



Young people having their say about the role of Independent Persons

Submission from Youthlaw in response to
Supporting young people in police interview
Background Paper
1st September 2009

About Youthlaw

Youthlaw is Victoria's state-wide community legal centre for young people. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

Youthlaw is based at Frontyard Youth Services which is a series of co-located youth services for 'at risk' young people, many of whom are transient and homeless. We act for clients up to the age of 25, many of whom are defendants in criminal matters in the Children's Court and Magistrates Court.

Youthlaw has been involved with Youth Referral and Independent Person Program (YRIPP) from its outset. Youthlaw delivers part of the training for the YRIPP program. Youthlaw is a member of the YRIPP Reference Group.

Youthlaw currently co-convenes the Children and Youth Issues Working Group of the Federation of Community Legal Centres ("the Federation"). In consultation with other community legal centres this working group has prepared a submission on behalf of the Federation. Youthlaw endorses and recommends this submission to you.

Consultations with young people

Youthlaw's casework, policy & project work is informed by the principle of youth participation embedded in the United Nations Convention on the Rights of the Child¹ ("CROC"). Over the past few years Youthlaw has been actively involved in policy and advocacy project work aiming to educate and engage with disadvantaged and marginalised young people around their legal issues within a human rights framework, and supporting them to put their views to government and strategic decision makers.

In this context, Youthlaw was delighted to be asked by the Victoria Law Reform Commission ("Commission") to assist them to engage young people in the consultation process and to ensure their experiences and voices are heard in relation to police interviews and the role of independent persons ("IPs"). It was agreed Youthlaw would run consultations with at least 2 groups of young people with experiences of police questioning and or interviews. Additionally Youthlaw lawyers would interview young people they have worked with who have experiences of police interviews.

¹ 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.

In partnership with the Commission, Youthlaw arranged and facilitated two focus group sessions (each 1 hour in duration) with 20 young people in total. Each participant received the equivalent of \$20 from the Commission. Commission staff took notes summarising the sessions.

The sessions were delivered at:

- 1) the Youth Enterprise Hub, Braybrook , 24th July 2009: 16 young people (“the Braybrook session” **summary A** attached) Most young people had had experiences of being stopped or questioned by police on the street, with a handful having experiences in police stations.
- 2) Whitelion on 19th August 2009: 4 young people all with experience of being questioned or interviewed by police. One had an independent person in an interview once and had her mum attend another time. Another had his dad attend when he was interviewed. Another had her mum there. (“the Whitelion session” **summary B** attached)

Youthlaw also devised a survey instrument which 10 young people (current or former Youthlaw clients) completed. Out of the 10, 7 had a parent attend the police interview with them, 1 another adult, 1 an uncle for the first interview and an IP for a second interview), and 1 person was allocated and Independent Third Person (ITP), even though they did not have a disability. (“the survey” **summary C** attached)

Response to the Background Paper

The response below is informed and premised on what young people contributed in the two consultations and surveys.

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?**

Advocacy and rights enhancement

The role of the IP was generally talked about in terms of an advocate for the young person with a key element of this role being explaining and making sure young people understand and can assert their basic legal rights at the station.

Interestingly most participants agreed they weren't really clear what their rights were before they went into their interviews. Young people completing the 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.

A survey respondent articulated that an IP is someone who will be unbiased and looking out for both parties and to help the accused understand what's going on and understand their rights.

Young people at the Braybrook session described an IP as someone who is not related to you, someone who can tell you your rights. They can stick up for you, advocate. An IP is someone who will butt in, someone who will give you advice on what to do at the police interview. They should make sure the young person's rights are not violated.

They should let you know that you are allowed to have a lawyer, and encourage you to get one. Some young people thought an IP should be able to give you legal advice. Youthlaw stresses the right to an IP is separate and complimentary to the right to legal advice. Interestingly we note that most of the young people consulted did not speak to a lawyer prior to their interview.

All survey respondents indicated they wanted information about their right to remain silent and support in interview if they didn't want to answer questions to police. A young person at the Whitelion session suggested that the IP should explain rights like the right to silence and 'explain it in layman's terms not

big words.’ The participant says that it is important to know you don’t have to say anything in an interview because the police can ‘twist it against you’.

