

**DCJ responses to questions on notice and supplementary questions from  
Committee on Children and Young People (Inquiry into Child Protection and  
Social Services System)**

<b>Questions on notice from hearing</b>	
<b>Question</b>	<b>Response</b>
1. MOU and Protocol with the Family Court.	Attached
2. MOU with Legal Aid	Attached
3. Criteria for accreditation of Independent Children's Lawyers	Child Representation Principles attached
4. Criteria for referral of child to Joint Child Protection Response Program (JCPRP)	Attached
5. Number of FC appeals by Department of Communities and Justice (DCJ)	<p>DCJ briefs the Crown Solicitor to represent the Secretary in any appeals.</p> <p>In 2020 DCJ briefed the Crown Solicitor to:</p> <ul style="list-style-type: none"> <li>• Appeal one Family Court matter on behalf of the Secretary</li> <li>• Represent the Secretary as a respondent in another.</li> </ul> <p>In 2021 DCJ briefed the Crown Solicitor to represent the Secretary as a respondent in two appeals. One was to the High Court of Australia.</p>
6. Number of requests for appeal or intervention from protective parents that come to DCJ that DCJ has either accepted or rejected	DCJ does not receive requests for appeal or intervention in Federal Circuit or Family Court proceedings from parents.
7. Number of times that DCJ has intervened in FC matters and types of interventions (following making of orders)	<p>DCJ briefs the Crown Solicitor to represent the Secretary if a decision is made to intervene in Federal Circuit Court or Family Court proceedings. If DCJ decides to intervene the Secretary is deemed to be a party to the proceedings.</p> <p>In 2020 DCJ briefed the Crown Solicitor to appear for DCJ in 24 intervention matters in the Federal Circuit Court or Family Court.</p> <p>In 2021 DCJ briefed the Crown Solicitor to appear for DCJ in 18 intervention matters in the Federal Circuit Court or Family Court.</p> <p>To date in 2022 DCJ has briefed the Crown Solicitor to appear for DCJ in 10 intervention matters in the Federal Circuit Court or Family Court.</p>
8. Number of Magellan orders DCJ has received and acted on	<p>In 2020 DCJ received and acted on 19 Magellan orders.</p> <p>In 2021 DCJ received and acted on 27 Magellan orders.</p> <p>To 12 August 2022 DCJ has received 12 Magellan orders.</p>

## DCJ responses to questions on notice and supplementary questions from Committee on Children and Young People (Inquiry into Child Protection and Social Services System)

Supplementary questions	
Question	Response
<p>1. The Committee heard that some evidence provided to the Family Court (e.g. DCJ reports or medical reports) is often heavily redacted and, as a result, less useful in substantiating risks of harm to children during family law proceedings.</p> <p>a. Has DCJ also encountered this issue?</p> <p>b. Is there a process where these reports could be provided to the Family Court confidentially, in a form that effectively communicates any risk of harm to children caused by one of their parents?</p>	<p><u>Response to 1a:</u></p> <p>DCJ has not encountered this issue.</p> <p><u>Response to 1b:</u></p> <p>DCJ complies with all relevant legislative non-disclosure provisions when producing material to the FCFCOA.</p> <p>Documents provided to the FCFCOA are redacted to comply with section 29(1)(f) of the <i>Children and Young Persons (Care and Protection) Act 1998</i> which prohibits the disclosure of the identity of a person who has made a report to DCJ. However, the section also includes an exemption allowing the identity of a reporter to be disclosed if a court provides leave. A court can do this if the court is satisfied that the evidence is of critical importance in the proceedings and that failure to admit it would prejudice the proper administration of justice. If a court provided leave under the section for the identity of a reporter to be disclosed, DCJ could provide reports without this information redacted.</p>
<p>2. Do the assessment tools or processes used by staff on the Child Protection Helpline provide any guidance on how to manage and assess risks to children when their parents are engaged in family law proceedings?</p>	<p>The Child Protection Helpline uses the Screening and Response Priority tool (SCRPT) which is a structured decision-making tool that assists Helpline caseworkers to assess whether the information received from a reporter meets the required NSW statutory threshold of Risk of Significant Harm for a child protection report.</p> <p>Information received is processed and assessed the same for all children and young people reported. SCRPT does not give any specific guidance when reports are received about children whose parents are engaged in Family Law proceedings. Helpline caseworkers take a range of information into consideration when assessing the report, including but not limited to, the nature of the concerns (extent of the alleged harm), immediate contact between the child or young person and person alleged to be causing harm, previous reported concerns, established patterns of behaviour by the person alleged to causing harm and the age of the child or young person.</p>
<p>3. Are there any legislative, regulatory or process improvements that can be made in New South Wales to better assist DCJ in intervening in a protective parent's case, and proactively providing information to the Family Court?</p>	<p>There is already a legislative provision that allows DCJ to proactively provide information to the FCFCOA (section 248 of the <i>Children and Young Persons (Care and Protection) Act 1998</i>). DCJ often uses this section to proactively provide information to the Federal Circuit Court and the Family Court.</p> <p>Currently reports about children subject to FCFCOA proceedings are triaged alongside all other ROSH reports received for allocation to a caseworker.</p> <p>There are processes in the SCRPT tool which prompts the Child Protection Helpline caseworkers to consider matters before the FLC as a Magellan matter, so information can be shared with FCFCOA in a timely manner.</p>

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<b>Supplementary questions</b>	
<b>Question</b>	<b>Response</b>
4. Are DCJ able to re-open a child protection case or leave it open, when it moves into the federal family law jurisdiction?	Yes. DCJ can respond to a Risk of Significant Harm report if a matter is before the FCFCOA. The case would remain open dependent on the safety and risk outcomes of the assessments undertaken and casework response needed to mitigate the risks identified.
5. Can you elaborate on the court liaison officers program, and how these caseworkers interact with the family court system?  a. While funding for this program is provided by the Commonwealth, is there a role the NSW Government can play in supporting its expansion and/or improving its effectiveness?  b. Is there anything NSW can emulate from systems in the United Kingdom, where social workers are involved with children very early in court proceedings?	<p>The original Commonwealth funded pilot (1 June 2020-30 June 2022) co-located state and territory child protection and policing officials in family law courts across Australia.</p> <p>In June 2020, DCJ established the NSW Family Law Court Liaison Team which operates only in Sydney, Parramatta, Wollongong and Newcastle registries with each liaison officer attached to one of the four court registries.). The four co-located child protection liaison officers are DCJ caseworkers who provide support and information-sharing for matters filed.</p> <p><u>Response to 5a:</u></p> <p>Commonwealth funding for the 1 July 2022- 30 June 2025 period of the program has not yet been finalised due to the change in federal government. While original funding covered the four trial sites, DCJ provides support to all the remaining FCFCOA registries through existing DCJ resources.</p> <p>The Commonwealth led development of an electronic recording system to capture the FCFCOA data is needed (currently DCJ undertakes manual counts of the requests and responses).</p> <p><u>Response to 5b:</u></p> <p>The FCFCOA employ social workers as Court Child Experts (formerly known as Family Consultants) who write Child Impact Reports to support decision-making by magistrates. The FCFCOA's social workers are also already involved in the Lighthouse Project (Evatt List) when assessing safety risks with parties early on in parenting proceedings.</p>
6. What can be done to facilitate DCJ making earlier interventions in cases that may involve the Family Court?	Occasionally the Family Court or the Federal Circuit Court will send DCJ a "request to intervene" as a party to proceeding under section 91B of the <i>Family Law Act 1975</i> but not provide copies or access to the documents that have been filed by the other parties in the proceedings. This means that DCJ often has to request these documents to make an assessment as to whether to intervene. If these documents were provided with the request this would remove the necessity for DCJ to have to request these documents.

**MEMORANDUM**

**OF UNDERSTANDING**

**BETWEEN THE**

**FAMILY COURT OF AUSTRALIA**

**AND**

**THE NSW DEPARTMENT OF**

**COMMUNITY SERVICES**

## **Introduction**

- 1.1.1 This Memorandum of Understanding has been established to facilitate contact between the NSW Department of Community Services (DoCS) and the Family Court of Australia (FCoA) in order to ensure that a child's or young person's needs for protection are met.
- 1.1.2 This Memorandum represents the present understanding between DoCS and FCoA about how each will deal with contacts from the other, in general terms, in cases where children and young people are the subject of proceedings before FCoA and issues about the safety welfare and wellbeing of those children and young people arise in those proceedings. More detailed procedures will be contained in a protocol to be developed by a Working Party established under this Memorandum of Understanding. That protocol will provide practical guidance to staff of DoCS and FCoA about procedures, to assist cooperation and improve decision-making.
- 1.1.3 In this Memorandum of Understanding, generally the phrase "child or young person" is used when referring to a person under the age of 18 years. The *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ("the *Care and Protection Act*") uses the terms "child" and "young person". It defines a "child" to be a person under 16 years, and a "young person" to be a person who is aged 16 or 17 years.
- 1.1.4 The *Family Law Act 1975 (Cth)* ("the *Family Law Act*") uses the term "child" and deals with parental responsibility for a child who is not yet 18 years. It provides that a parenting order cannot be made, or stops being in force, once a child turns 18 years, or if the child marries or lives in a de facto relationship. If the term child is used in relation to the *Family Law Act* or FCoA, it means a person under 18 years.
- 1.1.5 Providing protection for a child or a young person is a matter of paramount concern where allegations of child abuse or neglect are made, regardless of any disadvantage this may cause to an adult. DoCS is the mandated agency to investigate reports that a child or young person is at risk of harm, including reports made to it by officers of FCoA or parties in cases which are before it.<sup>1</sup>

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<sup>1</sup> S 23 of the *Care and Protection Act* lists 5 circumstances, the presence of one or a number of them in relation to a child about whom current concerns exist, establishes he/she is at risk of harm for the purposes of the *Care and Protection Act*.

## 2. **Principles**

2.1.1 The *Family Law Act* and the *Care and Protection Act* both contain provisions about the principles to be applied by decision-makers when decisions need to be made about children and young people under either Act.

2.1.2 Both Acts recognise:

- that the safety, welfare and wellbeing of children and young people should be the paramount consideration of the decision-maker;
- the important role parents have to play in the upbringing of their children, and that as far as possible the relationship between children and young people and their parents should not be interrupted;
- the importance to the child or young person of such things as the child's or young person's culture, lifestyle and identity;
- the need for the child or young person to maintain as far as possible contact with significant persons (including the parents and siblings), which will then assist the child's or young person's future development and stability;
- that as far as possible agreement should be reached about plans for the child's or young person's future parenting, and that agreement dispute resolution processes can assist the parties reach such agreement.

