



FAMILY LAW COUNCIL

Pathways for Children

**A review of children's representation
in family law**

August 2004

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Family Law Council

The Family Law Council is a statutory authority that was established by section 115 of the *Family Law Act 1975*. The functions of Council are set out in sub-section 115(3) of the *Family Law Act 1975* which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

Members of the Family Law Council at the time of production of this report were:

Professor John Dewar (*Chairperson*)

Ms Josephine Akee

Mr Kym Duggan

Ms Tara Gupta

Ms Susan Holmes

Ms Kate Hughes

Ms Christine Mead FM

The Hon. Justice Susan Morgan

Professor Patrick Parkinson

Child Representatives Committee

The members of Council's Child Representatives Committee were:

Federal Magistrate Judy Ryan (Convenor until 21 August 2003)

Ms Lani Blackman (until 11 April 2003 and from January 2004)

Ms Jennifer Cooke (Observer)

Mr Kym Duggan (Convenor) from 22 August 2003

Ms Kate Hughes

Ms Anne Rees (Observer until 21 August 2003)

Mr Matthew Osborne and **Mr Chris Paul** (Secretariat)

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Executive Summary

The then Attorney-General, the Hon Daryl Williams AM QC MP requested that the Family Law Council respond to recommendation 21 of the report of the Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Pathways Report).¹ In doing so Council was requested to review the role, and the basis of appointment, of child representatives, particularly in the light of Council's 1996 report, *Involving and Representing Children in Family Law*.

Council has considered a range of matters relating to child representatives and concluded that while some reforms should be made, particularly in relation to the support provided to child representatives, there is no need for radical reform in this area.

Council has considered the views expressed in a number of important reports, reviews and papers and also has undertaken a small survey of judicial officers and court counsellors to gauge the need for reform. The views of those judicial officers and court counsellors highlighted the valuable assistance that child representatives, properly performing their role, provide in family law proceedings involving children.

Council particularly considered two major issues that remain key questions in this area. The first is whether or not child representatives should act as independent advocates for the best interests of the child or act on the instructions of the child in the direct representation mode. The second is whether child representatives should only be appointed from the legal profession.

In both cases Council concluded that there were sound reasons, supported by experience, why there should be no major change to the current system. It should be emphasised that the Committee that undertook this work consisted of both lawyers and social scientists and that it was unanimous in its recommendations.

Council was strongly of the view, however, that the role of the child representative can best be carried out by a lawyer with the assistance of a child and family counsellor with both professionals acting as a team.

Council also believes that initiatives like the release in 2003 of the *Guidelines for child representatives: Practice directions and guidelines* by the Family Court of Australia will assist in overcoming at least some of the confusion about the role of the child representative that has been apparent in the past.

Council believes that more can be done to clarify the role. As a result, Council makes a range of recommendations designed to clarify and strengthen the role of the child representative.

¹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001).

The Role of the Child Representative

Council's research, and in particular the results of the survey of judicial officers and court counsellors, highlighted the valuable role that child representatives can play in the family law system. Two distinct features of the role were noted: (a) to assist the court to make a decision in the best interests of the child; and (b) to provide a voice for the child in proceedings affecting them. Council's considerations in completing this report were focused on ensuring that these valuable features of the current role would continue to be fulfilled and, if possible, enhanced.

Council was concerned about the minimal direction and guidance concerning the role of the child representative currently given by the *Family Law Act 1975* (Cth). The lack of clarity about the role has been a feature of numerous past reports and reviews. The child representative role has developed greatly since commencement of the *Family Law Act*, but Council believes the role has progressed to a point where it is time to place a basic outline of the role in legislation by including the elements of the role set out in the case of *P and P²* in the *Family Law Act*. Guidelines such as the *Guidelines for child representatives*, issued by the Family Court of Australia in 2003, will continue to play an important role in fleshing out the role and incorporating guidance that would not be appropriate for inclusion in legislation.

Appointment of Child Representatives

Council endorses the approach of the Full Court of the Family Court in the case of *Re K³* concerning the grounds of appointment of a child representative. Council does not believe that these grounds should be enacted into legislation at this point in time, as this may tend to restrict the flexibility of the current system to respond to new grounds that may emerge. Council does, however, recommend that research be undertaken to ascertain whether or not the *Re K* guidelines are applied consistently across registries of the Courts and to ascertain which of the *Re K* factors are most used to justify appointment. Depending upon the results of that research, the issue of inclusion in legislation of the grounds of appointment should be reconsidered.

Child Representatives as Best Interests Advocates

Council discusses the two main models for representation of children—bests interests representation and direct representation—and which model is the most appropriate for the child representative role in family law proceedings.

In considering the role of the child representative, Council noted the dearth of research on children's experiences of being represented by a child representative.⁴ As this kind of research is important to developing best practice for the child representative role, Council recommends that the Australian Institute of Family Studies should undertake research into the views of children in this context.

² *P and P* (1995) FLC ¶92-615

³ *Re K* (1994) FLC ¶92-461.

⁴ Note research in progress by Professor Parkinson, with Dr J Cashmore and Dr C. Wilson, "Children's Involvement in Decision-Making About Residence and Contact in Family Law Proceedings", funded by a grant from the Australian Research Council.

Overall, Council considered that it is appropriate that the child representative be a best interests representative. The feature of assisting the court while simultaneously allowing the child's voice to be heard is best fulfilled in this way. In addition, many of the protective features of the role—such as not requiring children to participate, but providing opportunities for children to voice their wishes without having to, for instance, express a view about the issues if they chose not to—were considered appropriate in the family law context, where there may be competing pressures and influences and ongoing relationships to maintain. Council is of the opinion that there is a need to specifically state in the *Family Law Act* that child representatives are best interests advocates.

Facilitating Direct Representation for Competent Children

Council does consider it appropriate to have some mechanism within the family law system to facilitate direct representation of competent children in appropriate cases. It is noted that there is no need for legislative change to facilitate direct representation, but that practice needs to change. Council sets out the circumstances in which it should be considered appropriate to appoint a direct representative for the child, without the need for a case guardian or next friend. In recognition of the possible impact on legal aid funding, Council recommends that the appointment of direct representatives and the impact on legal aid be monitored.

The Title of the Child Representative

Council also believes that there should be a change of name for the child representative. Council believes that the lawyer representing the child's best interests should be called the Independent Lawyer to make it clear to all, including the child, that the representative does not directly represent the child.

Qualifications of the Child Representative

There was vigorous debate about this issue within the Committee, with the Council concluding that the role of child representative should be carried out by a lawyer trained as a child representative.

Council is also of the view that the role is best carried out when the child representative has the assistance of a properly qualified family and child counsellor. Council recommends that the lawyer and the counsellor act as a team with a view to ensuring that avenues for primary dispute resolution for all the issues are taken, and that the most cogent evidence as to the best interests of the child are brought before the court.

Confidentiality of the Child Representative's Relationship with the Child

The level of confidentiality surrounding the relationship between the child representative and the child continues to be the subject of concern and confusion for many child representatives. The best interests basis of the role suggests that there cannot be a confidential relationship with the child. In the absence of a confidential relationship and the protections offered by client legal privilege, child representatives fear being subpoenaed or called as a witness to the proceedings.

While Council notes that confidentiality cannot be guaranteed in a best interests situation, it is essential to enable a professional relationship to be established between the child representative and the child. Council therefore believes that statutory amendment is necessary to protect a child representative from being required by any party or the court to disclose information communicated to the child representative by the child.

A statutory amendment should also be made to clarify that the child representative may, where the child representative considers it is in the child's best interests, disclose information provided by the child, even against the child's wishes. Guidance for child representatives on how to explain the relationship to the child, and to identify and act where a disclosure situation arises, is contained in the Family Court of Australia's *Guidelines for child representatives*, and should also be the subject of child representative training.

Statutory Immunity for Civil Suit

Council has been made aware that a number of child representatives have been the subject of formal complaints to professional bodies on the basis that those representatives made submissions to the court in support of orders that did not accord with the wishes of the child. There is a significant risk of a child representative being sued in his or her personal capacity in this regard. Council is of the view that this risk conflicts with the independence of the child representative, and is opposed to the public interest in finality of litigation. For these reasons Council considers that there should be statutory indemnity for child representatives similar to that for family and child counsellors operating under the *Family Law Act*. Child representatives would remain accountable as professional lawyers, and still be able to be the subject of a formal complaint.

Children's Cases Program

Since March 2004, the Family Court has offered parties to disputes involving children the option of participating in the Children's Cases Program (the Program). The Program is being trialled in the Court's Sydney and Parramatta registries.

The Program represents a significant departure from the ordinary course of adversarial litigation. The Judge assumes responsibility for determining how the competing claims of the parties are presented. Depending upon whether the Program is ultimately evaluated as being successful in achieving its aims, there may be significant implications for the roles and responsibilities of family law practitioners and, in particular, child representatives. If this Program is adopted nationally then the role and functions of the child representative may need to be reviewed again.

Recommendations

Recommendation 1: [Page 26]

The basic elements of the role of the child representative, as set down by the Full Court in *P and P*, should be incorporated into the *Family Law Act*.

Recommendation 2: [Page 29]

The Commonwealth Attorney-General's Department should commission research into how the discretion to appoint a child representative is exercised, including:

- **the influence of the various grounds set out in *Re K*;**
- **whether or not the *Re K* grounds are applied consistently;**
- **whether alternative grounds influence the discretion to make an appointment; and**
- **whether or not the appointment of the child representative contributed positively to the outcome of the proceedings.**

Recommendation 3: [Page 30]

The grounds for appointment of child representatives set out in *Re K* not be set out in legislation, but remain flexible and part of the common law, subject to the results of the research recommended by Council.

Recommendation 4: [Page 37]

The Australian Institute of Family Studies be commissioned to conduct research into the views of children about their experiences, expectations, and competence in family law proceedings and to evaluate children's experiences of child representatives.

Recommendation 5: [Page 40]

The Attorney-General's Department monitor the impact of different legal aid approaches relating to funding children's direct representatives in order to assess appropriate legal aid funding.

Recommendation 6: [Page 43]

The *Family Law Act* should be amended to specifically state that child representatives are best interests advocates.

Recommendation 7: [Page 43]

The *Family Law Act* should be amended to change the name from the Child Representative to the Independent Lawyer.

Recommendation 8: [Page 56]:

The Commonwealth Attorney General’s Department, Courts exercising jurisdiction under the *Family Law Act 1975*, organisations specialising in counselling and mediation in family law matters and Legal Aid Commissions should:

- a) endorse a team based approach to the representation of children, so that the appointed legally trained child representative is supported by a social scientist**
- b) develop a protocol for cooperation between lawyers acting as child representatives and family and child counsellors; and**
- c) provide sufficient funds to allow implementation of the protocol.**

Recommendation 9: [Page 60]

The *Family Law Act* should be amended to state that the child representative cannot be required, by any party or the court, to disclose information communicated to the child representative by the child. The *Family Law Act* should also include a provision stating that the child representative may, where the child representative considers it is in the child’s best interests, disclose to the court or relevant authority, information provided by the child against the child’s wishes.

Recommendation 10: [Page 62]

The *Family Law Act* should be amended to provide child representatives with a statutory immunity similar to that provided for family and child mediators and arbitrators by section 19M of the *Family Law Act*.

Terms of Reference

The Attorney-General endorsed the following terms of reference for this report:

That Council, as part of the Government response to recommendation 21 of the report of the Family Law Pathways Advisory Group, *Out of the Maze*,⁵ review as a matter of urgency:

- (i) the role of child representatives; and
- (ii) the basis for appointing child representatives

in light of the Council's 1996 report *Involving and Representing Children in Family Law*.

2. That the review consider Australian case-law and practice, reports, and research relating to the role of the child representative, following the publication of Council's 1996 report.

3. That the role of the child representative be examined from the perspective of the child's rights and best interests taking into account, *inter alia*, the UN Convention on the Rights of the Child.

4. That the review take into account, where appropriate, any work concerning child representatives being undertaken concurrently by other bodies such as the Family Court of Australia.

5. That options for reform of the role, and means of appointment, of the child representative be identified including, but not restricted to:

- (i) guidelines for the appointment and conduct of child representatives; and
- (ii) options for required training.

⁵ Recommendation 21: That the development of clearly defined roles for, and responsibilities of, child representatives be given urgent priority, with adequate funding allocated to support implementation.

1. Background

Purpose of this Review

1.1 In 2001, the Family Law Pathways Advisory Group concluded its appraisal of the family law system with the release of the report *Out of the Maze: Pathways to the Future for Families Experiencing Separation (Pathways Report)*. Recommendation 21 of the report stated:

That the development of clearly defined roles for, and responsibilities of, child representatives be given urgent priority, with adequate funding allocated to support implementation.

1.2 Following from the *Pathways Report*, the Attorney-General has requested that the Family Law Council (the Council) review, as a matter of urgency, the role and the basis of appointment of child representatives.⁶

1.3 The Council has examined the child representative role several times in previous reports (see below), and has also dealt with it in reports where child representation arises in the context of other issues.⁷ This review is to be conducted in the light of the Council's 1996 report *Involving and Representing Children in Family Law*.⁸

The Evolving Role of the Child Representative

1.4 In the vast majority of cases where children and young people are legally represented in the Family Court, or the Federal Magistrates Court, the lawyer is a child representative appointed pursuant to section 68L of the *Family Law Act 1975 (Family Law Act)*.⁹ The concept of a child representative pre-dates the *Family Law Act*, although the appointment of such a representative was not addressed seriously until after 1975.¹⁰

1.5 As a result of a lack of legislative prescription, the role of a child representative has evolved in practice. It has been developed by those who work with children in the family law context, in particular legal practitioners and judicial officers, against a background of changing knowledge and perceptions of the social effects of involving children in family proceedings.

1.6 Some commentators have suggested that had the legislature provided more detailed statutory guidance in 1975 on the role of a 'separate representative' (as it was

⁶ The full Terms of Reference are set out on page 11.

⁷ See for example, Family Law Council, *Access—Some Options for Reform* (1987); Family Law Council, *Child Sexual Abuse*, (1988).

⁸ See para 1.20ff for a more detailed overview of the 1996 report.

⁹ L Blackman, *Representing Children and Young People: A Lawyers Practice Guide* (2002) Victoria Law Foundation, 202.

¹⁰ See W Keough, *Child Representation in Family Law* (2000) LBC Information Services, 41–42 for discussion of cases involving separate representation of children under the *Matrimonial Causes Act 1959* (Cth).

then commonly referred to),¹¹ the beneficial and dynamic evolution that the role has since undergone would have been stymied. To others it has fostered uncertainty and confusion.

1.7 It has been some time since focused legislative reform has been undertaken in relation to the representation of children in family law proceedings. The *Family Law Reform Act 1995* was the last comprehensive reform package targeted at involving and representing children in family law.

1.8 While the need for a child representative role has been universally supported, the precise role as it has evolved in the family law system has been subject to continual review and, in some cases, criticism.

Previous Reviews of the Role

1.9 In undertaking the current review, the Council does not intend to give a detailed appraisal of the previous reviews—whether undertaken by the Council or another body—of the child representative role. Each of these reviews has been valuable in its time. However, the Council is aware that the changing nature of the child representative role, and the changing environment in which child representatives operate, necessitates a fresh evaluation.

1.10 At the same time, these previous reviews have informed Council in its consideration of the existing role and provide valuable background as to how and why the role has evolved into its current form. This understanding is necessary in order to develop effective measures for the future.

1.11 The following provides a brief overview of significant reviews of the child representative role.

Council's 1989 Report

1.12 In its 1989 report *Representation of Children in Family Law Proceedings* the Council considered the *Guidelines for Child Representatives* that had been issued by the Family Court in 1983. At that time child representatives appeared sporadically in family law proceedings, and the understanding of the child representative role varied greatly from place to place.¹²

1.13 Council found that the Guidelines issued at that time had failed to clarify the function or role of child representatives. It was concluded that the Guidelines did not deal adequately with, among other things, the tension between representing the best interests of the child and the appearance of providing direct representation in cases involving competent children.

¹¹ The term 'child representative' was introduced by the *Family Law Reform Act 1995* (Cth), however the term 'separate representative' continued to be used in some provisions of the *Family Law Act*. An amendment to reflect contemporary references to the role was contained in the *Family Law Amendment Act 2003* (Cth).

¹² Family Law Council, *Representation of Children in Family Law Proceedings*, (1989), 6.

1.14 Council stressed that the primary duty of the child representative is to assist the court to reach a decision in the child's best interests that is independent of the child's wishes. However, Council observed that many children may be competent to give instructions, and have an expectation that the child representative will act in accordance with their wishes. Council was concerned to clarify the role, and in particular its 'best interests' focus.

1.15 Council made recommendations to change the child representative role to a neutral *amicus curiae* (see Glossary) whose function is to ensure that all the evidence which is relevant to the best interests of the child is placed before the court. Council expressed a preference that while the child's wishes were to form part of the relevant evidence, the child representative was to perform his or her role independently of the child they 'represent'.

1.16 The recommendation was intended to clarify that the child representative acts for the best interests of the child, rather than as a direct representative of the child. To emphasise this aspect of the role, the Council recommended that the child representative role be renamed the 'Official Solicitor'.

1.17 Council also recommended that it be acknowledged that there will be some cases where the child demonstrates a need to be represented in proceedings by an advocate acting on instructions. Council suggested that in such cases, arrangements should be made to join the child as a party to the proceedings and for a lawyer in the ordinary sense (not the Official Solicitor) to be appointed to function as the child's direct representative.

1.18 Other recommendations were made with the intention of further clarifying and enhancing the role. One such recommendation was that where a child representative is appointed in the best interests of the child, the involvement of a social worker experienced in working with children should be a mandatory requirement.

1.19 The report was influential in the later development of the best interests model of representation (moving away from a direct representative or 'acting on instructions' approach – see Glossary). However, the recommendations were not implemented so as to clearly identify the full role as outlined by the Council.

Council's 1996 Report

1.20 The focus of the Council's 1996 report on the representation of children in family law proceedings was not so much a re-evaluation of the role of the child representative as ensuring the appropriate level of involvement and representation of children through the child representative in accordance with the United Nations *Convention on the Rights of the Child*. The report contained fourteen recommendations. These recommendations, together with Council's comments, are at Appendix A.

1.21 In 1996 the Council supported, with the reservation that it was still not entirely satisfactory, the alteration of the title 'separate representative' to 'child's representative'.

Developments since 1996

Seen and Heard: Priority for Children in the Legal Process

1.22 In 1997, the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) released the report—*Seen and Heard: Priority for Children in the Legal Process*.¹³ The report dealt with a broad variety of issues relating to the participation of children in the legal process, including in family law cases.

1.23 The report brought together many of the criticisms of the child representative role as it had evolved, and discussed a number of alternatives. Pivotal to the ALRC/HREOC criticism was that the role remained confusing, not only from the perspective of the child but also of practitioners.

1.24 The premise of the ALRC/HREOC recommendations was that a child with the capacity to give instructions to a lawyer should be directly represented. However, it was admitted that there is no overall model of representation of children to suit every jurisdiction and every occasion—it is necessary to consider the maturity and capacity of the child, as well as their desire for involvement in the litigation. The report stressed that everyone should be clear at all times about which model has been adopted, and there should be clear standards for all representatives as guidance for practitioners.

Legal Aid Agreements and Commonwealth Guidelines

1.25 The *Family Law Rules* set out the role of legal aid commissions in giving effect to an order of a court that a child representative be appointed in family law proceedings.¹⁴

1.26 Flowing from the role of legal aid commissions in the appointment process, the administrative funding arrangements for legal aid also directly affect the appointment of child representatives. This is because legal aid commissions appoint in-house lawyers as well as lawyers from the private profession as child representatives in family law proceedings. The Commonwealth sets out its legal aid priorities in Commonwealth Legal Aid Guidelines (the Guidelines).

1.27 The Guidelines are binding on State and Territory legal aid commissions in their disbursement of Commonwealth funds. A clear distinction is made in the Guidelines. The Commonwealth funds matters arising under Commonwealth law. In addition, the Commonwealth may specify 'priority matters'. Family law matters are stated to be a priority.

¹³ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, (ALRC 84, 1997).

