

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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Submission

To the Victorian Law Reform Commission

In response to:

Supporting Young People in Police Interviews - Background Paper

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Acknowledgements

This submission has been prepared for the Federation of Community Legal Centres (Vic) by the Children and Youth Issues Working Group in consultation with other member Community Legal Centres.

Specific consultations were conducted by Youthlaw and Springvale Monash Legal Service with young people and workers with young people.

Youthlaw undertook consultations with 2 groups of 20 young people with experiences of police questioning and or interviews. In addition, Youthlaw devised a survey instrument which was completed by 10 young people who are current or former Youthlaw clients. The results of these consultations have been provided directly to the Victorian Law Reform Commission by Youthlaw as well as being excerpted in this submission.

In the case of Springvale Monash Legal Service, 7 semi-structured interviews were undertaken with local service providers working with young people in the City of Greater Dandenong. Many of these services have particular expertise in working with young people and families newly arrived into Australia from diverse cultural and linguistic communities as reflected by the needs of the local area.

In addition, the following Community Legal Centres have provided ideas, input and comments:

- Youthlaw
- Springvale Monash Legal Service
- Flemington & Kensington Community Legal Centre
- Moreland Community Legal Centre
- Wyndham Legal Service
- Victorian Aboriginal Legal Service

About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About the Children and Youth Issues Working Group

The Children and Youth Issues Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group works on strategic law and policy reform in areas of law relevant to children and young people including policing, public space, public transport, education, civil and consumer law issues.

About Community Legal Centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Executive Summary

The Federation strongly supports legislative reform of section 464E of the Crimes Act. It is well documented that the presence of another adult in a police interview where a young person is suspected of committing an offence, is a necessary part of a humane, fair, just, age appropriate, efficient and effective criminal justice system.

The current provision provides that another adult should be present during the interview process –this requirement should be maintained. In our view legislative reform is necessary to ensure that statute outlines at minimum the role of the other adult, and their role vis-à-vis the role of a parent, guardian or other family member and the consequences when another adult is not present during a police interview or does not fulfil their role appropriately.

The Federation supports legislative amendments that would provide for the presence of a trained support person in all police interviews with young people suspected of committing an offence. In our view this should be in addition to and not instead of the support role performed by a parent, guardian or other family member to a young person when taken into police custody. Legislation should articulate that the role of this trained support person is to act in the best interests of the young person and ensure that the young person understands their legal rights, is able to make informed decisions about whether or not to exercise their legal rights and is supported to assert their legal rights throughout the formal interview and evidence gathering processes. The role should also include providing appropriate referrals to support services. Legislation should clarify that this role is interventionist and more than that of an observer but distinct from that of a lawyer providing legal advice to a young person.

Legislation should also provide clear direction about the consequences when another adult is not present during a police interview or does not fulfil their role appropriately. The Federation strongly supports evidence obtained from such interviews being inadmissible unless it is exculpatory or there are exceptional circumstances.

In addition to legislative reform, the Federation believes there are a number of associated procedural and policy reforms that are needed to improve upon the current system of independent persons. The organisation that trains, supports, rosters and allocates support people to police stations for young people should be independent of police and the criminal justice and juvenile justice systems to avoid any actual or perceived conflict of interest with a young person's best interests.

This submission begins by setting out the history and expertise of Community Legal Centres in this area and the broad framework upon which our position is based. We then provide a detailed response to the questions raised in the Victorian Law Reform Commission Background Paper, *Supporting Young People in Police Interviews* hereafter referred to as the "Background Paper". Our submission draws upon the expertise of Community Legal Centre workers and feedback provided in specific consultations with workers and young people about the current system set out in section 464E.

A potted history of Community Legal Centres support for Young People in Police Interviews

Local Youth-law lines

Since their establishment over 30 years ago Community Legal Centres have continued to work to improve relationships between local police and young people, including indigenous and culturally and linguistically diverse (CALD) young people. This work has taken on many forms including research, report writing, public advocacy for systemic law and policy change, local relationship building and networking, education about legal rights and supporting young people to do all of the above for themselves.