2.1.3 Both Acts also recognise specific needs of Aboriginal and Torres Strait Islander children and young people and their families.

2.1.4 The *Family Law Act* provides that, in determining what is in the child's best interests,<sup>2</sup> the court must take into account a number of matters, including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples and Torres Strait Islanders.<sup>3</sup>

2.1.5 The objects and principles in Chapter 2 give guidance and direction in the administration of the *Care and Protection Act*. One of the principles states that a child or young person's name, identity, language, cultural and religious ties be preserved as far as possible when he or she is temporarily or permanently deprived of his or her family environment.<sup>4</sup>

2.1.6 The *Care and Protection Act* also provides that Aboriginal and Torres Strait Islander people<sup>5</sup> are to participate in the care and protection of their children

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<sup>2</sup> S 68F (2) (f) of the *Family Law Act*.

<sup>3</sup> By the operation of s68F (4) of the *Family Law Act* "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 Islanders.

<sup>4</sup> S 9(c) of the *Care and Protection Act*.

<sup>5</sup> By the operation of s 5 of the *Care and Protection Act* "Aboriginal" has same meaning as "Aboriginal" in the *Aboriginal Land Rights Act 1983* and "Aboriginal and Torres Strait Islander" means people indigenous to Australia and the Torres Strait Islands. Subs (5) (2) also allows the Children's Court to determine that a child or young person is an Aboriginal for the

and young people with as much self-determination as possible.<sup>6</sup>

2.1.7 Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity to participate in decisions concerning the placement of their children and young people and in other significant decisions.<sup>7</sup>

2.1.8 The *Care and Protection Act* sets out placement principles for Aboriginal and Torres Strait Islander children and young people, which includes a general hierarchical order for placement.<sup>8</sup>

### **3. The Family Court of Australia**

#### **3.1 Jurisdiction**

3.1.1 Under the *Family Law Act* FCoA has jurisdiction to make orders concerning parental responsibility for and in relation to the welfare of children and young people. Parental responsibility includes the persons with whom a child or young person lives or has contact, and matters in relation to the day to day and long term care, welfare and development of the child or young person.

3.1.2 FCoA is required to regard the best interests of the child or young person as the paramount consideration in determining parental responsibility questions other than maintenance. In determining what is in the child's or young person's best interests, FCoA must consider a number of matters. These include the need to protect the child or young person from physical or psychological harm and any family violence involving the child or young person, or a member of the child's or young person's family.<sup>9</sup>

#### **3.2 Limitations to Jurisdiction**

3.2.1 FCoA's jurisdiction is limited<sup>10</sup> in that it must not make an order in relation to a child or young person who is under the care<sup>11</sup> of a person under a child welfare law unless:

- (i) the order is expressed to come into effect when the child or young person ceases to be under that care; or
- (ii) the order is made in proceedings relating to the child or young person in respect of the institution or continuation of which the written consent of the Minister.<sup>12</sup>

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purposes of the *Care and Protection Act* if the Children's court is satisfied that the child or young person is of Aboriginal descent.

<sup>6</sup> S 11 of the *Care and Protection Act*.

<sup>7</sup> S 12 of the *Care and Protection Act*.

<sup>8</sup> S 13 of the *Care and Protection Act*.

<sup>9</sup> S68F of the *Family Law Act*

<sup>10</sup> By s 69ZK of the *Family Law Act*.

<sup>11</sup> However that term may be described.

<sup>12</sup> In NSW, the 'child welfare officer' under the Family Law Act with power to consent is the Minister for Community Services. Where the relevant child welfare law is the Guardianship Act, e.g. for young persons with a disability under a guardianship order, then the relevant child welfare officer is the Minister for Disability.

- 3.2.2 FCoA may adjourn any proceedings before it that relate to the child or young person, where it appears to FCoA that a State court proposes to make an order. This is also an option when a State welfare officer takes other action which has the effect of placing the child or young person under the care (however described) of a person under a child welfare law.

#### **4. The New South Wales Department of Community Services.**

- 4.1.1 The NSW Department of Community Services (DoCS) has statutory responsibility under the *Care and Protection Act* for, amongst other things, child protection services for children and young people in NSW<sup>13</sup>.
- 4.1.2 DoCS is authorised to accept reports<sup>14</sup> of a child or young person at risk of harm and is responsible for any investigation or assessment of the allegation. In some cases, if the allegation involves a staff member or others (like carers) engaged to provide services to children, the Ombudsman may become involved in the investigation.<sup>15</sup>
- 4.1.3 The Director-General has the power to make such investigations or assessments as considered necessary to determine if a child or young person is at risk of harm. This includes a decision to take no further action if, on the basis of the information provided, the Director-General considers that there is insufficient reason to believe that the child or young person is at risk of harm.<sup>16</sup>
- 4.1.4 If DoCS forms the opinion, on reasonable grounds, that a child or young person is in need of care and protection it must take whatever action is necessary to safeguard or promote the safety, welfare and well-being and to reduce the level of risk to the child or young person.<sup>17</sup>
- 4.1.5 The action that DoCS might take includes: providing or arranging for support services; developing, in consultation with the parents, a care plan; ensuring the protection of the child or young person by exercising the Director-General's emergency protection powers; or seeking appropriate orders from the Children's Court.<sup>18</sup>
- 4.1.6 In deciding the appropriate response to a report in a situation of immediate risk, DoCS must have special regard to three principles. The primary principle is that the immediate safety, welfare and wellbeing of the child or young

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<sup>13</sup> S4 provides that the Act applies to children and young people who (a) ordinarily live in NSW, (b) do not ordinarily live in NSW but are present in NSW, or (c) are subject to an event or circumstances occurring in NSW that give rise to a report under the Act.

<sup>14</sup> Reports are information provided under ss23, 25 or 27 of the *Care and Protection Act* by a person who suspects on reasonable grounds that there are current concerns for a child or young person, or a class of children or young people, due to risk of harm from abuse or neglect. or under ss 120 or 121 that a child or young person is homeless.

<sup>15</sup> S 33 of the *Care and Protection Act* and ss 25C and 25D of the *Ombudsman Act 1974*.

<sup>16</sup> SS 30 and 35 of the *Care and Protection Act*.

<sup>17</sup> S 34 (1) of the *Care and Protection Act*.

<sup>18</sup> S34 (2) of the *Care and Protection Act*.



person<sup>19</sup> must be given paramount consideration. The other principles operate subject to this over-riding consideration.<sup>20</sup>

4.1.7 The second principle is any action taken must be appropriate to the age of the child or young person, any disability the child or young person or his or her family members have, and the circumstances, language, religion and cultural background of the family.<sup>21</sup> The third principle is removal of the child or young person from his or her usual caregiver may occur only where it is necessary to protect the child or young person from the risk of serious harm.<sup>22</sup>

4.1.8 Whilst these three principles have particular prominence in situations of immediate risk, the general principles of the Act<sup>23</sup> still need to be kept in mind, including:

- The principle of pursuing the least intrusive intervention in the life of the child or young person and his or her family;
- The principle of participation of the child or young person in decisions that have a significant impact on his or her life; and
- Permanency planning, especially for children of tender years.

## **5. The role of other agencies in the protection of children and young people in NSW**

5.1.1 In deciding what action to take to promote and safeguard the safety, welfare and wellbeing of a child or young person, DoCS may request a government department or agency or a non-government agency in receipt of government funding to provide services.<sup>24</sup>

5.1.2 Once requested to do so, the department or agency must use its best endeavours to comply. The Children's Court can also make orders directing a person or an organisation to provide support services for a child or young person subject to the consent of the person or organisation.<sup>25</sup>

5.1.3 To assist agencies in taking coordinated action in the protection of children and young people, the NSW Premier has issued *Interagency Guidelines for Child Protection Intervention* ("the *Interagency Guidelines*"). The *Interagency Guidelines* have also been given legislative recognition under the *Care and Protection Act*.<sup>26</sup>

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<sup>19</sup> This includes consideration of any other children in their usual residential setting.

<sup>20</sup> S 36 (1)(a) *Care and Protection Act*.

<sup>21</sup> S36 (1)(b) *Care and Protection Act*.

<sup>22</sup> S36 (1)(c) of the *Care and Protection Act*.

<sup>23</sup> Ss 9 and 10 of the *Care and Protection Act*.

<sup>24</sup> S 17 of the *Care and Protection Act*.

<sup>25</sup> S 18 of the *Care and Protection Act*.

<sup>26</sup> S 16 (2) and (3) of the *Care and Protection Act*.

5.1.4 For general information about other NSW agencies that share responsibilities with DoCS in this area, the *Interagency Guidelines* should also be consulted.

## **6 The NSW Children's Court**

6.1.1 The NSW Children's Court is empowered to hear and determine care applications. When it finds a child or young person in need of care and protection, it may make a number of orders.

6.1.2 The range includes:

- (i) An emergency care and protection order.<sup>27</sup>
- (ii) An assessment order.<sup>28</sup>
- (iii) Interim orders<sup>29</sup> and interim care orders.<sup>30</sup>
- (iv) An order accepting an undertaking from a person having parental responsibility.<sup>31</sup>
- (v) An order for the provision of support services<sup>32</sup> or to attend a therapeutic or treatment program.<sup>33</sup>
- (vi) An order for supervision or for contact<sup>34</sup>
- (vii) An order allocating parental responsibility for the child or young person, or specific aspects of parental responsibility.<sup>35</sup>
- (viii) An order providing for compulsory assistance.<sup>36</sup>

## **7. Disclosure of information by DoCS and FCoA**

### **7.1 Principles**

7.1.1 FCoA or DoCS may only disclose information where the law permits the disclosure. This Memorandum itself does not authorise the disclosure of information, but rather seeks to establish agreed procedures to ensure the exchange of information in appropriate cases where disclosure is otherwise lawful.

7.1.2 For FCoA, the paramount consideration of the best interests of the child or young person and statutory requirements of privacy and the security of

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<sup>27</sup> S 46 of the *Care and Protection Act*.

<sup>28</sup> SS 52-56 of the *Care and Protection Act*.

<sup>29</sup> S 70 of the *Care and Protection Act*.

