INTRODUCTION

The Family Law Council

The Family Law Council is a statutory authority established by section 115 of the Family Law Act 1975. Under sub-section 115(3) of the Act, the functions of Council are to advise and make recommendations to the Minister concerning:

• the working of the Family Law Act 1975 and other legislation relating to family law;
• the working of legal aid in relation to family law; and
• any other matter relating to family law.

Council’s advice and recommendations to the Attorney-General may be “either of its own motion or upon request made to it by the Attorney-General”.

Council members

Members of the Family Law Council at the time of this submission are:

Professor John Dewar Chairperson

Ms Josephine Akee
Mr Kym Duggan
Ms Tara Gupta
Ms Susan Holmes
Ms Kate Hughes
Mr Mark McArdle
Professor Patrick Parkinson
Federal Magistrate Judith Ryan
The Council currently has the following observers:

Ms Sheila Bird  
*Child Support Agency*

Ms Lani Blackman  
*Australian Law Reform Commission*

Ms Jennie Cooke  
*Family Court of Australia*

Ms Margaret Harrison  
*Senior Legal Adviser to the Chief Justice of the Family Court of Australia*

Ms Anne Rees  
*Law Council of Australia*

Mr Stephen Thackray  
*Family Court of Western Australia*

Ms Ruth Weston  
*Australian Institute of Family Studies*

Observers take part in Council’s discussions on issues but do not participate in Council’s decision making.

**General Comments**

1. Council notes that the draft Practice Guideline was released for comment in May 2002. Council decided to provide comments in relation to it at its meeting on 21-22 August 2002.

2. Council is grateful for the opportunity to offer comment on the draft guideline.

3. Council congratulates the Committee responsible for the drafting, which it understands included Judicial Registrar Smith, Federal Magistrate Rimmer, representatives of law bodies, the Commonwealth Attorney-General's Department, and legal and mediation staff of the Court.

4. The purpose of this submission is not to traverse exhaustively and in great detail through each line of the draft document. Suffice it to say, Council is generally impressed with the statements contained in the draft Practice Guideline. Council did not discuss the document in detail, and it was not perceived necessary to do this. Nonetheless, Council was of a view that it would be worthwhile bringing certain issues to your attention. The comments provided below are drawn from the Council's discussions in August.

5. In summary, Council is impressed by the stated principles and practices which the draft guideline seeks to enunciate. It comes at a time when child representatives do not necessarily operate, or conceive of their roles and responsibilities in the same way in each jurisdiction. It contains clear statements of the general principles, which together should provide good guidance to practising child representatives. Given its clear structure, the draft Practice Guideline should also provide a solid basis for the ongoing development and design of child representative training modules.

**Technical language**

6. The draft Practice Guidelines refer in a number of places to technical terms, such as "professional relationship", "privilege" and "systems abuse", which could be defined. As a further general point, 1.5 provides that "[T]he Child's Representative
must be truly independent of the Court and the parties to the proceedings." It is not entirely clear what "truly independent" means, particularly as it is the Court which makes an order for the provision of child representatives in appropriate cases.

Direct professional relationship with the child

7. The nature of the child's relationship with the child representative has attracted considerable comment, particularly given that:

- The child is not the lawyer's client; and
- The lawyer is not bound to act on the child's instructions under the best interests model of representation.

8. There is a question about what this statement means, and whether it simply reiterates an obligation on all legal practitioners to treat the persons with whom they work with professional courtesy and respect. As point 1.6 states that "[I]t is the right of the child to establish a direct professional relationship with his or her Child's Representative", there is a need for clear definition of the concept of a ‘direct professional relationship’. This will help to clarify whether it simply reiterates an obligation on all legal practitioners to treat the persons with whom they work with professional courtesy and respect.

9. The statement may also be intended to signpost the Court's understanding that the child representative should meet with the child. Council understands that the current practice in Queensland is that a court counsellor is interposed between the child and the child representative to enable the child representative to maintain the child at arms-length. The benefit of this approach is said to be that it enables the child representative to put forward objective submissions to the court about what is in the child's best interests. It also allows the child representative to call the court counsellor to give evidence with respect to anything that the child has said or disclosed that might be relevant to the child's best interests without putting him/herself in the position of also having to give evidence as a witness to something within his/her knowledge.

10. If the relationship were a traditional lawyer-client relationship, such a position would be difficult because of the fiduciary duties to maintain the client's trust and confidence. However, the child representative's relationship with the child is not such a relationship and 3.5 makes this clear by noting that the child representative fulfils a role in which he/she cannot guarantee the child a confidential relationship. In any event, Council understands that Legal Aid Queensland has no objection to adopting the Court's preferred approach, which is that the child representative meets the child.

Child protection matters

11. In the wake of the launch of Council's Family Law and Child Protection - Final Report,1 it is timely to note the role of child representatives in child protection

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1 On 27 October 2002, during his Ministerial Address at the recent XVI World Congress of the International Association of Youth and Family Judges and Magistrates in Melbourne, the Attorney-
proceedings. The Final Report notes the important role of child representatives and the bringing to bear of their professional judgment in child abuse cases. The Family Court of Australia's *Magellan* project and the Family Court of Western Australia's *Columbus* project have received widespread recognition for bringing to the fore the role of child representatives in this respect.

12. There should be some express statement in the guidelines relating to the role of child representatives in child protection matters. They could perhaps be statements along the following lines:

* A key role for the child representative immediately on being appointed is to find out whether the State/Territory child protection agency is involved with the family and if so, the extent of such involvement, and whether or not it intends to become involved in the Family Court proceedings or initiate other legal proceedings.

13. It should be noted, of course, the number of congruent issues that emerge in relation to both State child protection cases and family violence cases arising in family law proceedings, and the fact that child representatives appear in cases in both jurisdictions. To that end, it would be worthwhile in Council's opinion, for the Practice Guideline to make a similar reference along the lines of that above under the heading "10. Family Violence and abuse"; perhaps in the form of a new point 10.2.

**Cost of implementation**

14. Notwithstanding the obvious merits of the draft Practice Guideline, some members of Council were concerned about the possibility that its implementation – as drafted – may result in unforeseen cost implications.

15. Of course, the Court is entitled to introduce guidelines that set out what is expected of child representatives in family law proceedings. However, a question remains about what would happen if a child representative falls short of the Court’s expectations because of the cost burdens involved in meeting those expectations.

16. Council acknowledges that the issue of costs will be significant regardless of what model of child representation is implemented.

- There are implications for the public purse, and therefore for government;
- There are implications for legal aid commissions as they are generally involved in the provision of child representatives pursuant to court order; and
- There are also implications for the court that makes the order because it relies on the other links in the chain to do what is required to enable the terms of the order for appointment to be carried out.


2 See *Cripps and Cripps* (4 April 2002) per Faulks J at ¶25; *Harris v Harris* (13 June 2000) per Faulks J at ¶34-35.

17. Council cannot predict with surety exactly what cost implications the draft Practice Guideline would have. Therefore, Council suggests that it would be worthwhile to conduct a detailed examination of the cost implications of the draft Practice Guideline following its adoption. All relevant stakeholders should be involved if at all possible.

18. An opportunity also exists for the Court to use a detailed examination of the cost implications of the draft Practice Guideline to inform the Government’s ongoing review of the costs child representation. Council understands that the Attorney-General's Department is developing another consultation draft of the *Family Law Amendment Bill 2002*. The Bill is likely to include an amendment to the costs provision, s. 117(2). The amendments may provide for the costs of the child representative to be recouped by the making of a costs order against the other parties after the conduct of an investigation into their financial circumstances and capacity to pay.