¹⁴ *Family Law Rules 2004*, r 8.02. There is no counterpart rule in the *Federal Magistrates Court Rules 2001*. In such cases, the Federal Magistrates Court adopts the Family Court rule. There are other examples of different rules of court applying to child representatives in each case but this does not seem to be problematic. Council does not suggest that there should be a total integration of rules of court in child representative matters.

1.28 Since 1996 legal aid resources have been significantly restructured. The Commonwealth has introduced funding guidelines which establish eligibility for dealing with Commonwealth matters, including detailed requirements concerning family law matters.

1.29 Legal aid commissions are now responsible for managing those funds to provide efficient and effective legal aid services within defined parameters. These parameters include fixed funding ‘caps’ for family matters.

1.30 In the case of child representatives, the current ‘cap’ is \$15,000. Hence, price regulation may affect the number and calibre¹⁵ of lawyers who can afford to practice as child’s representatives.¹⁶ Under the Guidelines, Primary Dispute Resolution processes have become a key condition precedent in legally aided cases.

Family Court Initiatives

(i) Project Magellan

1.31 Council has also closely monitored the implementation of Project Magellan. This is the Family Court of Australia’s innovative approach to what may once have been perceived by some as an intractable segment of the Family Court’s case-load—those complex residence and contact cases involving allegations of child abuse.

1.32 A report prepared in 2002 which sought to evaluate Project Magellan, *Resolving Family Violence to Children*,¹⁷ helped to refine Council’s thinking in drafting this Report.¹⁸

(ii) Family Court practice guidelines for child representatives

1.33 In May 2002, the Family Court of Australia issued draft practice guidelines for child representatives to represent the best interests of the child in family law proceedings. The guidelines apply to child representatives acting in the jurisdiction of the Family Court.

1.34 The Chief Justice published a final set of *Guidelines for child representatives* in July 2003. The Guidelines are discussed in detail throughout this report.

¹⁵ Legal aid commissions have reported to the Commonwealth a phenomenon of ‘juniorisation’ whereby an increasing number of less experienced lawyers take legal aid cases. Whilst some experienced senior lawyers continue to undertake legal aid work, their numbers appear to be decreasing.

¹⁶ Note Family Law Council, *Child Contact Orders: Enforcements and Penalties*, (1998), [5.41]. See also the report of the Justice Research Centre, *Legal Services in Family Law* (2000), which found that legal aid cost structures will often provide a disincentive for legal practitioners to accept work from legal aid commissions. Note the announcement in the 2004-05 Budget that hourly rates for family lawyers undertaking legal aid work would be increased in the new legal aid agreements to be negotiated in the second half of 2004: P Ruddock, Attorney-General, ‘More Money for Legal Aid’, *Media Release*, 11 May 2004.

¹⁷ T Brown, R Sheehan, M Frederico, L Hewitt, *Resolving Violence to Children, Report Number Three: The Evaluation of Project Magellan a Pilot Project for Managing Family Court Residence and Contact Disputes when Allegations of Child Abuse Have Been Made*, (2001) Monash University (released on 24 April 2002).

¹⁸ Other valuable research has also played a role in shaping the thinking behind the recommendations in this Report, for example, H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years, Final Report*, (2001) University of Sydney and the Family Court of Australia.

(iii) Less adversarial procedures¹⁹ - The Children's Cases Program

1.35 Since March 2004, the Family Court has offered parties to disputes involving children the option of participating in the Children's Cases Program (the Program).²⁰ The Program is being trialled in the Court's Sydney and Parramatta registries.

1.36 The objectives of the program are, through a less adversarial approach, to reduce the delays to trial and judgment for children's matters, to reduce the costs of litigation to the parties, and to achieve more sustainable outcomes by reducing conflict and by focusing on the future and not the past.

1.37 Further, the Program adopts a set of evidential and procedural rules which provide an express waiver of certain rules of evidence. The hearing may take the form of various appearances rather than one event and the judge may make binding determinations on various issues as the hearing progresses.

1.38 Where the parties inform the Judge, Judicial Registrar, Registrar or a Deputy Registrar that they wish to enter the Program, and the case is one which requires a Child Representative, then an order will be made for the appointment of a Child Representative, if appropriate. The usual criteria apply for the appointment of a Child Representative.

1.39 The Program represents a significant departure from the ordinary course of adversarial litigation. The Judge assumes responsibility for determining how the competing claims of the parties are presented. Depending upon whether the Program is ultimately evaluated as being successful in achieving its aims, there may be significant implications for the roles and responsibilities of family law practitioners and, in particular, child representatives. If this Program is adopted nationally then the role and functions of the child representative may need to be reviewed again.

National training course for child representatives

1.40 A national training course for child representatives is run by National Legal Aid, the peak body representing all State and Territory legal aid commissions, and the Family Law Section of the Law Council of Australia. Much of its training material is drawn from the decided cases. It incorporates new developments such as the Family Court's *Guidelines for child representatives*.

Court decisions

1.41 Several important decisions of the Family Court have also profoundly influenced the appointment and the role of the child representative. In particular, much has changed following the Family Court's decision in *Re K* which accorded even greater prominence to the representation of children.²¹ Relevant decisions are discussed throughout this report.

¹⁹ Submission of the Family Court of Australia to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Joint Custody Arrangements In the Event of Separation, 52.

²⁰ See <<http://www.familycourt.gov.au/media/html/program.html>>.

²¹ *Re K* (1994) FLC ¶92-461.

Pathways Report—Out of the Maze

1.42 As noted above, the Council's current review arose out of an appraisal of the family law system by the Family Law Pathways Advisory Group, which was established in May 2000.²² Its four main objectives were to (i) establish stronger and clearer pathways to early assistance, (ii) help families minimise conflict, (iii) improve information and support, and (iv) provide better coordinated service delivery between the range of agencies involved in assisting families who interact with the family law system.²³ Council has sought to reflect these key objectives in its consideration of the issues arising from this review.²⁴

1.43 In its 2001 report, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (the Pathways Report), the Family Law Pathways Advisory Group recommended a review of the role of the child representative in family law proceedings. In a section titled 'Children's perspective', the Report noted that children caught up in the family law system were often 'overlooked and marginalised' and that 'the best interests of children can be best considered if the children's voices are heard'. The Pathways Report concluded that:

One of the difficulties in guiding the family law system to become more child centred is the lack of clarity surrounding the role of the child representative.²⁵

1.44 The Government's response to the report was released in conjunction with the 2003-2004 Budget.²⁶ The response addressed three broad themes:

- Early help—connecting people to information and services
- Better outcomes for children and young people
- An integrated system that meets families' needs.

Child Custody Report—Every Picture Tells a Story

1.45 In June 2003, the Prime Minister announced that the House of Representatives Standing Committee on Family and Community Affairs Committee were to conduct an inquiry into child custody arrangements in the event of family separation. The terms of reference for the inquiry included an examination of the concept of a 'rebuttable presumption' of equal time to be spent by children with each parent in the event of family separation, the child support formula, and grandparents' contact rights.

1.46 The Committee's Report, *Every Picture Tells a Story*, was released on 29 December 2003.²⁷ The Report contains 29 wide-ranging recommendations,

²² Chaired by the then Chairperson of the Family Law Council, Mr Des Semple, and having as one its members the current Chairperson of the Family Law Council, Professor John Dewar.

²³ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001), 2.

²⁴ The Council is actively involved in implementing a number of the recommendations of the Pathways Report: see <<http://www.law.gov/flc>>.

²⁵ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001), 72.

²⁶ *Government Response to the Family Law Pathways Advisory Group Report*, May 2003.

²⁷ House of Representatives Family and Community Affairs Committee, *Every Picture Tells a Story*, Parliament of Australia, December 2003.

including mandatory mediation before making an application to a court,²⁸ a national statute based Families Tribunal,²⁹ and child-focused service delivery.³⁰ The Government released its response on 29 July 2004.

Council's Survey of Court Opinion

1.47 In 2002, Council conducted a qualitative survey of judicial officers and counsellors of the Family Court of Australia and the Federal Magistrates Court. The survey's aim was to gain an understanding of what a cross-section of significant participants in the family law system think about the child representative's role in proceedings.

1.48 The survey was initiated by way of a letter from the Council Chairperson, Professor John Dewar, to the Hon A Nicholson AO RFD, Chief Justice of the Family Court of Australia, and Ms Diana Bryant, Chief Federal Magistrate. The letter requested their assistance in arranging for a survey form to be distributed to relevant persons (judges, judicial registrars, registrars, mediators, and federal magistrates) within the Court, and for arrangements to be made to ensure the return of responses by 13 September 2002.

1.49 Twenty-two survey forms were received from the Family Court (four judges, eleven mediators, and seven registrars). The Federal Magistrates Court provided their response in an aggregated form.

1.50 In every case, the survey respondents stated that a properly trained and resourced child's representative is a very valuable aid to the court. Participants were keen to point out the need for practitioners acting as child representatives, to have strong advocacy skills and appropriate training necessary to carry out the interviews with the children involved.

1.51 The survey highlighted the need for clarification of the role of the child representative. One participant commented that 'most child representatives appear to be confused in regard to what the court expects of them'. Mediators, too, may be confused with what the role of child representatives actually involves.

1.52 The survey found that decision-makers are assisted most by lawyers acting independently of the parties and the child in making submissions in the best interests of the child, and testing the evidence and submissions of the other parties.

1.53 Some respondents commented that the child representative should meet the child in every case, and were disappointed that child representatives in some States do not. A few respondents noted the difficulty of the role where the child has an expectation that the child representative will be their lawyer. A few also commented on the need for clear guidelines to resolve the best interest/direct representation debate.

²⁸ Ibid, recommendation 9, see [3.72].

²⁹ Ibid, recommendation 12, see [4.157].

³⁰ Ibid, recommendation 13, see [4.158].

1.54 In general, participants found the use of child representatives has a positive effect. Child representatives played a very important role by providing an independent, unbiased representation of the best interests of the child. One judge even commented that child representatives are ‘amongst the best innovations in family law in the past 20 years’.

1.55 The Council found the information provided by the survey participants of great assistance in determining the final tenor of the report. The provision of this information by active participants within the family law environment dealing with child representatives informed Council’s deliberations. The Council is highly appreciative of the support of the Chief Justice of the Family Court of Australia and Chief Federal Magistrate in completing the survey.

Overseas Family Jurisdictions

1.56 While not a major focus of this report, the Council briefly considered the child representation system in several overseas jurisdictions. The approaches in New Zealand and New York State in the United States are discussed briefly below.³¹ The so-called ‘tandem representation approach’ to be found in the United Kingdom is discussed in Chapter 5.

New Zealand

1.57 In New Zealand, the Family Court has broad authority to appoint lawyers to act as counsel for the child³² and it is the Family Court which maintains a list of lawyers available to act as counsel for the child. The role of the counsel for the child is to act on the child’s instructions in family law proceedings. This is in clear contrast to the situation in Australia where the child representative acts in the best interests of the child, not instructions.

1.58 Council understands that apart from the counsel for the child, the only other person in the Family Court process who has significant contact with the child is the court-appointed specialist report writer.³³

1.59 New Zealand has dealt with the issue of role of the representative by devising a system which separates the appointment of a ‘counsel for the child’ from a ‘counsel to assist the court’, presumably on the basis that the two roles are inconsistent and must be discharged independently.

1.60 The appointment of a counsel to assist the court is apparently often made in adoption cases ‘when there are novel legal issues involved and the Court requires further independent input other than that brought forward by the lawyers for the

³¹ Council has considered the family law systems in New Zealand, France, the UK, and Scotland.

³² See *Family Proceedings Act 1980* (NZ), s 162; *Domestic Violence Act 1995* (NZ), s 81; *Matrimonial Property Act 1976* (NZ), s 26; *Children, Young Persons, and Their Families Act 1989* (NZ), s 159 and the *Guardianship Act 1968* (NZ).

³³ This person may be a social worker. The closest analogy to the position in Australia would be the court child and family counsellor.

parties who are biased in their particular client's interests.³⁴ They are also appointed in some cases where a party is unrepresented.

1.61 The role of counsel to assist the court seems to represent most closely the role of the child representative as understood by Australian courts and the Council. It is interesting to note that there are far fewer appointments of counsel to assist the court than of counsel to assist the child. The cost of appointments of counsel for the child has increased steadily from \$5.7 million in 1995–96 to over \$11 million in 2000–01, compared to costs of counsel to assist the court rising from \$235,026 to \$503,695.³⁵

1.62 The New Zealand model is expensive. The costs however, are not borne entirely by the courts. The New Zealand High Court has confirmed that the Family Court has an unfettered discretion to recover the costs of appointment from the parties, which is now the situation in Australia following commencement of the *Family Law Amendment Act 2003* (Cth).

1.63 It is also interesting to note the Family Court's attitude to the appointment of a counsel to assist the court. It seems the role of the 'counsel to assist the court' does not incorporate an obligation to work with appropriately qualified people in the best interests of the child. It has been suggested that they have become the Family Court's answer to its lack of ready access to social workers, and that in turn has formed the basis of an observation that the lawyers concerned are often required to act beyond 'their best expertise.'³⁶

1.64 Hence, the New Zealand approach is to give the legal advocacy and court-assistance elements the status of separate roles, both of which are performed by lawyers.

New York State (USA)

1.65 Judicial officers in some other family law jurisdictions may also exercise considerable control over the appointment of lawyers to represent the best interests of a child.³⁷ For example, in New York children may be represented by 'law guardians' in child abuse and juvenile delinquency proceedings, and the judicial officers in those cases may 'personally choose the law guardian for each case' based on their knowledge of the lawyer's style and their assessment of the child's needs in the case.³⁸

³⁴ Law Commission (NZ) *Family Court Dispute Resolution* (2002) Discussion Paper 47, 30.

³⁵ See Law Commission (NZ) *Family Court Dispute Resolution* (2002) Discussion Paper 47, 29.

³⁶ *Ibid.*

³⁷ D Prescott, 'The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion or Referee?' (2000) 22 *Univ of Arkansas at Little Rock Law Review* 529.

³⁸ A Griffiths and RF Kandel, 'Legislating for the Child's Voice: Perspectives from Comparative Ethnography of Proceedings Involving Children' in M Maclean (ed), *Making Law for Families*, (2000) Hart Publishing, 170.

1.66 This emphasises the court's position as a stakeholder in ensuring the efficacy of the child representative's primary role as a fact-finder in the best interests of the child. There is also a possible argument that greater judicial intervention in the appointment-making process is an enhancement of its decision-making in the best interests of the child.

2. The Role of the Child Representative

Identifying the Role of the Child Representative

2.1 Child representatives are now an integral part of the family law system. The role played by the child representative has evolved together with an increasing awareness of the impact on children of family breakdown and involvement in court processes, and a highlighting of the need for decisions of the court to achieve outcomes that, above all, promote the best interests of the child.

2.2 The role of the child representative is also partly a reflection of changing knowledge and perceptions of the social effects of involving children in family law proceedings. Greatly influenced by the adoption of the *United Nations Convention on the Rights of the Child*, there is greater awareness of the right of children to have their voice heard in proceedings affecting them.³⁹

2.3 The role of the child representative therefore has two distinct features:
(a) to assist the court to make a decision in the best interest of the child; and
(b) to provide a voice for the child in proceedings affecting them.

2.4 Much of the confusion and criticism surrounding the child representative role stems from reconciling these two features. Some interpretations of the function of the child representative may lead to the belief that assisting the court to reach a decision in the best interests of the child is inconsistent with providing a voice for the child.⁴⁰ The Council does not believe that they are inconsistent, but concedes that guidance is required in order to achieve an appropriate balance.

2.5 The Council considers that much of the value of the child representative role, as it has developed in the family jurisdiction, comes from a successful combination of these features. Any changes recommended in the remainder of this report are made with the purpose of strengthening the child representative role and the appropriate balance of these key features.

Role of the Child Representative: The Case Law

2.6 The child representative's current role is neatly set out by the Full Court of the Family Court in its decision in *P and P*:

The separate representative ought to:-

1. Act in an independent and unfettered way in the interests of the child.
2. Act impartially, but if thought appropriate, make submissions suggesting the adoption by the court of a particular course of action if he or she considers that the adoption of such a course is in the best interests of the child.

³⁹ This increased awareness is reflected in developments such as the Family Court's website where age-specific material is listed under the heading 'Information for Children'.

⁴⁰ See the discussion in Chapter 4 on best interests versus direct representation at para 4.6ff.

3. Inform the court by proper means of the children's wishes in relation to any matter in the proceedings. In this regard the separate representative is not bound to make submissions on the instructions of a child or otherwise but is bound to bring the child's expressed wishes to the attention of the court.
4. Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the court.
5. Test by cross-examination where appropriate the evidence of the parties and their witnesses.
6. Ensure that the views and attitudes brought to bear on the issues before the court are drawn from the evidence and not from a personal view or opinion of the case.
7. Minimise the trauma to the child associated with the proceedings.
8. Facilitate an agreed resolution to the proceedings.⁴¹

2.7 Both key features of the child representative role are represented in this list. The requirement to provide a voice for the child is clearly set out in point three. (For discussion relating to not being bound by instructions of the child, see Chapter 4).

2.8 The Court in *P and P* clearly contemplated that, as part of the role of assisting the court to reach a decision in the best interests of the child, the child representative would be responsible for collating relevant and probative evidence, and cross-examining on the evidence adduced by the other parties and their witnesses.

2.9 In discussing this element of the role, the Court declared that the child representative must 'ensure that the views and attitudes brought to bear on the issues before the Court are drawn from the evidence and not from a personal view or opinion of the case.'⁴² Flowing from this, the child representative should not become an advocate in their own cause,⁴³ but rather has an obligation to collate and evaluate all of the relevant evidence in forming a proposal for the court as to the child's best interests.

Other Features of the Role

2.10 It should be noted that an important aspect of the role of a child representative is the function played outside of the courtroom. It is a commonly cited statistic that only 5% of family cases are resolved by a court determination, meaning that the vast majority are resolved at an earlier stage of proceedings, with many never reaching the trial stage before a judge.⁴⁴

2.11 While it can be assumed that the more difficult cases that require judicial determination are also the kinds of cases where child representatives are likely to be

⁴¹ *P and P* (1995) FLC ¶92-615, 82,157.

⁴² *Ibid*, 82,156-7.

⁴³ *Waghorne and Dempster* (1979) FLC ¶90-700 per Treyvaud J.

⁴⁴ For example, see Opening Address by A Nicholson, Chief Justice of the Family Court of Australia, 'The State of the Court', *Third National Family Court Conference*, Melbourne, 20 October 1998.

appointed, there are still many cases involving child representatives that do not reach trial.

2.12 In short, child representatives have a role to play in facilitating dispute resolution taking into consideration their view of the best interests of the child. In gathering evidence they also have a key role in ensuring that this does not result in 'systems abuse'.⁴⁵ Even in those cases which do require judicial intervention, a child representative may have been instrumental in narrowing the issues in dispute.

Guidelines for child representatives

2.13 Given the previous lack of clear guidance as to the content of the role, in 2003 the Family Court of Australia released *Guidelines for child representatives*. These *Guidelines* encompass the role of the child representative as expressed in *P and P* and other cases, and provide further guidance as to how the role should be fulfilled in any family law jurisdiction. They are a practical guide as to how to balance the key features of assisting the court to make a decision in the child's best interests, and providing a voice for the child.

2.14 The Family Court had released guidelines (in the form of a practice direction) for child representatives in the 1980s, although they were related more to the conduct than the role of the child representative. That practice direction was withdrawn in 1990. The 2003 *Guidelines* are more comprehensive than any previous document. They deal with the role and conduct of the child representative, as well as highlighting issues that have been the subject of confusion or disparate practice in the past, such as the relationship with the child.⁴⁶

2.15 Various State and Territory law societies have developed guidelines for those members practising as child representatives. Some legal aid commissions have published short pamphlets about what child representatives do in family law proceedings, and care and protection proceedings.⁴⁷

⁴⁵ 'Systems abuse' may occur when a child is 'exposed to excessive or repeated questioning or examination, without the likelihood of much benefit in terms of information which will assist in resolving the matter': see Family Law Council, *Family Law and Child Protection* (2002), 67.