<sup>30</sup> S 69 of the *Care and Protection Act*.

<sup>31</sup> S 73 of the *Care and Protection Act*.

<sup>32</sup> S 74 of the *Care and Protection Act*.

<sup>33</sup> S 75 of the *Care and Protection Act*.

<sup>34</sup> SS 76 and 86 of the *Care and Protection Act*

<sup>35</sup> S 79 of the *Care and Protection Act*.

<sup>36</sup> SS 123-133 of the *Care and Protection Act*. At the time of signing this protocol, these sections are still to come into operation.

personal information will underpin any exchange of information between FCoA and DoCS. For DoCS, the safety, welfare and well being of the child or young person must be the paramount consideration.

- 7.1.3 Both FCoA and DoCS accept that the welfare and protection of children and young people at risk is better secured by a free flow of relevant information between them, where permitted by law. Similarly, courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions.

## **7.2 Laws governing disclosure of information by DoCS**

- 7.2.1 The *Care and Protection Act* makes it an offence to disclose information obtained in connection with its administration or execution except in any one of the following circumstances:

- “(a) with the consent of the person from whom the information was obtained;
- (b) in connection with the administration or execution of the Act;
- (c) for the purposes of any legal proceedings arising under the Act;
- (d) in accordance with a requirement imposed by the *Ombudsman Act 1974*;
- (e) with other lawful excuse”.<sup>37</sup>

- 7.2.2 The disclosure of information to prescribed bodies in specific circumstances is authorised in s 248 of the *Care and Protection Act*. Prescribed bodies include the Police Service, government departments, public authorities, schools, TAFE establishments, public health organisations, private hospitals or bodies prescribed by the regulations.

- 7.2.3 The *Children and Young Persons (Care and Protection) Regulation 2000* (“the *Regulation*”) includes as prescribed bodies a designated agency,<sup>38</sup> a licensee of a children’s service<sup>39</sup>, a private adoption agency, FCoA and Centrelink. This makes it clear DoCS can disclose information about a particular child or young person<sup>40</sup> to FCoA.

- 7.2.4 The *Privacy and Personal Information Protection Act 1998* (NSW) came into force on 1 July 2000. It introduced a set of privacy standards for most of the NSW public sector. Personal information is protected by 12 information protection principles, subject to statutory exemptions. A *Privacy Code of Practice* if approved by the Privacy Commissioner, will allow those principles to be further modified in limited circumstances.

- 7.2.5 Principle 2 restricts the collection of personal information other than directly from the client unless it is authorised to do so, such as in accordance with s 248,<sup>41</sup> s 254 and the *Regulation*. A further relevant exemption operates to restrict principle 2 if compliance might detrimentally affect or prevent the

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<sup>37</sup> S254 of the *Care and Protection Act*.

<sup>38</sup> S 139 defines this term and it includes an organisation that arranges out-of home care.

<sup>39</sup> See Chapter 12 of the *Care and Protection Act*.

<sup>40</sup> This includes a class of children or young persons.

<sup>41</sup> Including those bodies included in s 248(6) (f) by clause 42 of the *Regulation*.

proper exercise of the Director-General's investigative functions under the *Care and Protection Act*.

- 7.2.6 Principle 10 restricts the use of personal information for any purpose other than that for which it was collected without the consent of the client or its use is necessary for the health or well being of the client. Relevant exemptions apply as above for principle 2.
- 7.2.7 Principle 11 prevents the disclosure of personal information unless directly related to the reason it was collected, the client would not object or the information is of a kind normally disclosed or the disclosure was necessary to protect the health or well being of the client. Relevant exemptions apply as above for principle 2.
- 7.2.8 Besides these laws, it is also recognised that restrictions may be placed on disclosure of information because of confidentiality requirements (for example, information concerning confidential counselling or alternative dispute resolution actions) or matters where it is not in the public interest for disclosure to occur at that time (for example, where a claim of public interest immunity might be raised if the material were the subject of a subpoena).

### **7.3 Laws governing disclosure of information by FCoA**

- 7.3.1 The *Privacy Act 1988* (Cth) prohibits the disclosure of personal information held by FCoA except in limited circumstances. One of those circumstances is where the disclosure is required or authorised by or under law.
- 7.3.2 When a notification is made under either s 67Z or 67ZA of the *Family Law Act*, s 67ZA(6) of the Act authorises such disclosures of other information as the notifier reasonably believes is necessary to enable DoCS to properly manage the matter the subject of the notification.
- 7.3.3 The Family Law Rules <sup>42</sup>prohibit a person searching the records of FCoA relating to proceedings or matters under the *Family Law Act*. Documents forming part of those records cannot be inspected unless the person is a party, an intervener to the proceedings, or has been granted leave of the Court or a Registrar to do so.
- 7.3.4 A person must demonstrate a "proper interest" before being granted leave to search records or inspect documents. Unless the written consent of each party to the proceedings has been obtained, a request for leave to search records or inspect documents would need to be in writing accompanied by evidence demonstrating a "proper interest". In some cases, FCoA would require the request and supporting documentation to be served on each party to the proceedings. The parties to the proceedings would have to be given a reasonable time to object, if they wished, to leave being granted.

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<sup>42</sup> Order 5 rule 6.

- 7.3.5 It is also recognised that some information held by the court may not be disclosed, for example information relating to confidential counselling or alternative dispute resolution actions.<sup>43</sup>

## **8 Reports of Risk of Harm from FCoA to DoCS**

- 8.1.1 During the course of Family Court proceedings, information may be sent to DoCS by the Court indicating a child may be at risk of being abused<sup>44</sup> or ill treated<sup>45</sup> or exposed or subjected to behaviour which psychologically harms the child<sup>46</sup>.

### **8.2 Request from Family Court that the Director-General intervene in proceedings.**

- 8.2.1 S 91B of the *Family Law Act* provides that in proceedings which affect or may affect the welfare of a child, FCoA may request the intervention of the Director-General of DoCS.<sup>47</sup>

- 8.2.2 Where FCoA makes a request under s 91B, FCoA Registry will promptly notify DoCS by forwarding to the DoCS Helpline a copy of any orders, reasons for judgment (if available) and, where appropriate relevant affidavit material, and will include information about the next date the matter is listed. If an order is made pursuant to s91B, then Director-General may upon application to the Registrar search and take copies of the documents on the Court file.

- 8.2.3 It is recognised that requests for intervention under s91B are made by judicial officers of the Court and are therefore an indication that the court requires some involvement by DoCS in the proceedings to assist the Court in addressing the issues of concern about the child or young person who is the subject of the proceedings.

- 8.2.4 DoCS will deal with a request for intervention as a report that a child or young person is at risk of harm under the provisions of the *Care and Protection Act*.

On receipt of a request for intervention from the Court, DoCS will:

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<sup>43</sup> S62(f) Family Law Act

<sup>44</sup> The Family Law Act (s 60D) defines "abuse" for the purposes of that Act to mean:

(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory where the act in question occurred; or  
(b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object, and where there is unequal power in the relationship between the child and the relevant person.

<sup>45</sup> The Family Law Act does not define "ill treatment".

<sup>46</sup> The Family Law Act does not define "behaviour which psychologically harms the child" or "psychological harm".

<sup>47</sup> This provides the Family Court a procedure by which it may promptly bring a particular case to the attention of the Director-General of DoCS for consideration and assistance.

- (i) Obtain as much background or other information as possible, from the Court
- (ii) analyse the information in accordance with the *Care and Protection Act* and the relevant DoCS procedures for assessing and investigating reports of risk of harm, giving due recognition to a request under section 91B having been made following an assessment by the Court; and
- (iii) will give written advice to the Court of any action DoCS has taken or intends to take.

8.2.5 FCoA notes that DoCS will usually require a minimum of 28 days from the receipt of the report or request for intervention to prepare its response. If a response is required by a certain date and further time is needed, DoCS will advise the Court in writing accordingly. If intervention is not proposed and care proceedings are not to be commenced, DoCS will advise of the reasons for the decision to not intervene and also advise whether it has any other information in relation to the child or any of the parties to the proceedings relevant to its investigative functions under the *Care and Protection Act*

### **8.3 Notice of allegations of child abuse made by a party in Family Court proceedings.**

8.3.1 Under s 67Z of the *Family Law Act*, where a party to proceedings alleges that a child to whom those proceedings relate has been abused or is at risk of being abused:

- (i) that person must file a notice in a prescribed form in the Court;<sup>48</sup> and
- (ii) the Court must, as soon as practicable, notify DoCS.

8.3.2 When filed at the court, the next hearing date is written on the cover sheet of the form. Court staff provide sealed copies of the form to the party filing the notice for service on other party(s) and on the alleged abuser (if not a party to the proceedings); and

8.3.3 The Registry Manager or his/her nominee forwards to the DoCS Helpline a copy of the form with a pro-forma letter.

### **8.4 Mandatory reporting<sup>49</sup> by Family Court personnel.**

8.4.1 Where a member of FCoA personnel<sup>50</sup> in the course of carrying out his or her duties has reasonable grounds for suspecting that a child has been abused,

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<sup>48</sup> Form 66

<sup>49</sup> S67ZA of the *Family Law Act* refers to reports as “notifications”.

<sup>50</sup> The *Family Law Act* (s 60D) defines a member of court personnel to mean:

- (a) a court counsellor; or
- (b) a court mediator; or
- (c) an approved arbitrator; or
- (d) a welfare officer; or
- (e) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
- (f) the Registrar or a Deputy Registrar of the Family Court of Western Australia.

or is at risk of being abused, that member must, as soon as practicable, report to DoCS his or her suspicion and the basis for the suspicion.

- 8.4.2 Where a member of the court personnel makes a report under the *Family Law Act*, he or she will make that report in writing to the DoCS Helpline. In cases of urgency, the report will be made by telephone followed up with a written report as soon as practicable. The DoCS Helpline will also be informed of the next date, if any, that the matter is listed before the Court.

## **8.5 Discretionary reporting by court personnel.**

- 8.5.1 Under s 67ZA(3) of the Family Law Act, where a member of FCoA personnel in the course of carrying out his or her duties has reasonable grounds for suspecting that a child has been ill treated, or is at risk of being ill treated, or has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child, that member may report to DoCS his or her suspicion and the basis of the suspicion.

- 8.5.2 Where a member of the court personnel makes a mandatory or discretionary report under the *Family Law Act*, he or she will make that report in writing to the DoCS Helpline.