In the 1980's in the western, southern and northern suburbs of Melbourne, Community Legal Centres supported young people in interviews with police through the development of *Youth-law lines*. *Youth-law lines* provided infrastructure, training and support for independent persons to attend police interviews and for lawyers to provide telephone legal advice to young people. In addition, *Youth-law lines* provided community education programs for young people, communities and police about the legal rights of young people. At one point there were at least four local *Youth-law lines* operating in metropolitan Melbourne using the manual and training guidelines published by the then Youth Advocacy Network. Until the development of the Youth Referral and Independent Person Project (YRIPP), Community Legal Centres were unsuccessful in obtaining anything but *ad hoc* project funds to support the consolidation and further development of the local *Youth-law lines* into statewide and regional programs.

In 2000, the Wyndham Legal Service established a program that provided trained independent persons for police interviews with young people at the Werribee Police Station. This program drew upon the resources and expertise developed by Community Legal Centres in the 1980's to develop itself into a successful program which was later handed over to YRIPP.

The last of the local youth law lines was *Alphaline* which operated throughout the 1990's and into mid 2000's out of the Fitzroy Legal Service. When *Alphaline* ceased operation it was an unfunded service relying on volunteers to provide 24/7 telephone legal advice to young people in inner Melbourne. Concurrently, Victoria Legal Aid was establishing an after-hours telephone legal advice line to support the YRIPP pilot. Community Legal Centres continue to support Victoria Legal Aid providing resources to ensure that appropriately trained staff lawyers are on call for young people in police interviews across Victoria.

Youth Referral and Independent Person Program (YRIPP)

In the early 2000's, the Federation worked with CMYI, YACVic, Victoria Police and others to establish YRIPP. The significant expertise and resources of Community Legal Centres in working with young people, police and the justice system were used by the YRIPP pilot when it was established in 2004.

Community Legal Centres continue to support YRIPP including:

- providing legal advice and expertise in terms of the legal process faced by young people to the development of materials for volunteers, parents and young people, training materials and trouble shooting issues.

- assisting with training of volunteers in terms of the legal module, *Role of the Independent Person: The Legal Perspective and Understanding Indigenous Young People*.¹
- supporting local YRIPP programs in particular regions of Victoria.
- assisting YRIPP to develop relationships with partner organisations in the legal sector including Victoria Legal Aid who have provided young people involved in YRIPP with a telephone legal advice line, 24 hours.

¹ Youthlaw lawyers deliver the Legal Module to YRIPP volunteers and staff from the Victorian Aboriginal Legal Service deliver the module, *Understanding Indigenous Young People*.

Young People, Police Interviews – best practise standards

International human rights standards

The Federation seeks to emphasise the wide range of human rights relevant to children that should be taken into account in redrafting s.464E. To a limited extent human rights have been legislated by Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) which provides a clear articulation of the obligations of police to uphold human rights. Reform of s.464E is an opportunity to further implement Australia's international human rights obligations.

The Background Paper provides an overview of human rights issues relevant to children in the criminal justice and juvenile justice systems. As is described in the Background Paper, children under 18 years benefit from all the human rights available to adults. Young people are also protected by United Nations instruments expressing international standards which take into account their special status and needs.

The *Convention on the Rights of the Child* (CROC) enshrines four key principles used as guides to interpret and implement all its articles:

- Non-discrimination (Article 2)
- The best interest principle (Article 3) states that in all actions concerning children the best interests of the child shall be a primary concern.
- The right to survival and development (Article 6) requires States to do everything within their power ("to the maximum extent possible") to ensure the survival and development of a child.
- The right to participation (Article 12) provides that a child who is capable of forming his or her own views has the right to express those views and have them taken into account in all matters affecting the child.

