



LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH, AGEING AND COMMUNITY SERVICES

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Submission Cover Sheet

Inquiry into Child and Youth Protection Services

Information Sharing under the Care and Protection System

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SUPPLEMENTARY SUBMISSION

Model for Representation of Children and Young People in Care and Protection Matters in the ACT Children's Court

1. The 'Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court' (copy attached) set out practice standards for the legal representation of children and young people in care and protection proceedings. The Guidelines were published by the ACT Law Society in August 2004 and were developed with reference to the now repealed *Children and Young People Act 1999*. As such, many of the matters referred to in the Guidelines are no longer current. The provisions dealing with the legal representation of children and young people are now found in Part 7A of the *Court Procedures Act 2004*.
2. In this regard, the Commission notes that, by contrast to the repealed 1999 Act,⁹ the current provisions in the Court Procedures Act do not expressly stipulate that a lawyer must act and make representations to the Children's Court in accordance with the instructions given by a child or young person who has the capacity to give the lawyer those instructions.
3. The current ACT legislative framework for the representation of children and young people in care and protection proceedings appears to provide a less rigorous model than those used by other jurisdictions when it comes to ensuring that children and young people have access to direct representation.
4. For example, under the Victorian model, lawyers are expressly obliged to act in accordance with a child's instructions, having regard to the maturity of the child.¹⁰ Further, we understand that Victorian courts appear to be given a more direct role in determining whether a child or a young person has capacity to instruct their lawyer.¹¹ The Commission also draws the Committee's attention to the recently published guidance by Victoria Legal Aid,¹² which contains more current advice on these matters, consistent with the requirements of article 12 of the UN Convention on the Rights of the Child.¹³
5. We consider that it would be valuable for the relevant sections of the Court Procedures Act be reviewed to examine how the Act may better facilitate the participation of children and young people in proceedings to ensure that their instructions, views and wishes are properly taken into account. In

⁹ See, s 24(4) of the *Children and Young People Act 1999* (repealed).

¹⁰ See, s524(10) of the *Children, Youth and Families Act 2005* (Vic).

¹¹ See, s524(1B) of the *Children, Youth and Families Act 2005* (Vic).

¹² See, Victoria Legal Aid, 'Representing children in child protection proceedings', April 2019, available at: <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-representing-children-in-child-protection-proceedings-guide.pdf>.

¹³ Article 12 of the Convention on the Rights of the Child 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.

particular, the Commission considers that the model for representation of children and young people must start from a presumption that a child or young person has capacity and a right to direct legal representation. In the absence of such capacity, the child or young person must be entitled to all supports necessary to ensure their views and wishes can be communicated to the court to their fullest extent.



GUIDELINES FOR LAWYERS
REPRESENTING CHILDREN AND YOUNG PEOPLE
IN CARE & PROTECTION MATTERS
IN THE ACT CHILDREN'S COURT

August 2004

Acknowledgements

In addition to a general literature review, these guidelines have been drafted with reference to the following: Louise Akenson *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (August 1999, a project of the Victoria Law Foundation); The Law Society of NSW *Representation Principles for Children's Lawyers* (2nd Ed, March 2002); Lani Blackman *Representing Children and Young People: A Lawyers Practice Guide* (2002, Victoria Law Foundation) and the Family Court of Australia *Guidelines for the Child's Representative*.

INTRODUCTORY NOTE

These Guidelines operate on the assumption that practitioners representing children and young people in care and protection matters are familiar with the relevant legislative sections of the *Children and Young People Act 1999*, ("the Act") especially Part 1.3, Chapters 2 and 3, Part 7.1, Part 7.3 and Chapter 11.

PURPOSE OF THESE GUIDELINES

This document aims to provide guidance and direction to lawyers who represent children and young people in the ACT Children's Court ("the Court") in care and protection proceedings. Lawyers representing children and young people face special practical and ethical difficulties that are unlikely to arise when acting for adult clients. Representing children in care and protection proceedings is significantly different from representing an adult client in civil law proceedings, particularly because the representative would not usually adopt an adversarial approach. It is therefore desirable that practitioners acting for children or young people undertake specific training in legal issues relating to children and young people and in the area of childhood development.