## **8.6. Action by DoCS following a notice of allegations by a party or a mandatory or discretionary report from FCoA**

- 8.6.1 DoCS will deal with a report from FCoA as a report that a child or young person is at risk of harm under the provisions of the *Care and Protection Act*.
- 8.6.2 On receipt of a report from the FCoA, a party to proceedings in the FCoA, or a report from court personnel, DoCS will make such investigations and assessments as DoCS considers necessary to determine whether the child or young person is currently at risk of harm.<sup>51</sup>
- 8.6.3 During any investigation and assessment by DoCS, the Court will provide DoCS with information about any orders made in proceedings concerning the child and if any Court proceedings concerning the child have concluded.<sup>52</sup>

## **9. The overlap of Federal and State jurisdiction in relation to children and young people**

### **9.1 Principles**

- 9.1.1 There is an overlap of the federal and state jurisdictions in relation to children and young people. This overlap raises a number of difficult legal issues where proceedings may be or are commenced in both the Children's Court and FCoA.

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<sup>51</sup> S.30 of the Care and Protection Act.

<sup>52</sup> This can be by order or by withdrawal or discontinuance of proceedings.

9.1.2 In dealing with these issues, it is necessary to recognise:

- (i) the specialised nature and separate jurisdictions of FCoA and Children's Court;
- (ii) that DoCS has statutory responsibilities which may involve, or result in the involvement of both FCoA and the Children's Court;
- (iii) that multiple hearings over prolonged periods of time in separate jurisdictions can be harmful to the child or young person and should where possible be minimised;
- (iv) those parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction;
- (v) that neither the Children's Court nor FCoA should be used as a de facto court of appeal one from the other.

## **9.2 Choice of jurisdiction by DoCS.**

9.2.1 When deciding in which court the matter should most appropriately proceed, it should be assumed that the nature of the individual case would determine the appropriate jurisdiction and consideration.

9.2.2 Amongst a variety of issues, consideration can be given to matters such as:

- (i) whether DoCS has current protective concerns for the safety, welfare or well-being of the child or young person;
- (ii) whether these protective concerns can be sufficiently addressed by a change in residence, contact or special issues orders, without the need for ongoing involvement by DoCS;
- (iii) if the court has appointed, or intends to appoint, a Child Representative in the proceedings, the need for DoCS to also be a party, taking into account the issues raised in the proceedings concerning the safety welfare and well-being of the child or young person;
- (iv) whether there is an appropriate parent or carer prepared to file a Family Court application to establish or vary residence, contact or special issues orders;
- (v) which court is likely to provide the most timely and effective solution to secure the safety, welfare and well-being of the child or young person and which order of which court will take precedence;
- (vi) which court has jurisdiction to make orders most likely to be supported by the parties, including the child or young person and their family.

9.2.3 DoCS reserves the right to choose the jurisdiction in which protective concerns are determined, guided by the principles enunciated above. If DoCS forms the view that FCoA is the appropriate jurisdiction to decide matters of a protective nature, it may choose not to become a party but to give evidence in support of one or another party, or the child's representative, if appointed. DoCS notes FCoA's preference that DoCS elects to intervene when requested by Order pursuant to s91B to do so.



- 9.2.4 DoCS' decision will be based on the level of concern including those concerns raised in FCoA proceedings, the preparedness of the other parties' legal representative to call DoCS' evidence, and a recognition that DoCS as a witness as opposed to being a party has no right of appeal against the orders made.
- 9.2.5 If, during the course of the proceedings in FCoA and as a result of new information, DoCS assesses that the child is at significant risk, and that none of the parties will protect the child or that the safety, welfare and well-being of the child will be best secured by an order of the Children's Court, DoCS may initiate proceedings in the Children's Court.
- 9.2.6 When requested by FCoA to intervene, and DoCS decides instead (based on the reasons set out in 9.2.5) to initiate proceedings in the Children's Court, it will inform FCoA at the earliest opportunity of its intentions.
- 9.2.7 If, as a party to Family Court proceedings, DoCS is dissatisfied with the outcome of the proceedings and considers the child or young person to be at significant continuing risk DoCS may appeal FCoA orders.
- 9.2.8 If, following the conclusion of Family Court proceedings, fresh concerns are raised about the safety, welfare or well-being of a child or young person, DoCS will determine whether the concerns are best addressed through care proceedings in the Children's Court or by bringing further proceedings in FCoA.
- 9.2.9 Where there have been previous proceedings in FCoA or proceedings are current in FCoA, DoCS will ensure, to the extent that it is aware, that this information is communicated to the Children's Court.

## **10. Protocol**

- 10.1 FCoA and DoCS have agreed to establish a Protocol to provide practical guidance to staff of DoCS and FCoA about procedures, to assist cooperation and improve decision-making.
- 10.2 The Protocol will include a process for the ongoing review and possible amendment of the Protocol, to take into account
- initiatives that are being considered or may be agreed between FCoA and DoCS (such as the Magellan Project - which is a project about the management of family law cases where allegations of serious sexual or physical abuse are made in the context of family law proceedings); and
  - the impact of Commonwealth and State legislation or other laws relating to the safety, welfare and wellbeing of children and young people.
- 10.3 The Protocol will be read subject to this Memorandum.

## **11. Review**

- 11.1 This Memorandum may be reviewed at any time by the agreement of both FCoA and DoCS and in any event within 5 years of the date of this Memorandum.

Date:

Director-General  
NSW Department of Community Services

Chief Justice  
Family Court of Australia

**PROTOCOL**

**BETWEEN THE  
FAMILY COURT OF AUSTRALIA**

**AND**

**THE NSW DEPARTMENT OF  
COMMUNITY SERVICES**

## **1. Introduction**

- 1.1 This Protocol has been established to facilitate co-operation and sharing of information and to clarify procedures between DoCS and FCoA in order to meet children's needs for protection.<sup>1</sup>
- 1.2 This Protocol should be read in conjunction with the Memorandum of Understanding (MoU) between the NSW Department of Community Services (DoCS) and the Family Court of Australia (FCoA). The MOU sets out the principles and objectives as well as the legal framework underpinning the relationship between DoCS and FCoA.
- 1.3 The MOU, this Protocol and any explanatory information issued by either DoCS or FCoA to staff form the basis of the interactions between DoCS and FCoA.
- 1.4 In this Protocol, as in the MOU, the phrase "child or young person" is generally used when referring to a person under the age of 18 years. The *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ("the *Care and Protection Act*") uses the terms "child" (a person under 16 years) and "young person" (a person aged 16 or 17). The *Family Law Act 1975 (Cth)* ("the *Family Law Act*") uses the term "child" but it does not define the term by reference to age. The relevant age is 18 years. The *Family Law Act* deals with parental responsibility (formerly "guardianship") with respect to children under 18 years, provides that parenting orders (formerly orders for "custody" and "access") cannot be made, or stop being in force, once a child turns 18 years, marries or lives in a de facto relationship.
- 1.5 Providing protection for a child or a young person is a matter of paramount concern where allegations of child abuse or neglect are made. DoCS is the agency mandated to investigate reports that a child or young person is at risk of harm, including reports made to it by officers of FCoA or parties in cases which are before the FCoA.<sup>2</sup>
- 1.6 Staff should refer in particular to Section 2 of the MOU (headed "Principles") for the general principles to be applied by decision-makers in DoCS and FCoA when making decisions about children and young people.

## **2 Reports of Risk of Harm & Requests that the Director-General intervene in proceedings.**

There are three types of reports of risk or harm that may arise in FCoA proceedings. These are:

- **Section 91B** - made by FCoA (either a Judge, Judicial Registrar, Registrar or Deputy Registrar);
- **Section 67Z** - made by a party to the proceedings on a Form 66 filed at FCoA;

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<sup>1</sup> It should be noted that this Protocol applies only to the relationship between the FCoA and DoCS.

<sup>2</sup> S 23 of the *Care and Protection Act* lists 5 circumstances, the presence of one or a number of them in relation to a child about whom current concerns exist, establishes he/she is at risk of harm for the purposes of the *Care and Protection Act*.

- **Section 67ZA** - made by a member of FCoA personnel.

## **2.1 Requests from FCoA for DoCS to intervene (s91B)**

- 2.1.1 Where FCoA makes a request for intervention under s91B, the FCoA Registry will promptly forward to the DoCS Helpline a copy of any orders together with notice of the next date the matter is listed before the FCoA.
- 2.1.2 It is recognised that requests for intervention under s91B are made by judicial officers of FCoA and are therefore an indication that the Court considers it appropriate that there be some involvement by DoCS in the proceedings to assist FCoA in addressing the welfare of the child or young person who is the subject of the proceedings.
- 2.1.3 When making the s91B request, FCoA should consider ordering the delivery of any relevant DoCS file to the Court prior to the next listing of the matter. The next listing will normally be about 6 weeks from the making of the s91B order.
- 2.1.4 FCoA will fax the request to the DoCS Helpline on (02) 9633-7666, marked to the attention of the Executive Director, Helpline.

## **2.2 Notice of allegations of child abuse made by a party in FCoA proceedings (s67Z) - Form 66**

- 2.2.1 Under s67Z of the *Family Law Act*, where a party to proceedings alleges that a child or young person to whom those proceedings relate has been abused or is at risk of being abused:
- (i) that person must file a notice in the prescribed form<sup>3</sup> in the Court, and
  - (ii) FCoA must, as soon as practicable, make a report to DoCS.
- 2.2.2 When a Form 4 is filed at the Court, the next hearing date is written on the cover sheet. FCoA staff provide sealed copies to the party filing the Form 4 for service on other party(s) and on the alleged abuser (if not a party to the proceedings), and
- 2.2.3 The Registry Manager or his/her nominee forwards a copy of the Form 4 to the DoCS Helpline together with a pro-forma letter.
- 2.2.4 The Form 4 sets out that a party has alleged abuse or risk of abuse. The Form 4 does not involve any judgment by anyone associated with FCoA that the allegation is true, or is likely to be true. The Form 4 simply provides a method of alerting DoCS to the fact that the allegation has been made.

