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Victorian Law Reform Commission

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To whom it may concern;

Review of Victoria's Child Protection Legislative Arrangements

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS works to ensure that all Victorians have access to and a fair share of the community's resources and services, through advocating for the development of a sustainable, fair and equitable society. VCOSS members reflect a wide diversity, with members ranging from large charities, sector peak organisations, small community services, advocacy groups and individuals involved in social policy debates.

This submission has been completed in collaboration with the Youth Affairs Council of Victoria (YACVic), the peak body representing the youth sector. YACVic provides a means through which the youth sector and young people voice their opinions and concerns in regards to policy issues affecting them. YACVic works with and makes representations to government and serves as an advocate for the interests of young people, workers with young people and organisations that provide direct services to young people.

VCOSS and YACVic also direct the Commission to the submissions of the Federation of Community Legal Centres (Vic) and the Centre for Excellence in Child & Family Welfare.

Introduction

Both VCOSS and YACVic have had an active involvement in the development and implementation process of the *Children, Youth & Families Act 2005*. In 2005, through the development of the *Children, Youth & Families Act* and the *Child Safety and Wellbeing Act*, Victoria was given a 'once in a generation' opportunity for real change in child protection and family services. There was a shared view that these reforms could deliver better services to ensure the safety and wellbeing of all children. Four years on the Victorian community

should be reaping the rewards of such reform, but sadly, as attested by the Victorian Ombudsman's report and this current VLRC review, it is not.

At the time of the legislation passing through the Victorian Parliament, Associate Professor David Green from LaTrobe University applauded the new legislative reforms but warned that if the resources were not provided to support the implementation, to ensure the words translated into real meaningful system change, then we would continue to fail our community's children.

Unfortunately, Associate Professor Green's warning has come to fruition and only four years after the generational reforms of 2005 we are needing to re-visit the intent and focus. It is important to acknowledge that there has been some significant progress achieved. However as a community, we continue to fail many vulnerable children and their families, as highlighted by the Ombudsman. While focusing the spotlight on child protection is important, a broader approach is required if we are going to have a system of support that best looks after our children – as was highlighted at the time of the 2005 reforms being passed. We need to be about working to protect the safety and wellbeing of children, but not about child protection.

VCOSS and YACVic have a number of concerns regarding the timing and consultation process of this review, along with the information paper and options that have been presented. Given the magnitude of the terms of reference a longer consultation would have enabled a more comprehensive discussion of this significant area and provided organisations, such as our own, to conduct consultations with member organisations intimately involved in the day to day workings of the children and family services system and so develop a more detailed submission. The process that led to the 2005 reforms was one that actively engaged the community sector in all aspects. It is disappointing that the current review process is limiting sector input. This submission provides a brief response. While we acknowledge the short time frame given to the Commission by Government, the absence of a more comprehensive information paper that detailed the rationale of each of the options presented would have enabled more informed submissions.

Further, a number of communities have felt excluded from this review process. For example, despite the over-representation of Indigenous children in the child protection system there was no mention of Indigenous children and young people, or specific responses for this community, in the information paper. In addition, this review appears to be being undertaken in isolation from a range of other reviews and evaluations that are being undertaken regarding both child protection and guardianship.

It is also of concern that the Commission process is occurring separate to that of the evaluation of the 2005 reforms. The Department of Human Services (DHS) have engaged KPMG to undertake an extensive three year review of the child and family services reforms

which will conclude in August 2011. The overarching objectives of the reforms are providing the focus for the evaluation, which include:

- ❑ intervening earlier through family services when families have difficulty protecting their children from harm and promoting their development
- ❑ ensuring all services focus not just on safety - but also on stability and child development
- ❑ improving the planning, coordination, targeting, delivery, quality and effectiveness of family services, child protection and out-of-home care services
- ❑ improving service responses for Aboriginal children and families and improving the cultural competence of services.ⁱ

The Evaluation Framework has been designed to guide how the various stages of the evaluation will operate in practice; and provide a shared understanding between the Department of Human Services (DHS) and the KPMG Evaluation Team, as to what the evaluation will achieve over the three year period August 2008 - August 2011. It is vital that any reform initiated by the outcomes of the Commission's review be informed by the findings of this evaluation.