⁴⁶ See P Parkinson, 'New Guidelines for Expert Witnesses and Child Representatives', (2003) 17 *Australian Journal of Family Law* 223.

⁴⁷ For example, the Legal Aid Commission of NSW (through Lawlink NSW) produced a short document, *Separate Representation of Children—For Parents*, in the context of family law proceedings <http://www.agd.nsw.gov.au/lac/lac.nsf/print/parents_rep_brochure>. Another document, *Children's Law: Children's Care Matters*, for child protection proceedings is at <<http://www.agd.nsw.gov.au/lac/lac.nsf/pages/childcareproc>>. See also L Akenson, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court*, (1999) Victorian Law Foundation, 8–9, which differentiates the role of the lawyer in the Children's Court of Victoria from the separate child representative in family law proceedings. See also R Layton, Report of the Review of Child Protection in South Australia, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003), [15.35]–[15.42].

Legislative Expression of the Role of the Child Representative

2.16 Given the lack of clarity about the role of the child representative highlighted by the *Pathways Report*, Council is of the view that legislative reform is necessary. The Council is very supportive of the Family Court's *Guidelines* and considers that they contribute a great deal towards clarification and standardisation of the child representative role. The *Guidelines* are not, however, a part of the law.

2.17 Council considers that the child representative role has progressed to a point where it is time to place a basic outline of the role in the *Family Law Act*. This will cement the basis of the role, providing certainty for the courts and all persons involved in future cases.

2.18 Council also notes the benefits of clearly setting out the position of child representatives in the *Family Law Act* for self represented litigants. At the same time, the *Guidelines* will continue to be a valuable tool for fleshing out the role, incorporating details that would not be appropriate for inclusion in legislation.

2.19 Council supports the formulation of the role expressed by the Court in *P and P*, and recommends that it be expressly adopted in the *Family Law Act* to make the role clear.

Recommendation 1

<p>The basic elements of the role of the child representative, as set down by the Full Court in <i>P and P</i>, should be incorporated into the <i>Family Law Act</i>.</p>

3. Appointment of Child Representatives

Grounds for Appointment

3.1 In the case of *Re K*, which was decided prior to the enactment of the *Family Law Reform Act 1995* (Cth), the Full Court of the Family Court set out the factors that it considered relevant to the appointment of a child's representative.⁴⁸ It set out 13 grounds where the appointment of a child representative would be justified. The Full Court made it clear that the grounds were not intended to be exhaustive. The list is set out below:

- i. Cases involving allegations of child abuse, whether physical, sexual or psychological.
- ii. Cases where there is an apparently intractable conflict between the parents.
- iii. Cases where the child is apparently alienated from one or both parents.
- iv. Where there are real issues of cultural or religious difference affecting the child.
- v. Where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare.
- vi. Where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare.
- vii. Where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children.
- viii. Where neither party may be a suitable resident parent.
- ix. Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent.
- x. Where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child.
- xi. Cases where it is proposed to separate siblings.
- xii. Custody cases where none of the parties are legally represented.

⁴⁸ *Re K* (1994) FLC ¶92-461.

- xiii. Applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

3.2 In Australia, legal aid commissions are primarily responsible for selecting the child representative. Australian courts do not have the power to determine the individual child representative.

3.3 Council notes that some respondents to its judicial survey were critical of certain lawyers currently performing the role. It may be that most judicial officers will know which lawyers perform the role well in particular circumstances, and which do not. In some instances legal aid commissions receive feedback on the quality of their appointments from judicial officers, which may influence which lawyers get work as child representatives in the future. Council notes the system in New York outlined in Chapter 1 might be one way of improving the appointment and 'matching' process.

Trends in the Appointment of Child Representatives

3.4 Since the decision in *Re K* in 1994, the number of appointments of child representatives has increased steadily, as illustrated in the following table.

Appointment of Child Representatives by Legal Aid Commissions 1994/95–2002/2003⁴⁹

Year	No. of child representative appointments	% change of appointments from year to year	Appointments as % of total family law applications for legal aid	% change of appointments relative to 1994/95 base ⁵⁰
1994/95	2608	-	9	-
1995/96	3405	+31	11.6	+31
1996/97	2677	-21	9.1	+3
1997/98	2672	0	8.6	+2
1998/99	2559	-4	8.4	-2
1999/00	2872	+12	10.3	+10
2000/01	3187	+11	9.7	+22
2001/02	3491	+10	10.1	+34
2002/03	3874	+11	10.6	+48

3.5 Council notes the trend in numbers of appointments over time, and in particular the 31 per cent increase in numbers of appointments immediately following the decision in *Re K* in 1994. While the rates of appointment seemed to stabilise in the late 1990s, more recent figures indicate a steady increase in the numbers of appointments to around 10 per cent of all family law applications for legal aid. In terms of overall family law applications there has been a 26 per cent increase from the

⁴⁹ Attorney-General's Department, LASSIE reports: *Separate Representation Applications Approved*, 24 February 2004; and *Separate Representation Applications Refused*, 24 February 2004.

⁵⁰ The 1994/95 figure is used as a benchmark because *Re K* (1994) FLC ¶92-461 was decided in that year.

1994/95 base year (from 28,990 to 36,676), compared with a 48 per cent increase in the numbers of child representative appointments (from 2,608 to 3,874).

3.6 Council is not aware of any research into the relationship between the rising numbers of appointments of child representatives and *Re K*. It may be that a court finds *Re K* persuasive when deciding whether to make an order, but is not determinative of whether an appointment is finally made. Council notes that some legal aid commissions have amended their guidelines to restrict the number of *Re K* grounds on which a grant of aid can be made for the appointment of a child representative. Council is aware, for instance, that the WA Legal Aid Commission only provides funds for child representatives appointed under grounds 1 and 6 of the grounds set out in *Re K*. It appears that, as a consequence, courts in WA often only order such appointments on those grounds.

3.7 Council considers that it would be valuable to research the impact of *Re K*, to determine which, if any, of the 13 factors stated in that case are most used to justify the appointment of child representatives in family law matters. It would also be very helpful to know whether *Re K* is considered to be comprehensive in its description of cases in which child representatives might helpfully be appointed.

3.8 Research should also be directed to finding out whether factors listed in *Re K* are being applied consistently across Australia, and if not, recommendations ought to be made to minimise any inconsistencies.

3.9 The research should also draw conclusions about the value the child representative has added to proceedings and resolution of the dispute, whether or not this is directly related to the original reason for appointment. Such research would be valuable in determining how the existing discretion to appoint is being used.

Recommendation 2

The Attorney-General's Department should commission research into how the discretion to appoint a child representative is exercised, including:

- **the influence of the various grounds set out in *Re K*;**
- **whether or not the *Re K* grounds are applied consistently;**
- **whether alternative grounds influence the discretion to make an appointment;**

and whether or not the appointment of the child representative contributed positively to the outcome of the proceedings.

Need for Statutory Grounds for Appointment?

3.10 The Family Court in *Re K* argued that it would be desirable for statutory guidelines to be provided to guide courts about when it is appropriate to appoint a child representative.⁵¹ In spite of the important changes made by the *Family Law Reform Act*, Council considers that these grounds for appointment remain apposite.

3.11 Council understands there to be good reasons for setting out the grounds of appointment in statute. The main benefit is to achieve greater certainty. However, new and difficult cases may raise issues that were not foreseen by the drafters of legislation, and thus not fit within any of the statutory criteria. It would potentially close the list of categories of cases in which an appointment may be justified, whereas the Family Court in *Re K* intended that they should remain open and non-exhaustive.

3.12 A further argument in favour of legislative prescription, raised by the Attorney-General's Department, is that with the lack of legislative guidance, the courts have interpreted the power to appoint under s 68L inconsistently across Australia since the decision in *Re K*.⁵² The results are said to have been significant increases in the number of child representative appointments made, and commensurate increases in costs borne by legal aid commissions.

3.13 As noted above, Council is not aware of any research which demonstrates a relationship between the guidance provided by *Re K* on the exercise of s 68L and the number of appointments made.

3.14 At present, Council is of the view that the grounds for appointment are not really a matter for prescription. Rather, they are a matter for judicial discretion. It is difficult to anticipate what the special needs of a child are or might be in any given fact situation.⁵³ The court needs the flexibility to be able to decide whether the circumstances of the case justify an appointment.

3.15 Council recommends that the grounds of appointment remain at the discretion of the court. However, the issue should be re-examined in the light of the results of the research recommended by Council in Recommendation 2.

Recommendation 3

The grounds set out in *Re K* not be set out in legislation. This issue should be reviewed subject to the results of the research recommended by Council.

⁵¹ *Re K* (1994) FLC ¶92-461, 81. Note that the Family Law Council's 1996 report does not address this issue directly.

⁵² See K Duggan (Assistant Secretary Family Law Branch, Attorney-General's Department), 'Options to Reform the Law Relating to Representation of Children in Family Law Proceedings', paper presented at the 10th National Family Law Conference, Melbourne 2002. A similar argument was raised in an unpublished paper by S Bourke (former Assistant Secretary Family Law Branch, Attorney-General's Department) entitled 'Does the Law in Relation to Representation of Children Need to be Reformed?'.
⁵³ See the High Court decision in *JLM v Director-General* (2001) FLC ¶93-081, 88,379.

4. Models of Representation

Giving children a voice

4.1 As noted in Chapter 2, the Council considers that one of the key features of the child representative role is to give the child a voice in the proceedings. There is, however, some debate about how this would be best achieved.

4.2 Australia ratified the *United Nations Convention on the Rights of the Child* (the Convention) on 17 December 1990. The preamble to the Convention stresses the importance of the family as the 'fundamental group of society'⁵⁴ and states that the family should be 'afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. Article 3.1 of the Convention provides that in all actions concerning children 'the best interests of the child shall be a primary consideration'.⁵⁵

4.3 Article 12 of the Convention deals specifically with a child's expression of his or her views in judicial and administrative proceedings. The Article states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

4.4 Article 12 is often considered to give children a 'right' to be heard in judicial and administrative proceedings. While the Article contains an obligation to provide a competent child with 'the right to express freely' his or her views, and to have those views given commensurate weight in the proceedings, there is a question as to what this obligation actually means.

4.5 Significantly for Council, it has been noted that:

the right to be heard—like any basic legal right or standard (eg equal protection, due process, reasonableness)—has no single, self-evident meaning and, therefore, its meaningful incorporation into domestic legislation requires that the standard be glossed with some set of requirements.⁵⁶

Council agrees with this conclusion.

⁵⁴ Sub-section 43(b) of the *Family Law Act 1975* (Cth) similarly refers to the need to give the widest possible protection and assistance to the family as 'the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children'.

⁵⁵ For further discussion about the issue of constitutionalisation in family law, see J Dewar, 'Family Law and its Discontents' (2000) 14 *International Journal of Law, Policy and Family* 59, 72.

⁵⁶ A Griffiths and RF Kandel, 'Legislating for the Child's Voice: Perspectives from Comparative Ethnography of Proceedings Involving Children' in M Maclean (ed), *Making Law for Families* (2000) Hart Publishing, 162.

Best interests versus direct representation

4.6 There are two main models for the representation of children, each of which have different strengths and weaknesses. The alternative models are commonly described as ‘best interests representation’ and ‘direct representation’.

4.7 The ‘direct representation’ model is the one most familiar to lawyers and non-lawyers alike. Advocacy under this model is undertaken on the instructions of the client. No distinction is made between the role of the lawyer representing an adult party and the lawyer representing a child. The lawyer acts on the instructions of the child.

4.8 The ‘best interests’ model is one in which the representative assists the court to come to a decision that is in the best interests of the child. The lawyer does not take instructions from the child and, in appropriate cases, advocates for an outcome that is not necessarily in accordance with the child’s wishes.

4.9 Advocates of the direct representation model argue that it is the only model that properly satisfies the right to be heard (as set out in Article 12 of the UN Convention). If a child representative acted on a direct representation model, the child would instruct his or her representative to gather evidence and make submissions in line with what the child wanted. Such a model clearly gives a direct voice for the child in the proceedings.

4.10 The model that has developed for the representation of children under the *Family Law Act* is that of best interests representation.⁵⁷ While a part of the role of the child representative is to ensure the wishes of the child are presented to the court, the child representative must ultimately make submissions to assist the court to make a decision based on what is in the best interests of the child, rather than upon the instructions of the child, or in accordance with the wishes of the child.

4.11 Proponents of the direct representation model argue that the best interests model is patronising and disempowering of the child, creating a buffer, or filter, between what the child says and what the court hears. This, it is said, denies children a direct voice in proceedings that fundamentally affect them.

4.12 The benefits and weaknesses of each model of representation were considered in detail by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) in the 1997 report *Seen and Heard: Priority for Children in the Legal Process*.⁵⁸

4.13 The *Seen and Heard* report noted that the best interests model was well regarded by many of the submissions to the Inquiry. A major advantage noted was the protection afforded by the model for children involved in family law litigation. The major criticism noted in the report was the denial of the right by competent children to instruct their own advocates.

⁵⁷ *Bennett and Bennett* (1991) FLC ¶92-191. See also Family Court of Australia, *Guidelines for child representatives* (2003).

⁵⁸ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: priority for children in the legal process*, (ALRC 84, 1997), Chapter 13.

Many children have the maturity and judgement to direct their lawyer just as many adults have limited maturity and poor judgement, but instruct legal representatives. The fact that a child's view may be editorialised or discounted for no reason other than that the representative disagrees with those views effectively holds children to a higher standard than adults.⁵⁹

4.14 The report noted that many children feel marginalised as a result of a best interest representation.⁶⁰

4.15 Another significant criticism noted in the report was the issue of role confusion, not only for the children, but also for the solicitors acting as the advocates. Part of the role confusion comes from the fact that the lawyer has no instructions and is not bound by the wishes or directions of the child.

4.16 The *Seen and Heard* report discussed the direct representation model as an alternative to best interest representation. The report noted that the strength of the direct representation model lay in the fact that the voice of the child in such a model is more direct and the model avoids role confusion.

4.17 Proponents of this model argue that this model alone enables the legitimate wishes and expectations of children to be fulfilled. Children readily understand that their wishes and instructions will be followed. The role of the lawyer is clear. This is a 'legal' model that imputes to the lawyer a responsibility to act in a way that is consistent with the fiduciary duties a lawyer owes to his or her client arising from the nature of the relationship. Role confusion is thereby avoided for both the lawyer and the child.

4.18 The drawback with the direct representation model is that it presumes that children will give instructions that are capable of being put into effect. This is not always the case. For example, a child may prefer to live with a parent who is unwilling or unable to have him or her. For the child whose instructions are, 'I do not want to choose' or, 'I will tell you, but I do not want you to tell anyone else' or, 'I just do not know', the model presents great difficulties. It does not accommodate these children's desire to participate in the proceedings on their own terms.

4.19 The ALRC and HREOC concluded that no one model is appropriate to all circumstances.

Ultimately the needs of children differ to such an extent that there can be no single model appropriate for all children. Children vary greatly in their capacities, maturity and desire for involvement in litigation concerning themselves and their families. A form of representation suitable for an articulate child at 14 may not be appropriate for a younger or pre-verbal child.⁶¹

Representation of Children in Other Jurisdictions

4.20 While the model of child representation in the care and protection jurisdiction varies between States and Territories, a common feature of this jurisdiction compared

⁵⁹ Ibid, [13.53].

⁶⁰ Ibid, [13.56].

⁶¹ Ibid, [13.80]. Note that the ALRC and HREOC also considered a team approach of a lawyer and social scientist: see Ibid, [13.66]–[13.73].

with jurisdiction under the *Family Law Act* is that the responsibility for adducing information to the court in relation to the best interests of the child is vested in the State or Territory child protection agency whereas, in the proceedings under the *Family Law Act*, the parties or the child representative have this responsibility.

4.21 In care and protection proceedings in New South Wales, South Australia, Victoria, ACT, the Northern Territory, and Western Australia, a child who has the capacity to give instructions is generally represented in a direct representative role, while children without capacity are represented in a best interests role.⁶²

4.22 In Queensland, legislation specifies that the lawyer shall act in the child's best interests.⁶³ The Tasmanian legislation is silent on the role of the representative, although the practice has developed as a best interests representative similar in style to the child representative role in family law proceedings. In all jurisdictions the state is charged with responsibility to act in accordance with the child's best interests.

4.23 Under some State legislation, child representatives in welfare proceedings are required to notify the court whether they are acting on a best interest or direct representation model. The lawyer must make an assessment of the child's capacity to properly provide instructions. There is no statutory guidance about how the decision to adopt one rather than the other model of representation should be made.

4.24 Council understands that as a general proposition, provided the child is willing to express an opinion about the outcome and has a reasonable understanding of the consequences of the proceedings, direct representation will be adopted.

4.25 In the context of care and protection proceedings, the State authorities bring the application and have an obligation to present all evidence relating to the child's protection. They act on a best interest basis. This means that submissions concerning the best interest of the child are made by the child protection authority to the court, thereby freeing up the child representative to act on a direct representation basis.

4.26 The parties involved are generally the State and the parents of the child. Often the proceedings involve an application to remove a child from his or her family or to make the relationship between the child and the parent the subject of supervision or other restrictions. It is appropriate in those circumstances for children to be represented on a direct representation basis, although in some cases children may not wish to express a view even in this situation.

4.27 Children in criminal proceedings are directly represented. In these proceedings, the child has been charged with an offence. The prosecution is brought

⁶² In Western Australia there is in practice no representation for children without capacity. In the Northern Territory there is a low level of representation for any children in care and protection proceedings. There is no legislative basis for the role of the representative in the Northern Territory or Western Australia. However, the Children and Community Services Bill 2003 (WA) currently before Parliament provides for separate representation on an instructions basis if of sufficient maturity, otherwise on a best interests basis. See *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 99; *Children's Protection Act 1993* (SA), s 48(2); *Children and Young Persons Act 1989* (Vic), s 20(9); *Children and Young People Act 1999* (ACT), s 24(4).

⁶³ *Child Protection Act 1999* (Qld), s 107(3).

by the State. The child is usually in a position to know about his or her involvement in events leading to the prosecution. The child can, if sufficiently competent, give instructions to an advocate.⁶⁴

The Position of Children in the Family Law Jurisdiction

4.28 Unlike criminal or care and protection jurisdictions, family law proceedings involving children are proceedings between private parties (generally the parents of a child). Family law litigation relating to children is unlike other private litigation. The child is in a peculiar position. He or she is the subject and focus of the litigation, but generally not a party to the proceedings. Unlike most third party litigation, the child will usually have a significant personal relationship with one or more parties to the litigation and be expected to continue this relationship after the conclusion of the proceedings. He or she may be subject to a range of pressures and influences not experienced in other legal jurisdictions.

4.29 While many children will have a keen interest in these proceedings which affect their lives, others may not. A child may be reluctant to state his or her wishes at all. The child may adopt a particular position out of fear of a parent, in an effort to please a parent, or to avoid hurting or upsetting them. In doing so, a child's perception of the parent's attitude may or may not be accurate.

4.30 If child representatives operated on a direct representation model they would not present evidence which did not support the child's stated wishes. They would not test evidence presented by other parties which accorded with the child's views. Influences on the child to come to a stated view may not be revealed. The basis of the child's stated wishes and how much weight should be placed upon them would not be explored by the child's representative. The benefits which currently flow to the court as a result of testing these issues would be lost.

4.31 The protective role of the best interest model should not be underestimated. In some circumstances a child may have a definite view but not want to make it known to one or more of the parties. It may be a relief to have an advocate who can explore the options and promote a particular outcome, taking responsibility for the submissions, without exposing the child to scrutiny from the parties. If the advocate is acting on a direct representation model it will be clear from where the instructions have come, thereby exposing the child.

4.32 In some cases a child will not want to know anything about the proceedings, will not want to express a view and will simply want a decision to be made to end the dispute. In those circumstances it would be unreasonable for a child to be required to give instructions or to express any preference as to outcome. In such a scenario, a direct representative would have no evidence to present to the court. In comparison, the child representative acting on a best interest model would still have an important

⁶⁴ There is no provision for best interests representation in the criminal jurisdiction. Lawyers with concerns about the capacity of the child to give instructions (or where a child refuses to give instructions) are placed in a difficult position, and are limited to representation of technical legal issues that can be argued on behalf of the child or young person: see L Blackman, *Representing Children and Young People: A Lawyers Practice Guide*, (2002) Victoria Law Foundation, 171.

role in gathering and testing the evidence relevant to the child and trying to bring about a speedy resolution of the matter.