The IP could warn you about the interview process, explain the ‘cop talk’, the methods that might be used and ‘*let them know what they’re up against*’. For example they could let young people know about standard police interview processes i.e. you will be asked the same question in 3 different ways. The IP should check that you understand these police interview questions.

Several survey respondents made reference to this police practice.

“ When I made ‘no comment’ I felt police kept trying to make me answer questions.”

“I felt pressured to answer questions and they would re-phrase questions to get the answers they wanted”

“They were not happy and kept asking repeat questions to try and trap me and get me to answer”

The police were “trying to shove words into my mouth”...(Braybrook participant)

It was also suggested in the Whitelion session that the IP could also let you know that ‘*nothing is ever off the record*’ with the police.

Many young people expressed keenness for IP’s to actively support them to exercise and assert these rights before, during and after interview. For example:

- All survey respondents indicated they wanted support and advice from IP especially when police wanted to fingerprint or photograph them, with a few commenting they didn’t know they could refuse a photograph.
- Intervene and have a role when they can ask to stop the interview.
- Remind them of the right to silence, or need for legal advice.

One participant at Braybrook explained that the IP helped him/her understand what was happening. Another had a positive experience with an IP attending the interview and understood clearly what his options were. Another participant believed they had better treatment by the police when an IP attended the interview. This young person gave a ‘no-comment’ interview. The police “*backed off*” when the IP showed up.

A participant at Whitelion suggested her IP did not mention her right to legal advice or right to give a no comment interview.

Support to make complaints about police conduct

In relation to incidents of police misconduct, many participants agreed that they expected volunteers to help them to make a complaint, back them up as a witness and verify what happened, perhaps make a ‘joint complaint’. A young woman in the Whitelion session spoke about how intimidating it is to make a complaint at the station. Others at the Braybrook session suggested it was better to have the IP do it because a young person at the station may be judged, not trusted or believed.

There was some debate about whether an IP should be able to make a complaint for a young person without their consent. Some thought this was ok, other thought the IP shouldn’t be able to unless the young person consents. Youthlaw maintains that a complaint against police should not identify a young person unless they consent to the complaint being made.

Welfare support

Most young people consulted thought IPs should do more than explain their legal rights, namely by providing emotional and referral support.

Someone suggested the IP should provide emotional support, be *'more or less like a parent'*, *'have a bit of care about the young person'*, that they should *have a talk about your life before you go in* [to interview].

A young person in the Whitelion session commented that IPs should talk to you about what you've been brought in for, offer more guidance, even if it's saying things like *'if I was in your situation I'd...'*

However young people felt that for young people to feel comfortable to receive emotional support there may need to be efforts to match IPs and young people by gender, age etc. One participant says she was allocated an older grey-haired male as her IP when she was 15 years old and being interviewed about drug related offences, and she suggested that if he'd tried to comfort her that would have *"felt pretty weird"*.

From the completed surveys, 7 participants thought the IP should link young people up with other support services after the interview.

Young people have also stated that if possible, an IP should follow a young person through to their court hearings (especially if a parent is not able to attend).

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?

Youthlaw supports the position taken by the Federation of Community Legal Centres that parents and independent persons can and should play distinct but complementary roles. We support legislative amendments that would require the presence of a trained independent person at every police interview with young people. This should not displace the parents from being encouraged to support their child at the police station. However their presence at the police station should not be critical to progressing the investigation.

The importance of the role of family was stressed by a number of young people who told us 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". It was raised that parents are always there for you. Another participant would rather his mum attend the interview because "she loves me".

Of the 5 survey respondents who said they would prefer to attend the interview with a parent, they gave the following reasons

- I feel more supported by someone I know and trust
- Step mum – is very supportive and I trust her
- I feel more comfortable with my parent
- They are the closest ones to me who I can trust

It is essential all young people access the same level of rights enhancement and welfare support. It is acknowledged that some family members are familiar with the criminal justice system and well placed to provide appropriate support.

"My parents a lawyer and knows my rights."

"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."

