22 February 2016
CCYPD/16/107

Ms Kerin Leonard
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Department of Justice and Regulation
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Dear Ms Leonard

Re: Access to Justice Submission 2016

We congratulate the Hon Martin Pakula, Attorney-General for establishing the Access to Justice Review and support its focus on how ‘the most disadvantaged and vulnerable in our community receive the support they need when engaging with the law and the justice system’.

The Commission for Children and Young People (the Commission) seeks to promote the rights and interests of all children and young people in Victoria, with a special emphasis on those who are particularly vulnerable. These include those who are clients of child protection, reside in out-of-home care or are involved in the youth justice system. Under the leadership of the Commissioner for Aboriginal Children and Young people, the Commission also has a strong focus on Aboriginal children and young people, their families and communities.

The Commission receives information about and from, children and young people through a variety of activities. Of particular relevance to this inquiry is the information obtained by the Commission through:

- the conduct of inquiries. The Commission’s recent inquiry “...as a good parent would...” includes information and recommendations which would be of particular relevance to this review. The report is available on the Commission’s website (www.ccyp.vic.gov.au).

The Commission is also in the process of finalising other inquiry reports which would be of relevance to this review including an inquiry into the circumstances of a vulnerable Aboriginal child and a report on services provided to Aboriginal children and young people in out-of-home care in Victoria, largely informed through the work of Taskforce 1000.

- independent visitor programs in youth justice services and pilot programs in residential care and secure welfare services.

Human Rights

The terms of reference for the review provide that the:

aim of the Access to Justice Review is to improve access to justice for Victorians with an everyday legal problem or dispute, and ensuring the most disadvantaged and vulnerable in our community receive the support they need when engaging with the law and the justice system.
The terms of reference do not specifically reference children and young people but it is clear that children and young people are particularly vulnerable, especially when they engage with the law and justice system.

The Charter of Human Rights and Responsibilities Act 2006 acknowledges the rights and vulnerabilities of children and provides 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. (s 17(2))

- A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age. (s 23(3))

- A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation. (s 25(3))

Any consideration of how access to justice could be improved in Victoria, should acknowledge the rights of children and young people to special protection and assistance.

The Commission understands the focus of this review is on 'everyday legal problems or disputes' and so broader questions about reform to the child protection and youth justice service systems are beyond the scope of the review. Nonetheless, improving the capacity of children and young people to access legal information and support is fundamental to driving improvements. As is holding these service systems to account for the quality of care provided to vulnerable children young people and protecting their fundamental human rights.

**Key recommendations**

The key recommendations included in our submission are:

1. An increase in resources for legal services, particularly those designed to assist vulnerable children and young people, and for legal advocacy for women and children experiencing family violence and sexual abuse.

2. The need for better access to legal advice, representation and support for children and young people who live in out-of-home care and those involved in the youth justice system.

3. The development of a protocol between the Department of Health & Human Services, Victorian Aboriginal Legal Services, Legal Aid and other legal services to:
   - ensure that timely legal advice and support is provided to children and young people charged with criminal offences and in youth justice custody
   - enhance the capacity of legal representatives to support children and young people who live in out-of-home care, particularly those who have been abused while in care
   - support the development of enhanced court procedures and collaboration between legal representatives to better support children and young people who are involved in proceedings in both the Family Division and Criminal Division of the Children's Court.

4. All those involved in the legal system – solicitors, barristers, bail justices and members of the judiciary – receive specific training in Aboriginal cultural competence. This is particularly important given the significant overrepresentation of Aboriginal children and young people in the child protection and youth justice service systems.
5. Strengthening the capacity of legal professionals to provide information, advice and representation for children and young people from culturally and linguistically diverse backgrounds.

**Increase funding for legal services**

Services such as Youth Law, the Victorian Aboriginal Legal Service, community legal centres, the Aboriginal Family Violence Prevention and Legal Service Victoria and Legal Aid fill an essential role in providing information, advocacy support and representation to young people about the law, their legal obligations and rights. Demand for these services remains high and funding is not sufficient to meet this demand. The two illustrations below highlight the challenges of insufficient funding.