4.33 Provided the wishes of the child and the arguments in support of those wishes are clearly put before the court, the ability to make submissions contrary to the child's wishes is a necessary feature to ensure that the court can, at the end of the day, make a decision in the best interests of the child.

4.34 For instance, in a case where a child has been physically abused or ill-treated but blames him or her self for the abuse and wishes to live with the abuser, evidence of the wishes of the child can be given, but the weight to be given to the wishes may be reduced in the context of the rest of the evidence (evidence which may not reach the court if the child was directly represented). If necessary, both the child and the disappointed parent can blame the child representative for not ultimately advocating that the child's wishes be followed.

Wishes of the Mature Child

4.35 Where a mature child expresses certain wishes and the child representative is able, on the basis of the evidence, to support those wishes as being in the best interests of the child, there is no conflict and no issue about whether the representative is a best interest or direct representative. In such cases it may be difficult to discern any difference in the models as the child representative will present evidence and make submissions consistent with the child's wishes under both models.⁶⁵

4.36 One of the most difficult situations is where the child representative considers that, in the best interests of the child, submissions should be made that conflict with the wishes of a mature child.

4.37 Council considers it appropriate that there be some mechanism within the family law system to facilitate direct representation of competent children in appropriate cases and welcomes the measures provided in the Family Court's *Guidelines for child representatives*. These measures are discussed later in this chapter. However, Council would urge caution that while there is scope for increasing the use of such a procedure there are inherent dangers in terms of opportunities for unscrupulous parties to unfairly influence or pressure the child into requesting a direct interest representative to advocate a particular position.

4.38 Unfortunately, there is no easily accessible research information that tells us much about the children for whom a child representative is appointed, their expectations of the child representative, or their perception on conclusion of proceedings.⁶⁶ There is no data on the breakdown of child representative

⁶⁵ The general obligation on the child representative to produce all relevant evidence may result in the production of some evidence that is inconsistent with the child's wishes, but the child representative's submissions would support those wishes and emphasise the supporting evidence.

⁶⁶ Some research has been done on this topic in the care and protection jurisdiction in NSW: see J Cashmore and K Bussey, 'Perceptions of Children and Lawyers in Care and Protection Proceedings' (1994) 8 *International Journal of Law and the Family* 319. Note research in progress by Professor Parkinson, with Dr J Cashmore and Dr C. Wilson, "Children's Involvement in Decision-Making About

appointments by age of the child, and thus no basis for knowing if issues of conflict over the wishes of mature children and young people are a common concern.

4.39 The lack of relevant information hampers any attempt to review what children need or want from a process that involves them in family law proceedings. Focused research needs to be undertaken by an appropriate body so that a better understanding is developed about the expectations, capacities and experiences of children in family law proceedings.

Recommendation 4

The Australian Institute of Family Studies be commissioned to conduct research into the views of children about their experiences, expectations and competence in family law proceedings and to evaluate children's experiences of child representatives.

The competent child's standing in proceedings

4.40 In general, civil law presumes that a child is a person under a legal disability, and thus is not competent to bring proceedings in his or her own right.⁶⁷ There are very few reported decisions in which a court has had to make a decision about a child's competence to apply to initiate proceedings or to become a party to proceedings.⁶⁸

4.41 Although rare, a child can, under s 65C(b) of the *Family Law Act* commence family law proceedings in their own right or make an application to become a party to proceedings for the making of parenting orders. The *Family Law Rules* assume that a child has a disability and must start, continue, respond to or intervene in a case only by a case guardian.⁶⁹ Similarly, if the proceedings are taken in the Federal Magistrates Court, a litigation guardian may be appointed.⁷⁰

4.42 In *Re K* the Full Court suggested that the inclusion of s 65C(b) in effect rebutted the presumption of legal disability:

It is true that at common law a child cannot instruct counsel or a solicitor except through a next friend or guardian. However, since the enactment of s.63C(1)(b) of the Act in 1987, which enables a child to institute proceedings, the rule that a child may not give instructions should be regarded as having been abrogated by statute, for it seems inconceivable that Parliament intended that a child could commence proceedings but not

Residence and Contact in Family Law Proceedings", funded by a grant from the Australian Research Council.

⁶⁷ See L Blackman, *Representing Children and Young People: A Lawyers Practice Guide*, (2002) Victoria Law Foundation.

⁶⁸ One example is *Pagliariella and Pagliariella* (1993) FLC ¶92-400 per Hannon J. Justice Hannon noted that he made an order under s 63C to join the child as a party to proceedings but did not explain his reasoning.

⁶⁹ *Family Law Rules 2004*, r 6.08. A case guardian, as defined in r 6.09, is an adult with no interest in the case adverse to the interests of the child in question. However, r 6.08(2) states that a case guardian is not necessary if the court is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case.

⁷⁰ *Federal Magistrates Court Rules 2001*, r 11.11.

give instructions to a solicitor or counsel to do so or to conduct the proceedings on his or her behalf.⁷¹

4.43 Here the Full Court gives its imprimatur for competent children to invoke *Family Law Act* jurisdiction without a court first appointing a child representative. Despite the fact that *Re K* was decided ten years ago, there are few examples of cases in which it has been recognised that children have the right and legal ability to commence proceedings on their own behalf. Most of the examples that Council could identify concerned applications by nearly adult children for maintenance after they turn 18 years. Even so the number of cases is small.

4.44 Consistent with the approach taken in *Re K*, the *Family Law Rules 2004* include clear indication that there may be circumstances in which a child may be able to commence, proceed with, or intervene in proceedings without the appointment of a case guardian. While it is presumed that a case guardian should be appointed for a child who is a party to the proceedings, rule 6.08(2) provides that a case guardian is not necessary if the court is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case.

4.45 Council considers that, although it is possible for a child to commence or join proceedings in his or her own right, this option is not currently promoted. The instances in which it occurs are rare but there is anecdotal evidence that it is increasing. Legal Aid Commission report an increase in the number of adolescents seeking their own advice about their parents' family law proceedings.

Assessing the competency of a child

4.46 This raises the question of when the law considers it is appropriate to recognise that a child has the capacity to make decisions in their own best interests, and has the capacity to take responsibility for those decisions.⁷²

4.47 Australian law has recognised that parental rights and responsibilities decrease as children become more mature and able to make decisions (and take responsibility for those decisions) on their own behalf.⁷³ A *Gillick* competent child, for the purposes of family law, is one whose capacities and maturity are such that parental authority over the child is displaced in relation to a particular issue. In other words, a court may find that whilst parental responsibility continues to vest in the parents, the child may make decisions in their own right that are inconsistent with the express wishes of the parents with respect to the child.

4.48 It is also possible that the child is competent to make decisions in relation to certain issues, but not competent enough to make decisions in relation to other issues. For example, a particular child may have sufficient maturity to make a decision in relation to whether or not they attend a particular school, but not mature enough to make a decision in relation to living with a person other than his or her parents.

⁷¹ *Re K* (1994) 17 Fam LR 537, at 550.

⁷² See, for example, the discussion in A Dickey, *Family Law* (2002, 4th ed.) Law Book Company, 334–36.

⁷³ See *Gillick v West Norfolk* (1986) AC 112. The rule in *Gillick* was applied by the High Court in *Marion's Case* (1992) 175 CLR 218, at 237.

4.49 The child's age is not determinative of his or her relative maturity and hence capacity. The maturity and capacity of each child should be considered individually. An important consideration is, however, the ability of the child or young person to understand the consequences of their decision, if it is acted upon.

Facilitating direct representation for competent children

4.50 A balance needs to be struck between the proposals to empower children to represent their own interests in family law proceedings to the extent they are capable of doing so and ensuring that the courts retain their power to make decisions in the best interests of the child.

4.51 It can be argued that ensuring that the child's wishes are placed before the court meets the obligation under Article 12 of the *United Nations Convention on the Rights of the Child* for the child to be heard. Whether or not the child representative makes submissions contrary to the child's wishes, the court has had evidence of the wishes and it is then the role of the court to determine the weight that should be given to those wishes. Even if the child was *Gillick* competent, had been directly represented, and submissions had been made to the court under instruction, the court would still have the crucial role of giving appropriate weight to those submissions and making a decision that was in the best interests of the child.

4.52 Council is of the opinion that there are circumstances in which it is appropriate to provide a *Gillick* competent child with direct representation. This can be facilitated by joining the child as a party to the proceedings and allowing the child to provide instructions to a legal representative (who is not the child representative). It is anticipated that this would be considered in a very small number of cases where:

- the child is considered by the court to be *Gillick* competent;
- the child has a strong view about the outcome of the proceedings;
- the child representative considers that, in the best interests of the child, submissions contradicting those wishes should be made to the court; and
- the child, after being told of the intention of the child representative to make contradicting submissions, seeks to have legal representation in order to make submissions supporting the child's wishes.

4.53 Council anticipates that in circumstances where the court considers it appropriate to grant the child leave to join the proceedings with a direct representative, it would also be appropriate for the child representative to continue his or her role as a best interests representative and make the appropriate submissions to the court.

4.54 The Family Court's *Guidelines for child representatives* include (in 5.1) guidance that, in appropriate circumstances, a child representative should advise a child of the possibility of applying to become a party and giving instructions to a legal representative. Council supports this guideline.

4.55 There is, however, one aspect on which the Council differs in opinion from the *Guidelines*. At present the *Guidelines* anticipate that a child joined as a party to proceedings should provide instructions to a legal representative *through a next*

friend. Council considers that if the court has found a child to be *Gillick* competent, and has exercised its discretion to join the child as a party for the reason of presenting evidence to support their own wishes, there is no need for the court to appoint a next friend. This is consistent with the view of the Family Court in *Re K*, as set out above, that the inclusion of s 65C(b) in effect rebutted the presumption of legal disability.

4.56 Council does not consider that there is any need to make legislative change to facilitate direct representation in this way. However, there is a need to ensure that, if the circumstances do arise, a direct representative is appropriately funded to represent the child.

4.57 Council recognises that, in most cases, funding would need to be provided from legal aid funds, and that this recommendation may therefore have an impact on legal aid expenditures. In recognition of this fact, Council recommends that the number of appointments of direct representatives in family law cases be monitored so as to factor this into Commonwealth decision-making concerning allocation of funds.

Recommendation 5

The Attorney-General's Department monitor the impact of different legal aid approaches relating to funding children's direct representatives in order to assess appropriate legal aid funding.

Overcoming Criticisms of the Existing Child Representative Model

4.58 The *Seen and Heard* report recommended that, to address some of the shortcomings of the current system, standards be developed to assist in the execution of the role of children's representatives as best interests advocates. Specific standards were recommended for situations in which a child wished to participate and others in which a child was not able or not willing to participate in the proceedings.

4.59 The recommendations in relation to standards have been addressed extensively in the *Guidelines for child representatives* issued by the Family Court of Australia in July 2003. The *Guidelines* put beyond doubt that the best interest model is the basis upon which a child's representative must act. The following excerpts from the *Guidelines* highlight how the major criticisms of the best interests model are answered:

- a) Reduction of the role confusion for lawyers. It is clear that lawyers act as lawyers, not social scientists, and on a best interests basis.

The professional relationship provided by the child's representative will be one of the skilful, competent and impartial best interests advocate.

The Child's Representative is to ensure that the views and attitudes brought to bear on the issues before the Court are drawn from and supported by the admissible evidence and not from a personal view or opinion of the case.

The Child's Representative is expected and encouraged to seek peer and professional support and advice when the case raises issues that are beyond his or her expertise. This may involve making applications to the Court for directions in relation to the future conduct of the matter.⁷⁴

...

The Child's Representative should guard against stepping beyond his or her professional role and seek guidance from a counsellor or other professional when necessary.⁷⁵

b) Facilitation of direct representation of children in appropriate circumstances.

Where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the Child's Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court ...⁷⁶

c) Ensuring that the wishes of the child are not just in evidence but that submissions are made in support of those wishes.

The Child's Representative should seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others.

A child who is unwilling to express a wish must not be pressured to do so and must be reassured that it is his or her right not to express a wish even where another member of the sibling group does want to express a wish.

The Child's Representative should ensure that there are opportunities for the child to be advised about significant developments in his or her matter if the child so wishes, and should ensure that the child has the opportunity to express any further wishes or any refinement or change to previously expressed wishes.

The Child's Representative must take into account that the weight to be given to the child's wishes will depend on a number of factors, and is expected to be familiar with caselaw on the subject.

In preparing to make submissions on the evidence as to the weight to be placed on the wishes of the child, the Child's Representative may consult with the Order 30A expert, Child and Family Counsellor or other relevant expert in relation to:

- the content of the child's wishes;
- the contexts in which those wishes both arise and are expressed;
- the willingness of the child to express wishes; and
- any relevant factors associated with the child's capacity to communicate.

The Child's Representative is to ensure that any wishes expressed by the child are fully put before the Court and so far as possible, are in admissible form. This includes wishes that the Child's Representative may consider trivial but the child considers important.

The Child's Representative is to also arrange for evidence to be before the Court as to how the child would feel if the Court did not reach a conclusion which accorded with the child's wishes.⁷⁷

...

⁷⁴ Family Court of Australia, *Guidelines for child representatives* (2003), from section 4.

⁷⁵ *Ibid*, from section 5.2.

⁷⁶ *Ibid*, from section 5.1.

⁷⁷ *Ibid*, from section 5.3.

If the Child's Representative considers that the evidence indicates that the best interests of the child will be promoted by orders which are contrary to the child's wishes, the Child's Representative is to:

- advise the child that he/she intends to make submissions contrary to the child's wishes;
- ensure that the child's wishes are before the Court, together with the arguments which promote the adoption by the Court of the child's wishes;
- make submissions which promote the adoption by the Court of orders which are in accordance with the child's best interests; and
- explain to the child at the conclusion of the proceedings why he/she made a submission that was contrary to the child's wishes (if there has not been an opportunity to do so prior to the conclusion of the proceedings).⁷⁸

d) Confirmation of the obligation on child representatives to meet with the children in all but exceptional circumstances or where there are significant practical limitations.

It is expected that the Child's Representative will meet the child unless there are exceptional circumstances or significant practical limitations. These occasions should be extremely rare. An assessment may be made in consultation with any child and family counsellor involved in the case as whether, where and how to meet the child.⁷⁹

e) Promotion of the effective use of teams where possible.

The Child's Representative and any Child and Family Counsellor involved in a case have joint responsibility to initiate liaison to clarify roles and identify any particular needs of the child.⁸⁰

Consultation between the Child's Representative and any Child and Family Counsellor involved in the case should be ongoing. This includes an external Child and Family Counsellor.⁸¹

The Child's Representative is to seek to develop a caseplan at the earliest opportunity in consultation with any Child and Family Counsellor involved in the case.⁸²

Conclusion

4.60 Council concurs with the view of the ALRC and HREOC in the *Seen and Heard* report that it is not possible to say one model is preferable in all circumstances.⁸³ The best model will depend to a large extent on the particular circumstances of a case. Council acknowledges that some children wish to have a direct voice in the family law proceedings and that this is best achieved by the direct representation model. The advantages of such a model, however, are out-weighted by the disadvantages if it was universally applied.

⁷⁸ Ibid, from section 5.4.

⁷⁹ Ibid, from section 6.2.

⁸⁰ Ibid, from section 6.1.

⁸¹ Ibid, from section 6.3.

⁸² Ibid, from section 6.5.

⁸³ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: priority for children in the legal process*, (ALRC 84, 1997), [13.80].

4.61 Council is of the view that the best interests basis for child representation is appropriate, especially given the legislative requirement for the court to make a decision in the best interests of the child. The role of child representatives acting as best interests advocates has been significantly clarified and enhanced by the *Guidelines for child representatives* issued by the Family Court in July 2003. The *Guidelines* address and rectify some of the major criticisms of the best interests model by ensuring child representatives meet with the children in all but exceptional circumstances and facilitate a competent child obtaining a direct representative advocate in appropriate circumstances.

4.62 There are a few remaining issues surrounding the best interests model that have not been rectified by the *Guidelines*. These are in relation to the confidentiality of the relationship between the child representative and child, and statutory immunity for child representatives. These issues are considered in Chapter 6.

4.63 Despite the clarifying role of the *Guidelines*, Council is of the opinion that the best interests basis for the child representative should be clearly and unambiguously included in the *Family Law Act*.

Recommendation 6

The Family Law Act should be amended to specifically state that child representatives are best interests advocates.

Referring to the Role – what should we call it?

4.64 Throughout this report, Council has referred to the role of the child representative. Council is of the view that the term, 'Child's Representative' creates confusion, particularly for children who may expect that the child's representative will act on the child's instructions. It is noted that Council has never been completely comfortable with the use of this term.⁸⁴

4.65 Changing the name of the child representative to 'Independent Lawyer' is regarded by the Council as being a useful step in helping children and parents understand the neutrality and independence of the child representative.

Recommendation 7

The *Family Law Act 1995 (Cth)* should be amended to change the name from the Child Representative to the Independent Lawyer.

⁸⁴ See Family Law Council, *Representation of Children in Family Law Proceedings* (1989). and Family Law Council, *Involving and Representing Children in Family Law* (1996).

5. Who Should be the Child Representative?

5.1 In Australia there are no legislative requirements as to the qualifications of the child representative. Since the commencement of the *Family Law Act* the role has always been filled by a lawyer. This chapter will consider the issue of whether a legal qualification is required to perform the role of child representative. Three alternative models will be reviewed:

- The replacement of a lawyer by a child and family counsellor.
- The tandem representation model as it operates in the United Kingdom.
- A team-based approach where a lawyer is retained as the child representative but works closely with a child and family counsellor particularly in relation to understanding the child's views on their family situation and any preferred outcomes they may wish to state.⁸⁵

5.2 When referring in this chapter to a 'child and family counsellor', the Council means a qualified social worker or psychologist with specialist experience in working with families who are experiencing separation. Child and family counsellors may be employed by the Family Court or be operating in an approved community-based agency under the Family Relationships Services Program. Many child and family counsellors are also trained mediators. (Court mediators employed by the Family Court are child and family counsellors with mediation training).

5.3 In considering whether a child and family counsellor could perform the child representative role there are a number of issues to consider given that the child representative plays a direct role in court proceedings. One issue is whether the child and family counsellor acting in the role would need to have the assistance of a lawyer to prepare the case, present evidence, perform cross examination and make submissions to the court. Alternatively, specific training could be provided to the child and family counsellor to cover these court-based roles.

5.4 There are a number of other aspects of the role of child representatives for which child and family counsellors, because of their training and experience, are well prepared. Child and family counsellors are particularly well prepared for roles involving communication with children and understanding complex family dynamics involved in disputes. These skills may be used to develop creative solutions to a problem prior to a matter getting to trial.

Functions of the Child Representative

5.5 In considering who should perform the child representative's role, it is difficult to escape a process which involves comparing and contrasting the skills and experience that each profession would bring to the job.

⁸⁵ Family Law Council, *Representation of Children in Family Law Proceedings* (1989). Recommendation 7 stated: 'The protocol should establish the mandatory involvement of social workers in the preparation of the case by the Official Solicitor. A team of a lawyer and a social worker should be set up for each case. Ideally the Official Solicitor should have the social worker on staff but there will be cases where outside expertise will have to be used'.

5.6 The major elements of the role of the child representative, as outlined in *P and P*,⁸⁶ were endorsed by Council in Chapter 2. These are focused on the trial end of proceedings and can be broken up into ten key functions:

- I. Act independently in the best interests of the child*
- II. Indicate to the Court the order the child representative proposes.*
- III. Inform the Court of the child's wishes*
- IV. Collect all relevant evidence including expert evidence*
- V. Where appropriate make an opening address to the Court*
- VI. Engage expert witnesses where appropriate*
- VII. Ask questions of other witnesses which are relevant*
- VIII. Minimise the trauma to the child associated with the proceedings*
- IX. Keep the child informed of progress in the matter*
- X. Institute an appeal where appropriate*

5.7 These elements are considered below in the context of what are the necessary or preferred qualifications and skills required to effectively fulfil the role.