VCOSS and YACVic are also concerned about the omission of any reference in the Information Paper to the rights of children under the *Charter of Human Rights and Responsibilities Act* (2006) ('the Charter'), and the importance of a rights-based approach to child protection. This omission is despite the Commission being required to have regard for the 'Charter'. Public authorities involved in service delivery to families and children are obliged to act in accordance with protections and rights under the Charter (Section 1(2)(c)). Section 17 of the Charter specifically refers to the protection of families and children and the duty to act in the 'best interests' of children. This provision mirrors Australia's obligations under the Convention on the Rights of the Child (CROC), which states that all actions concerning the child should take full account of his or her best interests (Article 3). Under the CROC, a child's rights to an adequate standard of living and development (Art 27(1)) free from violence and mistreatment is also protected (Articles 3.19, 20 and 25).

The 'best interests' principle is also reflected in the *Children, Youth and Families Act* (2005), in which a child's best interests must be a paramount consideration in decision making (Section 10(1)). This was then carried through in the implementation with a series of publications and training that supported and enabled practice change.ⁱⁱ Accordingly, the final options that are presented to Government should include reference to the 'best interests' principle and the rights of children protected under the Charter and international law, and how these are to be implemented in all aspects relating to a child's safety and wellbeing – particularly in the court process.

In this submission VCOSS and YACVic will broadly address each of the four options. While VCOSS understands that the VLRC Review will be presenting options to the Victorian Government rather than recommendations, VCOSS and YACVic urge the Government to undertake substantial further consultation with the community prior to implementing any reforms.

OPTION 1 – New processes that may assist in the resolution of child protection matters by agreement rather than by adjudication

VCOSS and YACVic would support the well resourced introduction of Alternative Dispute Resolution (ADR) processes in situations where appropriate, particularly through the introduction of family group conferencing. It is vital however that all parties, including both the children and their families are adequately supported to participate. We provide further discussion of this below.

VCOSS and YACVIC wish to note their concerns at how steps are being taken to reform the current system in isolation from each other.

A key example of this is the announcement of the new Child Protection Resolution Conferences on Thursday 1 April by the Minister for Community Services and the Attorney General. These Conferences, announced as part of the recommendations of the Child Protection Proceedings Taskforce, will provide a focus on collaborative dispute resolution outside of the Children's Court. It is concerning that these Conferences have been developed in parallel to the Commission's review and pre-empt the final report of the Commission. This announcement undermines any responses that are provided in relation to Option 1. In relation to ADR processes, VCOSS and YACVic believe further consideration and clarification is required as to what would be the role of community sector organisations in Alternative Dispute Resolution (ADR) processes, particularly given that in the current model, many community sector organisations may be providing support to families who subsequently become involved in ADR. Community sector organisations could also be involved directly in the ADR process or providing adequate support to families. The sector is already significantly under-resourced and often struggles to implement what is in existing court orders due to resource constraints. It is vital that if ADR is considered that the community sector be adequately resourced to both participate and support families.

As noted above, while VCOSS and YACVic would support the well resourced introduction of ADR in situations where appropriate, particularly through the introduction of family group conferencing, it is vital that all parties, including both the children and their families are adequately supported to participate. If ADR is introduced, families need to be provided with basic information regarding the process and its implications. There also needs to be the provision of safeguards, particularly through the provision of legal representation and information, otherwise there is the significant risk of power imbalances between the DHS and families.

Specific communities will also require additional supports and information to participate, particularly those people from Culturally and Linguistically Diverse (CALD) and Indigenous communities. Any ADR process that may be introduced will need to have a strong emphasis

on cross cultural communication and be informed by appropriate cultural advice. Importantly, the Cultural Competence Framework developed under the 2005 legislation should apply to any ADR processes.ⁱⁱⁱ Families will require someone present throughout the process that is culturally knowledgeable that can both translate and contextualise the process because for many CALD communities statutory processes mean different things. Culturally appropriate dispute resolution processes, such as the current Aboriginal Family Decision Making process, need to be further strengthened and legal support provided to families throughout the process. Children, young people and their families also need to be provided culturally appropriate legal assistance through relevant organisations.

