

Submission

Inquiry into Access for Justice

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James McDougall,

Director

National Children's and Youth Law Centre

1 National Children's and Youth Law Centre

- 1.1** The National Children's and Youth Law Centre ("NCYLC") is the only Australian national community legal centre working exclusively for, and with, children and young people. It was established in 1993 with the support of the University of New South Wales, the University of Sydney, the Public Interest Advocacy Centre and the (then) Australian Youth Foundation.
- 1.2** As Australia's only national community legal centre for children and young people, NCYLC is committed to increasing children and young people's access to legal assistance and improving the legal status of children and young people in Australia. Since its inception in 1993, NCYLC has made over 180 public submissions on law and policy affecting children and young people and handled over 150,000 inquiries.
- 1.3** The NCYLC provides advice and information to children and young people (under 18 years of age) through the Lawstuff website (www.lawstuff.org.au) and the LawMail service. Lawstuff provides general legal information and referral options on a wide range of issues relevant to children and young people. LawMail is a confidential legal advice and information service which responds to email requests from young people under the age of 18 from all over Australia.

2 Overview of our Submission

- 2.1** The NCYLC welcomes the opportunity to provide a submission to the Senate Inquiry into Access to Justice (**"Inquiry"**). Our submission uses a child rights-based approach to consider some of the issues raised by the Inquiry. In particular we aim to highlight the gaps in service delivery and access to justice for children and young people.
- 2.2** Our Submission draws upon research, consultations and our experiences in listening to children and young people. Our conclusion is that generally the legal system fails to provide appropriate mechanisms for the voices of children

to be heard. The legal system is built for adults. As a consequence access to justice for children is compromised.

- 2.3 Those mechanisms currently available in the legal system to provide representation and advice for children and young people are inadequate. The disadvantage experienced by children as a group is often compounded by the barriers that exist as a result of their situation in particular children experiencing poverty, family conflict and/or violence, Indigenous children, children with a disability, children from regional, rural and remote communities and from culturally and linguistically diverse communities.
- 2.4 The NCYLC calls for the development of models of advocacy which recognises these barriers to access and provide both practical support and appropriate advocacy. Such models are necessary if children and young people are to be heard in their own right and for their rights to justice to be effectively addressed.
- 2.5 Our experience informs us that in many if not most situations, children seek assistance in dealing with legal issues and their rights outside the conventional legal system. Families, school communities, health services, children's and youth services, peers and support groups play a key role for children in addressing these issues.
- 2.6 The legal system is often nowhere to be seen – particularly at times of family conflict and homelessness. The intervention of the legal system often comes too late and fails to address the key issues. It may even compound an experience of alienation and abuse.

3 **Still Unseen and Unheard - A Timeline of Inaction**

- 3.1 Australia ratified the *United Nations Convention on the Rights of the Child* (“**the Convention**”) in 1990. The Convention provides a universally accepted

rights-based framework for addressing the treatment of children. Under the Convention, Australia has specific obligations which include protecting children from discrimination¹ and allowing children who are capable of forming their own views to have the right to express those views freely in all matters affecting the child.

3.2 Although Australia has made some headway in implementing its obligations under the Convention, it is still said to “lack a comprehensive strategy to realise the rights of the child”². *The Non-Government Report on the Implementation of United Nations Convention on the Rights of the Child in Australia* published in 2005 (**“NGO Report”**) reported that:

- there is still no National Commissioner for Children and Young people³;
- there is still no specialist Commissioner within the Australian Human Rights Commission (**“HRC”**) dedicated to child rights⁴;
- discrimination still exists against children and young people⁵;
- there is an over-representation of Aboriginal and Torres Strait Islander children in the juvenile justice system and care and protection system⁶;
- and
- children are still not being provided with a voice in protection proceedings.

3.3 The United Nations Committee on the Rights of the Child made an extensive set of recommendations in October 2005 which the Australian Government has largely failed to adopt. These include a nationally coordinated approach to service delivery⁷, the independent monitoring of the rights of children⁸ and the needs of homeless children⁹.

1 Article 2.

2 NGO Report, p. 1.

3 A National Commissioner For Children Bill was introduced in March 2008 by Democrat Senator Bartlett.

4 NGO Report, p. 1.

5 Ibid, p 7 particularly for Indigenous and Torres Strait Islanders.

6 Ibid.

7 CRC/C/15/Add.268 Concluding Observations, United Nations Committee on the Rights of the Child, 40th Session, paragraphs 12 and 14