I Act independently in the best interests of the child

5.8 This is a requirement at all times, not just in the context of a trial. If a child representative is appointed early, a child and family counsellor in that role may be more effective in working with the child and the other parties to the litigation in finding creative solutions to the issues in dispute.

5.9 At a trial, the child representative has access to all the material presented and has an opportunity to cross examine witnesses called by other parties, and also to call witnesses of their own that may assist the judicial officer. Legal skills are required to fulfil these duties within the context of court proceedings. There are questions, however, as to the skills and experience of lawyers in interpreting this information and developing an appropriate approach as to what is in the best interests of the child.

5.10 Child and family counsellors who are family report writers are experienced in collecting information and making recommendations about the best interests of the child. In preparing a family report, the report writer will interview the child, relevant family members, and others who have contact with the child such as teachers. The report writer has a clear mandate to present both the expressed views of the child as well as their analysis of the overall family situation.

5.11 The report writer is then expected to make recommendations about the best interests of the child based on the information they have gathered from interviews with the child, the parties and relevant other people. The report writer presents the family report and is available for cross examination. The report writer, however, is often one of many witnesses and may not have seen much of the other evidence presented. If the child and family counsellor was the child representative, they would have a broader perspective of all of the case and be in a better position to make comprehensive recommendations about the best interests of the child.

⁸⁶ *P and P* (1995) FLC ¶92-615, 82,157

II Indicate to the Court the order the child representative proposes

5.12 If this element of the role is seen as the capacity to assess all the material available to the court and consider it in the context of the child's best interests, then on one level the child and family counsellor could be in a good position to do this based on their strong understanding of the needs of the child and the dynamics of family situations.

5.13 However, it could be argued that making submissions of this kind to the court requires legal knowledge and a full appreciation of the legislative framework within which the court operates. There is then a question of whether a sufficient level of training can be provided to enable a child and family mediator to effectively perform the role during court proceedings.

III Inform the Court of the child's wishes

5.14 The court must have regard to the factors set out in s 68F(2) of the *Family Law Act* in determining what is in a child's best interests. A child's wishes are one of these factors.

5.15 For the court to fully understand the child's wishes, the judicial officer needs to have material put to them in a way that sets the words of the child in a context that illustrates the full dimensions of their situation. In particular, the judicial officer needs to have the wishes placed in a 'developmental context' so that they can have an understanding of what level of communication could be expected of a child of a particular age, and what significant developmental factors may be impacting on the child's capacity to clearly understand and articulate their wishes.

5.16 This is a complex area where it is easy to take a child's words at face value and thus miss a range of complex dynamics that may mask significant material about what the child is really experiencing and wanting to communicate.

5.17 It can be argued that in relation to these duties the child and family counsellor has an advantage over the lawyer. The child and family counsellor is trained and experienced in dealing with the dynamics of separated families. They may also be trained and experienced in communicating with, and understanding, the developmental needs of children and young people. Therefore, they would be in a strong position to be able to both communicate effectively with the child, to put the child's wishes in a proper context, and ensure that the judicial officer was presented with the full information required to reflect the child's views in the context of the family situation. Arguably, however, this should be done in any event by the family and child counsellor engaged to present the evidence of the child's wishes to the court in the current context in which the child representative is a lawyer. Under the current model, the lawyer does not personally present the views of the child to the court but rather engages the services of a child expert who interviews the child and presents the evidence to the court.

5.18 Lawyers do not necessarily have the skills to obtain and decipher a child's wishes, or present them in the broader context that would most assist the judicial officer. Appropriate training in child development would enhance these skills.

5.19 At present, child and family counsellors use their skills and experience to obtain this information as family report writers. While family report writers are subject to cross examination, the extent to which the information in the report is explored and addressed at trial depends largely on the lawyers, including the child representative.

IV Collect all relevant evidence including expert evidence

5.20 When engaged as family report writers, child and family counsellors draw on a range of resources in preparing family reports, including seeking information from schools and other people outside the family who may have significant knowledge or contact with the child. This material is presented in the context of a family report together with the report writer's analysis of the material, and will contain inferences drawn from the material, all of which may be subject to cross examination. Objection may be made to such material, however, on the basis that information from third parties presented in a family report is hearsay. To avoid this, the third parties can give direct evidence in the form of affidavits and be subject to cross-examination.

5.21 It is feasible to suggest that child and family counsellors acting as a child representative would be able to gather evidence from a wide range of 'experts' to provide material relevant to the court. Child and family counsellors generally have skills in liaising and networking across health, educational and welfare sectors and are familiar with the overall service maps applying to particular areas.

5.22 Generally however, child and family counsellors within and outside the court would not have skills in legal rules covering the admissibility of evidence. If the child representative were to be a child and family counsellor, the feasibility of providing training in the court-based context for the collection and presentation of evidence is a significant issue.

V Where appropriate make an opening address to the Court

5.23 This issue is about familiarity with court requirements and in particular the laws of evidence. A non-legally trained child and family counsellor would need to ensure, in presenting issues to the court, that they do so with material that will be able to be properly considered.

VI Engage expert witnesses where appropriate

5.24 Material provided by expert witnesses is sometimes used by child representatives during negotiations with clients to assist them to come to a conclusion that has been endorsed by the expert as being in the child's best interests.

5.25 The child and family counsellor child representative would be in a strong position to understand the full implications of reports provided by experts with similar professional backgrounds. In that case the child and family counsellor would enjoy a distinct advantage in being able to use this material as part of negotiation discussions with clients, particularly if they have expertise in family dispute mediation.

5.26 However, the legally qualified child representative would have an advantage in being able to provide greater guidance on how the court may view the expert's report.

VII Ask questions of other witnesses which are relevant

5.27 There are particular legal skills involved in questioning witnesses. Again, there is the question of training and whether questioning witnesses involves easily definable skills that could be taught without attempting to turn the child and family counsellor into a lawyer.

VIII Minimise the trauma to the child associated with the proceedings

5.28 Given the over-arching priority of the child's best interest in family law proceedings, it is vital that a child's involvement in family law processes minimise exposure of the child to additional stress or trauma.

5.29 It is likely that children for whom a child representative is needed will be involved in family situations where there is a high level of ongoing conflict. To minimise exposure to further trauma, it is important that anyone dealing directly with the child, (or the child's key contacts), does so in a way which takes into account the impact of their actions on the child.

5.30 Clearly a child and family counsellor could be expected to have the expertise required to elicit the child's wishes so as to assist the family to resolve its dispute. The child and family counsellor may meet with the rest of the family to get a sense of the context in which the child expressed their wishes. A search for a negotiated settlement in the interests of minimising trauma to the child associated with the proceedings is an approach encouraged by the courts.⁸⁷

5.31 Child and family counsellors trained and experienced in working with children and young people would have an advantage over lawyers in being able to support children through the court process. Their understanding of child development would also assist in appropriately communicating with children. This would assist them in understanding the court process and in dealing with their emotions.

IX Keep the child informed of progress in the matter

5.32 The previous comments on child and family counsellor skills in interviewing and working with children apply equally in the context of keeping the child informed. There may be an issue of the child and family counsellor having sufficient detailed understanding of the court processes to be able to provide the required level of information to the child. However this would be less of a problem for child and family counsellors employed as court mediators who gain an in depth understanding of the court and its operations over time. It may be an issue for community-based child and family counsellors with less direct exposure to the court but could presumably be addressed both by appropriate training and by the experience gained as the result of acting as a child representative over time.

X Institute an appeal where appropriate

5.33 There are legal skills required in the assessment of whether or not there are grounds for an appeal. If the child representative was to be a child and family counsellor, there may be a need to give the child and family counsellor the authority to consult a legal practitioner to receive legal advice on this particular issue.

⁸⁷ See *P and P* (1995) FLC ¶92-636.

Replacement of a Legally Trained Child Representative by a Child and Family Counsellor

5.34 As can be seen above, many elements of the child representative's role presume prior legal training and experience in applying law and legal principle to a range of scenarios. Even so, there are other significant elements of the role for which child and family counsellors are well prepared, highly skilled and well trained.⁸⁸ In these aspects of the role, child and family counsellors may have a distinct advantage over their lawyer colleagues.

5.35 If child and family counsellors are to perform all the functions of the role, then they would require legal training. Some particular required legal skills include the capacity to both present evidence and cross examine witnesses on their evidence. There are other necessary skills, such as a capacity to research the law.

5.36 In order for child and family counsellors to have sufficient legal skills to carry out the role of child representatives they would require extensive training. Current legal aid policy requires that lawyers appointed as child representatives have at least 5 years post admission experience. Such a level of training is likely to be impractical for child and family counsellors, especially if they are likely to act as child representatives infrequently. The question of who would pay for the training would also need to be addressed.

5.37 Any proposal which would enable child and family counsellors to perform the role of child representative also raises the issue of distinguishing the child representative's role from the role of family report writer. Family reports are prepared by child and family counsellors. However, it would be inappropriate that one child and family counsellor perform both the role of witness as the family report writer and that of advocate as the child representative. There are issues of probity and conflict of interest that could not be overcome.

5.38 In particular, family report writers often make recommendations in the family report regarding their view of the best future arrangements for the children. Once these views were known by all parties to the dispute there may be some difficulty in the parent, whose position has not been supported by the family report writer, accepting the objectivity of that person if he or she is also performing the role of a child representative.

5.39 Council has come to the conclusion that it would be expensive and impractical in terms of both time and cost, to pursue a solution in which child and family counsellors are trained as lawyers. Similarly, it is not practical to expect lawyers to have all the skills and training of a child and family counsellor, although any lawyer appointed as a child representative must have undertaken the intensive training course

⁸⁸ See P Murphy and L Pike, *The Columbus Pilot in the Family Court of Western Australia: A Study in Reflective Practice*, AIFS Seminar, 15 April 2004. The Columbus Pilot project conducted in the Family Court of Western Australia during 2001–03 was established to deal with cases that are characterised by violence. The role of the counsellors in assessing risks and needs, developing appropriate interventions and assisting clients, be they the perpetrator or the victim (adult or child) to develop new skills, is central to the concept of the individualised case management approach inherent in Columbus.

developed by National Legal Aid and the Law Council of Australia in conjunction with eminent child and family experts.

5.40 There are other options for managing the role which bring together the necessary skill bases. One option would involve partitioning the role so that the child and family counsellor performs part of the role whilst a lawyer performs those aspects of the role which require legal skill. A model has evolved in the United Kingdom which takes this approach—it is known as ‘tandem representation’.⁸⁹

Tandem Representation

5.41 A model of tandem-representation was adopted in England and Wales under the *Children Act 1989*, pursuant to the *Criminal Justice and Court Services Act 2000*, in relation to child protection proceedings brought by the State.⁹⁰

5.42 Tandem representation has the following features:⁹¹

- A non-lawyer (social worker) guardian is appointed at the start of each proceeding to independently investigate the child’s circumstances, and report to the court with recommendations about what is in the best interests of the child.
- The guardian works ‘in tandem’ with a lawyer. The lawyer is appointed by the guardian from a panel of approved practitioners maintained by the Law Society.
- The lawyer acts on instructions if the child is considered mature enough (‘*Gillick* competent’) to give instructions.⁹²
- If the child’s wishes upon which the lawyer acts conflict with the view formed by the guardian as to the child’s best interests, the lawyer may continue to act but no longer does so in tandem with the guardian within the scope of the child representative’s role. In such a case, the guardian would proceed to appoint a new lawyer to advocate the child’s best interests.

5.43 Tandem representation combines the child representative’s role within one interdisciplinary unit with an additional safety valve to avoid instances of the guardian and lawyer giving a court contradictory advice about the child’s best interests.

⁸⁹ For other instances of a similar approach see for example guardians ad litem in the United States, D Prescott ‘The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion or Referee?’ (2000) 22 *Univ of Arkansas at Little Rock Law Review* 529. For another useful article which summarises the role see : R Stuckey, ‘Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality’ (1996) 64 *Fordham Law Review* 1785.

⁹⁰ Objective 5 of *The Lord Chancellor’s Departments Departmental Report 2001–2002*.

⁹¹ District Judge Nicolas Crichton, ‘The Children Act 1989 – England and Wales’ paper given at the *XVI World Congress of the International Association of Youth and Family Judges and Magistrates*, Melbourne, 29 October 2002.

⁹² In a notice to Children Panel members issued by the Law Society of England and Wales in September 2002 the issue of a child incapable of giving instructions and where no guardian had been appointed was discussed. The notice recommended in those circumstances that members should represent the child ‘in furtherance of the best interests of the child’. See Law Society, *Family Law News*, January 2003.

However, it clearly involves the additional cost associated with the employment of two, or in some cases more, professionals for each matter.

5.44 In Australia, New South Wales provides an example of the model, although there is no requirement regarding the qualifications or training of the guardian ad litem.⁹³ Section 100 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides:

Guardian ad litem—child or young person

- (1) The Children's Court may appoint a guardian ad litem for a child or young person if it is of the opinion that:
 - (a) there are special circumstances that warrant the appointment, and
 - (b) the child or young person will benefit from the appointment.
- (2) Special circumstances that warrant the appointment of a guardian ad litem may include that the child or young person has special needs because of age, disability or illness.
- (3) The functions of a guardian ad litem of a child or young person are:
 - (a) to safeguard and represent the interests of the child or young person, and
 - (b) to instruct the legal representative of the child or young person.
- (4) A legal representative of a child or young person for whom a guardian ad litem has been appointed is to act on the instructions of the guardian ad litem.

5.45 The advantages of the model appear to be clear. It ensures that people with the right skills perform the role and avoids the 'skill void' by ensuring that lawyers and social scientists work together to discharge the role of the child representative. The model also avoids the potentially messy and costly approach of providing extensive supplementary training to social scientists and lawyers for the purpose of enabling them to function individually as self-contained child representatives.

5.46 The main disadvantage is that the model is resource-intensive compared to the model of having a single comprehensively trained child representative. If that is the preferred solution then it begs a further question about the scope of the role. Moreover, if the role evolves, would it mean that the role could only be properly performed by adding additional people (with additional skills) to the mix of people already performing the role? For example, in the future the role may include the capacity to make medical diagnoses. In that event, three people may be needed to perform the role.

5.47 Council's preference is to avoid complicating the role. As the above discussion indicates, there are problems with trying to solve the 'skill mix' issue by significantly increasing the training load of child and family counsellors or of lawyers who currently perform the role. There are also difficulties with an approach which would see child and family counsellors and lawyers performing the role as one unit.

⁹³ *Children's Court News*, no 9 (2003) contains an interesting discussion of the question of appointment of a guardian in the case of *Re Matthias*, a decision of a NSW Children's Court magistrate (Scott Mitchell) on 12 November 2003. It deals also with the question whether a child who is being directly represented, has the right to see reports which will be used as evidence in the case but which may be disturbing for him.

5.48 Council's preferred approach is for lawyers to continue to perform the functions of child representative with one significant difference—they must work as a team with child and family counsellors to discharge the role. This 'team based approach' is outlined below.

Team Based Approach

5.49 The team based approach refers to a model which was discussed at length in the 1996 report to the Chief Justice of the Family Court *Representing the Child's Interests in the Family Court of Australia*. That report promoted the active cooperation between child representatives and any counsellor working with the family.

5.50 The context in which child representatives are now appointed is quite different. When the 1996 report was published, pre-filing counselling at the Family Court Counselling Service (a unit within the Family Court of Australia) was a feature of most children's matters. Court-ordered counselling also generally occurred at the Court Counselling Service. It was reasonably easy, therefore, for child representatives to identify a counsellor working with the family.

5.51 Since the 1996 report there has been a significant decline in the resources of the (now called) Family Court Mediation Service. Pre-filing counselling is rare and, although court-ordered counselling still occurs, it is less readily available within the Family Court than previously. The Federal Magistrates Court has been established in the intervening period and almost exclusively uses community-based organisations to provide court-ordered counselling or mediation.

5.52 The 1996 report recommended that one of the first steps a child representative should take is to inform the Family Court's counselling section of their appointment and make contact with the privileged counsellor involved with the family. The 2003 Guidelines for children's representatives reflects a similar approach. Guideline 6.3 deals with consultation between the child representative and any child and family counsellor involved with the family.

5.53 A better outcome is predicted for the child or children represented as a result of having a child representative and child and family counsellor working in consultation with one another. Both the 1996 report and the 2003 Guidelines envisage that the child and family counsellor would be in a position to provide to the child representative the following information:

- (a) preliminary overview of the dynamics of the separated family and the way this is impacting on the child;
- (b) which other agencies involved with the family;
- (c) recommendations for case management;
- (d) whether the child should be involved in further counselling and/or whether therapy is indicated;
- (e) whether there are any urgent issues; and

(f) details of any child abuse notifications made.⁹⁴

5.54 The team approach may continue right through to a final hearing where a family report is prepared by a Family Court of Australia mediator for use in a hearing. The Family Court of Australia case management system provides for a short report to be prepared initially. The short report, which contains the overall recommendations of the reporter, is used by the parties, including the child representative, as a basis for assisting the parties in their deliberations and hopefully coming to a negotiated settlement.

5.55 At this point, the child representative can work closely with the report writer. The report writer is able to inform the child representative of key information regarding the child's situation and, in particular, information gained from interviews with the child. In this way the two professionals work together to attempt a resolution of the matter that is in the child's best interest.

Sharing information

5.56 One concern about the team based approach is about accountability of information sharing between the child representative and a child and family counsellor who, in some circumstances, will end up being a witness in the proceedings.

5.57 There are obvious advantages to a close working relationship between the child representative and the child and family counsellor:

- the counsellor will be able to assist the children's representative in understanding more fully the family dynamics operating;
- the counsellor will be able to help shape some possible solutions for discussion between the parties and their legal representatives; and
- if the matter is not able to be resolved without judicial intervention, the counsellor may suggest avenues for the child representative to explore in terms of gathering other evidence.

5.58 The concern is that there is a potential for any report written by the counsellor to be influenced to some degree by 'unofficial' discussions with the child representative in which information may be exchanged, even subtly. Similarly, the submissions made by the children's representative to the court may be influenced by information gained other than through the formal report which is the evidence on which the court must rely.

5.59 The *Family Law Rules 2004* (which commenced operation on 29 March 2004) deal with communications between parties and experts. The Rules provide for all parties to be aware of communications between any other party and the experts. Family report writers fall within this category if they are to give expert evidence by way of a family report in children's proceedings. The question is to what extent that same report writer should be involved early on in the proceedings.

⁹⁴ Family Law Council, *Involving and Representing Children in Family Law*, Commonwealth of Australia, 1996, 32; Family Court of Australia, *Guidelines for child representatives* (2003), section 6.3.

5.60 The way the Family Court avoids the ‘contamination’ issue is to have two family and child counsellors involved in any one matter. The first counsellor is involved during the resolution and confidential counselling phase of proceedings (sometimes taking the role of a mediator). The second is involved during the determination and report writing phase of the proceedings.

5.61 Council is of the view that the advantages to be gained from having a close working relationship between the child representative and the child and family counsellor outweighs any concerns about the exchange of unofficial information. Nevertheless, it is important that child representatives are trained and alert to the danger of the exchange of such information. They must ultimately make submissions to the court based on the evidence before the court and not on any extraneous information.

5.62 Child and family counsellors involved in confidential counselling and mediation sessions understand what information must be kept confidential. Outside of this, the child and family counsellor must be able to answer with certainty questions about conversations and exchanges with any other person, including the child representative, about the matter. In this way, the relationship between the child representative and any family and child counsellor involved in the matter will remain transparent and accountable, as well as useful.

5.63 Previous reports on the role of the child representative have recommended that a single individual need not perform it. The Family Court’s *Guidelines for child representatives* issued in 2003 give guidance on the child representative working with child and family counselors both at the privileged mediation stage and during the preparation of a family report.

5.64 An advantage of the team-based approach is that the lawyer has access to a social scientist who can:

- provide expert assistance particularly in relation to understanding the family dynamics,
- put the views of the children within the context of these dynamics, and
- take into account the individual developmental stage of the child.