United Nations rules and guidelines provide further detail about human rights obligations relevant to children, policing and the juvenile justice system in the following documents:

- United Nations Committee on the Rights of the Child General Comment No. 10 (2007) on "Children's rights in juvenile justice"
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice - The 'Beijing Rules' (1985)
- United Nations Guidelines for the Prevention of Juvenile Delinquency: the 'Riyadh Guidelines' (1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty: the 'JDLS' (1990)
- United Nations Guidelines on the Administration of Juvenile Justice: the 'Vienna Guidelines', ECOSOC Resolution 1997/30 (1997).²

The rights relevant to this debate which are covered by these instruments include:

- A child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, which facilitates their reintegration into society which reflects the best interests of the child, and takes the child's age into account (Article 40 CROC/ section 23 Charter).
- Wherever possible child offenders should be diverted from criminal justice processing and redirected to community support services (Article 40 CROC / The Beijing Rules).

² See Overview of International and regional human rights norms and standards at <http://www.juvenilejusticepanel.org/en/standardsoverview.html>

- Detention or imprisonment of children should be an extreme measure of last resort (Article 37 CROC).
- Children shall not be subjected to torture; to cruel, inhuman or degrading treatment or punishment; to corporal punishment (Article 37 CROC/ section 22 Charter).
- A child who is detained shall have legal and other assistance as well as contact with the family (Article 37 CROC).
- Children shall be separated from adult detainees (Art 37 CROC/ section 23(1) Charter).
- Children's right to privacy (Article 16 CROC, / section 13 Charter/The Beijing Rules) is to be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle no information that may lead to the identification of a child offender may be published. (Rule 8 Beijing rules) Records of juvenile offenders to be kept strictly confidential and closed to third parties (Rule 21 Beijing Rules).
- If proceedings are not diverted, they should be conducive to the best interests of the child (Article 3 CROC) and with the juvenile free to participate in decisions that affect their interests (Article 12 CROC) (The Beijing Rules).
- Police officers and other officials who frequently deal with children and young people and are primarily engaged in the prevention of juvenile crime, to be specially instructed and trained. (Rule 12 Beijing Rules).
- Government should ensure there is adequate provision of medical, mental health care and housing for young persons (Standard of living (Art 27), Health and health services (Art 24), Social Security (Art 26)) Riyadh Guidelines.
- Provision of educational opportunities (Education (Art 28 CROC)) Riyadh Guidelines.

Throughout this submission, the Federation will seek to refer to many of these internationally established rights, in particular where they are not already contained in Victorian legislation.

Seen and Heard

In 1995 the Australian Law Reform Commission began what was to become the most comprehensive inquiry into children and the legal process in Australia. *Seen and Heard: priority for children in the legal process*³ sets 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 inquiry, the police. Many of these issues concord with the contemporary experience of young people presenting to Community Legal Centres in 2009. The Federation continues to actively support the implementation of the bulk of the recommendations of *Seen and Heard* with respect to criminal justice processes.

Seen and Heard recommends that the Commonwealth develop national standards for juvenile justice that 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.⁴ The Federation strongly supports this recommendation and in responding to the questions in the Background Paper we refer to the relevant sections of these proposed national standards as outlined in *Seen and Heard*.

³ Australian Law Reform Commission, Report No. 84, 1997, hereafter referred to as *Seen and Heard*.

⁴ *Ibid*, paragraphs 18.9 and 18.10.

Response to the Background Paper

1. What should be the role of an independent person who is present when the police are questioning a young person in custody whose parents or guardian are not available?

Seen and Heard provides that, “The presence of the interview friend is an important means of compensating for the disadvantage experienced by young people when being interviewed by police. ... the factors contributing to children's disadvantage in this situation as vulnerability to pressure, socialisation to agree with adult authority figures, lack of verbal fluency and a tendency to make false confessions under expert or hostile questioning.”⁵

Consultations undertaken for the purpose of this submission, confirm the experience of Community Legal Centres that these factors remain present in 2009. Young people completing the Youthlaw survey made general comments that they felt nervous, intimidated, pressured, tricked, confused, stressed when they had to answer questions from police in interview. Two survey respondents indicated they felt they were really badly treated in interview and felt unsafe.