To assist lawyers acting for children and young people in care and protection matters, the ACT Law Society has decided to adopt the following guidelines. The guidelines aim to direct lawyers to what is considered to be the best practice in these matters by taking a step-by-step approach to the processes involved in dealing with child clients.

Further, these guidelines aim to uphold the United Nations Convention on the Rights of the Child which was signed and ratified by Australia in December 1990. Of particular importance is Article 12, which emphasises a child's right to a voice in judicial and administrative proceedings:

Article 12 states:

1. Parties shall assure 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.

These guidelines describe an ideal set of interactions between lawyers and their young clients. Despite the resource and time pressures that often affect the lawyer-client relationship, the following information encourages lawyers to adopt a consistent approach to representation in cases involving children and young people.

In the end, commonsense should prevail. Some of the suggestions in these guidelines will not be appropriate for very young infants. In each case, the children's lawyer should adopt the guidelines to the individual needs and circumstances of their client.

GUIDELINES FOR LAWYERS REPRESENTING CHILDREN AND YOUNG PEOPLE IN CARE AND PROTECTION MATTERS IN THE ACT CHILDREN’S COURT

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1. ROLES & DEFINITIONS

1A) Children and Young People

Under section 7 of the Act, a child is a person who is under 12 years old. A young person is a person who is 12 years old or older but not yet 18 years old. Under section 22 of the Act, a child or young person has a right to take part in Court proceedings that relate to that child or young person.

1B) Indigenous Children and Young People

Section 14 of the Act requires that in making a decision or taking action under the Act in relation to an indigenous child or young person, a person must take into account submissions made by or on behalf of any relevant indigenous organisation about the child or young person and indigenous traditions and cultural values—including kinship rules—as generally stated by the indigenous community. Practitioners should also refer to the indigenous placement principle in section 15, which requires that an indigenous child or young person be placed with a member of his or her family if the child or young person does not object.

1C) A Lawyer's Role

At all times, a legal representative must ensure that any views or wishes stated by their child or young client are put to the Court (s23(1)(b)). However, in care and protection proceedings, a representative must specify to the Court whether he or she is acting on the instructions of the child or young person or in the best interests of the child or young person (s23(1)(c)). The preliminary task of a lawyer is to investigate what representational role it is appropriate for him or her to undertake. The documents filed in a matter may assist a practitioner to form a view or to determine what further enquiries need to be made.

1D) The Direct Representative

In care and protection proceedings, a lawyer who is satisfied that a child's or young person's age, maturity or level of understanding warrants that the child or young person can give the lawyer instructions, must act and make representations to the Court in accordance with these instructions

(s24(4)). In such circumstances, the lawyer is required to act as a ‘direct representative’ who receives and acts on the child’s instructions irrespective of the lawyer’s own opinion of what is in the client’s best interests.

Whilst it is recognised that not all children and young people can provide instructions “...the direct representation model is preferred as it provides for a clear lawyer-client relationship, and allows children and young people to participate directly in proceedings if they are willing and able to do so.”¹ This is the approach adopted by the Law Society of New South Wales, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission.²

1E) The Best Interests Representative

If a lawyer in care and protection proceedings is not satisfied that a young client is capable of giving instructions, he or she must act and make representations to the Court in the ‘best interests’ of the child or young person (s24(4)). A best interests representative must act impartially by making submissions to the Court based on evidence gathered from sources which include, but are not limited to, the child’s or young person’s wishes.³ It is possible that the submissions of a best interests representative will conflict with the wishes of the client. Sections 12 and 13 of the Act detail factors which the Court is required to consider in determining “best interests”. These factors guide the representative as to the nature of the evidence and submissions that are relevant.