Any introduction of ADR must be adequately resourced. At least the judicial process through the Children's Court, however adversarial, is resourced.

Option 2 – New ground upon which State intervention in the care of a child may be authorised and reform of the procedures followed by the Children’s Court when deciding whether to provide this authorisation

NEW POWERS FOR DHS

VCOSS and YACVic would not support any additional powers being given to the Department of Human Services (DHS), as they are already overwhelmed with existing powers, some of which are conflictory. Further, Victorian families do not need a carrot and stick approach to caring for their children. What is required is investment in a no fault public health model that supports and promotes the wellbeing of children, young people and their families through early intervention.

STEPS REQUIRED TO BETTER PROMOTE THE WELLBEING OF CHILDREN

Steps are urgently required to ensure that vulnerable children and families can access the support services they need when they need it. If this can be achieved, then not only would the intent of the 2005 reforms be achieved, but judicial processes would only be required in the most extreme and necessary circumstances. Currently the system is under so much pressure that services – rightly – have to prioritise those children most at risk. This results in families falling through the cracks due to an increasingly over-stretched and under-resourced child and family services system. As such, families needing support cannot access support when they need it – and too often they progress down until the situation has reached crisis point. This is not acceptable when the evidence points to the importance of families having the supports they require so as to support and promote the wellbeing of their children.^{iv} This lack of support must stop if we are going to reduce the numbers of children entering the child protection system and becoming so damaged, so traumatised that they suffer very deep and long term impacts – individual impacts which have broader social and economic impacts.

Early intervention is a critical component of the whole system of protecting children. Despite the significant reforms – including the new Child FIRST intake model for assessing families’ needs – there has not been any new investment in early intervention family services. The only increased funding has been for supports for families where children have reached the point of being at risk, but not an increase in funding for those services that can prevent situations progressing to crisis point. In too many instances, family services are too stretched to provide outreach and parenting support. So we are left with a system where parents cannot access the full range of supports they may need early enough.

Currently, many Victorian families are only receiving a service once they reach crisis point and services are often unable to fully engage with the breadth of their issues, which can

include combinations of mental health problems, disability, drug and alcohol abuse and family violence. In building equal social foundations, it is critical that the Victorian Government invest in providing support to families whenever and wherever they need it. VCOSS and YACVic call on the Commission to advocate for investment in early intervention as part of a new set of grounds for promoting the safety and wellbeing of children.

PARENTAL RESPONSIBILITY CONTRACTS

VCOSS and YACVic are concerned about the possible introduction of parent responsibility contracts and their capacity to be a trigger for income quarantining, particularly as Premier Brumby indicated support for income quarantining measures in media interviews following the release of the Victorian Ombudsman's report.

The introduction of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009* and related bills at the Federal level could see parent responsibility contracts in Victoria be an exceptional circumstances that sees families having their income support payments quarantined to pay for 'basics'. This would see 50 per cent of a family's payment being quarantined in a manner that does not align with existing support measures, including family support programs, case management and financial counselling, nor does such an approach have the best interests of the child being paramount. While some VCOSS members have used income management as a tool to ensure the best interests of a child in severe cases, it is not a model that should be automatically adopted for all cases.

Parent responsibility contracts would also need to be managed, and so there is a need for greater clarity as to whose responsibility this would be. It is likely that the responsibility would fall to community sector organisations. If this were to occur, additional resources would be required as community sector organisations would not have the existing capacity to undertake this role. Further, community sector organisations may also have reservations regarding taking on such a role, as it could be viewed as a punitive one, and would pose significant organisational risks along with the potential to compromise existing relationships between services and families. What is required is services and supports that work alongside families in a meaningful way.

THE VOICE OF CHILDREN AND YOUNG PEOPLE

Children and young people have a right to be adequately represented and have their voices heard during the court process. The *United Nations Convention on the Rights of the Child* (ratified by Australia) outlines a range of human rights obligations that the nation state has to its children and young people. The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) also enshrines the rights of Victorian children and young people - amongst all Victorians - to a range of fundamental human right protections.