Seen and Heard provides at recommendation 212 that the national standards for juvenile justice should 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.

The Federation strongly supports this recommendation. In addition, the Federation believes that the trained support person should ensure that the young person not only understands their legal rights, but is able to make informed decisions about whether or not to exercise their legal rights and is supported to assert their legal rights throughout the formal interview and evidence gathering processes. In practise, this means explaining the caution to a young person in simple language, in particular the right to silence, or to make a “no comment interview”. It should not be the role of a trained support person to advise a young person to exercise a particular right. However, if a young person decides to exercise their right to silence, the trained support person should be able to actively intervene in an interview if a young person appears not to be taking this course.

The role of a trained support person is discussed in more detail in question 6 below with respect to specific issues. In addition to the roles articulated above and in question 6, the Federation supports the role of the trained support person encompassing the referral component currently undertaken by YRIPP independent persons. Victoria’s juvenile justice system has a focus on diversion of young people away from the criminal justice system⁶. The trained support person is well placed to contribute to this and without such intervention at the point of interview, a significant opportunity for diversion is lost.

⁵ Ibid, paragraph 18.103.

⁶ Sections 361 and 362 *Children Youth and Families Act 2008* (Vic), implementing Article 40(1) Convention on the Rights of the Child.

It is common for months to pass between a police interview and a final determination by the Children's Court of a criminal matter. In that time, the criminal justice system rarely intervenes to provide referrals for young people and/or their families to support services that may be able to address issues leading to offending. The police interview provides a key opportunity for early intervention to assess and respond to health, welfare, education, recreational and other support needs.

In our view, it is inappropriate for police to undertake assessment and referral to welfare and support services. Moreover, police are not adequately trained and do not have the expertise to undertake these functions. As has been demonstrated by the YRIPP program, independent persons, if appropriately trained and supported by adequate referral systems provide a significant opportunity for diversion from the criminal justice system.

2. Should the role of the independent person be any different to the role which the parents or guardian should play if they were available?

The Federation strongly believes that parents and trained support persons can and should play distinct but complementary roles. We support legislative amendments that would require the presence of a trained support person at every police interview with young people, regardless of the availability of the parent or the wishes of the child.

The presence of a trained support person should not displace the parents from providing additional support to their child from the point that they are taken into custody. Nevertheless in our view, the presence of a parent or guardian at the police station should not be critical to progressing the investigation.

In some cases, a parent may have sufficient understanding of the legal system by virtue of their experience or education such that they can support their child both emotionally and provide information and support about legal rights and the interview process. In our experience, this is rare. Participants in the Youthlaw consultations provided the following comments, "My parents a lawyer and knows my rights" and the "Best person to go in with you is a family member who has been through the system because they know how to speak to police."

It is our experience that parents are unable or unwilling to provide support or assistance to their child in understanding the legal system or in accordance with the best interest of their child. One participant in the Youthlaw consultations said that parents may actually take the police's side. Some parents would assume they were guilty already and ask the young person questions like "*why did you do it?*"

Consultations undertaken by the Springvale Monash Legal Service provide the following insights, in particular with regards young people from CALD communities:

Due to their lack of knowledge about the police interview and the rights of a young person, a parent/guardian may be inclined to give incorrect guidance and advice, to the detriment of the young person. For example, refugees from Sudan may have never experienced law and order, and certainly how it is applied in Australia. To teach Sudanese parents/guardians about the police interview would mean starting from the very basics.

Even in circumstances where the parent/guardian believes that the interview room is being conducted unfairly, they may not speak up. They may also feel intimidated by the police whether it be the police station, the specially designed interrogation room, or the uniform, the police can make anyone feel vulnerable. However, such

tactics are less likely to affect an independent person who has been trained to assert the young person's rights.