5.65 Under this approach, the child representative would not be bound by the advice of the family and child counsellor, and would be able to assess his or her evidence in the light of all other evidence and will make submissions on the evidence as a whole.⁹⁵

5.66 It may be that the lawyer would need some further training to ensure their capacity to properly identify the parts of the role where they will need the assistance of a child and family counsellor in a matter. It is unlikely that the cost of providing such training would be very significant compared to the cost of providing

⁹⁵ A more detailed summary of these issues can be found in A Weidmann and M Cunningham, ‘Child Representation: The Team Approach’, *8th Family Law Conference—The Challenge of Change*, Hobart, 24–28 October, 1998.

comprehensive training for both child and family counsellors and lawyers, although Council has not considered the issue of cost in detail.

5.67 It is worth noting however, that a National Training Program for child representatives is jointly run (for lawyers) by National Legal Aid and the Family Law Section of the Law Council of Australia. In that sense, the training needs of lawyers in the role are already addressed to a large extent, and provide a forum for the introduction of any identified additional training needs.

5.68 Two further advantages are immediately obvious:

- a 'team-based approach' is consistent with the Family Court's *Guidelines for child representatives*; and
- implementation of a team-based approach would not require major changes to either the legislative framework or the policies and practices of stakeholders in the family law system.

Conclusion

5.69 Council is firmly of the view that the recommendation it made in its 1989 report was the correct one, namely that a team-based approach involving both child representatives and child and family counsellors should be used in the preparation of cases.⁹⁶ As the discussion above illustrates, Council sees real advantages in the performance of various child representative functions by child and family counsellors given their mix of skills and experience. However, it is unlikely that child and family counsellors could be expected to perform all the functions of a child representative as currently understood.

5.70 Council believes that whilst the role could be performed by child and family counsellors, it would continue to be necessary (and prudent) to instruct a lawyer in cases which involve any significant court work. In that event, the total cost of child representation would need to include the expenses incurred as a result of appointing both a child and family counsellor and a lawyer.

5.71 The approach advocated in Council's 1989 report is for a team-based approach in which lawyers continue to perform the role and who work alongside counsellors with skills appropriate to the particular cases at hand. Council understands that most, if not all, current child representatives are familiar with this approach and would be comfortable with it.

5.72 Council supports the aim of the tandem representation model which is to ensure that appropriately qualified people are involved in promoting and protecting the legal and other needs of the child in family law proceedings. However, it is a resource-intensive model and Council notes that the House of Commons Select

⁹⁶ Family Law Council, *Representation of Children in Family Law Proceedings* (1989). Recommendation 7 stated: 'The protocol should establish the mandatory involvement of social workers in the preparation of the case by the Official Solicitor. A team of a lawyer and a social worker should be set up for each case. Ideally the Official Solicitor should have the social worker on staff but there will be cases where outside expertise will have to be used'.

Committee on the Lord Chancellor's Department has launched an inquiry into the tandem representation program, which will contribute to the continuing debate.⁹⁷

5.73 The Council considers that it is highly desirable for the child representative to work as part of a team. The child and family counsellor would prepare a family report in the matter and/or work with the child representative. This would particularly assist the child representative to understand the needs and expressed views of the child involved.

Recommendation 8

The Commonwealth Attorney General's Department, courts exercising jurisdiction under the Family Law Act 1975, organisations specialising in counselling and mediation in family law matters and Legal Aid Commissions should:

- a) endorse a team based approach to the representation of children, so that the appointed legally trained child representative is supported by a social scientist**
- b) develop a protocol for cooperation between lawyers acting as child representatives and family and child counsellors; and**
- c) provide sufficient funds to allow implementation of the protocol.**

⁹⁷ See M Mullin, 'Comment: Speaking for Children' [2003] *Fam Law* 217.

6. Confidentiality and Immunity

6.1 Council supports the status quo as regards child representatives being lawyers that act in a best interests capacity. However, this mixture has, in the past, led to some confusion or concerns for lawyers trying to fulfil the role. As Council has noted, the *Guidelines for child representatives* issued by the Family Court of Australia in 2003 have clarified many of the seemingly conflicting aspects of the child representative role.

6.2 There are, however, a number of outstanding issues that Council considers need some further clarification and, in some instances, legislative change.

Privilege and Confidentiality

6.3 The Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission noted in the *Seen and Heard* report that doubts had been expressed as to whether client legal privilege applies to the relationship between child representative and child given that the child is not a client and the lawyer is not subject to instruction.⁹⁸ In other words, there were concerns that the relationship between the child representative and the child is not confidential.

6.4 As a result, many child representatives feared that they might be liable to cross-examination on discussions they have had with the child. The concerns also led to a practice developing amongst some child representatives of not meeting with the children they represent or only meeting with the child in the presence of a counsellor. This practice was in fact considered to be best practice in some locations around Australia.

6.5 Meeting with the child is important if a child representative is to properly fulfil his or her role. A meeting (or series of meetings) not only provides the child representative with the opportunity to discover firsthand the wishes (if any) of the child, it also provides strong impressions about the child's maturity, the child's relationship with his or her family and strangers, and the child's reaction to the overall proceedings.⁹⁹ This is not to say that the child representative's decision about what submissions to make to the court should be based only on the meeting with the child—there are other sources of evidence, and Council has already noted in Chapter 5 the importance of working with a qualified child and family counsellor to interpret the evidence as a whole. However, the meeting can provide important insights for the child representative, even where the child is young.

6.6 Also of great importance is the role a meeting plays in communicating to the child the role of the child representative and, in particular, that the child's wishes are being taken seriously and will be presented to the court by the child representative,

⁹⁸ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, (ALRC 84, 1997), [13.96].

⁹⁹ L Blackman, *Representing Children and Young People: A Lawyers Practice Guide* (2002) Victoria Law Foundation, 208.

through a counsellor or other expert who will interview the child in depth. Equally, if the child does not want to take responsibility for his or her wishes, the meeting with the child representative can clarify that the child is not required to make decisions but that the child representative will still play a role in helping to resolve the proceedings in the child's best interests.

6.7 The *Guidelines for child representatives* have now clarified that the Court expects that the child representative will meet with the child unless there are exceptional circumstances or significant practical limitations.¹⁰⁰ The *Guidelines* do, however, note that it is not the role of the child representative to conduct disclosure interviews, become a witness in the proceedings, or conduct therapy or counselling with the child.

6.8 At the same time, the *Guidelines* confirm that there is no guarantee of a confidential relationship between the child representative and the child.¹⁰¹ The following guidance on the relationship between the child representative and the child is scattered throughout the *Guidelines*:

- The child has a right to establish a professional relationship with the child representative.¹⁰²
- The child representative is to ensure that the child is aware that information provided to the child representative may have to be communicated to the Court, the child's parents or other persons or agencies.¹⁰³
- If there is a need to communicate information provided by the child to others, a strategy for this disclosure should be developed with a child and family counsellor and the child.¹⁰⁴
- There may be a need to periodically remind the child during the relationship that confidentiality cannot be guaranteed.¹⁰⁵

6.9 The issue of confidentiality is critical in establishing a professional relationship between the child and the child representative. It is important to the child, who must decide whether they can talk to and 'trust' the child representative, and also to the child representative. As is demonstrated by previous interpretations of the role of the best interests child representative, lawyers may feel uncomfortable operating in a relationship that is not protected by client legal privilege.

6.10 Client legal privilege (also known as legal professional privilege) recognises the public interest in protecting the confidential communications between a lawyer and his or her client.¹⁰⁶ In short, the privilege means that the lawyer cannot be required to provide to the court or any other person information, or documentation containing information, which was communicated or prepared in providing legal

¹⁰⁰ Family Court of Australia, *Guidelines for child representatives* (2003), section 6.2. It is anticipated that such occasions would be very rare.

¹⁰¹ See, eg, *ibid*, section 5.2 on 'Limitations of the Role of the Child's Representative'.

¹⁰² *Ibid*, section 5.

¹⁰³ *Ibid*, section 5.1.

¹⁰⁴ *Ibid*, section 5.1.

¹⁰⁵ *Ibid*, section 6.2.

¹⁰⁶ Although the privilege was originally developed at common law, the application of client legal privilege in Federal courts is now set out in the *Evidence Act 1995* (Cth), Pt 3.10, Div 1.

advice or conducting litigation. The privilege belongs to the client—that is, if the client decides to reveal the confidential information to another person, or otherwise decides there is no need to keep the communication confidential, all protections are removed.

6.11 For a child representative, who is a lawyer acting in a best interests capacity, client legal privilege cannot operate. This is because the child representative has an overriding duty to the court to present all relevant evidence and make submissions in the child's best interests. As is recognised in the *Guidelines for child representatives*, there may be some instances where the child representative is required to communicate (or disclose) information that has been provided by the child to others. While ideally the child should be informed of a decision to disclose, and involved in developing a strategy to disclose the information, the decision to disclose cannot be left to the child. Making that decision is part of the professional responsibility that must be exercised by the child representative.

6.12 Even if it is understood that the child representative must sometimes disclose information against the child's wishes, it is still necessary to consider the nature of the relationship between the child representative and the child and information that is passed between them. If there were considered to be no level of confidentiality in the relationship, the child representative would be susceptible to having documents subpoenaed or being called as a witness by other parties in order to obtain information about the communications between the child and child representative. These concerns are real and, as noted above, have influenced the behaviour of child representatives in the past. While the *Guidelines* anticipate that there is some level of confidentiality that can be maintained between the child representative and the child, there is nothing in the *Family Law Act*, the *Family Law Rules* or the *Guidelines* that would prevent a child representative from being subpoenaed or called as a witness.

6.13 Council considers that there is a need to clarify through legislative change the level of confidentiality that exists in the relationship between the child representative and the child, and provide an appropriate level of protection that balances the need for the child representative to establish a professional relationship with the child while operating in the child's best interests.

6.14 This report already contains recommendations that basic elements of the child representative role, and the fact that child representatives are best interests advocates, need to be specified in the *Family Law Act*.¹⁰⁷ Together with these amendments, Council considers it is necessary to provide that:

- the child representative cannot be required, by any party or the court, to disclose information communicated to the child representative by the child; and
- the child representative may, where the child representative considers it is in the child's best interests, disclose information provided by the child against the child's wishes.

¹⁰⁷ See Recommendation 1 in Chapter 2 and Recommendation 6 in Chapter 4.

6.15 This approach is consistent with that adopted in the current *Guidelines*. Council considers that training of child representatives must include clear guidance on the relationship that exists between the child representative and the child, how the child representative should explain the relationship to the child, the kinds of circumstances that might precipitate a child representative disclosing information against the wishes of the child, and the steps the child representative should take where such circumstances arise.

Recommendation 9

The *Family Law Act* should be amended to state that the child representative cannot be required, by any party or the court, to disclose information communicated to the child representative by the child. The *Family Law Act* should also include a provision stating that the child representative may, where the child representative considers it is in the child's best interests, disclose to the court or relevant authority, information provided by the child against the child's wishes.

Ownership of the File

6.16 Another issue of concern that has come to Council's attention is the ownership of the file created by the child representative in fulfilling his or her duties during proceedings. It has been suggested that some parents or children may attempt to subpoena the file in order to obtain information known to the child representative.

6.17 Council considers that there would not be a great deal of additional information held on this file that is not otherwise available through the court processes. The exception would be any notes created by the child representative, which may include information communicated to the child representative by the child.

6.18 Council believes that a file created by a child representative during proceedings is the property of the child representative. The disclosure of any information contained within the file is therefore a decision to be made by the child representative, exercising his or her professional judgment.

6.19 It is possible that the file may be subpoenaed. While the contents of the file are not covered by any client legal privilege, Council's recommendation (above) that the child representative should not be required, by any party or the court, to disclose information communicated to the child representative by the child would provide protection for any such information contained within the file. Council considers that this protection is sufficient, and does not make any further recommendations in relation to the child representative's file.

Statutory Immunity from Civil Action

6.20 Council has been made aware that a number of child representatives have been the subject of formal complaints to professional bodies on the basis that those representatives made submissions to the Family Court for orders that did not accord

with the wishes of the child. In some cases child representatives have been subjected to civil suits.¹⁰⁸ Thus far, Council is not aware of any successful suits. However, Council has concerns that child representatives may be subjected to vexatious litigation as a result of making submissions that, while perhaps inconsistent with the views of parties or the children involved in the proceedings, are a proper fulfilment of the independent role of the child representative.

6.21 Section 19M of the *Family Law Act* provides that a family and child mediator or arbitrator, in performing the functions of a family and child mediator or arbitrator, has the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge. It has been suggested that the same protection and immunity should be afforded to child representatives.

6.22 Judicial immunity is a common law principle that protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity.¹⁰⁹ Judges are protected from actions for defamation, negligence, deceit or other tortious conduct arising from their judicial words and actions. The principle has been said to be essential to the independence of the judiciary.¹¹⁰ Another purpose of the principle is to encourage finality of actions.

6.23 In the interests of the administration of justice, the concept of judicial immunity has been extended by the common law to cover other participants in the adversarial system, including jurors, witnesses and advocates in relation to courtroom work.¹¹¹

6.24 The same public policy arguments that support judicial immunity—ie, to protect the independence of the officer and to promote finality of actions—apply to considerations of application of immunity to child representatives.

6.25 As has been discussed throughout this report, child representatives play an important role in assisting the court to reach a decision in the best interests of the child. In order to properly fulfil this role, the child representative must be able to operate independently. There is no duty to a 'client', only a duty to the court. The child representative should not be subjected to a fear of further litigation that could be initiated by the parties because the child representative's actions or submissions are not consistent with the wishes of the parties or of the child.

6.26 If a child representative acts as an advocate within the courtroom, the immunity for counsel would apply. However, it is not necessarily clear where the counsel's immunity stops. The protection will apply to work that is intimately connected with the conduct of the case in court to the extent that it can be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to

¹⁰⁸ Although not involving a child representative, see, eg, *Soames v State of New South Wales* [2001] NSWSC 1043 in which the applicant, who had been involved in numerous family law proceedings, sued the state for defamatory statements made by officers of the NSW Department of Youth and Community Services.

¹⁰⁹ *Re East: ex parte Nguyen* (1998) 196 CLR 354.

¹¹⁰ *Yeldham v Rajski* (1989) 18 NSWLR 48 per Hope A-JA.

¹¹¹ See *Giannarelli v Wraith* (1988) 165 CLR 543 for a full consideration of the reasons for the application of the immunity to counsel.

that hearing.¹¹² In many cases child representatives engage counsel to undertake specific courtroom work, so that the counsel immunity would not apply. In addition, child representatives can be involved in pre-trial arrangements, including negotiations. The *Guidelines for child representatives* encourage the child representative to act as the ‘honest broker’ on behalf of the child in any negotiations with the other parties and their legal representatives.

6.27 Council considers there is significant value in ensuring that child representatives are protected from civil liability for all actions undertaken by the child representative when acting in his or her capacity as a child representative. This is best achieved through an unambiguous statement in the *Family Law Act*, similar to section 19M in relation to family and child mediators and arbitrators.

6.28 The application of immunity does not protect child representatives from complaints about their conduct being made to professional bodies. This professional complaints avenue remains an important aspect of the accountability mechanism for child representatives, and provides a balance against the granting of immunity from civil suit.

Recommendation 10

The *Family Law Act* should be amended to provide child representatives with a statutory immunity similar to that provided for family and child mediators and arbitrators by section 19M of the *Family Law Act*.

¹¹² *Rees v Sinclair* [1974] NZLR 180 at 187 per McCarthy P as cited in *Giannarelli v Wraith* (1988) 165 CLR 543 at 560.

Glossary

Some of the terms used in this report are explained below:

Amicus curiae is a friend of the court who may be given leave to appear before a court to make submissions on questions of fact and law. The amicus requires leave to appear. The parties to a proceeding can seek to prevent this by objecting to leave being granted.

Best interests of the child when used in this report, refers to the matters set out in section 68(F)(2) of the *Family Law Act*.

Best interests representation when used in this report, means a relationship between a child and their representative that requires that action be taken based on the representative's assessment of what is in the child's best interests, whether or not this is inconsistent with the child's expressed wishes. Compare with **Direct representation**.

Child in this report means a person under the age of 18 years.

Child and family counsellor means a qualified social worker or psychiatrist with specialist experience in working with families who are experiencing separation.

Child representative has the role of assisting the court in its determination of what orders to make in the best interests of the child. The child representative is appointed by the court. The term 'child representative' was formally inserted in the *Family Law Act 1975* by the *Family Law Amendment Act 2003*.

Direct representation when used in this report, means a relationship between a child and their representative that requires action to be taken only on the instructions of the child. Compare with **Best interests representation**.

Family and child counsellor has the meaning given in the *Family Law Act* in section 4:

- (a) a court counsellor; or
- (b) a person authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation; or
- (c) a person authorised under the regulations to offer family and child counselling.

Family Court means the Family Court of Australia and the Family Court of Western Australia.

Federal Magistrates Court –also exercises jurisdiction under the Act.

Guardian ad litem is the title given to a person appointed to defend an action or other proceeding on behalf of a child on the basis that the child is a person within a

class of persons assumed to be under a legal disability and thus incompetent to instruct a lawyer or to manage the conduct of a proceeding themselves.¹¹³

Next friend is the title used to describe the person in whose name an action is brought on behalf of a child. Usually the next friend is a relative of the child. The Family Law Rules 2004 define a *case guardian* as ‘a person appointed by the court under rule 6.10 to manage and conduct a case for a child or a person with a disability, and includes a next friend, guardian ad litem, tutor or litigation guardian.’

Parent whenever used in this report, includes a guardian or other person or persons responsible for the care of the child.

Separate representative/separate legal representative ‘Separate representative’ was the formal title given to the lawyer who represented a child in family law proceedings under the *Family Law Act* prior to commencement of the *Family Law Amendment Act 2003*. See now **Child representative**.

¹¹³ See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 100.

Attachment A

**Recommendations from the Family Law Council's 1996 Report:
*Involving and Representing Children in Family Law***

Recommendation 1- Dispute resolution options (para 2.13)

That the government arrange for a study to be undertaken into the potential for increasing the range and effectiveness of dispute resolution options for parties and children available through the court prior to the matter proceeding to judicial determination.

Recommendation 2- Trial management (para 2.14)

That the court arrange for a study of trial management of those matters which require judicial determination. That this study be funded by government.

Recommendation 3- Counselling of children (para 4.07)

The *Family Law Act 1975* should be amended to provide that the Family Court may order that a child receive counselling, attend information sessions or be provided with other such assistance where, in the opinion of the court, the child would benefit from such counselling, information or assistance.

Recommendation 4- Involving children (para 4.31)

That the Family Court be asked to develop a policy for public dissemination on the involvement of children in the processes of the court. The policy should cover:

- counselling, mediation and related services
- the role of professionals, including separate legal representatives
- the role of those involved in case and trial management
- the complexity and possible risks to children, and
- information for children,

and should be aimed at outlining the opportunities for children to be involved, directly or indirectly, wherever possible, in those processes at various stages.

Recommendation 5- Information sessions for children (para 4.32)

That the Family Court further extend the availability of information sessions for children.

Recommendation 6- National protocols (para 5.29)

The relevant Commonwealth/State Ministerial Council should be asked to develop a national approach on protocols which will result in satisfactory information exchange,

timely referrals and responses, case conferences, comprehensive case management and other desirable improvements. For this purpose supporting legislation at the State level may need to be put into place.

Recommendation 7- Court counsellors memorandum (para 5.43)

To ensure that the number of interventions in the child's life is kept to a minimum, the Court Counsellor's Memorandum issued at the conclusion of privileged counselling should include, in addition to the recommendation as to whether or not a child's representative is appointed, the following:

- (a) whether the court will need to appoint a counsellor or other person to offer clinical interventions or professional advice to the child or the family;
- (b) whether relevant reports are available from someone outside the court system and how they can be obtained;
- (c) what other professionals, agencies and persons are already working with the child;
- (d) whether any of those professionals would be prepared to: (i) maintain liaison with the Court with a view to ensuring that the services already being provided to the child are not disrupted by the legal process; (ii) to act as a contact point for any separate legal representative appointed to the case by the Court; and (iii) where appropriate, assist the separate legal representative in the case and to help explain the court processes to the child;
- (e) whether the child's interests are being adequately addressed by the parties; and
- (f) whether or not a child should be assessed further.