1F) Practitioner may act in both roles

The Act provides that a representative may act as both a direct representative and a best interests representative in the process of a single case (s23(1)(c)). Thus, a lawyer is free to deem a child competent to give instructions in relation to a particular subject but incapable of instructing in relation to other relevant issues. Such flexibility may create confusion for a young client and indeed, for the practitioner themselves. Given the important differences between the role of a direct representative and the role of a best interests representative, it is essential for lawyers to know in which role they are acting at each stage of a case and to ensure that the Court and the other parties are aware of the role adopted in a timely manner.

¹Lani Blackman *Representing Children and Young People: A Lawyers Practice Guide* Victoria Law Foundation, Melbourne, 2002 p18

² Australian Law Reform Commission and Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for children in the legal process* ALRC 84, Sydney, 1997, Ch.13; Law Society of New South Wales *Representation Principles for Children’s Lawyers* 2nd ed – March 2002

³ See *Bennet and Bennett* (1991) FLC 92-191

1G) Inform Client of which role Practitioner will perform

Once a practitioner has determined whether he or she is acting in a best interests or a direct representational role, it is essential that the practitioner explain this role to the child or young client as soon as possible. If a practitioner decides to change their role during proceedings, the practitioner must advise the child or young person as soon as practicable.

2. MEETING WITH THE CHILD OR YOUNG PERSON

2A) Regular meetings with Client

A practitioner should usually meet the child or young client, no matter how young they are, and meet with older clients before *each* Case Management Conference or Court appearance. Meeting face-to-face with the child or young person is the best way for the lawyer to gain a true understanding of the character and circumstances of the individual they are representing. An initial pre-hearing meeting is essential as the lawyer must have an opportunity to assess the child's or young person's competency to instruct before commencing work on the case. If a practitioner forms the view that it is important to meet regularly with the child or young person, he or she should press for their grant of legal assistance to be extended to ensure this can occur.

2B) Appropriate time and venue

Meeting with a lawyer may be an overwhelming and confusing experience for a child or young person. Contact should therefore occur where and when it is comfortable and convenient for the client, not merely where and when it is convenient for the practitioner. The Law Society of New South Wales emphasises:

“The office of a practitioner is not always the best place to take instructions, although it may be the most convenient for a practitioner. Sitting behind a big desk emphasises the gulf between the practitioner's knowledge of law and that of the child client. Other options for seeing a child client should be considered, such as their home, a youth centre or their cultural centre. ...Where it is necessary to conduct the interview in a practitioner's office, consider the office layout and use the least formal room available. Practitioners with a number of child clients might consider decorating their rooms to incorporate child-friendly images... Practitioners need to be flexible with seating arrangements and should try to remove obstacles such as desks and computer from between the practitioner and client...”⁴

⁴ Law Society of New South Wales *ibid.* Principle D4 at p10.

2C) Explanation of Lawyer's role

At the initial meeting, the lawyer should discuss the practitioner's general role in representing the child or young person (see section 1) and explain why they have been appointed. If possible, the lawyer should seek to ensure that the client understands the difference between direct and best interests representation.

2D) Involvement of a support person

A child or young person may wish to have an adult support person to accompany them to the interviews.⁵ In such circumstances, the lawyer must determine whether it is appropriate for the interview to occur in the presence of a third party. Young children may feel more comfortable talking about their wishes in the company of somebody they already know. However, the lawyer must protect against the child's or young person's wishes being unduly influenced by the presence of a third party. It would rarely be appropriate for a parent, adult sibling, carer or caseworker to be present during an interview.

If a support person attends the interview, he or she needs to be advised of the confidential nature of the meeting.

