



## Submission on Children’s Rights to Access to Justice and Effective Remedies (General Comment No.27)

We acknowledge the Traditional owners of the lands on which we work. We pay our respects to their Elders past and present, and commit ourselves to the ongoing journey of Reconciliation.

Youth Law Australia is an accredited community legal service dedicated to helping children understand their legal rights, and find solutions to their legal problems. In this submission, we draw upon our experience as the only national, specialist legal service for children in Australia.

### Understanding access to justice and effective remedies for children

1. The terms ‘access to justice’ and ‘effective remedies’ have distinct, although overlapping, meanings. Access to justice should be understood not only as the process by which children seek remedies in cases of alleged rights violations,<sup>1</sup> but should also include:
  - 1.1 processes by which children can seek intervention to avoid a potential or likely violation of their rights;
  - 1.2 processes by which children can seek an enhancement of their rights – particularly for economic, social and cultural rights.
2. Key elements of access to justice include:
  - 2.1 access to child-friendly information about rights and remedies
  - 2.2 access to free child-friendly legal and (non-legal) advocacy services<sup>2</sup>
  - 2.3 child-friendly judicial and non-judicial procedures (including complaint mechanisms).
3. In this submission, we focus on the first two of these elements, which may also be required by specific clauses in the Convention on the Rights of the Child (**‘the Convention’**), such as the right to information (Article 13), and the right to legal assistance for children deprived of their liberty

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<sup>1</sup> See Ton Liefwaard, ‘Access to Justice for Children: Towards a Specific Research and Implementation Agenda’ (2019) 27 *International Journal of Children’s Rights* 195, p 200.

<sup>2</sup> An example of this sort of service is an individual education advocacy service for children with disabilities in Queensland who advocate for more inclusive education. See Queensland Advocacy for Inclusion, Annual Report 2022-2023, p 30.



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(Article 37). They can also play a role in promoting other rights that enable access to justice. For example, legal and advocacy services can play a role in ensuring children can access high-quality education, which is an important part of developing a child's legal capability, which enables access to justice.<sup>3</sup>

### The importance of disclosure in ensuring access to justice

4. A child disclosing harm they have experienced can be a crucial precondition for access to justice and effective remedies. This is particularly the case for a violation of the rights recognised in Article 19.
5. A national inquiry into child sexual abuse, drawing on the testimonies of thousands of victims, found that many victims of child sexual abuse may not disclose their abuse for many years after it has occurred – on average over twenty years.<sup>4</sup> Victims of other forms of abuse or exploitation may also take many years – and the right supports – before they feel ready to disclose.
6. Barriers to disclosure are likely to be particularly pronounced for children in institutional care settings, such as out-of-home care, detention and mental health facilities,<sup>5</sup> and for children who do not have a safe home.
7. This points to two important considerations in relation to access to justice and effective remedies:
  - 7.1 access to justice should be understood as including legal, institutional and policy structures that encourage and support safe disclosure of harm and maltreatment by children;
  - 7.2 legal mechanisms for remedies for violations of children's rights involving harm should reflect delayed disclosure with respect to limitation periods and retention of records.<sup>6</sup>

### The impact of a lack of enforceable child rights

8. In Australia, international treaties do not automatically become part of domestic law and there is no national legislated code of children's rights.<sup>7</sup> This means there are particular challenges in

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<sup>3</sup> On the connection between education and access to justice, see OECD Child-Friendly Justice Framework (2023), pp 39-40.

<sup>4</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Volume 4, Identifying and disclosing child sexual abuse, p 9.

<sup>5</sup> The particular vulnerabilities of children in institutions is also recognised in articles 25 and 40 of the Convention on the Rights of the Child.

<sup>6</sup> For this reason, the Royal Commission recommended that limitation periods that apply to claims of sexual abuse or charges of sexual abuse should be removed, and that records relating to child sexual abuse be retained for minimum periods. See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Volume 4, Identifying and disclosing child sexual abuse, recommendations 30-31, 85-88, 8.1.

<sup>7</sup> Australia does not currently have a national human rights act, and only three of seven states and territories within Australia have a human rights act. See *Human Rights Act 2019* (Qld), *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 2004* (ACT). These are all different and do not contain all Convention rights, and some limit the ability to access judicial proceedings or monetary remedies. For example, the Victorian human rights legislation does not include a right to education, whereas the ACT and Queensland human rights legislation do. In Queensland, while there are complaint mechanisms for human rights complaints (a complaint can be made to the Queensland Human Rights Commission), if this can't be resolved through a conciliation process, a breach of human rights can only be taken to a court or tribunal if a child has another legal cause of action or legal remedy available (aside from the human rights argument).

ensuring children have access to justice and an effective remedy for violations of all rights in the Convention, and in assessing Australia's compliance with this obligation.