Recommendation 8- Assisting the child (para 5.44)

On receipt of the counsellor's memorandum, and preferably no later than the first hearing date, the Court should determine:

- (a) whether health, welfare or other persons should be appointed to assist the child to ensure that his/her best interests are protected while the matter is before the court; and
- (b) whether or not the appointment of a separate legal representative should be ordered.

When making a decision in relation to (a) above the court should have regard to:

- (i) the need to ensure that the best interests of the child (in the broadest possible application of the term) are not adversely affected by the legal processes;
- (ii) the need to ensure that the child's best interests (in the broadest possible application of the term) are adequately protected during the legal processes;

When making a decision in relation to (b) above the court should have regard to:

- (i) the capacity and willingness of the parents to represent adequately the child's interests; and

(ii) whether the child is able to provide evidence on his or her own behalf, and if so in what manner.

Recommendation 9- Funding the training program (para 7.18)

That the Commonwealth should provide funding to assist those who are developing the training program for separate legal representatives.

Recommendation 10- Management responsibilities (para 7.25)

There is a need to clarify who is responsible for the management and performance of the separate representative. To this end, National Legal Aid, the Attorney-General's Department, the Family Court and the Law Council of Australia should consider the issue and particularly consider what the responsibilities of the Legal Aid Commissions are in relation to the quality and management of separate representatives.

Section 65 of the *Family Law Act* and Order 23 Rule 4 of the Family Court Rules should be amended to clarify the role of the Legal Aid Commissions.

Recommendation 11- Funding separate representation (para 7.51)

The Government should ensure that adequate funding is available to the Legal Aid Commissions for the provision of separate representation.

A specific, dedicated fund should be provided for the purpose of separate representation in each of the Legal Aid Commissions. The separate representation fund should be reviewed annually and existing legal aid funds should not be depleted to pay for separate representation.

Recommendation 12- Consistent approach (para 7.52)

The Family Court examine the disparate application of the decision in *Re K* and other relevant cases and find some way of ensuring that a consistent approach is taken in all registries of the Court in relation to the exercise of the discretion to appoint separate representatives.

Recommendation 13- Legal Aid Commission's role (para 7.53)

The Legal Aid Commissions should remain responsible for funding and arranging the appointment of separate legal representation for children.

Recommendation 14- Recovery of costs from parents (para 7.65)

A scheme similar to that operating in New Zealand should be introduced under which the Court has a discretion to issue an order for the recovery of costs of separate representation from the parties where they are able to meet those costs. However, there should be no means test on children in relation to the provision of separate representation to them.

Relevant provisions of the Family Law Act 1975

SECTION 68L Court orders for separate representation

(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the court that the child ought to be separately represented, the court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure that separate representation.

(2A) However, if the proceedings arise under regulations made for the purposes of section 111B, the court may order that the child be separately represented only if the court considers there are exceptional circumstances that justify doing so, and must specify those circumstances in making the order.

Note: Section 111B is about the Convention on the Civil Aspects of International Child Abduction.

(3) A court may make an order for separate representation:

- (a) on its own initiative; or
- (b) on the application of:
 - (i) the child; or
 - (ii) an organisation concerned with the welfare of children; or
 - (iii) any other person.

SECTION 4 Interpretation (excerpts)

child of a marriage includes a child who is, under subsection 60F(1) or (2), a child of a marriage, but does not include a child who has, under subsection 60F(3), ceased to be a child of a marriage.

child representative means a person who represents a child in proceedings under an appointment made under a court order under subsection 68L(2).

family and child counselling means any of the following kinds of counselling:

- (a) marriage counselling;
- (b) child counselling;
- (c) counselling about any matter that arises out of proceedings under this Act and that involves:
 - (i) a parent or adoptive parent of a child; or
 - (ii) a child; or
 - (iii) a party to a marriage.

family and child counsellor means:

- (a) a court counsellor; or

- (b) a person authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation; or
- (c) a person authorised under the regulations to offer family and child counselling.

family and child mediation means mediation, conducted in accordance with the regulations, of any dispute that could be the subject of proceedings (other than prescribed proceedings) under this Act and that involves:

- (a) a parent or adoptive parent of a child; or
- (b) a child; or
- (c) a party to a marriage.

family and child mediator means:

- (a) a person employed or engaged by the Family Court or a Family Court of a State to provide family and child mediation services; or
- (b) a person authorised by an approved mediation organisation to offer family and child mediation on behalf of the organisation; or
- (c) a person, other than a person mentioned in paragraph (a) or (b), who offers family and child mediation.

parenting order has the meaning given by subsection 64B(1).

SECTION 19M Protection of mediators and arbitrators

A family and child mediator or an arbitrator has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.

SECTION 65C Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

- (a) either or both of the child's parents; or
- (b) the child; or
- (ba) a grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child.

SECTION 65D Court's power to make parenting order

(1) In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper.

Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of a court to make a parenting order.

(2) Without limiting the generality of subsection (1) and subject to this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

(3) If the application for the parenting order was made as a result of the adjournment under paragraph 70NG(1)(c) of proceedings under Subdivision B of Division 13A of Part VII:

- (a) the court must hear and determine the application as soon as practicable; and
- (b) if the court makes a parenting order on the application, the court may, if it thinks it is appropriate to do so, dismiss the proceedings under that Subdivision.

Note: The applicant may apply to the Family Court or to the Federal Magistrates Court for the application for the parenting order or for the proceedings under Subdivision B of Division 13A of Part VII, or both, to be transferred to the Federal Magistrates Court or to the Family Court, as the case requires (see section 33B of this Act and section 39 of the *Federal Magistrates Act 1999*).

SECTION 65E Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Division 10 deals with how a court determines a child's best interests.

SECTION 65F General requirements for counselling before parenting order made

(1) In proceedings for a parenting order in relation to a child, the court may order the parties to the proceedings to attend a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate.

(2) Subject to subsection (3), a court must not make a parenting order in relation to a child unless:

- (a) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to which the proceedings relate; or
- (b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
- (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

(3) Subsection (2) does not apply to the making of a parenting order if:

- (a) it is made with the consent of all the parties to the proceedings; or
- (b) it is an order until further order.

SECTION 65G Special conditions for making residence order or specific issues order by consent in favour of non-parent

(1) This section applies if:

- (a) a court proposes to make:
 - (i) a residence order; or

- (ii) a specific issues order under which a person will be responsible for a child's long-term or day-to-day care, welfare and development; and
 - (b) the court proposes to make that order:
 - (i) otherwise than in favour of a parent, or of persons who include a parent, of the child concerned; and
 - (ii) with the consent of all the parties to the proceedings.
- (2) The court must not make the proposed order unless:
- (a) these conditions are satisfied:
 - (i) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to be determined by the proposed order; and
 - (ii) the court has considered a report prepared by the counsellor or officer about that matter; or
 - (b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.

SECTION 65H Children who are 18 or over or who have married or entered de facto relationships

- (1) A parenting order must not be made in relation to a child who:
- (a) is 18 or over; or
 - (b) is or has been married; or
 - (c) is in a de facto relationship.
- (2) A parenting order in relation to a child stops being in force if the child turns 18, marries or enters into a de facto relationship.
- (3) A court having jurisdiction under this Part may make a declaration to the effect that the child is in, or has entered into, a de facto relationship.
- (4) A declaration under subsection (3) has effect for the purposes of this Act but does not have effect for any other purpose (including, for example, other laws of the Commonwealth or laws of the States and Territories).

SECTION 65LA Court may order attendance at a post-separation parenting program

- (1) In proceedings for a parenting order, the court may also make an order in respect of any party to the proceedings as follows:
- (a) directing the party or each party to attend before a provider so that the provider can make an initial assessment as to the suitability of the party concerned to attend a program;
 - (b) if a party so attending before a provider is assessed by the provider to be suitable to attend a program or a part of a program and the provider nominates a particular program for the party to attend—directing the party to attend that program or that part of that program.

(2) In deciding whether to make a particular order under subsection (1), a court must regard the best interests of the child as the paramount consideration.

Note: Division 10 deals with how a court determines a child's best interests.

(3) In this section:

post-separation parenting program or *program* means a program that:

- (a) is designed (including by providing counselling services or by teaching techniques to resolve disputes) to help people to resolve problems that adversely affect the carrying out of their parenting responsibilities; and
- (b) is provided by a provider; and
- (c) consists of lectures, discussions (including group discussions) or other activities.

post-separation parenting program provider or *provider* means a provider of a program that is included in a list of providers compiled by the Attorney-General.

SECTION 65M General obligations created by residence order

(1) This section applies if a residence order is in force in relation to a child.

(2) A person must not, contrary to the order:

- (a) remove the child from the care of a person; or
- (b) refuse or fail to deliver or return the child to a person; or
- (c) interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.

SECTION 65N General obligations created by contact order

(1) This section applies if a contact order is in force in relation to a child.

(2) A person must not:

- (a) hinder or prevent a person and the child from having contact in accordance with the order; or
- (b) interfere with the contact that a person and the child are supposed to have with each other under the order.

SECTION 65P General obligations created by specific issues orders that confer responsibility for a child's care, welfare and development

(1) This section applies if a specific issues order:

- (a) is in force in relation to a child; and
- (b) confers responsibility on a person (the *carer*) for the child's long-term or day-to-day care, welfare and development.

(2) A person must not hinder the carer in, or prevent the carer from, discharging that responsibility.

SECTION 68F How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

Aboriginal peoples means the peoples of the Aboriginal race of Australia.

Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands.

Guidelines for child representatives

Practice directions and guidelines

1. The Purpose of these Guidelines

This document is intended to provide guidance to the Child's Representative in fulfilling his/her role.

The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the Family Court, with information about the Court's general expectations of Child's Representatives. It also sets out these expectations as they relate to children in circumstances of family violence, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Straight Islander children, and where applications arise for the authorization of special medical procedures and other orders relating to the welfare of children.

This is a public document that is made available by the Court. In addition, the Guidelines will be used in the training of Child's Representatives.

2. Introduction

The role of the Child's Representative is unique. The lawyer appointed to represent and promote the best interests of a child in family law proceedings has special responsibilities.

Decisions in particular cases as to how the Child's Representative progresses the case and how he/she involves the child in the case are ultimately in the Child's Representative's discretion.

The Child's Representative is expected to use his/her professional judgment and skill, subject to any directions or orders of the Court. The availability of funding is a practical constraint.

The way in which the Child Representative acts may not always meet with the approval of the parties or the child, but this does not mean that the Child's Representative has failed in his/her professional responsibilities.

A glossary of terms used in the guidelines appears at the end of this document to assist readers in understanding them.

3. Statement of Principles

The appointment of a Child's Representative is one means of giving effect in family law proceedings to the United Nations Convention on the Rights of the Child which states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Article 3)

Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (Article 12.1)

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body consistent with the procedural rules of national law. (Article 12.2)

4. The role of the Child's Representative

The best interests of the child will ordinarily be served by the Child's Representative enabling the child to be involved in decision-making about the proceedings. However, this does not mean that the child is the decision maker. Among the factors that indicate the appropriate degree of involvement in an individual case are:

the extent that the child wishes to be involved; and

the extent that is appropriate for the child having regard to the child's age , developmental level, cognitive abilities, emotional state and the child's wishes are.

These factors may change over the course of the Child's Representative's appointment.

The Child's Representative is to act impartially and in a manner which is unfettered by considerations other than the best interests of the child.

The Child's Representative must be truly independent of the Court and the parties to the proceedings.

The professional relationship provided by the Child's Representative will be one of a skilful, competent and impartial best interests advocate. It is the right of the child to establish a professional relationship with his or her Child's Representative.

The Child's Representative should seek to work together with any Child and Family Counsellor or external expert involved in the case to promote the best interests of the child.

The Child's Representative should assist the parties to reach a resolution, whether by negotiation or judicial determination, that is in the child's best interests.

The Child's Representative should bring to the attention of the Court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

The Child's Representative is to promote the timely resolution of the proceedings that is consistent with the best interests of the child.

The Child's Representative does not take instructions from the child but is required to ensure the Court is fully informed of the child's wishes, in an admissible form where possible.

The Child's Representative is to ensure that the views and attitudes brought to bear on the issues before the Court are drawn from and supported by the admissible evidence and not from a personal view or opinion of the case.

The Child's Representative is expected and encouraged to seek peer and professional support and advice where the case raises issues that are beyond his or her expertise. This may involve making applications to the Court for directions in relation to the future conduct of the matter.

5. Relationship with the Child

The child has a right to establish a professional relationship with the Child's Representative.

In considering any wishes expressed by the child and the steps to be taken in a matter the Child's Representative is to be aware:

- that each child will have different emotional, cognitive and intellectual developmental levels, family structures, family dynamics, sibling relationships, religious and cultural backgrounds; and
- that children are vulnerable to external pressures when involved in residence, specific issues and contact disputation.

5.1 Information which should be explained to the child

When the Child's Representative meets the child, s/he should explain to the extent that is appropriate for the child:

- the role of the Child's Representative including the limitations of the role;
- the Court process (including any anticipated interlocutory stages); and
- the other agencies that may be involved and the reasons for their involvement.

The Child's Representative is to ensure that the child is aware that information provided by the child to the Child's Representative may have to be communicated to the Court, the child's parents or other persons or agencies. A strategy should be developed in consultation with any Child and Family Counsellor involved in the case and with the child as to the manner in which

this is done. The aim is to minimise the potential for any adverse reaction towards the child.

Despite the inability to guarantee the child a confidential relationship, the Child's Representative should, however, strive to establish a relationship of trust and respect. This is assisted by explaining the role of the Child's Representative, including:

- how the child can have a say and make his/her wishes and views known during the process;
- that where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the Child's Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court;
- the involvement of any report writer, the nature and purpose of the report, the use to which the report will be put and that all parties will see the report; and
- how the Child's Representative can be contacted by the child.

5.2 Limitations of the Role of the Child's Representative

The Child's Representative should guard against stepping beyond his or her professional role and should seek guidance from a counsellor or other professional when necessary.

The Child's Representative cannot guarantee the child a confidential relationship. In addition to explaining this limitation at the commencement of the relationship, it may be necessary to periodically remind the child.

It is not the role of the Child's Representative to:-

- conduct disclosure interviews;
- become a witness in the proceedings; or
- conduct therapy or counselling with the child.

The Child's Representative should be alert and sensitive to the risk of a child becoming over dependent upon him or her and should consider seeking peer or professional advice in responding to such a situation.

The Child's Representative should prepare the child for the end of the professional relationship before the end of the proceedings. They should discuss the fact that the Child's Representative's role will soon be over, and determine what contact, if any, they will continue to have.

5.3 Children's Wishes

The Child's Representative should seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others.

A child who is unwilling to express a wish must not be pressured to do so and must be reassured that it is his or her right not to express a wish even where another member of the sibling group does want to express a wish.

The Child's Representative should ensure that there are opportunities for the child to be advised about significant developments in his or her matter if the child so wishes, and should ensure that the child has the opportunity to express any further wishes or any refinement or change to previously expressed wishes.

The Child's Representative must take into account that the weight to be given to the child's wishes will depend on a number of factors, and is expected to be familiar with caselaw on the subject.

In preparing to make submissions on the evidence as to the weight to be placed on the wishes of the child, the Child's Representative may consult with the Order 30A expert, Child and Family Counsellor or other relevant expert in relation to:

- the content of the child's wishes;
- the contexts in which those wishes both arise and are expressed;
- the willingness of the child to express wishes; and
- any relevant factors associated with the child's capacity to communicate.

The Child's Representative is to ensure that any wishes expressed by the child are fully put before the Court and so far as possible, are in admissible form. This includes wishes that the Child's Representative may consider trivial but the child considers important.

The Child's Representative is to also arrange for evidence to be before the Court as to how the child would feel if the Court did not reach a conclusion which accorded with the child's wishes.

5.4 Making submissions contrary to the Child's wishes

If the Child's Representative considers that the evidence indicates that the best interests of the child will be promoted by orders which are contrary to the child's wishes, the Child's Representative is to:

- advise the child that he/she intends to make submissions contrary to the child's wishes;
- ensure that the child's wishes are before the Court, together with the arguments which promote the adoption by the Court of the child's wishes;
- make submissions which promote the adoption by the Court of orders which are in accordance with the child's best interests;
- provide clear and cogent submissions as to why the child's wishes do not promote the child's best interests; and
- explain to the child at the conclusion of the proceedings why he/she made a submission that was contrary to the child's wishes (if there has not been an opportunity to do so prior to the conclusion of the proceedings).

6. General procedures to be followed when a Child's Representative has been appointed

6.1 Who should be advised?

The Child's Representative must file and serve an Address for Service to advise the Court and the parties of his/her appointment.

The Child's Representative is to advise all necessary agencies, for example the Family Court Mediation Section and the State Welfare Authority, of his/her appointment.

The Child's Representative is to make contact with the State Welfare Authority and seek information about:

- the extent of any child protection involvement with the child or family, in particular, any abuse or neglect notifications and investigations; and
- if there has been any such involvement, whether the Authority intends to become involved in the family law proceedings or is considering the initiation of other legal proceedings.

Where the Child's Representative considers it is necessary to advise other individuals and organisations such as, the child's school or therapists, of the appointment, the Child's Representative shall seek (if appropriate to the age and degree of understanding of the child) and take into account any views of the child.

The Child's Representative is to advise the parties of his/her role in the presence of the parties' legal representatives.

The Child's Representative and any Child and Family Counsellor involved in the case have joint responsibility to initiate liaison to clarify roles and to identify any particular needs of the child.

6.2 Meeting the Child

It is expected that the Child's Representative will meet the child unless there are exceptional circumstances or significant practical limitations. These occasions should be extremely rare. An assessment may be made in consultation with any Child and Family Counsellor involved in the case as to whether, where and how to meet the child.

6.3 Consultation between the Child's Representative, Child and Family Counsellor

After a Case Assessment Conference, or any resolution event conducted under privilege, the Child and Family Counsellor may be in a position to provide information to the Child's Representative of the following:

- a preliminary overview of the dynamics of the separated family and the way this is impacting on the child;
- other agencies involved with the family;
- recommendations for case management;
- whether the child should be involved in further counselling and/or whether therapy is indicated;
- whether there are any urgent issues; and
- details of any child abuse notifications made.

Consultation between the Child's Representative and any Child and Family Counsellor involved in the case should be ongoing. This includes an external Child and Family Counsellor. The Child's Representative should not seek a detailed account of what took place during privileged counselling.

6.4 Relationship with the Parties and their Legal Representatives

A Child's Representative is to remain independent, objective and focused upon promoting the child's best interests in all dealings throughout the proceedings.

The parties and their legal representatives should be encouraged to be non-adversarial where possible and to maintain a focus on the child's best interests. The Child's Representative should promote this approach whenever appropriate.

The Child's Representative should as soon as practicable inform the parties of their role and use their best endeavours to ensure the parties understand the Child's Representative's role within the proceedings.

Where parties are legally represented, communication between the Child's Representative and the parties should normally be through the legal representatives.

The Child's Representative may need to have direct contact with the parties during the course of the proceedings. Such contact must have the consent of the party concerned and should normally be arranged through the parties' legal representatives. If one or more parties are unrepresented, the Child's Representative is to communicate directly with the party and should advise the other parties of the fact of any meeting with an unrepresented party.

The Child's Representative is not required to communicate to the other parties the substance of his or her conversations with the child.

The Child's Representative must at all times be and be seen to be independent and at arm's length from any other party to the proceedings.

The Child's Representative is to act as an "honest broker" on behalf of the child in any negotiations with the other parties and their legal representatives.

Once the Child's Representative has formed a preliminary view as to the outcomes which will best promote the child's best interests, the Child's Representative will consult with the child and take into consideration any expressed wishes of the child, as may be appropriate in all the circumstances. The Child's Representative will then communicate his/her views and details of proposed orders to the parties where possible.