It may be appropriate for a support person to remain in the interview room whilst a general introduction is made and the lawyer discusses his or her role with the young client. The support person may then be encouraged to leave the room during discussion of important issues. This arrangement importantly maintains the confidentiality of the client-lawyer discussion and minimises pressure on the child or young person to tailor their responses to the wishes of the third party. It may help to explain to the client and the support person that the Court needs to be sure that client has not been influenced by anyone whilst providing information on important issues.⁶

3. ASSESSING CAPACITY TO GIVE INSTRUCTIONS

Assessing a client's capacity to instruct is perhaps the most challenging task of a Children's Court lawyer. In the absence of legislative guidelines, the following framework discusses how lawyers might go about making such an assessment. Lawyers may also wish to refer to the NSW Law Society's publication *Client Capacity Guidelines: Civil and Family Law Matters* which outlines the processes involved in assessing an adult client's capacity to instruct. A lawyer must remember that the

⁵Blackman, *ibid* p62

⁶ Louise Akenson, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court A* Project of the Victoria Law Foundation, Melbourne, 1999.

duty to assess a client's capacity to instruct continues throughout the case, as a client's level of understanding about relevant matters may change as the case progresses.⁷

3A) Enhancing a Child's or Young Person's capacity to communicate

Practitioners should be aware that a child's ability to communicate will depend significantly upon the practitioner's interviewing skills. Section 12(2)(b) of the Act states that if a child or young person can form and express views about his or her well-being, those views should be sought and considered. Practitioners should seek to enhance a young client's capacity to provide instructions by structuring communication to account for the client's age, level of education, cultural context and degree of language acquisition.⁸

Part 2 of these guidelines discusses the importance of creating an environment for interviewing young clients where they will feel most comfortable using their language skills. The following suggestions aim to assist lawyers to improve their personal communication with a child or young person during an interview:

- Examine any known details about the case before the interview to reduce the time needed to establish crucial facts.⁹
- Open the interview by introducing yourself and explaining your role as a practitioner. Encourage your client to share something of a general nature such as a like or dislike, whether they have any brothers or sisters or what they like to do on weekends. Exchanging such information puts the client at ease as well as providing the practitioner with valuable information about the client's language abilities.
- Inform the child or young person that it is acceptable for them to respond with a simple 'I don't know' or a request for the question to be repeated or explained in a different way.
- Begin with general questions which encourage the child or young person to tell their story in their own words. The accuracy of a young client's memory is likely to be better when it is 'freely recalled', deteriorating as questions become more focused.¹⁰
- Provide all necessary information in the simplest possible language. Avoid complex sentences or questions involving more than one topic or idea. When trying to explain concepts or legal strategies, try to provide concrete examples.
- Avoid leading questions. Young clients are likely to tell you what they think you want to hear.

⁷ Akenson, *ibid* p12

⁸ Law Society of New South Wales *ibid*. Principle C2 p7

⁹ Blackman, *ibid* p51

¹⁰ Akenson, *ibid* p11

- Be prepared to vary the form of your questions as a child or young person may be able to comprehend and respond to questions about significant issues when they are framed in alternative ways. For example, a child may not be able to explain what they want but may be able to state clearly what they do not want.¹¹
- Be aware that a child's or young person's attention span may be limited. Listen sensitively to the client's responses and make provisions for small breaks or a topic change if the client seems to be losing interest.

3B) Communicating with Children and Young People with disabilities

Children or young people with physical, intellectual, mental and/or emotional disabilities may need additional assistance to communicate their preferences. In such circumstances, the lawyer should consult the child or young person about liaising with their carer or specialist support provider to determine how communication between the client and the lawyer can best be facilitated.¹²

3C) How to assess capacity to instruct

Child-development literature indicates that the skills required to be capable of giving instructions are usually attained by age six or seven. However, acquisition of verbal skills depends upon a range of factors and the lawyer must make an assessment based on the capacity of the individual client.¹³ Practitioners should be alert to factors that may temporarily limit a child's or young person's capacity to provide instructions, such as if the child or young person is under the influence of alcohol, suffering trauma or in a distressed emotional state. In these circumstances, the lawyer should arrange an alternative time to meet with the client or, if necessary, seek an adjournment so that assessment can occur at a later date.¹⁴

Whilst the legislation provides practitioners with a relatively broad discretion in determining whether a young client is capable of giving instructions, this discretion must be exercised with reference to the overall objects and aims of the Act. The objects of the Act contained in sections like 12(2)(b) and 23(1)(b) uphold a preference for the direct representation model, as it allows children and young people to participate directly in proceedings if they are willing and able to do so.