Children and young people in youth justice centres have expressed to the Commission's independent visitors concerns about the legal representation provided to them:

- legal representatives not returning calls in a timely manner
- delays caused because lawyers have not had time to prepare cases, a particularly vexed problem for children and young people whose time on remand is extended because of the delays
- information being provided in a form the children do not understand
- not being kept informed about 'what is happening' with their matters.

We suspect that many of these problems arise not because of a lack of concern or commitment on behalf of the legal representatives but because existing legal services are stretched too thin and are insufficiently resourced.

Through his work on Taskforce 1000 and other activities and community conversations, the Commissioner for Aboriginal Children and Young People has witnessed the profound impact of family violence on children, young people, women and communities as well as the need for additional legal and other services to be provided. For example, the Commission is very concerned about the inadequate level of funding provided to the Aboriginal Family Violence Prevention and Legal Service Victoria, most notably in the Inner Gippsland region. The service has an office in Bairnsdale but lacks sufficient capacity for the whole Gippsland region.

**Enhancing capacity and inclusiveness within the legal sector**

Aboriginal children and young people continue to be significantly overrepresented in child protection and youth justice services. The number of Aboriginal children and young people in out-of-home care is continuing to increase and Victoria has one of the highest removal rates in Australia. As noted in the *Access to Justice Arrangements Productivity Commission Inquiry Report*:

> Aboriginal and Torres Strait Islander Australians often have complex legal needs and face substantial barriers in accessing legal assistance. The nature and complexity of their civil law needs means that specialist legal assistance services remain justified. (p761)

Ensuring that Aboriginal families have access to information about their rights and access to high quality and culturally appropriate legal services is an essential part of supporting families. This support must be timely and appropriate to address problems at an early stage before they escalate to a point where the safety and wellbeing of children is at risk. Lawyers can be an important avenue for advice and information and for advocating for access to services.

For children and young people in Victoria, this means ensuring that specialist Aboriginal legal services receive adequate funding. It also means ensuring that all those involved in the administration of justice
receive ongoing training in Aboriginal cultural competence and actively seek to increase the number of Aboriginal people working within and leading in all aspects of the legal system.

**Legal advice and assistance for vulnerable children and young people in relation to decisions by government agencies**

Timely and appropriate advice, support and alternative dispute resolution can play an important part in resolving ‘everyday legal problems’. This is particularly important for areas where the failure to resolve issues can have a profound impact on children and young people.

Children and young people and their families need to access information, advice and representation when government authorities make decisions which can have a significant impact on their lives. The information and advice must be a form which is accessible to those who are most vulnerable.

The ‘everyday’ legal issues for vulnerable children and young people, including their capacity to complain about or contest government decisions, may be quite different to those experienced by others in the community; or they may be at a particular disadvantage because they are unaware of or lack the skills and support necessary to challenge decisions. The examples below illustrate some of these challenges.

- **School expulsion**

The Commission has for many years been concerned about the extent to which vulnerable children and young people become disengaged from education. The decision to expel a child or young person from school has a significant impact. The *Youth Parole Board and Youth Residential Board Annual Report 2014 –2015* reported on a snapshot survey carried out by the Department of Health & Human Services which showed that 58% of the 157 males and 8 females detained on sentence and remand had previously been suspended or expelled from school.

Youth Law has information available on its website to explain to students their rights if suspended or expelled from school. It is important that information such as this is widely available to all students who are at risk of suspension or expulsion and in a form that is accessible to them and their families and that they have access to legal advice and representation.

As a matter of policy, all children and young people facing the prospect of school expulsion should have access to advice and advocacy support and this should be reflected as a priority in the allocation of legal services directed to the resolution of ‘everyday legal problems’.

- **Appealing case plan decisions**

The *Children Youth and Families Act 2005*, and other legislation, is intended to promote the best interests of children. For children and young people entrusted to the care of the state, the state should act ‘as a good parent would’. Yet it is clear this does not always occur.

Under section 333 of the Children Youth and Families Act, children (and others) have rights of appeal to VCAT in relation to case plan decisions. The Commission’s impression is that this is an avenue rarely used by children. While it would be best for children and young people to have their voices heard and issues resolved in a less adversarial manner, it is also important that vulnerable children and young people are informed of their rights and have effective mechanisms to have their concerns addressed.