9. It also means the legal landscape is complex and difficult to navigate both for children and their advocates, and for lawyers assisting them.<sup>8</sup> In its General Comment No.5, the Committee emphasised that all children's rights 'must be regarded as justiciable, and it is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.'
10. Because of the lack of an enforceable child rights framework in Australia, in this submission we have used the terms legal issues and child rights issues or violations interchangeably.

### Enabling factors and strategies: the role of legal and advocacy services

11. Legal and advocacy services for children are a crucial part of legally empowering children, and ensuring children can enjoy their right to access justice and effective remedies.<sup>9</sup> They can ensure:
  - 11.1 the right of children to information under Article 13 of the Convention;
  - 11.2 a complete assessment can be made of rights issues a child is facing or has experienced;
  - 11.3 children can make an informed decision about the best option for accessing an effective remedy in their situation;
  - 11.4 children receive fair, safe and child-friendly treatment when advocating for or disclosing violations of their rights, and feel supported to do so;
  - 11.5 power imbalances between children and duty-bearers or institutions are addressed;
  - 11.6 discrimination and other barriers to access to justice are addressed, minimised and overcome – such barriers might include poverty and economic status, being a member of a cultural minority, being in out-of-home care or detention, and living with disability or having experienced trauma;
  - 11.7 socio-cultural attitudes in which children may not be seen as rights-bearers can be challenged;<sup>10</sup>
  - 11.8 children are supported to access other services, such as counselling or health services, that may be required.
12. Children's legal services can enhance children's rights by:
  - 12.1 advising, advocating for and representing children in relation to child-rights issues;

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There is also no entitlement to monetary compensation for a breach of human rights. See *Human Rights Act 2019* (Qld), s 59.

<sup>8</sup> On the difficulties involved in ascertaining the content of various laws relevant to the rights of children, which are often contained in many different enactments, see Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Taylor & Francis, 2013, pp 52-53), citing S Goonesekere, *Children, law and justice: a South Asian Perspective* (UNICEF, 1998), p 375.

<sup>9</sup> See Liefwaard above n 1 at 4.3.1. These services are distinct from legal services based on a 'best interests' model, such as Independent Children's Lawyers in the family law system in Australia.

<sup>10</sup> Liefwaard above n 1, p 204

- 12.2 adopting policies and practices for the delivery of services which are consistent with children’s rights, including rights to access information and have a voice, and designing their services with children;
  - 12.3 undertaking law reform and systemic advocacy in relation to child-rights issues;
  - 12.4 training other youth organisations and professionals on children’s rights.
13. While legal and non-legal advocacy services both serve an important role in access to justice, legal services are essential because of the lawyer’s obligations to maintain client confidentiality, and because only lawyers can give advice about judicial mechanisms for access to justice.

### The role of the State in ensuring equal access to legal and advocacy services

14. States should periodically conduct a whole-of-system review of legal and advocacy services for children living in their jurisdiction. This review should be guided by the considerations we have outlined below, although particular states may have other considerations depending on, for example, the existence of particular marginalised groups or conflict zones.
15. States should ensure there is adequate funding and policy work to support a system of legal assistance services<sup>11</sup> with the following characteristics:<sup>12</sup>
- 15.1 **Free and for children** – there should be free legal services which are specifically for children.<sup>13</sup> These services should be child-friendly, child-safe, trauma-informed, culturally-safe and adopt a child-rights approach. Lawyers working with children require particular skills and knowledge.<sup>14</sup> Legal services for children are more likely to have comprehensive policies on issues that arise when advising children, and are more likely to adopt a child-rights approach and be designed with children, meaning they are also more likely to be accessible, useful and empowering for children.<sup>15</sup>
  - 15.2 **Inclusive, accessible and targeted** – legal and advocacy services for children should be accessible for all children, which means proactively trying to reach the most disadvantaged groups of children. Children experiencing disadvantage are more likely to experience legal and rights problems, and be the least able to resolve these problems alone. Children are also less likely than other groups to recognise a problem as legal, and to seek out legal advice.<sup>16</sup> A combination of in-person and technology-based outreach

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<sup>11</sup> See OECD Child-Friendly Justice Framework, above n 3, p 49 on the obligations on states to ensure proper resourcing of free legal assistance for children in all areas of the country.

<sup>12</sup> We have adapted these for the purposes of this general comment from the OECD Framework, above n 3, especially pp 27-29 and 41, and research conducted in the Australian context into legal needs and reshaping legal assistance services which explored key characteristics of legal assistance services (from a systems perspective). While this research wasn’t specific to children, it may provide a useful framework for assessing the adequacy of the system of legal and non-legal services for children. See Law and Justice Foundation of NSW, ‘Reshaping legal assistance services: building on the evidence base’ (April 2014).