3D) No requirement to express views or wishes

In care and protection proceedings, no child or young person can be required to express their views or wishes in relation to a matter (s274). Whilst practitioners must provide an opportunity for young

¹¹ Akenson, *ibid* p11

¹² Family Court of Australia, *Guidelines for the Child's Representative* Paragraph 10 p14.

¹³ Law Society of New South Wales *ibid* Principle C1 p7; Akenson, *ibid* p13

¹⁴ Law Society of New South Wales *ibid* Principle C3(b) p8

clients to express their views or wishes, such clients should not be compelled to do so. Lawyers should bear in mind that requiring a child or young person to actively participate in discussion may break down the coping mechanisms he or she has developed to deal with their situation.

4. THE DIRECT REPRESENTATIVE: TAKING INSTRUCTIONS FROM A COMPETENT CLIENT

4A) Relationship with Child or Young Person

A direct representative may counsel a child or young person against a particular decision. However, the representative should be aware of the amplified power imbalance between themselves and the client by virtue of both age and legal knowledge. There is a risk that a young client will be overly reliant on suggestions of influential adults, including the legal representative. It is vital that young clients do not feel pressured or manipulated into decisions which they later regret. In this context, a direct representative must take extra caution to ensure that the ultimate decisions made by a child or young person actually reflect the client's position. Extra time should be set aside so the representative can check that he or she has properly understood the instructions given, allowing the client to change or even withdraw directions as the child or young person sees fit.¹⁵

In addition, section 272 of the Act requires the Court to allow a child or young person who is the subject of care and protection proceedings "a reasonable opportunity to give his or her views or wishes personally to the Court as to his or her ongoing care and protection unless satisfied that the child or young person is not capable of doing so." Lawyers should inform young clients of this and consider making arrangements for them to provide their views and wishes directly to the Court if the client so requests. The adversarial process may negatively impact on a child who is cross-examined by a parent or a parent's lawyer about their wishes or any statements they make. Therefore, a proposal that the child appear in open Court should be treated cautiously. A preferable approach is to have an appropriately qualified person, such as a psychologist, interview the client and prepare a report for the Court.

Where an expert is appointed to assess the child or young person, their representative should ensure that the expert's terms of reference provide for the expert to obtain the child's views and wishes where appropriate, assess the weight to be given to them and address the possible consequences of the child or young person not getting what they want.

¹⁵ Akenson, *ibid* p16; Law Society of New South Wales Principle D2 p10

4B) Empowering a Child or Young Person

A direct representative should keep in mind that, whilst it is usually of benefit to the child to be given a voice in proceedings, a child or young person may be empowered by the process of giving instructions to the point where he or she uses that power to inappropriately influence parents or other persons.

4C) Inconsistent or incomplete instructions

The Act is not clear on the role a representative should undertake when the child or young person is capable of providing instructions but does so in an inconsistent or incomplete manner. The lawyer should put these instructions before the Court without imposing an external structure upon them to discharge the lawyer's duty to place the child's or young person's wishes before the Court (s23(1)(b)). However, a lawyer in care and protection proceedings may interpret the phrase "satisfied that...the child or young person can give the lawyer instructions" in s24(4)(a) as "satisfied that the child or young person can give consistent and complete instructions." Under this interpretation, a child or young person who is unable, or unwilling, to provide consistent and complete instructions will lose their direct representation to the extent of such inconsistency or incompleteness.

5. THE BEST INTERESTS REPRESENTATIVE: DETERMINING A CLIENT'S BEST INTERESTS

5A) Placing evidence before the Court

The primary duty of a best interests representative is to ensure that all relevant evidence regarding the child's or young person's welfare is placed before the Court, whether or not such evidence supports the representative's case. All submissions by the lawyer must be objectively based on consideration of this evidence, not the lawyer's subjective opinion of what is best for the child or young person.