Parents/guardians often encourage the young person to "tell the truth" during the police interview, contrary to the best interests of the young person. This is in contrast to the advice given by most lawyers to make a no-comment interview.

Parents/guardians from different backgrounds will not act independent of their cultural values which may be contrary to the young person's interests during the police interview. For example: Vietnamese families may be more concerned about 'saving face' in their community than they are about the interview. They may also be more disinclined to speak up when they think the interview is being conducted unfairly because of cultural values.

Finally, the potential past experiences of parents/guardians may influence behaviour that is adverse to the young person's experience. For example, due to previous bad experiences with authorities, parents from Sudanese or South-East Asian backgrounds are more likely to try and appease the police during the interview than to advocate for the young person's rights. Also young people from migrant/refugee backgrounds are likely to be more fluent in English and less socially isolated than their parents. Because the parent/guardian is dependent on the young person to translate, they may feel disempowered during the police interview and are unlikely to assist the young person to assert their rights.

Unlike the independent person, a parent/guardian is unlikely to refer their young person to support services which may be used as leverage in the courts and act as a form of deterrence for young people.

In some cases a trained support person will be able to establish sufficient rapport with a young person to provide the emotional support that a parent would otherwise provide. In the vast majority of cases however, where a parent or close family member is in a position to do so, they are best placed to provide emotional support to their child. The feedback from Youthlaw consultations with young people supports this view. A number of young people stressed that they feel more comfortable sitting in interviews with family members. Seven out of 16 participants at Braybrook preferred to have their parent or guardian at an interview. Those that preferred their parent or guardian said that their presence meant that there was someone there who was "on your side".

These views are consistent with the recommendations in *Seen and Heard* which provide at Recommendations 208 and 209 that:

The national minimum standards for juvenile justice should provide that police should inform a young suspect's carers or the relevant community services department, whichever is most appropriate in the particular circumstances, of his or her whereabouts as soon as possible after he or she is detained.

Police should receive regular reminders of the importance of ensuring that young people's carers are notified of their child's detention in custody.

Human rights principles provide also some guidance as to the rationale for parents being contacted by the police as soon as their child is arrested. General Comment No.10 by the Committee on the Rights of the Child provides at paragraphs 53 and 54 provides that:

53. Parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. The presence of parents does not mean that parents can act in defence of the child or

be involved in the decision-making process. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings.

54. The Committee recommends that States parties explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child's infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.⁷

In our experience, police will contact parents or other adults when they are ready to conduct the police interview. They will not necessarily contact parents as soon as possible after arrest for the purposes of providing a young person with the opportunity for support at the police station while further inquiries are undertaken prior to a formal interview being conducted.

In light of this, the Federation strongly supports the role of the parent, guardian or other family member being formally acknowledged in legislation, as distinct from the role performed by a trained support person, and that police should attempt to contact the parent as soon as possible after taking a young person into custody. The experience of the Victorian Aboriginal Legal Service with respect to notifications to that service of an indigenous person being taken into custody suggests that this requirement should be articulated in legislation and not merely the Victoria Police Manual.

The Federation acknowledges that our proposal has significant resource implications in the short term to train additional volunteers. It is hard to get a clear picture of the number of police interviews conducted of young people annually from publicly available data. The Drugs and Crime Prevention Committee *Inquiry into Strategies to Prevent High Volume Offending by Young People* states that there were 33,911 alleged youth offenders processed by the police in 2007/08.⁸ The Children's Court Annual Report for 2005/06 provides that 11,552 matters were initiated in 2005/06. In our experience young people will not be formally interviewed if they are to be given a formal caution, as is required by police standing orders for a first and some subsequent offences. In many cases, young people will be charged with multiple offences as a result of one interview. Hence the Children's Court figures may more accurately reflect the number of police interviews conducted in Victoria in a given year.