For example, the Commission continues to be concerned about the number of placement changes experienced by children and young people in out-of-home care. The report ‘...as a good parent would...’ documents a range of concerns about the quality of care provided to children in residential care, for
example by noting that the data in relation to the cases reviewed by the inquiry showed that one child experienced more than 100 placement changes and 85 children (52 per cent) experienced more than 11 placement changes. (p.46).

If vulnerable children and young people in out-of-home care are to have access to justice, they must have easy access to information about their rights while in care and legal advice and representation to support them to raise concerns and have matters addressed.

- Cultural plans

The Children Youth and Families Act 2005 provides that a cultural plan must be prepared for each Aboriginal child placed in out-of-home care under the guardianship of the Secretary. Recent amendments will extend this requirement to have a cultural plan to all Aboriginal children in out-of-home care. Through Taskforce 1000 and other work the Commission is aware that many Aboriginal children either have no cultural support plans or have a clearly inadequate one. While the primary responsibility for ensuring strong plans are developed and implemented rests with the Department of Health & Human Services, there is also scope to enhance the capacity of lawyers working in the children protection arena to ensure the department complies with its legislative requirements.

The Commissioner for Aboriginal Children and Young People, appearing before the Standing Committee on Legal and Social Issues Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015 emphasised the rights of Aboriginal children:

> What I have seen in practice after reviewing around 500 Koori children across the state is that when decisions are being made about Aboriginal children and young people, their culture and identity, which are core to their wellbeing and their right, in many, many of the cases is not given the necessary focus that is due. I have seen many examples where a child's identity as an Aboriginal person is not established for many years after, and over the last couple of weeks, including yesterday, there have been cases of up to four, five, seven years. We need to know that the question as to whether the child is Aboriginal or Torres Strait Islander has been asked and more than once, and asked in the right way. Potentially and realistically we have seen Koori children processed through the child protection system, I believe, without being identified as Koori.

Access to justice for Aboriginal children and young people means creating a legal system which fully supports their rights to culture. It means having legal representatives (as well as the judiciary) well versed in their rights and able to ensure that government agencies are held to account for their failure to comply with statutory rights.

Access to legal advice and representation when allegations of abuse are raised

The "...as a good parent would..." report includes data, information and recommendations from the reviews of 166 individual children subject to reports of sexual abuse in residential care. The report notes that when allegations of abuse were raised, children were 'often not provided with adequate information about outcomes, counselling, redress or their legal rights'. (p.16) Further even 'in circumstances when allegations were proven, there was no record that the children were given the ability to pursue their legal rights (either by way of compensation or redress for their experience)'. (p.55). One case was described in the report as follows:

> Police interviewed the girl in relation to a residential care worker who had sexually assaulted her. She stated that the abuse happened over a three-year period, from when she was eight years old. She identified another child who was also sexually assaulted by the same residential care worker. File notes do not indicate if she was offered support or counselling following this interview. It is unclear what
investigation or outcomes occurred in relation to the residential care worker, including whether or not this person continues to work in the residential care sector within Victoria.

There was no evidence on file whether the state, as her legal guardian, arranged for her to obtain legal advice in order for her to explore legal avenues of redress, such as victims of crime assistance.

Ensuring children and young people who experience out-of-home care had ready access to information about their rights and priority access to legal services would enhance the protection of their rights and provide a mechanism to hold the service system to account when it fails to deliver on the principles and standards articulated in the legislation, particularly the most basic of rights to be kept safe.

To avoid any lack of clarity about who has responsibility for ensuring children and young people in out-of-home care have access to legal information, advice and representation, a protocol could be developed between the Department of Health & Human Services, Legal Aid and Victorian Aboriginal Legal Services specifying, among other things, the ways in which legal information, advice and assistance will be provided, and when these legal services must be notified that a child or young person may require advice or assistance. This is particularly important for those children and young people who raise allegations of abuse while in care. In some cases a litigation guardian may be required, especially for those cases where the child is abused while in care and also under the guardianship of the Secretary to the Department of Health & Human Services.