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<sup>3</sup> Form 4

## **2.3 Mandatory Report by FCoA personnel (s67ZA)**

- 2.3.1 Where, in the course of carrying out his or her duties, a member of the FCoA personnel<sup>4</sup> has reasonable grounds for suspecting that a child or young person has been abused, or is at risk of being abused, that member must, as soon as practicable, make a report to DoCS of his or her suspicion and the basis for the suspicion.<sup>5</sup> In practice, this most commonly occurs when a court counsellor has such grounds as a result of interviews with litigants and/or the child or young person.
- 2.3.2 Where a member of the FCoA personnel makes a report under the *Family Law Act*, he or she will make that report in writing to the DoCS Helpline. In cases of urgency, the report may be made by telephone followed up with a written report. The DoCS Helpline will also be informed of the next date, if any, that the matter is listed before FCoA.

## **3 Dealing with requests under s91B or reports under s67Z or s67ZA**

- 3.1 Where the FCoA has faxed the request or report to the DoCS Helpline, DoCS will deal with the request or report forwarded by the FCoA as a report that a child or young person is at risk of harm under the provisions of the *Care and Protection Act*.
- 3.2 The DoCS Helpline makes an initial assessment as to the categorisation of the case and, where appropriate, advises the relevant Community Services Centre (CSC) or Joint Investigative Response Team (JIRT). In the case of a request for intervention, the DoCS Helpline will draw to the attention of the CSC or JIRT that the request has come from a judicial officer and is therefore an indication that the FCoA considers it appropriate that there be some involvement by DoCS in addressing issues of concern about the child or young person who is the subject of the proceedings.
- 3.3 Where the Helpline has referred a report to a CSC or JIRT, the DoCS Helpline will advise the FCoA, by means of a "Feedback to Reporter's Letter", to which CSC or JIRT the report has been referred. On receipt of an initial assessment from the Helpline or a request for intervention from the FCoA, the CSC or JIRT will:
- 3.3.1 assess the request for intervention as soon as possible; and,
  - 3.3.2 determine whether the report requires further assessment to be undertaken.

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<sup>4</sup> The *Family Law Act* (s 60D) defines a member of court personnel to mean:

- (a) a court counsellor; or
- (b) a court mediator; or
- (c) a welfare officer; or
- (d) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
- (e) the Registrar or a Deputy Registrar of the Family Court of Western Australia.

<sup>5</sup> Section 67ZA.

- 3.4 Where the report or request for intervention has been allocated for additional work by the CSC or JIRT, the CSC or JIRT will:
- 3.4.1 obtain as much background or other information as possible, either from FCoA or, in the case of a notice under s67Z, from the legal representative acting for the party who filed the notice if they are represented, but if not, from the party who made the report; and,
  - 3.4.2 analyse the information in accordance with the *Care and Protection Act* and the relevant DoCS procedures for assessing and investigating reports of risk of harm; and,
  - 3.4.3 give written advice to FCoA of any action DoCS has taken or intends to take as a result of the secondary assessment of the case.
- 3.5 DoCS will usually require a minimum of 28 days from the receipt of the report or request for intervention to prepare its response. If a response is required by a certain date and further time is needed, DoCS will advise FCoA in writing accordingly. DoCS will use its best endeavours to provide a response to FCoA within 42 days of receiving the report or request. If intervention is not proposed and care proceedings are not to be commenced, DoCS will advise whether it has any other information in relation to the child or any of the parties to the proceedings relevant to its investigative functions under the *Care and Protection Act*.
- 3.6 During any investigation and assessment of the report by DoCS, FCoA will provide DoCS with information about any orders made in proceedings concerning the child or young person and if any court proceedings concerning the child or young person have concluded.
- 3.7 In the case of a request for intervention, the judicial officer making the request should consider whether or not it is appropriate in the circumstances to make a specific order granting DoCS leave to inspect the FCoA file. In the absence of any such specific order, prior to DoCS determining if it wishes to intervene in any FCoA proceedings, DoCS may seek leave to search the relevant FCoA records by making an application to a Deputy Registrar for such leave pursuant to Rule 24.13 of the Family Law Rules.
- 3.8 DoCS will respond to the s91B request in one of the following ways;
- 3.8.1 DoCS may bring a care application in the Children's Court to protect the child or young person;
  - 3.8.2 DoCS may intervene as a party to the proceedings in FCoA;
  - 3.8.3 DoCS may indicate that it does not intend to intervene but has information which may be of assistance to FCoA; or
  - 3.8.4 DoCS may indicate that it does not intend to take further action and has no information of assistance to FCoA.

- 3.9 In the event that DoCS intervenes in the proceedings, DoCS is deemed to become a party to the proceedings<sup>6</sup> and has the same rights as any other party to search the relevant FCoA file and the same right to obtain copies of any relevant document contained within any such file.

#### **4 Disclosure of Information by DoCS and FCoA**

##### **4.1 Disclosure of information where a report or request has been received by DoCS from FCoA**

- 4.1.1 The DoCS officer who receives the report or request should direct his or her enquiry for information from FCoA to:
- (i) if a report was made by a member of the FCoA personnel, the person who made the report; or
  - (ii) if a request is made under s91B, the Manager Mediation or Registry Manager at the Registry from which the request was sent; or
  - (iii) if the person who made the report or request cannot be identified or is a party to the proceedings, the Manager Mediation or Registry Manager at the Registry from which the report or request was sent.
- 4.1.2 FCoA may disclose to the DoCS officer any information necessary for DoCS to properly manage the matter the subject of the report or request. FCoA may also disclose information regarding the progress of the FCoA proceedings, including:
- (i) the stage the proceedings have reached;
  - (ii) any future listing dates;
  - (iii) the identity and contact details for the Child Representative (if one has been appointed by FCoA); and
  - (iv) whether a Report pursuant to Part 15.5<sup>7</sup> or a Family Report has been ordered and prepared.
- 4.1.3 The information may be given on a 'phone back' basis to the DoCS officer or, depending on the nature and extent of information to be divulged, in a face to face meeting with the DoCS officer.

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<sup>6</sup> See s91B(2)(b) of the Family Law Act

<sup>7</sup> See Rule 15.48



#### **4.2 Disclosure of information by FCoA Personnel to DoCS where a report has been made to DoCS**

- 4.2.1 If a report has been made under s67ZA the DoCS officer may contact the reporter to discuss the protective concerns held for the child or young person and the basis for those concerns. At the same time, the DoCS officer should note the confidential nature of information disclosed to a Court Mediator during confidential conferences. Section 19N of the *Family Law Act* provides that evidence of anything said, or any admission made, at a meeting or conference conducted by a court mediator is not admissible in proceedings before any court. This means, for example, that DoCS cannot put evidence of such confidential disclosures made to a court counsellor before another court, such as the Children's Court. DoCS will need to obtain its own evidence of any matters of concern through its own investigation process.
- 4.2.2 If DoCS receives a request from the NSW Ombudsman to supply information of a confidential nature that was disclosed to a Court mediator during confidential counselling, DoCS shall comply with any lawful obligations to produce such information. DoCS shall however notify the Manager Mediation of the FCoA of such production within seven days of it taking place.
- 4.2.3 If a report has **not** been made by a FCoA officer, but the family is known to DoCS for some other reason, DoCS will need to make an application under Rule 24.13 of the *Family Law Rules* for permission to search the records of the Court and inspect documents contained in those records. The DoCS officer should consult DoCS Legal Services concerning this application.

#### **4.3 Disclosure of Information by DoCs to FCoA**

- 4.3.1 DoCS may disclose information to any person who has made a report concerning any action taken as a consequence of the report, if it is of the view that the disclosure of information is consistent with the objects and principles of the *Care and Protection Act*.
- 4.3.2 Where no report to DoCS has been made by FCoA, but there are proceedings pending in FCoA relating to a child or young person and FCoA becomes aware that there are past or current care proceedings involving DoCS, FCoA may obtain the following information from the DoCS Helpline:
- (i) Whether DoCS has received any reports in respect of that child or young person;
  - (ii) the status of investigation on any current reports and information on their assessment of the risk involved;
  - (iii) in general terms, any action DoCS proposes to take on any current reports;
  - (iv) the status of any care proceedings, including:
    - (a) any orders that have been made;
    - (b) the listing date, if any, for pending proceedings; and
    - (c) contact details of the relevant DoCS caseworker.

- 4.3.3 The information on the status of the DoCS investigation shall be given to the FCoA officer. This can be by way of a telephone conversation or by letter.

## **5 Case Management and the role of Case Conferences**

- 5.1 Case conferences are a critical aspect of case management in child protection work and should be convened at critical decision-making points, where the participation of a number of individuals is needed to guide decision-making. A case conference can ensure that relevant information is shared and determine which jurisdiction can best respond to the needs of the child or young person.
- 5.2 Consistent with the *Care and Protection Act*, DoCS may proceed to develop a care plan to address issues concerning the safety welfare and well-being of the child or young person, and may convene a case conference of all involved parties in responding to a report of suspected child abuse or neglect. Where a report has been received from FCoA, the timing of the case conference should, where possible, occur within the period of any adjournment of FCoA proceedings.
- 5.3 The Manager Mediation or his/her nominee can be invited to attend and participate in such conferences as appropriate and where possible.

## **6. General Search of FCoA Records by DoCS**

- 6.1 The general provisions relating to searching FCoA records by officers of DoCS are set out in paragraph 7.3.3 and 7.3.4 of the MOU.
- 6.2 If DoCS is not a party to proceedings, DoCS is required to seek leave from a Deputy Registrar to search the Court records pursuant to Rule 24.13 unless such an order has already been made.

## **7. Location Orders**

- 7.1 Section 67M of the *Family Law Act* relates to location orders other than from a Department of State of the Commonwealth or a Commonwealth Instrumentality.
- 7.2 A location order is an order requiring the person to whom the order is addressed to provide to the Registrar of the FCoA such information as the person has relating to the subject child's location.
- 7.3 Information about the child's location is defined in s67H of the *Family Law Act*. It is information about where the child is or where a person, who the Court has reasonable cause to believe has the child, is.
- 7.4 The FCoA may make a location order under s67M(2) with respect to DoCS in the event that the Court is satisfied that DoCS is likely to have information about the location of any relevant child.
- 7.5 A location order will stay in force for a period of 12 months or such longer period as the FCoA may determine.
- 7.6 While a location order is in force, DoCS must provide the information sought by the order as soon as practicable or as soon as practicable after DoCS obtains such information.
- 7.7 DoCS must comply with the location order in respect of any child falling within the jurisdiction of the *Family Law Act* in spite of anything in any other law (s67M(6)).<sup>8</sup>
- 7.8 Section 67P of the *Family Law Act* sets out how the FCoA must deal with any location order information provided to it. The FCoA, or any other person who obtains the location order information because it has been provided by the FCoA, must not disclose it to any other person except:
- 7.8.1 The Registrar of another court;
  - 7.8.2 An officer of the Court, or of another court, for the purpose of that officer's responsibilities and duties;
  - 7.8.3 A process server engaged by, or by an officer of, the Court or another court;
  - 7.8.4 With the leave of the court that made the location order, the legal adviser of the applicant for the order or a process-server engaged by that legal adviser;
  - 7.8.5 A person authorised or directed to execute, or assist in executing, a recovery order<sup>9</sup>.
- 7.9 In the event that DoCS seeks not to comply with a location order, DoCS must file an Application in a Case<sup>10</sup> in the FCoA to seek to become a party to the proceedings and to seek discharge the relevant location order.