Recommendation 212 in *Seen and Heard* provides that the national standards for juvenile justice should include the following.

Where an interview friend is a relative or friend of the young suspect who has not received training in the role he or she should be given the opportunity to watch a short video outlining his or her responsibilities prior to interrogation. The young person should also watch the video which should also inform the suspect of his or her rights during police interview. Where the police station does not have video facilities information brochures should be provided.

Whilst the Federation supports a trained support person being present at all interviews, where such a person is unavailable, clearly the opportunity for a parent or other family member to view a training video would provide a young person with more support than that currently provided by an untrained parent.

⁷ Forty-fourth session, Geneva, 15 January – 2 February 2007

⁸ Final Report, July 2009, Table 1, page 333.

3. Should certain people be prohibited from acting as an independent person?

The Federation supports restrictions being placed on the type of people acting as trained support people. In order to avoid any actual or perceived conflict of interest with a young person's best interests, volunteers should be independent of police and the criminal justice and juvenile justice systems. This would exclude Bail Justices, other police members and probably child protection workers from performing the role.

Furthermore, the diversity of our community should be reflected in the diversity of people undertaking the role of a trained support person to the extent that those volunteers meet agreed competencies, skills and attributes necessary to appropriately undertake their role.

The following example clearly demonstrates why a trained support person needs to have good vision. The Flemington & Kensington Community Legal Centre has had experience of young people being interviewed by the police in the presence of a blind independent person. Each of the young people said they were visibly injured by the police during the course of their arrest and had visible injuries on them at the time they were interviewed. If the independent person had been able to see, an independent record of these injuries could have been taken at the police station and the independent person could have followed up on the cause of those injuries. This did not occur.

4. Is 'independent person' an appropriate title, or would another title be better?

"Independent person" has created confusion for all parties and the Federation we would support a different title in reformed legislation. If the role is to be clarified in legislation it is important that a new title is also given to distinguish the new role.

In our experience, independent persons are commonly confused with the "independent third person" whose role is similar but different.

The phrase "independent" is also misleading and confusing. The question as to who the person is independent of is one of conjecture. Should they be independent of police, of the young person, of the circumstances of the offence and/or of the legal process?

We have concerns about the title "interview friend" as this may inaccurately limit the role to that performed during the formal interview process.

We have used the title "trained support person" throughout this submission only because it is the best option that we are aware of.

5. Should the role of an independent person be set out in legislation?

The Federation strongly supports the role of a trained support person and of a parent being set out in legislation. The current situation results in police largely determining how the role is performed because they control how interviews are conducted.

If the role is not defined in legislation, the current situation will continue whereby courts will be left to interpret the role. This is unsatisfactory given that police are not able to be retrained adequately to take into account case law as it changes.

Police should be required to read out the requirements of the role at the beginning of each interview to ensure that all parties have the same understanding of the role.

6. If the role of an independent person is set out in legislation should it include any of the following things?

6a. to act in the best interests of the young person

The Federation supports the legislation setting out an overriding principle of “best interests of the child” by stating “that all obligations of the trained support person shall be performed in the best interests of the young person”.

6b. to provide emotional support to the young person

As outlined in question 2 above, the Federation supports legislative amendments that would provide for distinct but complementary roles for the parent and trained support person. The trained support person would provide emotional support to the young person during the formal interview process in addition to that provided by the parent whilst a young person is in police custody.

6c. to provide assistance to the young person

As outlined in question 1 above, the Federation supports legislative amendments that would provide for a trained support person’s role to include ensuring that the young person understands their legal rights, is able to make informed decisions about whether or not to exercise their legal rights and is supported to assert their legal rights throughout the formal interview and evidence gathering processes.

6d. to observe whether the interview is being conducted fairly and to intervene if it is not

As outlined in question 1 above, the Federation supports legislative amendments that would clarify that the role of a trained support person is interventionist. This would include in circumstances where it is necessary to assist a young person to exercise their legal rights if they have chosen to do so.