How can legal services to vulnerable children and young people in out of home care be improved?

Policies directing the allocation of legal resources and services should clearly articulate that children and young people who live in out-of-home care are entitled to receive priority access to legal services. Funding should be provided to enable legal services, in collaboration with children and young people who have experienced out-of-home care, to:

- develop resources and tools specifically targeted to meet the particular needs of these children and young people
- develop training and specialist accreditation for lawyers working with children and young people in the out-of-home care sector.

Access to legal representation for children and young people in youth justice detention

The Commission has expressed in a number of forums our continuing concern about the high numbers of young people being remanded. We are also particularly concerned about the overrepresentation of Aboriginal children and young people and children and young people known to child protection on remand.

Ensuring children and young people have timely access to appropriate legal representation is an important part of addressing this issue. The Commission, through its independent visitor program in youth justice centres, has heard from young people about the challenges they have experienced in accessing legal advice and assistance while on remand. Some have expressed concerns about not having access to their lawyers before court hearings and others about matters being adjourned and children and young people being re-remanded because their case was not sufficiently prepared to proceed. This appears to be particularly challenging in rural areas.

The Commission is also very concerned about those children and young people who are both clients of child protection and youth justice services. The Youth Parole Board and Youth Residential Board Annual Report 2014-2015 notes that:
The annual snapshot survey of young people in custody showed that 43 per cent of young people in youth justice centres had previous child protection involvement; 70 per cent of young people 15 years and younger in custody had been subject to a previous child protection order 17 per cent of those sentenced to a custodial order through the Children's Court were currently a dual client of the child protection and youth justice services.

The Board considers it imperative that the child protection and youth justice services work collaboratively to implement supports that will assist young people to overcome, as much as possible, the effects of traumatic experiences early in life.

Our experience has shown that access to justice for children and young people who are clients of both service systems can be quite elusive. While these issues raise larger questions outside the remit of this review, some of the answers do lie within the way in which legal service are provided to these vulnerable children and young people.

For example, for many of these children the lawyer who acts for them in child protection matters is different to the lawyer engaged to represent them in criminal matters. In such cases, if the lawyers do not receive an appropriate briefing and time to confer with one another, the child or young person will not receive a just and holistic response.

Further complicating the picture is the role of child protection when a child in care is charged with criminal offences. A good parent would be a court with their child, support and advocate for their child and assist with identifying services and supports for the child. A good parent would, to the best of their ability, ensure their child has a legal representative who is well briefed on the child's circumstances. We are aware that this is not always the case for children and young people for whom child protection has responsibility.

This review provides an important opportunity to examine and make recommendations about the way in which legal services provided to these vulnerable children can be improved and child protection services work more effectively and collaboratively with legal representatives. The development of a protocol would assist in strengthening relationships and clarifying expectations and responsibilities. It could also pave the way for broader reforms, such as a specific list in the Criminal Division of the Children's Court for child protection clients at which it would be expected that a representative of child protection would be present and fully briefed on the resources available to support each child and young person.

**Children and young people from CALD backgrounds**

The Commission is concerned that children and young people from culturally and linguistically diverse backgrounds are overrepresented in all aspects of the criminal justice system. This overrepresentation arises from a range of factors including the fact that young people who are new to Australia may not understand Australian laws or how to find legal advice and support. Some of these challenges can be addressed by ensuring that information relevant to children and young people is accessible in a wide range of formats and languages. Other strategies should also be considered including:

- expanding the opportunities for legal services to provide information and training about the law directly to those who work with CALD communities
- secondments between legal services and bodies representing CALD communities
- developing innovative approaches for government complaints handling bodies to work with and provide information to organisations supporting CALD communities.
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Conclusion

This review provides an important opportunity to consider how legal services to the most vulnerable children and young people in the community can be enhanced.

The Commissioners would be pleased to meet with Crown Counsel Melinda Richards SC and Rachel Hunter directly to discuss these, or any other issues, in more detail.

Yours sincerely

Hon. FHR Vincent AO QC
Acting Principal Commissioner

Andrew Jackomos PSM
Commissioner for Aboriginal Children and Young People