



# Victorian Aboriginal Legal Service Co-operative Ltd.

*Head Office:*  
6 Alexandra Parade,  
P.O. Box 218  
Fitzroy, Victoria 3065  
Phone: (03) 9419 3888 (24 Hrs)  
Fax: (03) 9419 6024  
Toll Free: 1800 064 865

**VALS Submission to the Office of the Advocate for Children in Care  
in response to the Development of a Charter of Rights for Children and Young  
People in Care Discussion Paper (May 2005) sent 22 August 2005**

Thank you for the opportunity to comment on the Charter of Rights for Children and Young People in Care (Charter)

VALS agrees with arguments made in submissions by the Victorian Aboriginal Child Care Agency (VACCA) and Victoria Legal Aid. In this submission VALS will expand upon some of the arguments made in the previously mentioned submissions and highlight issues that are relevant to the Indigenous Australian community or the services provided by the Victorian Aboriginal Legal Service Co-operative Limited (VALS).

## **RIGHTS TO BE INCLUDED IN THE CHARTER**

VALS believes the presentation of the Convention on the Rights of the Child as ‘controversial’ in the Discussion Paper is placing unwarranted weight on a small number of often ill informed critics. The argument quoted in the Discussion Paper against the Convention on the Rights of the Child (eg: it could lead to the imposition of adult responsibilities on children) is in our view an extremely unlikely outcome and one that flies in the face of common sense. It is not at all clear why the argument should be considered substantial enough to be included in the Discussion Paper.

As the Convention on the Rights of the Child has been signed by almost every country in the world it is surely an exemplary document to use to guide the work of the Office of the Advocate for Children in Care (Office). VALS believes that it is incumbent on the Office to justify why it does not start from an assumption that that Convention on the Rights of the Child should be the starting point for the Charter. The failure to do this and the lack of independence of the Office mean that the Office and its work will struggle to be regarded as a credible vehicle to protect children’s rights. This issue is discussed further below.

### **Recognition of the specific rights of Indigenous Australian children and youth**

VALS agrees with VACCA that there needs to be recognition of the UN Convention on the Rights of the Child (Particularly Article 30 which specifically states the rights of persons of Indigenous persons to culture, religion and language). VALS agrees with VACCA that it would be appropriate to incorporate Indigenous specific principles into the Charter. There is a need for the recognition of Indigenous Australian children and youth’s specific rights in the Charter. It is an inappropriate assumption to make that the Charter will protect the rights of all children if the Charter simply states that the rights in it apply to all children. This is because in reality not all children are granted equal

rights. The Charter needs to go further than this and recognise the specific rights of disadvantaged groups. There is need for substantive equality.

The arguments for recognition of the specific rights of Indigenous Australian children and youth are that:

- Government policy documents that are aimed at addressing disadvantage (i.e.: Aboriginal Justice Agreement, Attorney-General Justice Statement (2004), A Vision for Victoria to 2010 and Beyond: Growing Victoria Together and A Fairer Victoria) specifically refer to the need to address the distinct disadvantage that Indigenous Australians face.
- Indigenous Australians are over-represented in the Child Protection System. At 30 June 2003, the number of Indigenous Australian children in out of home care was more than 13 times the number of other Victorian Children.<sup>1</sup> Given that the child protection system has a disproportionate impact on the Indigenous Australian community in comparison to non-Indigenous Australians the specific needs of Indigenous Australians should be addressed to make this experience positive.
- Given that the Child Protection System is being reformed and the reforms are likely to have a large impact on the Indigenous Australia community, it is important to put mechanisms in place to protect Indigenous Australian's rights.
- The Department of Human Services is prepared to recognise the specific needs of Indigenous Australians and that a different approach needs to be taken for Indigenous Australians in the Child Protection System. For instance, the Department of Human Services is open to the possibility of enshrining the Aboriginal Child Placement Principle in legislation. Also, the Department is considering granting Guardianship Powers over Indigenous Australian children and youth to an Indigenous Australian organisation as part of the Child Protection System reform package.