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<sup>8</sup> Section 69ZK provides, in effect, that children who are subject to orders under a Child Welfare Law fall outside the jurisdiction of the FCoA.

<sup>9</sup> Section 67Q(b) and (c)

<sup>10</sup> See Rule 6.05

- 7.10 Where DoCS has provided information as set out in any location order, FCoA shall notify DoCS Legal Services of any listing date when the issue of release of such information is to be considered.
- 7.11 FCoA shall use its best endeavours to inform DoCS Legal Services when a location order has been satisfied, discharged or the information sought in the order is no longer required.

## **8. Recovery Orders**

- 8.1 A recovery order is an order requiring the return of a child to one of his or her parents or a person who has residence or contact to the subject child.<sup>11</sup>
- 8.2 A recovery order may authorise or direct a person, with such assistance as may be necessary and if necessary by force, to stop and search vehicles, vessels and aircraft and to enter and search premises for the purpose of finding the subject child.
- 8.3 If, prior to the making of a recovery order, the FCoA becomes aware that:
- 8.3.1 there is a current s91B invitation in existence in the particular matter;
  - 8.3.2 there is a Form 4 in existence in the particular matter; or
  - 8.3.3 it appears to the FCoA that DoCS may have some current involvement with the subject child/children,

FCoA should consider whether DoCS Legal Services should be given notice of the application for the recovery order prior to the making of the recovery order.

- 8.4 In the event that DoCS Legal Services has been given notice of the application for a recovery order, DoCS may seek to intervene in the proceedings either generally or in relation to the limited issue of the making of the recovery order.
- 8.5 In the event that DoCS has not been given prior notice of the making of the relevant recovery order and DoCS either objects to the recovery order or seeks not to have to comply with such recovery order, DoCS may file an Application in the FCoA to seek to become a party to the proceedings and to seek discharge the relevant recovery order.
- 8.6 DoCS reserves the right to bring such urgent proceedings before the Children's Court as it considers appropriate in the circumstances in the event that FCoA makes a recovery order and time does not permit DoCS to either seek to intervene in the relevant FCoA proceedings or to seek to discharge the said recovery order.
- 8.7 In the event that DoCS brings urgent proceedings before the Children's Court, DoCS will notify the Registry Manager of the FCoA Registry from which the recovery order was issued. DoCS will also keep the FCoA informed of any decision either to continue in the Children's Court or have the matter return to the FCoA.

## **9. Dispute Resolution Process**

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<sup>11</sup> Section 67Q of the Family Law Act sets out the meaning of "recovery order".

- 9.1 Any dispute or complaint in relation to the operation of this Protocol should be dealt with, in the first instance, at the level of the respective DoCS worker and FCoA officer. If the workers concerned cannot resolve the problem the following process is to be implemented.
- 9.2 Depending on the nature of the complaint, contact will be made either verbally or in writing between the DoCS worker's line supervisor and the FCoA officer's supervisor.
- 9.3 If resolution of the problem is not achieved at this level and the FCoA Mediation section is involved, the complaint shall be directed to the relevant Director Child and Family of DoCS or the relevant Manager Mediation of the FCoA, depending on the worker making the complaint.
- 9.4 If resolution of the problem is not achieved at this level, the matter should be referred to the Registry Manager of FCoA and the relevant DoCS Regional Director who will together decide on a course of action to resolve the problem.
- 9.5 Should the above course of action not resolve the dispute then the Registry Manager of FCoA and the DoCS Regional Director may then need to consult their respective managers for resolution at higher levels of each service.

## **10. Magellan Project in NSW**

- 10.1 FCoA identifies certain cases in its Sydney Registry involving child abuse which require particular judicial management as Magellan cases. It is acknowledged that the children the subject of these cases have generally been the subject of reports and/or investigation of child protection concerns by DoCS or other State/Territory welfare agencies. In the event that DoCS establishes that the Magellan procedure is creating workload issues for DoCS then this will be referred to a state Magellan Working Party.
- 10.2 Where FCoA identifies a Magellan case in the Sydney Registry, FCoA may request that a report be prepared by DoCS regarding the involvement of DoCS in relation to the child and/or their family. The request will nominate the date on which the report is to be provided. There is in principle agreement that the form of the secondary risk of harm assessment report will be considered as the basis of this report.
- 10.3 The benchmark for production of the report is 4 weeks. It is acknowledged that there may be circumstances where a shorter timeframe is requested in the best interests of a child or where DoCS may need to request some further time to produce a report. The time for preparation of the report should not exceed 42 days without the agreement of FCoA.
- 10.4 Where such a request is made, FCoA shall send a copy of the relevant order to the nominated officer of DoCS. The officer shall ensure the relevant DoCS staff [or name of position] prepare the report within the timeframe requested. If DoCS anticipate the report cannot be available by the date nominated, the DoCS officer will advise the Magellan Deputy Registrar and request an alternate date.
- 10.5 Where such a request is made, DoCS will provide a report:
- detailing the involvement of DoCS in relation to the child and/or their family including notifications, investigations and assessments.
  - addressing matters referred to in the order making the request for the report.

- The report will be sent by DoCS to the registry manager of the relevant FCoA registry.
- 10.6 When DoCS files are subpoenaed to FCoA, DoCS must comply with the provisions of Part 15.3 of the *Family Law Rules 2004* other than where a provision or provisions have been dispensed with by the Court. It is acknowledged that this will include the blanking out of the name of reporters of children at risk of harm. If this information is required then a decision will be made on a case by case basis with DoCS represented before the Court.
- 10.7 These Magellan procedures will be reviewed at the conclusion of 12 months from the date of this document with a view to its possible extension elsewhere within NSW.

Date:

Director-General  
NSW Department of Community Services

Chief Executive Officer  
Family Court of Australia

**INFORMATION SHARING AGREEMENT  
ABOUT  
INDEPENDENT CHILDREN'S LAWYERS  
IN PROCEEDINGS UNDER THE *FAMILY LAW ACT 1975***

**BETWEEN**

**DEPARTMENT OF FAMILY AND COMMUNITY SERVICES  
(FACS)**

**AND**

**LEGAL AID NSW  
(Legal Aid)**

## **Purpose**

1. This Information Sharing Agreement ('Agreement') sets out information sharing and associated procedural matters agreed to by the parties when an Independent Children's Lawyer ('ICL') is appointed for children and young persons in proceedings under the *Family Law Act 1975*.
2. This is a collaborative measure and is not intended to create legal obligations or entitlements. This Agreement does not purport to alter the law or interfere with the exercise of jurisdiction by the courts nor apply in circumstances where FACS is a party to proceedings.
3. This Agreement replaces all previous Memoranda of Understanding entered into between the parties.

## **Principles**

4. Safeguarding children's safety and promoting their best interests will be facilitated by a free flow of relevant information between the parties, so that decisions affecting children will be based on the best available information.
5. A co-operative working relationship, with appropriate sharing of information, can also reduce conflict and misunderstanding, avoid duplication of effort and resources, and reduce the risk of 'systems abuse' of children.
6. Each party will use effective, practical and efficient procedures to share information with the other party, where the information appears relevant to the other party and where providing it is lawful and reasonably practicable.
7. The information to be shared will include information about steps taken, and if practicable, steps likely to be taken by each party, and other information, particularly information relating to the particular child, that will assist a party in carrying out its obligations.
8. The simultaneous involvement of separate courts in issues relating to a particular child can cause added cost, confusion, delay and distress for family members



involved, and inefficient and wasteful use of scarce public resources, particularly where one court in effect overrules the previous decision of another. The parties will therefore take all practicable steps to ensure that proceedings relating to a child occur only in one court, being the most suitable court for the particular child or family.

9. This Agreement is intended to support rather than inhibit open and collaborative relationships between the parties and their personnel at the operational level, and the development of other agreed measures (including local arrangements) that are consistent with the principles of this Agreement.

### **General**

10. ICLs will take care to ensure that in seeking or providing information to FACS and in other matters, they do not duplicate what has already been done by others.

### **Collaboration between FACS and ICLs.**

11. On appointment, the ICL will promptly write to the General Counsel of FACS Legal (by email or letter) advising of his or her appointment<sup>1</sup> and providing identifying details relating to the case.
12. Where the ICL is not aware of any actual or contemplated involvement by FACS, the letter will indicate that the ICL will provide information about the family court proceedings if FACS requests it.
13. On receiving communication confirming the appointment of an ICL, FACS will respond to that letter within fourteen (14) days with the following content:
  - a. If FACS has any records or relevant knowledge of the family, and
  - b. Whether FACS has allocated the matter to a legal officer.
14. If the matter is allocated to a FACS legal officer, that officer will co-ordinate any future contact between the ICL and FACS until such time as either the proceedings have concluded or FACS becomes an independent party to the proceedings.