The role should also be to complete a report of interview that is made available to the parties in the matter upon request. The Federation is concerned that information recorded by a support person about police misconduct does not form the basis of a formal complaint without the young person’s consent.

6e. to identify any communication problems with the young person and help them to understand what is said by the police

There is a clear role for a trained support person to help young people understand what is said by police. As has been described by participants in the Youthlaw consultations, ‘explain it in layman’s terms not big words’ and an independent person can explain the ‘cop talk’. The Springvale Monash Legal Service consultations provided the following insights:

In Greater Dandenong, English is not the first language for many people. In every consultation we conducted, there was concern about language barriers in a police interview. These prevent young people from fully understanding their rights and what police are communicating to them. For example, when a young person says ‘Yes, yes,’ to the police, they may not actually be intending to agree with what the police are saying. Instead, they may simply be trying to show that they are listening. Obviously such situations can lead to admissions that the young person did not intend to give.

Even with an interpreter present, language barriers can still be problematic. In many languages, there are Australian legal words that have no direct equivalent in another language. This entails an interpreter, who has no formal training in legal matters, to explain to a young person what the police are conveying.

Language barriers often come with other barriers. For example, the lack of education system in Afghanistan in the last ten years means that young Afghans have more difficulty adapting to a foreign legal system. Also young people from African backgrounds may not even understand they have broken the law because they see no obvious consequences of their actions. This is because the police may not explain what the charge is at the time of the interview and the young person hears nothing about an offence until they receive a court summons months later.

A trained support person has a clear role in assisting both the young person and the police to overcome communication barriers.

6f. to ensure the young person understands their basic legal rights, such as:

i. that the person is not obliged to say anything during questioning;

ii. that anything the relevant person says during questioning may be used in evidence;

iii. that the person may request legal advice

As outlined in question 1 above, the Federation supports legislative amendments that would provide for a trained support person's role to include ensuring that the young person understands their legal rights before, during and after the interview. These rights include:

- That the person is not obliged to say anything during questioning;
- That anything they say during questioning may be used in evidence;
- That the person can get legal advice;
- That the person can contact a friend or family member;
- Right to an interpreter if required;
- Search powers;
- Rights regarding bail;
- Right to refuse finger printing if under 15 years; and
- Right to refuse a photograph or cover one's face when being photographed.

6g. to assist the young person to exercise any of those rights.

The Federation strongly believes that it is essential for the trained support person to not only ensure that a young person understands their rights, but also to ensure that a young person is able to make informed decisions about whether or not to exercise their legal rights and is supported to assert their legal rights throughout the formal interview and evidence gathering processes if they choose to do so. This may involve active intervention and advocacy by the support person before, during and after the interview. Legislation clearly permit this so that there need not be disagreements between police and the support person at the police station.

7. Are there any circumstances in which the police should be required to arrange for an independent person to be present even when a parent or guardian is available?

As outlined in question 2 above, the Federation supports legislative amendments requiring that a trained support person be present for all interviews with young people and that police must contact parents when a young person is first taken into custody. The support person and parent, where available, would meet with the young person prior to the formal interview in order for the

trained support person to explain the process and the young person rights. The trained support person would assist the young person during the formal interview process.

8. What should happen if the police question a young person in custody without a parent, guardian or independent person present?

Seen and Heard provides a recommendation 212 that:

The national standards for juvenile justice should include that an interview friend must be present during police questioning of a child suspect and have an opportunity to confer in private with the child prior to questioning. Statements made in the absence of an interview friend should not be admissible in evidence against the child.

The Federation strongly supports this recommendation.

Furthermore, in circumstances where the other adult present does not fulfil their role according to that set out in legislation, the Federation strongly supports evidence obtained from such interviews being inadmissible unless it is exculpatory or there are exceptional circumstances. This would include circumstances where a parent insists that their child makes full admissions.