Below is a list of some Indigenous specific principles which would strengthen protection of the rights of Indigenous Australian children and young people:

- There needs to be mention of cultural issues throughout each section of the charter, rather than tacked on at the end (VACCA submission).<sup>2</sup>
- There is a need for a culturally appropriate definition of best interests, rather than a mainstream definition. Best interests of the child should include the protection of identity and culture.<sup>3</sup> VALS agrees with VLA suggestion that the Charter not single out 'developmental needs' as a matter that must be considered when determining the best interests of the child. VALS agrees that "[t]he elevation of developmental needs may

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<sup>1</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2002-2003*, Child Welfare Series No 34, Canberra, Table 4.8, p46, available as <http://www.aihw.gov.au/publications/csw/cpa03-04/cpa03-04.pdf> as cited in Victoria Legal Aid Submission on the Charter of Rights and Young People in Care, 12 August 2005, 4.

<sup>1</sup> Op cit, 8.

<sup>2</sup> VACCA submission "Response to Discussion Paper on the Development of a Charter of Rights for Children and Young People in Care" (August 2005), 2.

<sup>3</sup> Op cit, 1.

skew decision making in a particular direction that may ultimately be adverse to the best interests of children'.<sup>4</sup>

- “Aboriginal Children have particular rights as a consequence of the status of Aboriginal people as the traditional owners and custodians of the land and their rights to self-determination” (VACCA submission)<sup>5</sup>
- VALS agrees with the Core Principles to be included in the Charter suggested by VACCA. For example:
  - Right to maintain cultural identity.<sup>6</sup>
  - Child welfare provision must be governed by the Indigenous Child Placement Principle
- The preamble of the Charter should outline the context of Charter, such as Stolen Generation (VACCA submission).<sup>7</sup>
- There is need for an Indigenous Charter (VACCA submission).<sup>8</sup>
- Indigenous Australians have a right to a Child Protection System that meets their needs and does not take a one size fits all approach. Indigenous Australians have a right to be consulted on the Child Protection System.
- Indigenous Australians have a right to the provision of, and access to services in a timely manner and provide avenues of resource in case of failure. The services that are accessed in a timely manner should be appropriate services (ie: culturally sensitive). VALS is aware that Indigenous Australians often do not have access to appropriate services. This results in Indigenous Australians failing to comply with Court Orders because the services are inappropriate.

### **Failure to recognise the Convention on the Rights of the Child**

The decision to exclude the Convention of the Rights of the Child is based on a wrong interpretation of the Convention of the Rights of the Child (ie: responsibility akin to adults). It is wrong to assume that Institutions (ie: Courts) are not capable of interpreting the Convention on the Rights of the Child in light of the different developmental stages of children and young people.

VALS is concerned by the failure to include the Convention of the Rights of the Child. VALS agrees with the analyses of this failure in Youthlaw and VLA submissions. According to Youth Law, section 3 of the Discussion Paper, which explores the definition of “rights” for a Charter of Rights, then defines “rights” in a way that does not refer to or contemplate human rights.<sup>9</sup> According to VLA the “universal rights in the Convention on

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<sup>4</sup> Victoria Legal Aid Submission on the Charter of Rights and Young People in Care (12 August 2005) 4

<sup>5</sup> VACCA submission “Response to Discussion Paper on the Development of a Charter of Rights for Children and Young People in Care” (August 2005),2.

<sup>6</sup> Op cit 3..

<sup>7</sup> Op cit 4.

<sup>8</sup> Op cit 6.

<sup>9</sup> Submission of Youthlaw “Development of a Charter of Rights for Children and Young People in Care” (August 2005) 4.

the Rights of Child should be included”.<sup>10</sup> Also the “Discussion Paper appears to focus on children’s rights independently of a broader international human rights framework”.<sup>11</sup>

Unfortunately, it appears that the Office is picking and choosing International Standards of rights protections, and rejecting others, just as the Human Rights Consultation Committee has done (State Attorney-General appointed Committee to consult about a Bill of Rights in Victoria). There is a need to include the rights within the Convention on the Rights of the Child in the Charter because it is likely that they will not be included in the Bill of Rights. This is the case in the ACT Bill of Rights.

