recommendations were broadly supported across the sector. The proposed definition of ‘Independent Person’ and section 31 of the Criminal Investigation Powers Bill Exposure Draft fail to adequately reflect the body of work in this and previous reports. In particular, and as per the VLRC recommendations, we would support:

- A renaming of the ‘Independent Person’ to more appropriately reflect that the role is intended as a supportive one for young people in police;
- Clarity around the requirement for support persons to be present;
- A clear definition around who can perform the Independent Person role (and in particular, that they should be screened, trained and registered with the appropriate State supported program and drawn by police without preference);
- The consequences of police failing to provide a support person and moreover a ‘registered’ support person;
- the role of the support person and when they are required (including in interviews where parents are also in attendance if required);
- A requirement for a government particular body to be responsible for the procedures and operations of the scheme;
- Responsibility to a government department for administering a scheme including minimum standards;
- A protocol for reporting allegations made by young people against the police; and

- A clarification of the role of independent persons in bail hearings.

Without the above, we fail to work within a 'best interests of young people' framework. Unless we enshrine young people's rights in legislation in line with our international human rights obligations and the Victorian Charter, we risk significant infringement on young people's rights in the investigation process.

## **Recommendations**

Recommendation 1: The parts of the proposed legislation that relate to children or young people aged 10-17 years should sit within legislation that provides an appropriate framework for the protection of children's rights.

Recommendation 2: Part 2.2 include a pre-charge decision-making hierarchy requiring police to consider diversion options for children, young people and possibly others prior to issuing a summons or charge.

Recommendation 3: That the name 'independent person' be changed to 'support person'.

Recommendation 4: That the role of the parent, carer or independent person be defined in line with the VLRC's recommendations (11-15) to ensure active support of the young person through the process.

Recommendation 5: That clarification be provided to Independent Persons in how to respond to young people's allegations of police misconduct through the implementation of the VLRC's recommendations 22 and 23.

Recommendation 6: That as per VLRC recommendation 6, the role of Independent Person be performed by fully screened and trained persons drawn by police without preference.

Recommendation 7: That training for Independent Persons include not only relevant police and legal issues but also training in working with young people including those from refugee, migrant and Indigenous backgrounds.

Recommendation 8: That VLRC recommendations 4, 5 and 12 be implemented to ensure that parents are appropriately supported in their role in their child's interview.

Recommendation 9: That the VLRC's recommendations 16-21 in relation to the development of a framework for an Independent Person scheme and administration of the scheme be implemented.

Recommendation 10: That all young people under 18 receive the support of a Support Person, whether they be a victim, witness or suspect.

Recommendation 11: That the scope of legislation relating to Independent Persons be broadened to include all vulnerable people in police custody.

Recommendation 12: That the proposed legislation clarify the situation in relation to young people's rights vis-a-vis 'mug shots'.

Recommendation 13: That the notification of destruction of fingerprints continue to happen as a matter of course.

Recommendation 14: That the wording of Section 27 relating to people with a physical disability being "unable to communicate with reasonable fluency in the English language" be extended to those without a sufficient knowledge of the English language, rather than this latter group being required only to "understand the questioning".

Recommendation 15: That a new section be created replicating the section 48 definition of “fit for questioning” and that police be unable to interview a suspect if a police member deems that they are unfit for interview.