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<sup>1</sup> The standard letter informing FACS of the appointment of the ICL is annexed to this Agreement

15. If the ICL has reason to believe that FACS has been involved with the family, or considers that such involvement is desirable or likely, the initial letter will also provide the following information (so far as it is known to the ICL):
- Any Notice of Child Abuse;
  - Any notifications that have been made under sections 67Z or 67ZA;
  - Whether any subpoenas have been issued, or are likely to be issued to FACS;
  - Whether any orders have been made, or are likely to be made, under section 91B;
  - Whether any orders have been made, or are likely to be made, under section 69ZW;
  - Information about the next steps in the family court proceedings, notably the dates and times of future court hearings or mentions;
  - Whether the Independent Children's Lawyer is concerned for the immediate safety or welfare of the child, and the basis of such concern;
  - Any other information about the family court proceedings or the circumstances of the case that the ICL considers is likely to be helpful to FACS.
16. FACS will share with the ICL the following information:
- Any FACS involvement with the child or the child's family and the nature of that involvement;
  - The nature of FACS' current plans;
  - The nature of the information held by FACS including expert reports and how that information might be accessed by the ICL.
17. Where the matter is urgent the FACS legal officer will:
- advise the ICL whether FACS holds any current concerns for the child; and
  - advise the ICL if investigations are currently being conducted, the likely timeframe for the completion of those investigations, and
  - arrange for a letter to the Court advising of these matters.
18. If the ICL decides that urgent subpoenas need to be issued for the FACS file and/or officers to give evidence in an urgent hearing, the ICL will advise the legal officer so that the FACS response to the subpoenas can be coordinated.
19. Any report made by the ICL under section 67ZA(2) will be made to the FACS

Helpline by submitting an eReport<sup>2</sup>. If the child or young person is at immediate risk of significant harm the report must be made by telephone. The ICL is required to advise an allocated FACS legal officer that a report has been made and the general nature of the report. The allocated FACS legal officer will be sent details of the report from the Helpline. On receipt of a notice, unless the circumstances make it impracticable or inappropriate, FACS will:

- Acknowledge receipt of the notification and accompanying information;
- As soon as possible indicate what steps, if any, it has taken or proposes to take in relation to the matter;
- Specify the person or body responsible for further communications with FACS relating to the matter; and
- Respond to any requests for information relevant to the family law proceedings, such as information about investigations commenced or discontinued, relevant proceedings in the Children's Court and significant assessments or reports becoming available.

### **Sharing Information**

20. The ICL should keep FACS informed if they have information that might reasonably be required by FACS, and should provide such information on request if doing so is reasonably practicable, and is not legally prohibited.
21. The ICL may seek orders of its own initiative or at the request of FACS, that allow the release of information or for FACS to access information about the family law proceedings including any expert report or Family Reports, copies of court orders, copies of affidavits, copies of transcripts of evidence and/or access to inspect and make copies of documents on the Court file, or copies of a judgment delivered in the proceedings.
22. If an affidavit is required from a FACS officer, the legal officer will facilitate the ICL discussing the contents of that affidavit with the FACS officer. The ICL will prepare a draft affidavit and forward it to the legal officer. The legal officer will then provide

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<sup>2</sup> The eReporting – How to Guide is annexed to this Agreement

comments or, if no changes are suggested, arrange for the affidavit to be sworn/affirmed and returned to the ICL.

23. Subject to any specific provisions of this Agreement relating to particular matters:

- Information intended for FACS should be supplied to the FACS legal officer and requests by Legal Aid for information from FACS directed to the FACS Legal Officer (other than subpoenas for FACS records which should be directed to the FACS subpoena clerk);
- Information intended for Legal Aid NSW should be directed to the Legal Officer at Legal Aid, or where the ICL is a private practitioner such requests should be made directly to the private solicitor, and requests by FACS for information from Legal Aid should be directed to the Legal Officer at Legal Aid; and
- The parties will explore ways of avoiding undue formality associated with the provision of documents and information to the family courts in connection with subpoenas and section 69ZW orders.

### **Collaborative Decision Making**

24. Where practicable, FACS and the ICL should engage in collaborative decision making practices when making recommendations or decisions about children from families that they are both involved in.

### **Operation and Review**

25. A collaborative relationship between the parties will continue to be facilitated by the parties who will each take appropriate measures to ensure that personnel of each party understand the purpose and principles contained in this Agreement. Other measures will include:

- Publishing summaries of relevant legislation on websites or otherwise making them available to the other parties;
- Providing some education or training in areas of particular need;
- Encouraging collaboration in particular cases, for example, by means of participation in case conferences; and

- Providing mechanisms by which personnel can readily interact with and learn from personnel in different organisations.
26. This Agreement will be prominently displayed in a form readily available to personnel of each party, for example by having a conspicuous presence on each party's Intranet.
27. This Agreement will be published in a form readily available to those affected by it, for example legal practitioners, court personnel and family counselors, and to the public (for example by inclusion on the public websites of the relevant agencies).
28. Each party will ensure that this Agreement is given appropriate attention in staff training and supervision.
29. The operation of this agreement will be monitored by the General Counsel FACS Legal and the Executive Director, Family Law, Legal Aid NSW regularly and personnel will be asked to keep them informed about the operation of the agreement, and about any difficulties that arise.

Secretary

  
Department of Family and Community Services NSW

Dated: 1.2.16

  
Chief Executive Officer

Legal Aid NSW

Dated: 15/12/15

**Annexure 1**

The General Counsel Legal Services  
Department of Family and Community Services  
DX 21212 ASHFIELD

**EMAIL:** [FACS.LegalInbox@facs.nsw.gov.au](mailto:FACS.LegalInbox@facs.nsw.gov.au)

Dear Sir/Madam

**RE: APPOINTMENT OF INDEPENDENT CHILDREN'S LAWYER FOR:  
CHILD NAME BORN: DAY/MONTH/YEAR  
PARTY & PARTY – PROCEEDINGS NO.**

Pursuant to the Information Sharing Agreement between the Department of Family & Community Services and Legal Aid NSW, I wish to advise that I have been appointed as the Independent Children's Lawyer for [name of child] in [proceedings no] in the Federal Circuit Court of Australia at [Registry name].

I draw your attention to the following matters:

[Note that pursuant to the Information Sharing Agreement the ICL should draw attention to:

- any notice of child abuse filed;
- any notifications that have been made under s 67Z or section 67ZA;
- whether any subpoenas have been issued, or are likely to be issued to FaCS, including whether an urgent subpoena needs to be issued;
- whether any orders have been made or are likely to be made under section 91B;
- whether any orders have been made, or are likely to be made, under section 69ZW;
- information about the next steps in the family court proceedings, notably the dates and times of future court hearings or mentions;
- information about urgency, including whether the ICL is concerned for the immediate safety or welfare of the child and the basis of such concerns;
- any other information about the proceedings or the circumstances of the case that the ICL considers is likely to be helpful to FaCS.]

This matter is next listed before the [name of court] on [date of listing] for [type of court event].

Please advise details of the Department of Family & Community Services lawyer who will be liaising with the Independent Children's Lawyer in this matter.

Yours faithfully

Solicitor



THE LAW SOCIETY  
OF NEW SOUTH WALES

# REPRESENTATION PRINCIPLES FOR CHILDREN'S LAWYERS

4TH EDITION

UPDATED AUGUST 2014

## ***DISCLAIMER***

This document has been produced solely to provide general information. It is not exhaustive of issues which practitioners may encounter, nor does it constitute legal advice. It is a general guide only and practitioners must take care to fully consider the circumstances and laws applicable to their circumstances. While every care has been taken in the production of this document, no legal responsibility or liability is accepted, warranted or implied by the authors or The Law Society of New South Wales and any liability is hereby expressly disclaimed.

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# Representation Principles for Children's Lawyers

## **ENDORSEMENT**

The Representation Principles for Children's Lawyers are an ongoing project of the Juvenile Justice and Family Issues Committees of the Law Society of NSW. The Council of the Law Society adopted the first edition of these Representation Principles for Children's Lawyers on behalf of the profession on 19 October 2000. The second edition was adopted by Council on 21 March 2002, and the third edition on 20 September 2007. The fourth edition was adopted by Council on 20 November 2014.

## **ACKNOWLEDGEMENTS**

The first edition of the Representation Principles was produced with the valuable contribution and participation of the members of the 1999 and 2000 Children's Legal Issues Committees; the Australian Law Reform Commission; Inoka Ho; Meredith Wilkie (Human Rights and Equal Opportunity Commission); Dr Judy Cashmore; NAPCAN Australia; Deborah de Fina; Judith Walker and Frith Way. Appreciation is also due to Robert Fitzgerald, Jenny Barga, Lani Blackman, Peter Champion, Janine Dethlefs, Robert Ludbrook, Janet Loughman, Jane Sanders and Dr Choon-Siew Yong who, initially with members of the Children's Legal Issues Committee and then the Family Issues Committee, generously volunteered their time and expertise to assist in refining the commentary to the Representation Principles.

The 2001 Children's Legal Issues Committee (in particular Michael Antrum, Rod Best, Cate Escobar, Alexandra Mackenzie, Nadine Miles, Geoff Monahan, Eija Roti) as well as Dr Judy Cashmore, Kerry Graham, Janet Loughman, Jane Sanders and Alanna Sherry contributed their time to review the Representation Principles generally.

Many of the improvements in the second edition of the Representation Principles were informed by the views of children and young people about legal representation. The support and assistance of UNICEF Australia and the Legal Aid Commission of NSW Children's Legal Service are gratefully acknowledged. Particular thanks for their commitment to the project go to Alanna Sherry and Kerry Graham, who undertook the consultations and produced the report *This is what I think of you: Feedback on Representation Principles for Children's Lawyers*. The fourth edition includes the views of some young people in central Sydney who are now aged over 18 who were interviewed as part of a small research project undertaken by a law student at the University of Technology Sydney in late 2013. The views of children and young people about their Independent Legal Representatives in Family Court matters included in the fourth edition are taken from the Australian Institute of Family Studies *Independent Children's Lawyers Study Final Report* (May 2013).

Members of the 2007 Family Issues Committee, Judith Walker, Associate Professor Geoff Monahan, Rod Best and Alexandra Harland updated the guidelines in 2007 to reflect legislative amendments to that date.

Members of the 2014 Family Issues Committee, the Indigenous Issues Committee and the Juvenile Justice Committee were all invited to contribute to the fourth edition of the Principles. Special thanks are due to Ms Jane Irwin and Ms Jenny Barga of the Juvenile Justice Committee for their many contributions to this edition.

Many local, national and international documents have been consulted in updating the fourth edition. These include American Bar Association *Standards of Practice for Lawyers Representing Children in abuse and neglect cases* (1996), American Bar Association Section of Family Law *Standards of Practice for Lawyers Representing Children in Custody Cases* (2003), the Australian Institute of Family Studies *Independent Children's Lawyers Study* (2013), National Legal Aid *Guidelines for Independent Children's Lawyers* (2013), the US National Juvenile Defender Centre *Juvenile Defense Standards* (2012) and *Role of Juvenile Defense Counsel in Delinquency Court* (2009), Legal Aid New South Wales *Children's Criminal Practice Standards* (2008), Legal Aid New South Wales *Care and Protection Practice Standards* (2012), Legal Aid New South Wales *Practice Standards for Independent Children's Lawyers in Family Law Matters* (2007), Dr Nicola Ross PhD thesis, *The Hidden Child: How Lawyers See Children in Child Representation* (2012 – used with permission of the author).