## **Legal Advice**

As the legal service provider that services the majority of the Victorian Indigenous Australian community VALS is aware of the importance of Indigenous Australians receiving culturally appropriate legal advice.

VALS agrees with VLA that the “Charter should contain the right to access a lawyer with experience in the child welfare jurisdiction in a range of situations including:

- Case planning meetings, particularly where there is an issue of access under a guardianship order
- Where voluntary agreements are entered into resulting in the removal of a child or parent from their home”

VALS has observed a trend where rights to legal representation are being wound back. On 20 July 2005 at a House of Representatives Standing Committee on Legal and Constitutional Affairs Public Hearing on the proposed amendment to the Family Law Act (Shared Parental Responsibility Bill 2005) VALS argued that people should have access to legal advice prior to going to the Family Dispute Resolution Centre. It should also be included in the Charter that children and young people have the right to legal advice during individual complaint processes to uphold the rights in the Charter.

## **Responsibilities**

VALS agrees with VLA that children’s rights under the “charter should not be contingent on, or related to, their ability to meet a raft of obligations”.<sup>12</sup> VALS also extends this argument to young people VALS agrees with VLA that the Charter should “firmly place responsibility and accountability on the Department of Human Services and other service providers”.<sup>13</sup> VALS agrees with Youthlaw that “[w]here care is provided through kinship care, then the responsibility for ensuring access to resources and supports for the children/young people in care to be able to enjoy their rights, falls to DHS and whole of government”.<sup>14</sup>

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<sup>10</sup> Victoria Legal Aid Submission on the Charter of Rights and Young People in Care (12 August 2005) 5.

<sup>11</sup> Op cit 6.

<sup>12</sup>Op cit.3.

<sup>13</sup> Ibid.

<sup>14</sup> Op cit 5.

## **Enforceability**

VALS agrees with Youthlaw that the Charter needs to have appropriate mechanisms to address breaches. Remedies for breach should be available both at an individual level and in relation to systemic issues.<sup>15</sup> VALS repeats the concerns of Youthlaw that the Office is not independent enough from Government to oversee systemic issues.<sup>16</sup> VALS supports the calls of Youthlaw for a Children and Young Person's Commission.<sup>17</sup> The Body should look into issues relevant to Indigenous Australians,(ie: impact of new system, compliance with Aboriginal Child Placement Principle).

## **Implementation Plan**

VALS agrees with VLA that the accessibility of the Charter for Children and Young People in care is crucial to ensuring its effectiveness.<sup>18</sup> Education material that is produced should reflect be appropriate for different age groups ranging from childhood to youth. There should be Indigenous Australian specific publication. This should be drafted in consultation with the Indigenous Australian community.

There needs to be an implementation plans that works in with the Indigenous Australian community and respects their right to self determination. Indigenous Australians should contribute to the training of workers in the Child Protection System etc (ie: cultural sensitivity training).

## **Other issues**

VALS agrees with VLA comments on the scope of the Charter being limited.<sup>19</sup> The Charter should cover not only children in out of home care, but all children facing intervention by the DHS and related agencies. This is particularly relevant considering the over-representation of Indigenous Australians. Also, it is relevant considering the new outsourced intake model proposed by the Department of Human Services (community services).

VALS held an Indigenous Australian Human Rights Forum (Forum) on 10 August 2005, where Muriel Bamblett presented a paper titled *Getting 'Rights' Right and Righting the Wrongs: A Rights Framework for Aboriginal and Islander Communities and Their Children*. VALS agrees with the arguments made. Please find the papers presented at the Forum by Frank Guivarra and Muriel Bamblett attached for your information.

If you have any queries please do not hesitate to contact Greta Jubb on 9419 3888.

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<sup>15</sup> Op cit 3.

<sup>16</sup> Op cit 9.

<sup>17</sup> Ibid 9.

<sup>18</sup> Victoria Legal Aid Submission on the Charter of Rights and Young People in Care, 12 August 2005, 9

<sup>19</sup> Op cit, 8.

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VACCA submission “Response to Discussion Paper on the Development of a Charter of Rights for Children and Young People in Care”(August 2005).

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