Section 17(2) of the Charter 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.'*

Article 12 of the United Nations Convention on the Rights of the Child states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This right is reflected in the *Children Youth and Families Act 2005* in Section 10 3(d) which states that:

In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action –

(d) the child's view and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;

In order to ensure that the best interests of the child are met by the Victorian Children's Court process it is critical that the process support children and young people to be heard. It is vitally important that the recommendations of this review find opportunity to promote the importance of the rights of children and young people to meaningfully participate and be heard in the court process and in their broader interaction with the Department of Human Services (DHS).

Currently the DHS represent children under the age of seven in court processes, despite the DHS no longer having early childhood responsibility or expertise within its jurisdiction since the transfer of the Office for Children into the Department of Education and Early Childhood Development in 2007. The lack of independent representation for these children is concerning and VCOSS and YACVic would welcome the introduction of independent advocates, with early childhood expertise, to work with these children to represent their views.

Option 3 – The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.

YACVic and VCOSS support the position put forth by the Federation of Community Legal Centres in their submission to this review that Victoria would benefit from the establishment of an independent statutory commission for children and young people, but not one that has a role in individual child protection cases. YACVic and VCOSS support the Federation's call for increased accountability on the part of the Department of Human Services (DHS) in the provision of meaningful support for families, in ensuring that the child's best interests are paramount in the formulation of appropriate case plans, and to working in accordance with the principles outlined in the Act.

In his investigation of DHS's Child Protection Program, the Ombudsman made the following comment regarding accountability of the Department:^v

I consider that the accountability framework that has developed around the child protection system lacks sufficient rigour and transparency or the proactive elements required to ensure the state's response to children meets community expectation.

The Ombudsman went on to state:

While measures can be taken to enhance the performance of the child protection system in the short and medium term, it is my view that greater transparency should be introduced into the child protection system to support a long term focus on maintaining standards acceptable to the community.

The Federation of Community Legal Centres also identifies a 'lack of meaningful independent oversight of DHS' which it suggests compounds current problems stemming from the complex multiple functions DHS has under the *Children, Youth and Families Act 2005*. VCOSS and YACVic would like to reiterate the Federation's suggestion that:

On a systemic level increased accountability of DHS and improved compliance with best practice service standards could be achieved by the establishment of an independent statutory commission for children and young people.

YACVic and VCOSS have both long advocated for the creation of an independent Children and Young People's Commission for Victoria. The case for a Victorian Children and Young People's Commission was put forward in the 2001 YACVic discussion paper *'Are you listening to us?'*^{vi} At the time of the release of this discussion paper, a community Coalition of over 50 organisations continued to advocate collectively for the establishment of an Independent Commission for Children and Young People in Victoria.

Since then we have seen the appointment of an Advocate for Children in Care in 2004, replaced in 2005 by the establishment of the Office of the Child Safety Commissioner. Whilst YACVic and VCOSS welcomed the appointment of both the Advocate for Children in Care and the Child Safety Commissioner, both models have fallen short of what is needed to affect systematic change to better protect the rights and interests of all children and young people in Victoria.

With regard to the role of the Child Safety Commissioner, the Ombudsman's report into child protection highlighted shortcomings in his capacity to provide the level of meaningful oversight and scrutiny of DHS:

The key independent scrutineer of the child protection program is generally considered to be the Child Safety Commissioner. My investigation concluded that he does not have the ability to initiate investigations and has limited investigative powers. Also, the Child Safety Commissioner has no coercive powers to investigate matters and relies of the cooperation of the department and other agencies to perform its functions.

The Ombudsman's concerns articulate in part the reasons why YACVic and VCOSS continue to advocate for the establishment of an independent Commissioner for Children and Young People in Victoria.

A Victorian Commission for Children and Young People should utilise the Convention of the Rights of the Child as it's guiding charter and be underpinned by the following principles:

- ❑ Independence – accountable to the Parliament in order to ensure objectivity and candour.
- ❑ Statutory powers – established by legislation which give the Commission the necessary authority to carry out its functions.
- ❑ Focus on children and young people up to the age of 18 – ensure the rights and interests of children and young people are not overlooked in favour of those of adults.
- ❑ Adequate resources – commensurate with the responsibilities of the Commission and determined by Parliament.
- ❑ Broad perspective – broad jurisdiction that takes into account all levels of government, non-government and commercial organisations which impact on children and young people.
- ❑ Accessibility – ensure the Commission is accessible to all children and young people and recognises the diversity of children and young people.