8 Ibid, paragraph 16.

9 Ibid, paragraphs 5 and 66.

- 3.4 Of particular note is the Committee's recommendation that Australia "strengthen its efforts to conform its domestic laws and practice to the principles and provisions of the Convention, and to ensure that effective remedies would be always available in case of violation of the rights of the child"¹⁰.
- 3.5 In 1997, the Australian Law Reform Commission and the (then) Human Rights & Equal Opportunity Commission jointly published *Seen and Heard: Priority for Children in the Legal Process*¹¹ ("**Seen and Heard Report**")
- 3.6 The Seen and Heard Report concluded that the justice system discriminates against children and young people¹² and fails to provide them with a voice in matters directly affecting them¹³. It identified:
- poor coordination of services for children, particularly those already vulnerable¹⁴;
 - an increasingly punitive approach to children in youth justice systems¹⁵ ;
 - over-representation of Indigenous children in the youth justice system¹⁶ and care and protection placements¹⁷;
 - court processes as intimidating and confusing to children¹⁸.
- 3.7 The Seen and Heard Report made several recommendations including:
- a summit on children to be attended by all heads of Australian Governments;
 - a taskforce on children and the legal process;

¹⁰ Ibid, paragraph 10.

¹¹ The result of an inquiry made by the Australian Human Rights Commission and the Australian Law Reform Commission into children and the legal process

¹² http://www.hreoc.gov.au/HUMAN_RIGHTS/children/seen_and_heard.html

¹³ http://www.hreoc.gov.au/HUMAN_RIGHTS/children/seen_and_heard.html, for example in family law proceedings – Seen and Heard Report, 1997, para 2.73

¹⁴ http://www.hreoc.gov.au/HUMAN_RIGHTS/children/seen_and_heard.html

¹⁵ http://www.hreoc.gov.au/HUMAN_RIGHTS/children/seen_and_heard.html

¹⁶ Seen and Heard Report, 1997, para 2.82 (Indigenous children don't benefit from cautions to the same extent as non-Indigenous children), para 2.85 (Indigenous children are more likely to be arrested than summonsed, and Indigenous children are 26 times more likely to be held in police custody than non-Indigenous children), para 2.118 (Indigenous children are over-represented in juvenile detention centres)

¹⁷ Seen and Heard Report, 1997, para 2.68

¹⁸ http://www.hreoc.gov.au/HUMAN_RIGHTS/children/sentencing.html#4.2

the development of an Office for Children at the Commonwealth level;

- national standards in the areas of school discipline, care and protection, investigative interviewing of children and youth justice;
- adoption of child friendly service delivery standards by Government agencies;
- development of standards for the representation of children in family law and care and protection proceedings;
- national endorsement of rehabilitation as the primary aim of youth justice.

3.8 Despite the significance of the Seen and Heard Report findings, in 2008 the NCYLC Director James McDougall, Tiffany Overall and Peter Henley in their article, '*Seen and Heard Revisted*' concluded that "little progress [had] been made in implementing the recommendations from the *Seen and Heard* Report."¹⁹. The article noted:

- the summit had not taken place²⁰;
- the taskforce and Office for Children had not been established²¹;
- the specialist children's rights unit for the HRC had not been established²²;
- no substantive support had been provided for the development of a network of community based and peer advocates for children since 1997²³;
- there had been no development of national standards for the representation of children in family law, protection²⁴ and youth justice proceedings²⁵; and
- the recommendation that there should be a focus on rehabilitation in youth justice had not been addressed²⁶.

4 The Unheard Voices of Australian Children and Youth

4.1 Children and young persons are not heard in many decision making processes that have significant implications for their rights and well-being.

4.2 Despite the efforts of many, this still includes the circumstances of family conflict and relationship breakdown. Family Court proceedings still fail to consistently provide for the voices of children to be heard²⁷. In circumstances where family conflict is resolved outside the trial setting of courts, the

19 Australian Law Reform Commission, (2008). "Children and Young People" *Reform, A Journal of National and International Law Reform*, Winter, Issue. 92, p. 10.

20 Ibid.

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid 12.

26 Ibid.

27 Judy Cashmore and Patrick Parkinson, *The Voice of a Child in Family Law Disputes* (2008).

voicelessness of children is exacerbated even further. Access to justice for children is compromised. Research is now being proposed to consider how this failure may increase the incidence of youth homelessness.