5B) Seeking and representing the views of the Child or Young Person

A best interests representative is bound to inform the Court of a child's or young person's wishes in relation to any matter in the proceedings (s12(2)(b), s13(b)(iv)). Although a best interests lawyer is not bound to make submissions based on the child's or young person's instructions, they are bound to bring the child's express wishes to the attention of the Court.¹⁶ This duty must be exercised in light of section 274 of the Act which states that no practitioner can require a child or young person to express his or her views in relation to a matter.

¹⁶ *P and P* (1995) FLC 92-615

Section 272 of the Act equally applies to children who have a best interest representative (see Part 4A above).

5C) Seeking other information relevant to Child's or Young Person's welfare

The Act requires that any decisions or actions of a best interests representative should be consistent with the child's or young person's racial or ethnic traditions and religious, cultural and individual values (s12(1)(i)). As such, a best interests representative should ensure that people who may have valuable information regarding the child or young person make that information available to the Court. Such persons may include teachers, doctors, psychologists, family members, neighbours and child welfare protection workers.¹⁷ When gathering or assessing relevant evidence, practitioners should be conscious of their confidentiality obligations (outlined below in Part 6), particularly when dealing with a child or young client from a small community. A best interests representative must have regard to sections 12 and 13 of the Act, which outline the matters to be taken into account when applying the best interests principle.

As mentioned above in Part 1B, if the child or young person is indigenous, the best interests representative should consult any relevant indigenous organisation in relation to issues affecting the child or young person (s13(1)(a)). In matters involving cross-cultural issues, the representative should be particularly mindful of the capacity of the extended family and community network to promote the best interests of the child or young person.¹⁸

5D) Seeking information from Client's parent

If a practitioner wishes to gather information from a client's parent, the practitioner should arrange for such information to be gathered by the parent's solicitor or an expert, who can provide evidence to the Court based on their observations and conclusions.¹⁹ A child's or young person's representative should avoid discussion with their client's parent to minimise the possibility of a conflict of interest as discussed below in Part 8.

5E) Making submissions contrary to the Child's or Young Person's wishes

If a best interests representative decides that the evidence indicates that the best interests of the child or young person will be promoted by orders which are contrary to the client's wishes, the representative should:

- Advise the child or young person that he or she intends to make submissions contrary to his or her wishes. Depending upon the age and maturity of the client, it may be helpful to explain

¹⁷ Law Society of New South Wales Principle E2 p19; Blackman *ibid* p211

¹⁸ Family Court of Australia *ibid*. Paragraphs 8-9, p12-13

¹⁹ Blackman, *ibid* p212

to the client what the Court is most likely to find is in his or her best interests, based on the evidence before it;

- Ensure that the client's wishes are brought to the Court's attention; and
- Provide clear and cogent submissions to the Court as to why the client's wishes do not promote their best interests.²⁰

6. CONFIDENTIALITY

6A) Direct Representative

A practitioner representing a child or young person as a direct representative owes their client the same duty of confidentiality as an adult client. The practitioner must always seek the child's or young person's consent before disclosing any confidential information to another party. Explaining the relationship of confidentiality to a child or young person is particularly important as he or she may be wary of disclosing information for fear of retribution. It is necessary to remind a young client of the confidential nature of the client-lawyer relationship at the beginning of each meeting.

In particular, it may be valuable for a representative to explain the difference between the lawyer-client relationship and that which the child or young person may have with other adults, such as school counsellors or youth workers who are subject to mandatory reporting obligations regarding child abuse and neglect. The child or young person may feel more comfortable discussing their circumstances if they are aware that lawyers are not subject to the same requirements under law.²¹

6B) Best Interests Representative

The Act is unclear regarding the relationship of confidentiality between a best interests representative and a young client. From a legal perspective, there is no formal lawyer-client relationship and therefore the child is not entitled to the same protection under legal privilege.