However many parents will either not know about or understand the system, or may give advice that's to the detriment of a young person or contrary to their best interests. Some parents' may want their child to simply agree with or go along with police. One Braybrook participant said that parents may

actually take the police's side. Some parents would assume their child was guilty already and ask the young person questions like "*why did you do it?*"

The impression given by some young people at the Braybrook session was that the IP provides knowledge and neutrality - qualities that their parents might not be able to offer - especially if they are not as skilled in language or local knowledge.

This may be overcome in part by providing the family members at the station with information about the process and their child's legal rights. However such information is unlikely to by-pass cultural values of parents of different racial backgrounds (see Federation submission in this regard).

Consideration of the respective roles of parent and IPs inevitably raises the question of when is it appropriate for a young person to refuse attendance by a parent or guardian. Many young people we spoke with expressed a preference for an IP over a parent. 9 out of 16 participants at the Braybrook session preferred an IP at their interview. They gave reasons including:

- they wanted to keep their family out of the problem,
- they wanted confidentiality,
- so they can't tell you off or judge you.

Four survey respondents preferred another adult (IP) making comments such as:

"then I could speak my mind without being told to be quiet. Someone I have to listen to me."

"Got in trouble with my dad while in custody, it was embarrassing - he hit me"

"My parents are controlling"

One participant stated that he would rather be able to have his mentor there, or nominate a worker or someone else.

There will be some situations where it is in the child's best interest for parents to not be asked to attend the interview e.g. parent who are estranged from the young person who expressly objects to their parent's presence. However acting in child's best interest does not always mean that the child has the final say; other considerations may be deemed more significant than his/her views. The weight of the child's view will be assessed according to the child's age and whether the child has sufficient understanding and intelligence to understand fully what is proposed.² In practice, in the first instance, a parent should be encouraged to attend the police station. An IP and the parent will then meet with the young person pre-interview, and the IP will explain the process and the young person rights. Understanding these rights and their options the young person could then expressly elect not to have the parent or IP attend the balance of the interview process.

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

The group of young people at the Braybrook session indicated it was very important to have a clear distinction between police members and the role of the independent person. Consequently the IP needs to be sourced externally from Victoria Police e.g. not a Youth Resource Officer, and not a Bail Justice.

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

The word "independent" is open to misinterpretation in that police tend to interpret as meaning 'independent of the whole process', whereas young people see as independent of the police.

² Collins, T and Pearson, L, 'What does the "best interests of the child" mean?' *Discussion Paper* 6 April 2002, http://www.sen.parl.gc.ca/lpearson/htmlfiles/hill/17_html_files/Committee-e/Tara-ABestInterests.pdf, p3

At the Braybrook session some participants thought that the term 'independent' doesn't sound like the person is on your side.

Other terms suggested by participants included:

- personal assistant,
- lawyer,
- 'support worker' or 'support person'
- independent legal advisor

Other participants thought the term was ok. Others thought it was perfect as it says the IP is just there to help and nothing else.

Half of the young people who completed the survey did not know what an independent person was. Once explained, nine thought 'independent person' was a good way to describe the role.

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

Youthlaw endorses the Federation's position that the role of an independent person be set out in legislation. 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.

Although not specifically asked in the consultations or the surveys, the findings of both highlight experiences of inconsistent practice by volunteers and confusion amongst young people about what the role actually is.

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

Although this questions was not specifically put to the young people consulted, they did discuss elements of the role (see question 1 above)

Youthlaw supports the legislation setting out an overriding principle of "best interests of the child" by stating "*that all obligations of the IP shall be performed in the best interests of the young person*".

By way of summary the young people consulted see the role as including:

- i) Providing emotional support to the young person (although this is the primary role of the parent)
- ii) Making sure a young person understands their legal rights, being:
 - 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
 - Search powers
 - Rights regarding bail
 - Right to refuse finger printing if under 15 years
 - Right to refuse photograph
- iii) Assisting the young person to exercise any of those rights, (including intervening and clarifying police questions if necessary)
- iv) Witness whether the interview is being conducted fairly and intervene if it is not (or provide feedback report)
- v) Providing referrals to early intervention and diversionary support services and other relevant programs
- vi) Providing information and support to the young person about making a complaint.

