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10 January 2011

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Sir/Madam

Commonwealth Commissioner for Children and Young People Bill 2010 ("the Bill")

I refer to the inquiry into the Bill, and am grateful for the extension of time for the making of a submission, to 14 January 2011.

Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians, including children. We know that the interests of the broader community are served by having children grow and develop in a safe, secure and conflict free environment. We have a large practice in Family, Youth and Children's law and also provide assistance to clients in the area of migration law through our Civil Justice Program. Our investment in these areas is consistent with our obligations under the National Partnership Agreement on Legal Assistance Services.

Our Family Law Program provides legal advice and assistance to parties and children in matters before State and Commonwealth Courts including disputes within the family about a child's care, contact with parents and extended family members and their financial support (private disputes), those involving child protection authorities (public disputes), and the use of family violence restraining orders.

Our Migration Program works with vulnerable non citizens, providing legal advice and advocacy (through grants and the Immigration Advice and Assistance Scheme) at detention centres and at tribunals and courts, including the High Court. The program makes significant contributions to community legal education and law reform in collaboration with the community legal sector.

Children in immigration detention

VLA recently issued proceedings on behalf of four children in immigration detention at Melbourne Immigration Transit Accommodation. The proceedings, issued in the High Court, seek constitutional writs quashing the decision of the Minister for Immigration and Citizenship to detain

the four children. The proceedings also seek damages for the detention of the children. Documents filed with the Court assert that the Minister for Immigration and Citizenship has breached a duty of care which he owes to the children, and has acted in breach of a statutory duty owed to the children. The litigation thus seeks to clarify the question of the extent of the obligations of the Minister as legal guardian of non-citizen children who arrive in Australia, as provided for by the *Immigration (Guardianship of Children) Act 1946*.

The Federal Court has held that the *Immigration (Guardianship of Children) Act* confers on the Minister all the usual incidents of guardianship, in respect of unaccompanied minors arriving in Australia: *Odhiambo v MIMA* [2002] FCAFC 194. The statutory duties conferred by guardianship are in addition to common law duties the Commonwealth owes to immigration detainees. The Commonwealth has a non-delegable duty of care to children in detention by virtue of its relationship with them: *S v Secretary, DIMIA* [2005] FCA 549 at [199]. The minimum standard of care set by these common law duties is to "ensure that reasonable care is taken of the detainees, who, by reason of their detention cannot care for themselves" [212].

The Courts have expressed the view (see, for example, *Odhiambo v MIMA* [2002] FCAFC 194, at [90]) that the Minister's role as a guardian to asylum seeker children involves a conflict of interest where the Minister is also the person ordering detention of the child. VLA further notes that articles 3 and 18 of the *Convention on the Rights of the Child* require that the best interests of a child be a "basic concern" of the child's legal guardian, and provide guidance as to what is required by a state party to act in a child's best interests. In VLA's view, the best interests of the child should be the primary consideration of a minor's guardian.

VLA notes that the Bill makes provision for the Commonwealth Commissioner for Children and Young People to act "in appropriate cases" as the guardian of children arriving in Australia without a visa. VLA makes the submission that, whatever course is taken in respect of the Bill, the position of the Minister in relation to children who are in detention, and also subject to the Minister's guardianship, is untenable. It is inappropriate that the Minister continue to occupy a position of conflict in relation to these situations. Legislative or policy change is needed, to avoid such conflict.

VLA otherwise does not take a position in relation to the Bill under consideration by the Committee, save to express its agreement that, if a statutory office of Children's Commissioner is to be established, its guiding principle should be the protection (and balancing) of the rights, interests and well-being of children and young people.

If you have any questions in relation to the above, please contact Joel Townsend on (03) 9269

Yours faithfully

JOEL TOWNSEND
Acting Co-Director
Civil Justice, Access & Equity