- 4.3 Our failure to hear the voices of children in family conflict is reflected in the LawMails received by the NCYLC. Between 1 March 2005 and 31 March 2008, 19.1% (687) of the 2752 LawMails received related to family and family law issues. Of these, 29% of children and young people expressed a desire to have a say or control over decisions that were being made that directly affected them. This desire was often coupled with feelings that the child or young person was not being listened to.
- 4.4 One 10 year old male wrote that *“I don’t want to see my dad on visits anymore. How can I stop this, no one will listen to me. Also can I divorce my dad and will this stop this problem? How old do I need to be to be able to say what I want?”*
- 4.5 Another 16 year old male wrote *“How can I stop my mom from abusing me? The family court and the child advocate do not let me have a say, so nobody knows except me and my dad.”*
- 4.6 These pleas, and the many others like them, highlight the need in family conflict for:
- an appropriate mechanism through which children and young persons can be heard and their concerns acknowledged and addressed; and
 - services that specifically cater for children and young people who are experiencing family conflict and/or violence.
- 4.7 We note the United States system of ‘Court Appointed Special Advocates’ (**“CASA”**). This system merits serious consideration as a means to assist children and young people access justice in the courts. This scheme involves court appointment of a volunteer whose role is to “watch over and advocate for abused and neglected children, to make sure they don’t get lost in the

overburdened legal and social system or languish in an inappropriate group or foster home²⁸. Since 1977, when the scheme first began, CASA volunteers have helped more than two million abused children.

- 4.8 The success of the program can be seen in the results of an independent audit by the Office of the Inspector General in 2006 which found that:
- CASA volunteers spend majority of their volunteer time in contact with a child;
 - CASA volunteers are effective in getting their recommendations accepted in court;
 - When a CASA volunteer is assigned, a higher number of services are provided;
 - A child with a CASA volunteer is more likely to be adopted; and
 - A child with a CASA volunteer is less likely to re-enter the child welfare system²⁹.

5 Practical Assistance and Advocacy

- 5.1 The issues affecting children and young people within Australian society are numerous, complex and often inter-related. These issues include family and relationship conflict, youth homelessness, consumer and debt issues, interactions with education, criminal justice and welfare systems, and discrimination on the basis of race, cultural difference, age and sexuality. Most of these issues are experienced at greater rates by Indigenous children and young people.

- 5.2 Despite the demanding nature of these issues, children and young people are being denied adequate practical assistance and effective mechanisms through which their concerns can be heard. The disadvantage is often compounded for Indigenous children, children with a disability, children from regional, rural and remote communities and from culturally and linguistically diverse communities. This is unacceptable.

28 http://www.nationalcasa.org/about_us/index.html

29 http://www.nationalcasa.org/about_us/studies.html

5.3 The advocacy mechanisms currently in place to address the specific concerns of children are inadequate. We note the particular impact of the following:

- most youth organisations operate at a local and community level without adequate support for national networking and advocacy;
- the majority of advocacy organisations are not child and youth-specific;
- those that are child and youth-specific, such as the NCYLC, attempt to advocate for change on a broad level but are often unable to represent the specific interests of particular groups such as homeless young people or Indigenous children;
- the resources, skills and time required to provide for the effective involvement of children in advocacy are considerable; and
- the implicit assumption that children's needs for advocacy will be met within the family unit – without recognition of the family's limitations.

5.4 In relation to the provision of practical assistance to children and youth, few services operating nationally or consistently across Australia are able to provide a full range of services to children and youth. Often advocacy (both individual and systemic) is not an integral part of the services. The services required by children span legal, housing, education and training, welfare and health assistance – and advocacy can be the tool that crosses the boundaries of these service areas.

5.5 The services that are available in the community:

- are not always equipped or funded to deal with all of these issues and their complexity;
- are not able – because of funding boundaries, lack of resources or skills – to facilitate the linkages required between services in order to ensure coordinated service delivery – that is, ensure that a child in difficulty is able to access all of the different services required.

For example, youth justice lawyers working in courts are not able to locate accommodation for children on conditional bail and consequently such children remain in detention.

- 5.6 Often the only services that can cross these boundaries are youth workers and counsellors. Whilst such assistance is invaluable, it is unrealistic to expect youth workers and counsellors to have the skills and resources to meet the specific service needs of each child.

6 The Effective Involvement of Children and Young People

- 6.1 The involvement of children and young people themselves in advocacy is vital in order to ensure that the concerns of children and young people are adequately reflected. This must include children and young people who suffer additional barriers to access. NCYLC supports use of direct representation models and calls for particular attention to the skills, time and resources required for effective and respectful communication with children and young people.
- 6.2 Children and young people must be given the information about the processes and the decisions that affect them on a daily basis. Then they will be better able to contribute their views, understand the outcomes and accept the consequences of the decisions made. Children and young people do not expect that the decisions that are made will always reflect their own wishes. They should be able to expect that their views are heard, treated with respect and given due weight in decision making processes.

7 Recommendations

- 7.1 The NCYLC supports the development of an advocacy model which recognises that both practical support and advocacy at the broadest level is essential if children and young people are going to be heard and their needs comprehensively addressed. The advocacy often needs to operate outside the conventional legal system but with the knowledge of how the various systems operate and interact. A key role is to support and facilitate the work of

community groups and services that are able to address the issues of family breakdown, conflict and homelessness.

NCYLC would welcome the opportunity to provide additional assistance to this Inquiry.