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?

Yes, wherever possible (see question 2). In the first instance a parent should be encouraged to attend the police station. An IP and the parent will then meet with the young person pre-interview and the IP will explain the process and the young person rights. Understanding these rights and their options the young person may expressly elect not to have the parent or IP to attend the balance of the interview process.

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

This question was not specifically posed in the consultations or survey.

Youthlaw and the Federation hold the position that if the police question a young person in custody without a parent, guardian or independent person present the interview should be automatically inadmissible as evidence.

It is Youthlaw and Federation's further submission that in circumstances where either a support person (i.e. *Toolmalatai*) or parent is present in interview, but they do not fulfill their role properly and in accordance with the child's best interests, any evidence acquired in the interview should also be rejected and ruled inadmissible.

At the Braybrook session it was made very clear that young people felt threatened when it was just them and police - they had a clear preference for support and reflected that the presence of an IP reduced police aggression & intimidation. And as stated earlier in question 2, parents, at times, may give advice to the detriment of a young person or contrary to their best interests.

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?

This question was not specifically posed in the consultations or survey.

Youthlaw endorses Federation's response that wherever possible support persons in interview should have received training about their role and the young persons rights. If they have not received training police should be required to provide a standardised written summary of young person's rights to an IP and or a parent or guardian. Additionally we repeat Federation's endorsement of recommendation 212 of the *Seen & Heard* Report requiring the screening at the station of an explanatory video prior to interrogation.

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

Youthlaw repeats Federations recommendations for the role to be expressly limited to those who have received adequate training. Although parents should be encouraged to attend the police interview, their attendance should be in addition to a suitably trained adult.

All IP's should receive free training which should be consistent with YRIPP induction and ongoing training which covers legal rights of young persons, referral avenues, how to deal with young people in these stressful situations.

Young people we have consulted have also suggested that trainees:

- know what young people are like/ up to i.e. visit youth centres
- be able to talk to young people at their level; a 65 year old isn't going to know what it's like to be a 17 year old with heroin problems.
- know the law as it relates to young people "*inside out*"

It was recommended by the Whitelion group that young people who have come into contact with the criminal justice system but are now over 18 should be encouraged to train as volunteers.

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?

Youthlaw endorses Federations' submission that as part of IP's role they must explain to the young person their right to get legal advice, refer them to Victoria Legal Aid's youth telephone advice line and if necessary place a call to the service on their behalf. If at this point a young person doesn't wish to speak with a lawyer, then the volunteer has satisfied their obligation.

Interestingly none of the participants in the Whitelion session knew of the 1300 free legal advice line, and didn't know they could use it to phone for legal advice in an interview situation.

When asked if IPs should be able to call for legal advice, even if the young person doesn't want it, participants suggested it should depend on the seriousness of the offence, or the age of the person being detained). One suggestion made in the Whitelion session was that it may be ok to go over the young person's head if they are say 10 to 15 years, but a young person between 16 to 18 years should be able to decide for themselves. However they acknowledged that if the young person didn't want legal advice they couldn't be forced to cooperate.

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

This question was not specifically asked or addressed in the consultations or survey.

Youthlaw endorses Federation's comments in this regard to this question.

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

Some young people we spoke to talked about the time delays in an IP arriving at the station. Often this is the period when young people are more vulnerable to police intimidation i.e. photographs, pressure to make admission, harassment. Calling the IP as soon as possible might help stop problems with police. As one survey respondent put it:

"I have had friends charged with resisting arrest whilst in police stations. Independent Person needs to get there earlier so things don't get out of hand..."

There is a strong sense amongst some participants that police tend to take photos and prints before anyone is there. One Whitelion participant stated that he had no one with him at the station (aged 12 years) and his finger prints were taken, but it didn't bother him.

"They took my photo and finger prints before anyone go there. Independent Person should be there well before that happens..."

If you have any queries about the content of this submission, please contact Tiffany Overall at Youthlaw on 9611 2422 or via email tiffany@youthlaw.asn.au.