However, it is recommended that a best interests representative adopt the same approach to confidentiality as a direct representative. It is equally as important for a best interests representative to develop a relationship of trust with the child or young person they are representing. The subject of confidentiality should be explained to the child or young person at the initial meeting. If it is necessary for the lawyer to disclose information provided by the child or young person during a

²⁰ Family Court of Australia *ibid* Paragraph 5.4 p4-5

²¹ Blackman *ibid* p28

private interview, it is preferable for the representative to first discuss this disclosure with the child or young person.²²

6C) Compulsory and Voluntary Disclosure

Lawyers are not contained in the list of professional persons who are legally required to report suspected sexual abuse or non-accidental physical injury under section 159 of the Act. However, sections 156 and 158 of the Act allow a person to make a voluntary report to the Chief Executive if they believe or suspect that a child has, is being, or is likely to be, abused or neglected. Practitioners undertaking the role of a best interests representative may report suspected abuse or neglect of their client directly on the Family Services General Public Line

Representatives finding themselves in this situation may also wish to refer to the Department of Education, Youth and Family Services publication *Reporting Child Abuse: Keeping Children and Young People Safe*,

Where a direct representative considers a child or young person to be at risk of harm, he or she has a range of options. The lawyer may choose to discuss this concern openly with the child or young person, highlighting the benefits of disclosing such information to another professional, such as a youth worker or counsellor, who can place the child or young person in contact with relevant help and support services. Alternatively, the lawyer may choose to discuss his or her concerns confidentially—for example, presenting the issue as a hypothetical—with other professionals, including Family Services staff.

In each case, practitioners should encourage the child to disclose the abuse to a third party who will report the abuse without compromising the solicitor/client relationship.

7. CHILD’S OR YOUNG PERSON’S ACCESS TO DOCUMENTS

General rules regarding documentation apply equally to child and young person clients. However, direct representatives should exercise caution about showing documents to children and young people. Most importantly, practitioners must be careful to adhere to Court-ordered restrictions on documentation. In general, if a document concerning a child or young person contains complex legal

²² Blackman, *ibid* p31

information, sufficient time should be set aside to explain particular terms and concepts in language that the child or young person can understand.

Before giving a child or young person access to documents, a lawyer should also consider the emotional impact that the information may have upon their client. If information is likely to distress a young client, the lawyer may request that the information be imparted by the author of the document or an adult such as a doctor or counsellor who is already familiar to the child or young person.²³

In some circumstances, it may simply be inappropriate for the child to access certain information. For example, if a document discloses that a child is the product of his or her mother being raped, such a document would be inappropriate to disclose. In these situations, it is preferable for the author of the document to seek a Court order which suppresses certain sections.²⁴

The practitioner should consider at least providing the client with a letter summarising the content of the document and explaining any recommendations.

8. CONFLICTS OF INTERESTS

8A) General rule of conflict of interest

All lawyers representing children and young people have a general duty to avoid conflicts of interest. It is particularly important for a child's or young person's representative to identify conflict before a case begins, as a change in representation is likely to be particularly unsettling for such clients. Practitioners must avoid accepting roles which involve an inherent conflict of interest, such as acting for a child and their parent in the same care and protection proceedings.

8B) Acting for more than one Child or Young Person in the same proceedings

Although it may be reasonably common for a practitioner to act for several children or young people from the same family in a care and protection proceeding, lawyers must be conscious of the types of conflict which may arise in such circumstances. For example, two siblings may desire such different results that a practitioner is unable to advocate for their conflicting interests. In such a case, the practitioner may need to arrange individual representation for the clients and withdraw altogether, particularly where he or she has obtained confidential information from one client which would have a significant effect on the case of the other client.²⁵

²³ Blackman, *ibid* p140-141

²⁴ Blackman, *ibid* p140-141; Akenson *ibid* p21

²⁵ Law Society of New South Wales *ibid* Principle G1 p28

9. CONDUCT OF THE CASE

9A) Duty to protect against over-interviewing of Child or Young Person

As a party to proceedings, a child or young client may be subject to many different interviews and assessments with psychologists, psychiatrists, counsellors, lawyers, doctors and the police. Direct and best interests representatives should be conscious of the possible effect upon their client of multiple interviews and of the need to minimise the risk of the child's or young person's evidence being contaminated by extensive questioning.²⁶