<sup>13</sup> On the importance of free legal services, see OECD Framework, above n 3, p 30.

<sup>14</sup> In recognition of this, see for example Council of Europe’s Guidelines on child-friendly justice (*Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, Strasbourg, 17 November 2010).

<sup>15</sup> See L Thomas (2020), ‘Increasing access to justice through human-centred design’. See also OECD Framework, above n 3, ‘access to legal assistance services’, p 48.

<sup>16</sup> For research in the Australian context, see G Rychner and R Jupp, ‘Young people’s experience of legal problems’ (Victoria Law Foundation 2024).

should be used across the system, and should be targeted to ensure equal access.<sup>17</sup> Technology-based outreach needs to keep evolving to keep pace with the using preferences of young people.

15.3 **Joined-up** – legal problems commonly exist as part of a broad set of related legal and wider social, economic and/or health problems. Fragmented and poorly-coordinated legal services can act as a barrier to help-seeking ('referral fatigue'). This points to the need for joined-up services (both legal/legal and legal/non-legal).<sup>18</sup>

15.4 **Timely and appropriate** – legal services should be available across a spectrum ranging from early intervention (information and education, and supported dispute resolution and advocacy) to engagement with the formal justice system including legal representation.<sup>19</sup> Intensive assistance should be available to prevent problems from entrenching or multiplying, and to prevent them from bringing about or reinforcing disadvantage.<sup>20</sup> For some children, particularly those who have experienced trauma, continuity of care will be an important aspect of overcoming barriers to access to justice.<sup>21</sup>

16. It is unlikely that one service will be sufficient to meet these system requirements, and a diversity of services is preferable. One reason for this is that legal services have to manage conflict of interest issues, which occur where a legal problem involves other children.

#### A national model

17. Youth Law Australia provides a national legal service for all children and young people in Australia who are under 25. Key elements of our approach are:

17.1 **We publish child-friendly information on our website, covering all states and territories, and the legal and child rights issues children most commonly face.** A child who has access to the internet, no matter where they are in Australia, can access accurate, reliable and accessible legal information that has been prepared specifically for children.

17.2 **Our service provides a doorway for any child (or young person) in Australia with a legal issue.** Because children with one legal problem may be experiencing multiple problems simultaneously,<sup>22</sup> it is important that children can access a general legal service that can identify and help with all their legal needs. Triaging and co-ordinating is also an important part of a child-friendly justice system, and of addressing barriers arising from the complexity of the justice system and referral fatigue.<sup>23</sup> Given that there may be delays in disclosure of harm and that child rights violations may have ongoing impacts, it is important for services to extend beyond when children turn 18, and to assist with the transition from childhood (under 18) to adulthood (over 18). In recognition of the

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<sup>17</sup> Law and Justice Foundation of NSW, above n 12, ch 3, especially pp 37-39.

<sup>18</sup> Ibid, ch 4 and p 33; OECD Framework, above n 3, p 35.

<sup>19</sup> See OECD Framework, above n 3, p 30.

<sup>20</sup> Law and Justice Foundation of NSW, above n 12, chapter 5-7.

<sup>21</sup> See the Australian Independent Review of the National Legal Assistance Partnership: Final Report (March 2024), p 185.

<sup>22</sup> See for example G Rychner and R Jupp, 'Young people's experience of legal problems' (Victoria Law Foundation 2024).

<sup>23</sup> See OECD Framework, above n 3, p 31.

important role parents or other adult supporters can play in enabling access to justice for children, especially younger children, we also help advocates where they are acting on behalf of a child and in their best interests.

- 17.3 **We use technology to increase access.** We provide multiple avenues through which children can contact us, including through our website, by email, phone, or online chat. An evaluation of our chat program in 2023 found:

*Anonymity is a key factor that contributes to a child...’s willingness to seek help. The chat interface used by [Youth Law Australia] is identified by many clients as their preferred way to communicate. This is because of the opportunity for the anonymity it provides in making disclosures about serious harm, or enquiring about topics they might perceive as stressful, embarrassing, or implicating. YLA clients often seek to clarify laws around grooming or sexting, so the anonymous aspect is “reassuring and preventative”.*<sup>24</sup>

Technology was also a particularly important part of ensuring access to justice for children during the COVID-19 pandemic.