9. Should the police be required to provide an independent person (or a parent or guardian) with a written summary of the detained young person's rights?

The police should be required to read out at the beginning of the interview a summary of the young person's rights and the role of the trained support person. This ensures that the police are also clear about the role.

10. Should independent persons be trained? If so, what should the training involve?

The Federation supports all volunteers being required to participate in a comprehensive training package, such as that provided by YRIPP to its volunteers, prior to them performing the role. The YRIPP training package covers:

- Module 1: YRIPP Information, Processes and Protocols
- Module 2: Independent Person Role: The Legal Perspective
- Module 3: Independent Person Role: Police Processes
- Module 4: Working with Young People in Custody
- Module 5: Working with Refugee and Migrant Young People
- Module 6: Working with Indigenous Young People
- Module 7: Referral and Review⁹

In our view, all of these modules are essential learnings.

11. Should the independent person be able to arrange legal representation on behalf of the young person without express permission if they believe it is in the best interest of the young person?

⁹ www.yripp.org.au

Seen and Heard clearly articulates a number of significant barriers to young people accessing legal advice. These include that they may not understand the role of a lawyer, may not know that a service is freely available, they may agree with police allegations simply to get out of the police station or they may be discouraged by police from seeking to contact a lawyer. These barriers are confirmed by Youthlaw's consultations in that most of the young people consulted did not speak to a lawyer prior to the interview.

There is a strong case to suggest that providing information about legal rights and the availability of free telephone legal advice services is insufficient to ensure that a young person properly understands the right to legal advice. In our view the role of a trained support person should include as a matter of course, contacting the telephone advice line on a young person's behalf where there is a belief that this is in the young person's best interests. If at this point a young person doesn't wish to speak with a lawyer, then the support person has satisfied their obligation.

The Federation strongly supports the development and resourcing of a 24 hour, 7 day a week telephone legal advice service for people in police interviews. This service should be provided by Victoria Legal Aid and staffed by appropriately trained lawyers. The establishment of such a comprehensive service is consistent with recommendation 226 of *Seen and Heard* which provides that:

The national standards for juvenile justice should provide that a child suspected of committing an offence should have a statutory right to access legal advice prior to police interview and that police must inform young people of this right at the time of apprehension. Duty solicitor schemes should be appropriately resourced to enable practitioners to meet with their child clients before the first court appearance

12. Does the YRIPP system work efficiently? How could it work better?

The systems established by YRIPP for rostering, training and timeliness of attendance have significantly improved the system of independent persons in Victoria for both police and young people. The YRIPP system of central and random allocation of trained volunteers has significantly improved the situation from one where police controlled the person who attended the interview from their own lists. The Federation supports expanded resources being provided to YRIPP to enable a comprehensive service to be provided to all young people in police interviews throughout Victoria.

13. Is there anything else you would like to tell us?

A young person's right to choose who should be present during an interview

Seen and Heard provides at recommendation 212 that:

The national standards for juvenile justice should include that a child suspect should have the right to choose his or her own interview friend if he or she wishes provided that person is not suspected of involvement in the alleged offence. If the child does not wish to choose an interview friend the existing statutory order should apply.

The Federation is concerned that a young person in a pressured environment of police custody or in the presence of a parent should not as a matter of course choose who should be present during the interview. The young person may feel pressured to choose who the police want or who their parents want rather than the person who will act in their best interests. The Federation takes the view that only after a young person has had their rights and options explained by a trained support person, should they be able to expressly elect to have an adult other than the trained support person present in the interview.

Independent Third Persons

The Federation supports the role of the independent third person for people with cognitive impairment being elevated into legislation from the Victoria Police Manual alongside that of support people for young people. We note the detailed reports previously provided to the VLRC by the Disability Discrimination Legal Service as part of the sexual offences reviews with respect to the role of independent third persons.