9B) Explanation of proceedings to Child or Young Person

Section 12(2)(a) of the Act requires that children and young people be given sufficient information about the decision-making process, in accessible language and manner, to allow them to take part fully in the proceedings. A child's or young person's representative should make every effort to advise their client regarding the following topics, using age-appropriate language:

- the practitioner's role in representing the child or young person (see Part 1)
- the relationship of confidentiality (see Part 6)
- the subject matter of the litigation
- the nature of the proceedings
- the role of the child or young person, including why their wishes are important to the proceeding and whether they will need to attend and/or give evidence to the Court
- the role of the other parties and anyone else who is likely to be involved in the case, such as professionals who may be called upon to interview the child or young person
- the Court system, including an explanation of conferences and hearings and what is expected to happen before, during and after each Court event
- the Court's approach to decision making, including the best interests principle (if applicable)
- the possible outcomes and consequences for the child or young person.

9C) Avoid creating unrealistic expectations

Care must be taken to avoid creating unrealistic expectations in the mind of a young client regarding the outcome of the case. When providing advice regarding possible outcomes of the proceedings, lawyers should emphasise that although they will present the views and wishes of the child or young person, the Court's ultimate decision may differ from those views and wishes.

²⁶ Blackman, *ibid* p125

9D) Duty to minimise formality

Under s288 of the Act, all representatives in care and protection matters have a duty to conduct proceedings with as little formality and technicality and as quickly as the requirements of the Act and proper consideration of the matter permit. Efforts to avoid or reduce case delays are important to minimise trauma which a child or young person may associate with the proceedings. For example, case delay may mean a lack of certainty about a child's or young person's living arrangements, which can be unsettling for a young client.²⁷

9E) Dealing with unrepresented parties

It is possible that unrepresented parties may misunderstand the role of a child's or young person's representative, believing that he or she is a source of advice for parents or a hostile 'enemy' who is working to damage their relationship with the child or young person. If a lawyer is approached by an unrepresented party seeking advice, it is important for them to clearly explain their duty to the child or young person and encourage the other party to seek information elsewhere. A lawyer must refrain from offering any kind of advice. A professional representative should always treat an unrepresented party with respect, particularly given that the child's or young person's attendance at interviews may rely upon the practical assistance of other parties to the case.²⁸

10. CONCLUDING THE PROCEEDINGS

10A) Explaining orders to the Child or Young Person

It is essential for a lawyer acting as either a best interests or direct representative to contact the child or young client after the conclusion of the proceedings to explain the orders and care plan or outcomes reached. The representative should discuss the reasons for the orders and explain the practical effect of the orders and care plan in non-legal terms. If necessary, section 289(1) of the Act allows a party to care and protection proceedings 28 days to apply for a statement of reasons in respect of any orders made. Following discussion with the child or young person, it may be beneficial to check whether they have an accurate understanding of relevant information by asking them to explain the outcome of the proceedings in their own words.

10B) Discuss possibility of Appeal

It may be relevant for a direct representative to discuss the possibility and desirability of an Appeal or further application with the child or young person (Chapter 11 of the Act).

²⁷ Akenson, *ibid* p22-23

²⁸ Blackman, *ibid* p224-225

10C) Ending the relationship

It is important for lawyers to prepare young clients for the end of the personal lawyer-client relationship. The lawyer may inform the client that he or she can be contacted regarding any legal issues arising from the case. However, it may be necessary to emphasise that he or she will not be available to discuss general issues regarding the child's or young person's welfare. It may be appropriate to refer the client to the case worker with responsibility for supervising their case or to discuss the availability of other support persons such as youth workers and school counsellors whom the child or young person may contact if they are in need of general advice or assistance.²⁹

²⁹ Law Society of New South Wales Principle J1, p31; Blackman, *ibid* p161