In *'Are You Listening to Us?'* YACVic proposed that a Children and Young People's Commission should have the following functions:

- ☐ Involve and engage young people
- ☐ Perform an advocacy role
- ☐ Review existing proposed legislation
- ☐ Monitor policies and practices
- ☐ Initiate and conduct inquiries
- ☐ Report and make recommendations to Parliament
- ☐ Provide information, referral and assistance to complainants
- ☐ Research crucial issues
- ☐ Promote public education programs
- ☐ Promote models of child and youth participation in decision making
- ☐ Apply for standing before the court in special selected cases involving the rights of children and young people
- ☐ Form partnerships with other statutory bodies.

The Commission would have a unique responsibility for protecting and promoting the rights of children and young people at a state level. A broad based, independent model for a Commission is necessary to perform this function; however, the Commission's mandate could include a specific focus on giving priority to promoting the protection of Victoria's vulnerable children and young people (as does the NSW Commission for Children and Young People). An independent Commission could investigate and make recommendations to protect vulnerable Victorian children without waiting for direction from government.

An Independent Children's Commission could undertake the functions currently the mandate of the Office for the Child Safety Commissioner. Its broader mandate and independent statutory powers could demand a level of accountability of the Department of Human Services in maintain a consistent focus on compliance with best practices service standards and a consistent prioritising and adequate resourcing of child protection services by Government.

In addition, when thinking about the creation of an independent statutory commissioner it is important to remember Section 18 of the *Children, Youth & Families Act 2005* which provides for the transfer of guardianship from the Secretary to Aboriginal agencies which is currently being implemented and discussed between Aboriginal organisations and DHS. Any

changes in relation to the function of the DHS, particularly in relation to guardianship, need to take into account Section 18.

Option 4 – Changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial members

VCOSS and YACVic are concerned that this option could dilute the legal and judicial process and undervalues the importance of the wellbeing of children and young people. The Court is the place for serious issues to be heard as it values and understands the laws, rights and the Charter. Strong judicial oversight is vital.

VCOSS and YACVic are concerned that this review is being used to suggest reforms that would have a broader impact than simply child protection. The introduction of a new Protective Tribunal to 'deal with a range of matters where the state intervenes in the lives of people for their protection' would have a far reaching impact, particularly concerning the guardianship implications for people with a disability, mental health concerns or older adults. Adequate consultations would be necessary with a wider scope than those concerned with child protection, include a review of the existing mechanisms – including the Victorian Civil and Administrative Tribunal (VCAT). As the VLRC is also conducting a review of guardianship in parallel to this review it is vital that each review informs the other.

Contact

Should you require any further information or if you wish to further discuss the VCOSS and YACVic submission please contact Lauren Matthews on E: lauren.matthews@vcoss.org.au or T: 9654 5050.

Yours sincerely



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References

ⁱ Further information regarding the *Evaluation of the Child and Family Service System Reforms* by KPMG see: <http://www.cyf.vic.gov.au/every-child-every-chance/evaluation-of-child-and-family-services-reforms>

ⁱⁱ For example, see *The Best Interests framework for vulnerable children and youth – Best interests series*, Office for Children, Department of Human Services, February 2007, at: http://www.cyf.vic.gov.au/__data/assets/pdf_file/0011/43013/ecec_best_interest_framework_proof.pdf

ⁱⁱⁱ For further information regarding the *Cultural Competence Framework* see: <http://www.cyf.vic.gov.au/indigenous-initiatives/publications2/aboriginal-cultural-competence-framework>

^{iv} Range of evidence available at:

http://www.rch.org.au/ccch/resources.cfm?doc_id=10885

Family and Community Support Branch, Community Care, DHS, *Establishing priorities for gain: The health, development, learning and wellbeing of Victoria's young children*, DHS, Melbourne, 2004.

^v Ombudsman Victoria, *Own motion investigation into the Department of Human Services Child Protection Program*, Victorian Government Printer, November 2009.

^{vi} Youth Affairs Council of Victoria, *Are You Listening to Us? The Case for a Victorian Children and Young People's Commission* - http://www.yacvic.org.au/policy/detail-old.chtml?filename_num=256894.