If during the period of appointment of a Child's Representative there are proceedings between other parties in respect of contravention of an order, generally the role of the Child's Representative ought not be an active one. However, this is subject to the proviso that where the Child's Representative considers (a) that such proceedings are detrimental to the best interests of the child or (b) that the presence of the Child's Representative may further the best interests of the child, then it is appropriate for the Child's Representative to be present and, if necessary, to seek to appear on the proceedings. The Child's Representative must, however, be served with the application and any supporting material, and be notified by the parties of any findings and sanctions imposed by the Court.

6.5 Case Planning

The Child's Representative is to seek to develop a case plan at the earliest opportunity in consultation with any Child and Family Counsellor involved in the case.

In the case plan, the Child's Representative:

- canvasses the nature of any reports or examinations which will involve the child;
- develops a strategy for the involvement of the child in any examination/assessment process;
- liaises with any Child and Family Counsellor involved in the case, relevant government departments, contact centres, schools and agencies to bring together relevant information to assist the Court in assessing and determining the best interests of the child;
- develops opportunities for the matter to reach an agreed outcome which best promotes the child's best interests;
- provides information, support, and assistance as required for or requested by the child during the process of litigation, whether directly or by way of appropriate referral;
- is vigilant and makes every endeavour to minimise systems abuse of the child; and
- if it is thought that some form of expert report may help to resolve the matter at an early stage, the Child's Representative should consider seeking to obtain such a report during the resolution phase of the proceedings.

The strategy outlining the involvement of the child in the examination/assessment process has the following primary aims:

- to ascertain the level of involvement that the child wishes to have in the court proceedings;
- to provide the child with opportunities to express his or her wishes in relation to with whom they live and who they see, to the extent that the child wants to express any wish;
- to provide evidence of matters relevant to the child's best interests and in particular the relationship of the child and the parties;
- to prevent the systems abuse of the child as a result of the child being over-interviewed; and
- to be in accordance with the Chief Justice's Family Violence Policy, other relevant best practice guidelines and applicable protocols for dealing with matters involving family violence. No process should be pursued which departs from these guidelines.

6.6 Changing, Reviewing or Terminating the Appointment of the Child's Representative

The appointment of a Child's Representative for sibling groups can present special difficulties. Cases may arise where the Child's Representative may need to give consideration to the Court making a further assessment as to whether the proceedings require another Child's Representative to be appointed.

The Child's Representative should consider the usefulness of the order for representation of the child from time to time during the course of a case. The matter should be relisted and an order sought from the Court discharging the appointment if the Child's Representative is of the opinion that:

- there is no useful purpose or no further purpose served by the order for the representation of the child;
- the Child's Representative's relationship with the child has broken down irretrievably to the extent that it is not possible to represent his or her best interests;
- continuation of the appointment would be adverse to the best interests of the child; or
- practical circumstances make it impracticable to represent the best interests of the child.

The Child's Representative should ensure that arrangements are made to inform the child or children of any alterations to the arrangements affecting their representation in accordance with their age, developmental level, cognitive abilities and emotional state.

6.7 Reports

The Child's Representative's communications with a Child and Family Counsellor or expert are not privileged. Evidence of these communications may be included in a report or given in oral evidence.

If a Child and Family Counsellor or other expert is requested to prepare a report, the Child's Representative should, to the extent that the issue is not the subject of an order by the Court:

- liaise as appropriate with the other parties concerning the nature of the report, the identity of the report writer, the terms of reference, the persons who should participate in the assessment, and the material to be provided to the report writer;
- satisfy him/herself that the report writer has the appropriate qualifications and experience to conduct the assessment, prepare the

report and give evidence for the particular case;

- facilitate the participation of the child and other relevant persons in the assessment as appropriate;
- ensure that the report writer is provided with the information and documentation necessary to complete the assessment, including any order concerning the parameters of the report;
- liaise with the report writer and facilitate the timely release of the report; and
- convene a conference of experts where appropriate and seek an agreed statement as to the outcomes of that conference.

If a dispute concerning the preparation of a report appears to require judicial intervention, the Child's Representative should consider applying for legal aid to list the matter to seek appropriate directions and orders from the Court.

Where the report is a family report or an Order 30A report, the writer is the Court's witness. The Child's Representative is not bound to make submissions which adopt the recommendations made by the report writer or any expert called in the proceedings. Evidence given by an expert or Child and Family Counsellor or other expert is one part of the total evidence and must be evaluated within that context.

It is not the role of the Child's Representative to direct the methodology to be used by the family report writer or Order 30A expert. The methodology must be based upon the author's sound clinical experience.

6.8 Interim Hearings

Time constraints and the circumscribed nature of interim hearings may result in the Child's Representative not having the opportunity to fully investigate the child's circumstances. However where possible, the Child's Representative should have issued subpoenas to relevant agencies and be in a position to tender relevant material. Such evidence is particularly helpful to the Court where allegations of unacceptable risk are present in the case.

In circumstances where little is known about the child's situation the Child's Representative should be circumspect and should not feel compelled to make a submission as to the child's best interests, presenting rather an analysis of the available options to the extent possible.

The Child's Representative should ensure so far as is possible, that the child's wishes are made known to the Court in admissible form.

6.9 Final hearing (The Trial)

In the event that the matter proceeds to trial, the Child's Representative should comply with all procedural and timetable requirements. The Child's Representative should identify and obtain relevant documentation, organise the preparation of appropriate Order 30A expert and other reports and arrange for relevant witnesses such as State Welfare Authority officers, police officers, school teachers or similar persons to give evidence.

Where the Court is to make interim or procedural orders, the Child's Representative should consider whether they adequately promote the best interests of the child and make submissions as appropriate. The Child's Representative should also consider whether to seek the child's views on the matter and should inform the Court of the wishes, if any, of the child.

The Child's Representative is to promote the timely resolution of the proceedings that is consistent with the best interests of the child.

Where the Child's Representative has formed a preliminary view as to the outcomes which will best promote the child's best interests, it may be appropriate to inform the Court at the commencement of the hearing of those views and where appropriate, provide details of draft orders.

The Child's Representative is to arrange for the collation of all relevant and reasonably available evidence including expert evidence where appropriate, and otherwise ensure to the extent possible, that all evidence relevant to the best interests of the child and the factors set out in section 68F(2) of the *Family Law Act* is before the Court. The Child's Representative is not responsible for adducing evidence to establish the case of a party.

The Child's Representative is to test by cross-examination or other processes where appropriate, the evidence of the parties and other witnesses, including witnesses who are called by the Child's Representative.

The Child's Representative is to make submissions evaluating the evidence and the proposals of each party and in doing so it is expected that the Child's Representative will consider any practical problems associated with, and possible solutions for, such proposals. In appropriate cases the Child's Representative will also make submissions as to the proposed terms of orders.

Children rarely give evidence in proceedings. However there may be cases where consideration is to be given to what direct role the child might have in giving evidence to the Court. If the Child's Representative believes that it may be appropriate for the child to give evidence, the Child's Representative should consult with the Child and Family Counsellor or Order 30A expert. Where a child of sufficient maturity wishes to give evidence, the child should be appropriately advised and the opportunity to apply to give direct evidence canvassed. The purpose of section 100B should be explained to the child.

6.10 At the Conclusion of Proceedings

The Child's Representative should consider whether leave should be sought to provide copies of the orders, reasons for judgment of the Court and any other material, including expert reports, to any relevant professional involved with the family.

In appropriate circumstances the Child's Representative has a responsibility to explain to the child, or to facilitate an explanation by a Child and Family Counsellor or other appropriate expert who has provided a report in the case:

- the orders made by the Court;
- the effect of those orders;
- if submissions were made by the Child's Representative that were contrary to the child's wishes, the reasons for so doing; and
- whether leave has been sought to provide copies of the orders, reasons for judgment of the Court and for any other material, including expert reports, to any relevant professional involved with the family and to whom the Child's Representative intends to forward such material.

In consultation with a Child and Family Counsellor or an appropriate expert in the case, the Child's Representative should determine who is the most appropriate person to explain the orders, taking into account their current respective relationships with the child.

Where the Child's Representative is appointed for a sibling group, consideration should be given to whether explanations are best provided on an individual or group basis.

The Child's Representative does not monitor final orders unless there are exceptional circumstances and there is an order to this effect.

The Child's Representative should prepare a concise report as to outcomes of the proceedings to be placed on the client file. It should be written in a manner that is informative to any subsequent Child's Representative that may be appointed and easily understood by the child if he or she is able to access it in later life.

6.11 Appeals

A Child's Representative has a right to appeal orders made by the Court on behalf of the child.

The Child's Representative should consider whether an appeal is appropriate. An appeal should only be lodged where the interests of the child would be promoted by such a procedure and after taking the wishes of the child into account.

If one of the other parties appeals, the Child's Representative should inform the child and explain the process involved unless there are particular reasons not to do so, for example previously stated wishes of the child.

Where appropriate the Child's Representative should participate in the hearing of the appeal.

7. Family Violence and Abuse

Like all practitioners, the Child's Representative is expected to be familiar with the relevant provisions of the *Family Law Act 1975* (Cth), the Family Law Rules and the Chief Justice's Family Violence Policy for dealing with matters involving alleged family violence. The Child's Representative must also be familiar with other relevant best practice guidelines and applicable protocols between the Court and State and Territory departments responsible for the investigation of child abuse.

Family violence and abuse are serious issues whenever they have occurred and should always be presented as being so. They are factors pursuant to section 68F(2) of the Act of which a Court must take account. Their degree of relevance in a particular case should be considered with the assistance of a counsellor or other mental health professional that has knowledge of family violence and abuse issues. In appropriate cases a full assessment should be conducted by such a counsellor or other mental health professional prior to the matter being settled or heard by a Court.

Particular difficulties can arise for a Child's Representative where one or more of the parties is unrepresented. While it is not expected that a Child's Representative will present the case for an unrepresented party, the Child's Representative should ensure that as far as practicable, evidence concerning family violence and abuse that is relevant to the best interests of the child is put before the Court.

The Child's Representative is expected to be alert to any risk of harm to a child that may arise from the other parties, or the physical environment in which the child may be. It will usually be inappropriate for the Child Representative to bring the child into proximity with an alleged perpetrator of harm. Where this does occur, visual or verbal contact with a party may be harmful and it will be necessary to carefully consider whether interview arrangements and the physical setting need to be structured in particular ways in order to protect the child and/or accompanying family members.

8. Cross-cultural and/or Religious Matters

The Child's Representative needs to take particular care in matters involving cross-cultural and religious issues.

The Child's Representative should be aware of Article 14 of the United Nations Convention on the Rights of the Child which states:

- State Parties shall respect the right of the child to freedom of thought, conscience and religion.

- State Parties shall respect the rights and duties of parents and, when applicable, legal guardians to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

Strategies that are sensitive to culture and religion need to be developed as part of a case management plan for the child within the context of the proceedings. The Child and Family Counsellor who conducted privileged counselling in the case should provide valuable assistance in this area, in particular in assisting appropriate referrals to relevant experts.

During the course of a matter the Child's Representative needs to:

- be aware that the child's English language skills may be in early stages of development;
- be aware that the child may be unfamiliar with the social and legal concepts involved in the proceedings;
- seek to identify service options that are appropriate to the culture and or religion of the child, make these known to the child, and assist the child to access them if requested;
- utilise the expertise of any Child and Family Counsellor involved in the case as may be appropriate;
- be mindful of the need to use interpreter services during meetings and throughout the proceedings where either the child or a party is not proficient in the English language;
- understand that the child may be fearful of isolation by his or her community or fearful of his or her community becoming aware of the proceedings;
- be mindful that the child may be fearful of courts, government departments and authorities; and
- be mindful that the child may be fearful of expressing wishes that are based upon or contrary to religious or cultural beliefs and background.

The Child's Representative is to consider the broader community and extended family support available to the child in recognition of the important role that may be played by extended family members in the raising of the child. That is, the Child's Representative needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

In obtaining an Order 30A report, the Child's Representative should inquire as to the report writer's training and experience in working with families of the child's culture and their capacity to relate to such families in a sensitive and appropriate manner prior to allocating the report to that individual. The Child's Representative must be satisfied

that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the cultural issues pertaining to the case. The Order 30A expert, Child and Family Counsellor or other relevant expert retained in the case may assist with adducing this evidence before the Court.

9. Aboriginal and Torres Strait Islander Children

In representing indigenous children, there are clear and specific issues that a Child's Representative must consider. Foremost of these is section 68F(2) of the *Family Law Act* that specifies that in considering the best interests of a child, a judicial officer must consider "any need" the child may have "to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders."

The Child's Representative should be aware of Article 30 of the United Nations Convention on the Rights of the Child which states that an indigenous child:

"shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."

In cases involving an Aboriginal or Torres Strait Islander child, the Child's Representative should liaise with a Family Court Aboriginal or Torres Strait Islander Family Consultant or an agency to which they are referred by the Family Consultant, and as appropriate, facilitate liaison between the Consultant or agency with any Order 30A expert, family report writer or other relevant expert retained in the case. This liaison is for the purpose of assisting the Child's Representative to consider the need of the child to maintain "a connection to culture" and how this can most effectively be achieved in considering the case before the Court.

It is imperative that the Child's Representative be familiar with relevant judgments, articles and reports in relation to indigenous issues, in particular *The Bringing Them Home Report of the Human Rights and Equal Opportunity Commission*.

To effectively represent the interests of any indigenous child the Child's Representative must have a clear understanding of the importance of the indigenous child's "connection to culture" and to understand the means by which this connection can be maintained and enhanced in the context of the case before the Court.

The Child's Representative also needs to consider the broader community and extended family support available to the child in recognition of the important role played by extended family members in the raising of indigenous children. That is, the Child's Representative needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

In obtaining an Order 30A report, the Child's Representative should inquire as to the report writer's training and experience in working with indigenous families and their capacity to relate to indigenous families in a sensitive and appropriate manner prior to

allocating the report to that individual. The Child's Representative must be satisfied that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the cultural issues pertaining to the case. The Order 30A expert, Child and Family Counsellor or other relevant expert retained in the case may assist with adducing this evidence before the Court.

10. Children with disabilities

Particular sensitivity is needed to ensure that children with physical, intellectual, mental and/or emotional disabilities can participate in the decision-making process involved in the proceedings to the extent of the child's abilities and wish to participate.

The Child's Representative should be aware of Article 23 of the United Nations Convention on the Rights of the Child which states that:

- State Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

The Child Representative will be assisted by liaison with the existing specialist supports to the child in ascertaining the child's capacity to communicate their wishes, how the expression of such views can be facilitated, and any other relevant needs the child may have.

In obtaining an Order 30A report, the Child's Representative should inquire as to the report writer's training and experience in working with children with disabilities prior to allocating the report to that individual. The Child's Representative must be satisfied that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the disability issues pertaining to the case. The Order 30A expert, Child and Family Counsellor or other relevant expert retained in the case may assist with adducing this evidence before the Court.

11. Special medical procedures and other *parens patriae* / welfare jurisdiction cases (section 67ZC)

The principles stated above apply so far as sterilisation and other *parens patriae* / welfare jurisdiction cases are concerned.

In special medical procedure cases, a primary duty of the Child's Representative is to establish whether expert evidence indicates that the child in question is Gillick competent.

The Child's Representative should be familiar with cases in which the Full Court has dealt with the issue and also of applicable Court guidelines and protocols relating to Special Medical Procedures.

Where the evidence indicates that a child is Gillick competent, the Child's Representative should list the matter for the Court to determine whether a next friend should be appointed so that the child is given an opportunity to present his or her own case to the Court.

Where the evidence indicates that a child is not Gillick competent the Child's Representative cannot consent to the proposed procedure. The Child's Representative should ensure the matter comes before the Court as quickly as possible.

The *parens patriae* / welfare jurisdiction is not an adversarial jurisdiction. The Child's Representative is to gather and file material indicating what options are available to the Court and make submissions about the benefits and detriments for the child of each available option.

12. Glossary of Terms

Case Assessment Conference

The first major event most people have at the Family Court after documents have been filed is called a Case Assessment Conference. The Case Assessment Conference provides an early opportunity to identify issues in dispute, reach an agreement, identify dispute resolution events to be undertaken by the parties and adopt a case management pathway.

Case Management Directions

A set of directions that the Court uses to help clients achieve a just resolution of their dispute that is prompt and economical. These directions must be followed.

Case Manager

A member of the Court's administrative staff who manages individual case files and is the primary contact person for parties and lawyers in respect to a case file.

Child and Family Counsellor

A Child and family Counsellor can be: a court counsellor; or a person authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation; or a person authorised under the regulations to offer family and child counselling. These counsellors are approved to offer marriage counselling, child counselling or counselling arising out of an individual or family's contact with the Court. This may also be available to a parent or adoptive parent, a child or a party to a marriage. The Court may order a Child and Family Counsellor to prepare a family report for the purposes of the proceedings.

Child Mediation

This involves discussing difficulties experienced (as an individual or as parents) regarding the arrangements for children during or after separation. The goal is to achieve an agreement which is in the best interests of children.

Court Events

Court events include conferences, mediation, hearings and other court appearances before judges, judicial registrars, registrars or deputy registrars.

Court Mediator

Court mediators are qualified social workers and psychologists with specialist experience in working with families who are experiencing separation. They are part of the Court's team trained in mediation.

Family Consultant

The Court employs male and female Aboriginal Family Consultants whose role is to assist Aboriginal and Torres Strait Islander clients to access the services of the Court. The consultants work within the Court's mediation service and assist counsellors and the Court to respond to the needs of indigenous clients, especially in relation to disputes involving children following separation.

Family Violence Policy

The Family Court has acknowledged that there are many circumstances where families are attending the Court where violence is a factor. To assist parties in the resolution of disputes, and to promote the safety of litigants, the Family Court has articulated its policy to guide litigants, practitioners and others of the approach taken by the Court in circumstances of family violence.

Gillick Competent

Before a child reaches the age at which he or she could consent to medical treatment under the relevant legislation, the child may be lawfully competent to consent to at least some procedures. This depends on whether the child is a 'mature minor' under the Gillick test, a test which was approved by the High Court of Australia in 1992. This means that the person has 'achieved a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.

Treatment may be provided to a child if the parent or guardian consents or, if the child consents and (a) the medical practitioner is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and wellbeing, and (b) that opinion is supported by the written opinion of another medical practitioner who has examined the child.

Honest Broker

A person who has accepted the role of negotiator in the dispute because their impartiality is unquestioned by either side.

Mediation Service

Services are offered by the Court to help settle disputes by agreement rather than a hearing. Sessions deal with child-related issues or combined child-related and financial issues. The way a session is structured will depend on the individual needs and circumstances of the family. Sessions can be conducted by mediators trained in law, social work or psychology who are expert in child-related and/or financial issues as relevant. In some instances a person may be ordered to attend a mediation session by the Court. Mediation sessions are privileged and anything said can not be used later in a trial. However, the mediator is obliged by the *Family Law Act* to notify the State Welfare Authority if an allegation of child abuse is made.

Next Friend

A person appointed by the Court to conduct proceedings on behalf of another person who is a party to the proceedings, but is infirmed or a child.

Order 30A Expert

A professional (such as a psychologist or psychiatrist) who has been appointed by the Court under Order 30A of the Family Law Rules to be involved in the proceedings.

Privileged Counselling

Privileged counselling involves a counselling session with a Child and Family Counsellor where the contents of that counselling remain confidential. The Court will usually direct parties in a children's case to such a session at an early stage of the proceedings.

Resolution Event

These are events such as mediation that take place during the period between the commencement of proceedings to the point at which it is decided that the matter should be prepared for trial.

State Welfare Authority

State Welfare Authorities are the government department which deals with child protection issues. They are usually notified by counsellors, teachers or others with responsibility for a child, where a concern about child abuse is raised.

Systems Abuse

Systems abuse occurs when a child is further traumatised by the systems (courts, child protection or other State Welfare Authority), which he/she encounters or which are appointed to make decisions about the child.

"Systems abuse can be characterised as involving one or more of the following: the failure to consider children's needs; the unavailability of appropriate services for children; a failure to effectively organise and coordinate existing services; and

institutional abuse (i.e. child maltreatment perpetrated within agencies or institutions with the responsibility for the care of children)."

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