- 17.4 **Our service is free and confidential, and designed for children.** Access to free and confidential help is an important part of reducing barriers to disclosure and access to justice, particularly for issues where children may not have support from their parents or guardians. Children should have access to a service that is for them, rather than having to navigate services designed for adults, and which may not have expertise and skills in working with children.
- 17.5 **We have a specialist team that works with children who have experienced forms of harm, including sexual abuse and family and domestic violence.** Lawyers working in this team have expertise in working with children who have experienced trauma, and who may be at risk of harm.
- 17.6 **We take a holistic view of children’s needs and rights.** There is a strong correlation between a young person having one or more legal problems, and experiencing mental distress,<sup>25</sup> and legal problems often exist as part of a broader set of problems. We link children with other services that can help with their non-legal needs. For example, we have a partnership with a youth mental health centre in which we provide training to mental health practitioners on recognising legal problems, and operate a streamlined referral system.
- 17.7 **We use our data as the largest children’s legal service in Australia to advocate for changes to laws and policies,** and to make sure our legal information and outreach strategies are targeted.

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<sup>24</sup> Urbis, ‘Evaluation of the enhancement and expansion of legal assistance services for victims and survivors of child sexual abuse’, Final Report, 20 December 2023, p 40.

<sup>25</sup> Hugh M McDonald and Rochelle Jupp, ‘Mental distress and experience of legal problems’, Public Understanding of Law Survey 2023; Georgina Rychner and Rochelle Jup, ‘Young people’s experience of legal problems’, Public Understanding of Law Survey 2023, p 4.

**Complemented by specific services**

18. Our model is an important part of ensuring access to justice and effective remedies for children, but it is not sufficient because:

- 18.1 **Our model relies to a large extent on children having access to the internet and basic English literacy skills.** Other options need to be available for children who live in remote areas without any or reliable internet connection, for children who do not feel comfortable communicating in English, for children in certain institutional settings (such as youth detention), for children whose economic or family situation means they have limited or no access to the internet (including children experiencing family and domestic violence and neglect), and for children with certain disabilities. For example, a school lawyer project in Australia places a lawyer in a school to help children and their families in ‘a geographically, electronically and socially isolated community’.<sup>26</sup>
- 18.2 **First Nations children should have the option of accessing an Aboriginal or Torres Strait Islander-controlled organisation that provides free legal and advocacy services.**<sup>27</sup> This is an important part of self-determination for Indigenous peoples. At the same time, all services that help children and young people in Australia should be culturally informed, and culturally safe for Aboriginal and Torres Strait Islander children.
- 18.3 **Children in certain institutional settings require dedicated legal and advocacy services.** This includes children in out-of-home care, children in residential or disability care, children in detention, and children in mental health facilities.<sup>28</sup> These children are particularly at risk of rights violations, these systems are inherently disempowering, and they may not have access to a trusted adult they would feel comfortable disclosing to.<sup>29</sup> An opt-out advocacy system may be one way of improving access for children in these settings.<sup>30</sup> Other examples include a legal clinic for young people in residential care which operates in collaboration with youth, health and wellbeing services;<sup>31</sup> and an intensive legal service for children and young people who are transitioning from out-of-home care who have commonly experienced pre- and in-care violence and abuse, are more likely to be homeless after leaving care, and more likely to come into contact with the criminal justice system.<sup>32</sup>

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<sup>26</sup> An evaluation of this project, found a range of positive outcomes for students and their families. See E Pritchard, ‘School Lawyer Project: End of Project Evaluation Report’, WEstjustice, August 2017.

<sup>27</sup> See recommendations of the Independent Review of the National Legal Assistance Partnership Final Report (March 2024).

<sup>28</sup> A review of recommendations made by inquiries relating to the safety and wellbeing of vulnerable children in Australia found that a key theme that cut across the OOHC and youth justice supervision contexts was the need for access to advocacy and legal support. See Australian Institute of Family Studies, ‘Improving the safety and wellbeing of vulnerable children: A consolidation of systemic recommendations and evidence’, June 2024, p 15.

<sup>29</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, above n 4, pp 36-37.

<sup>30</sup> As an example, see the (non-legal) mental health advocacy scheme in Victoria, which operates on an opt out basis: See the *Mental Health and Wellbeing Act 2022* (Vic).

<sup>31</sup> See Westjustice, ‘Submission regarding Victoria’s Youth Strategy’, Westjustice Community Legal Centre, 18 January 2021. Available at: [wj-youth-strategy-submission--final\[1\].pdf](https://www.westjustice.org.au/wp-content/uploads/2021/01/wj-youth-strategy-submission--final[1].pdf) ([westjustice.org.au](https://www.westjustice.org.au)).

<sup>32</sup> Mid North Coast Community Legal Centre, ‘LevelUP: An innovative legal project to help young people in Out of Home Care (2021).

18.4 **Children who are defendants in the criminal law system or who are involved in child protection proceedings require expert legal representation.** In Australia, legal assistance for child rights issues involving the State (such as criminal proceedings and child protection proceedings) is commonly undertaken or facilitated by Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services.

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23 August 2024