## **CONSULTATION**

A wide range of people and organisations were invited to comment on the Representation Principles and have expressed interest in their development. The Law Society of New South Wales thanks everyone who has been, and continues to be, involved with this project.

## **COMMENTS**

The Law Society encourages readers to make comments and suggestions for further refining and expanding the Representation Principles. Please write to the Policy Lawyer for the Juvenile Justice Committee or the Policy Lawyer for the Family Issues Committee at the Law Society of New South Wales, 170 Phillip Street, Sydney NSW 2000. DX 362 Sydney. Telephone: (02) 9926 0333, Fax: (02) 9231 5809.

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# Preface to the Fourth Edition

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In 1997 the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission called on the legal profession to develop guidelines for the legal representation of children and young people. The Law Society of New South Wales was pleased to be able to answer that call. We hope that these principles will help to challenge the dangerous view that the Children's Court is a place for beginners, and that the child client deserves only a basic competency in advocacy and representation. These principles set a high standard, and it is hoped that solicitors will use them as the platform for their professional work with children and young people.

The Law Society is very aware that the principles espouse best practice, and that the practical day-to-day challenges facing the children's lawyer sometimes demand compromises and alternative approaches. Nevertheless, it is our observation that lawyers who represent children are generally a tenacious lot, and we are confident these principles will not be ignored. Indeed, the first and second editions have excited interest around the world, and throughout Australia. Judges, Magistrates, Directors-General and agency managers are referring to these principles in increasing numbers, and the Law Society encourages their adoption by legal professionals wherever possible. It is pleasing that similar representation guidelines have now been developed in the Australian Capital Territory (*Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court, August 2004*) and South Australia (*Guidelines for Lawyers Acting for Children, July 2007*). Another important and related recent development is the publication of a *Code of Conduct for Legal Representatives in Care and Protection Proceedings in the Children's Court of NSW* (May 2012), prepared by the Children's Court Advisory Committee.

The Law Society welcomes your comments and your ideas for the next edition, particularly if you are a young person with experience of the justice system. In our courts and tribunals, children sometimes tragically have no one to trust. The competent lawyer often represents the final opportunity for a child for the right to be heard. Adherence to these principles will ensure that that last chance is not squandered, and that all children and young people entering our justice system can at least count on their lawyers to do the right thing.

The Law Society thanks everybody who has been involved with the development of the first four editions of these principles, and encourages all lawyers working with children in legal systems to apply them. To the many outstanding children's lawyers working in Australian courts we hope the principles provide some grounding for your practice, and a springboard for promoting the highest principles of legal professionalism.

***Juvenile Justice and Family Issues Committees***

***August 2014***

# Definitions

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## **‘Child’**

These principles use the term ‘child’ to refer to a person under the age of 18. This term is used so as to be consistent with definitions under the United Nations Convention on the Rights of the Child. A number of publications and statutes use the term ‘young person’ to refer to children of teenage years. These principles incorporate a degree of flexibility to ensure that legal practitioners interact with and represent all persons under the age of 18 in a manner appropriate to their age and level of maturity.

## **‘Direct representative’**

A direct representative, regardless of how he or she is appointed, receives and acts on instructions from the child client irrespective of what the representative considers to be the best interests of the child client. A direct representative owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult client.

## **‘Best interests representative’**

A best interests representative must act impartially and make submissions to the court to further the best interests of the child. The representative must inform the court of the child’s wishes by proper means (*Bennett and Bennett* (1991) FLC 92-191). A best interests representative may be referred to as an independent legal representative as defined in s 99A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), or as an independent children’s lawyer (ICL), formerly child representative, in the *Family Law Act 1975* (Cth). The role of the ICL is set out in s 68LA of the *Family Law Act*. See also *Re K* (1994) 17 Fam LR 537 which sets out the non-exhaustive criteria for appointment of an ICL. For comprehensive research on the role of the ICL in the Family Court of Australia, see Rae Kaspiew, Rachel Carson, Shamee Moore, John De Maio, Julie Deblaquiere and Briony Horsfall, *Independent Children’s Lawyers Study, Final Report*, Australian Institute of Family Studies, Canberra, May 2013, (available at <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/IndependentChildrensLawyersStudyReport-Publication.pdf>)

## **‘Guardian ad litem’**

A guardian ad litem is a person appointed by the court to make decisions on behalf of a child in the legal proceedings. This is generally done where the court considers the child incapable of conducting legal proceedings in their own right. While different jurisdictions have differing requirements of the guardian ad litem, it is generally required that the guardian ad litem not have an interest adverse to the child’s, and expected that the guardian ad litem will act in the best interests of the child. A guardian ad litem may be appointed by the Family Court (s 123, *Family Law Act 1975* (Cth)) and by the Children’s Court in care and protection matters (s 100, *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

### **‘Case Guardian’**

A case guardian is a person appointed by the court to make decisions on behalf of a child in the legal proceedings. The role of the case guardian is the same as that of the guardian ad litem.

## A. Who is the Client?

---

### ***PRINCIPLE A1 - Client of a direct representative***

**Where a legal practitioner is acting as the direct representative of a child, the child is the client. The direct representative must act upon the instructions of the child client, regardless of who has appointed the practitioner or who is paying legal fees.**

#### ***Commentary***

Direct representatives may be appointed by a court, retained directly by the child or by the parents or guardians of the child. In some cases parents or guardians may fund the legal representation. Such funded legal representatives should proceed on the basis that the child is the client and that the person paying the legal fees has no authority to direct the practitioner in his or her undertaking of the representative role. This is also the case for direct representatives funded by Legal Aid NSW or any other source of funding.

Where third parties are involved in appointing or funding legal representation, or become involved in the direct representative's relationship with the child, the direct representative should clearly state his or her role to the third party, and explain the limitations of the third party's role in the legal representation of the child. The same prohibition against disclosure of confidential information provided by the child applies to third parties that may be funding the legal representation as to any other third person. Direct representatives may need to advise or remind third parties that it is the child who is the client of the representative.

### ***PRINCIPLE A2 - Client of a best interests representative***

**A best interests representative does not have a client. A best interests representative acts as an officer assisting the court by representing the best interests of the child. Nevertheless, the child must still be given the opportunity to express his/her views and have those views taken into account.**

#### ***Commentary***

A best interests representative may be appointed by a court or retained directly by the parents or guardians of the child. In circumstances where a representative has not been appointed by the court, the representative may appear only with leave. Despite the fact that some children who are provided with a best interests representative may be intellectually, developmentally and emotionally capable of providing instructions, the best interests representative does not act on the instructions of the child.

A best interests representative should seek the child's views and present them to the court. However, the best interests representative does not act on the instructions of the child, parent, guardian or anyone else connected with the child or the legal proceedings. The representative will often request



experts from other fields to provide reports or opinions. Best interests representatives must consider a range of information and opinions in deciding what position to take in any proceedings, and must conduct their role consistently with what they consider to be the best interests of the child. A court may give directions to a best interests representative appointed by the court, as it may with any other practitioner, but it is not to limit the role of the best interests representative.

***PRINCIPLE A3 - Client where a guardian ad litem or next friend has been appointed***

**Where a guardian ad litem or next friend has been appointed to act on behalf of a child in legal proceedings, that person is the client of the legal practitioner. The legal practitioner is to act on the instructions of the guardian ad litem or next friend.**

***Commentary***

Where a court appoints a guardian ad litem or next friend, that person is given authority to conduct proceedings on behalf of the child. Any legal representation is therefore provided to the guardian ad litem or next friend. There is no relationship between the legal representative and the child, although the legal practitioner may be required to communicate with the child in performing his or her duties as instructed by the guardian ad litem or next friend. General principles for communicating with children, determining when children should give evidence and questioning child witnesses remain relevant for legal practitioners acting for a guardian ad litem or next friend.

## B. Role of Practitioner

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### ***PRINCIPLE B1 - Role of the practitioner***

A practitioner is to act as the direct representative of the child except where:

- The law clearly states that the representative shall play a different role in representing the child; or
- The practitioner determines that the child is incapable of giving instructions.

Under no circumstances should the practitioner proceed if he or she is uncertain of the basis of representing the child.

### ***Commentary***

There is sometimes confusion for practitioners in determining what their relationship should be with the child they have been appointed, or retained, to represent. Practitioners should represent a child as a direct representative unless there are reasons why this model cannot or should not apply. The primary examples of when a lawyer acts as a 'best interests' representative are in the Family Court, where the court may appoint an Independent Children's Lawyer (ICL) to independently represent the child's interests (ss 68L and 68LA *Family Law Act 1975* (Cth), and in care matters in the Children's Court where, depending on the child's age and maturity, the court may appoint a lawyer to act either as an independent legal representative (ILR) or a direct legal representative (ss 99-99D *Children and Young Persons (Care and Protection) Act 1998* (NSW)). A direct representation model is the same model used for practitioner-client relationships where the client is an adult, requiring the practitioner to act on the instructions of the client and to maintain confidentiality. The model allows children to participate directly in proceedings if they are able and willing to do so, as required by international law. Solicitors, whether acting as direct or indirect representatives, are also required to comply with the *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)*, available on the NSW Law Society website.

There are some circumstances where the law has determined that children should not be directly represented in proceedings, but should have a legal representative acting in their best interests. Where the law clearly indicates that a practitioner should act as a best interests representative, the practitioner should adhere to the law and these guidelines where they apply to the professional conduct of a best interests representative. These guidelines set out instances where the law requires practitioners to act as a best interests representative in specific jurisdictions.

Where the child is not capable of giving instructions, the practitioner cannot act as a direct representative. These guidelines provide assistance to practitioners to determine when a child is incapable of giving instructions (see Principle C1).

***"I want my lawyer to say the same as what I say."*** - male, 16 years

***“My lawyer made my mind up for me.”*** - female, 16 years

***“The lawyer should explain the consequences, but if the kid still wants to do it, that is what the lawyer’s got to do.”*** - male 17 years

## ***PRINCIPLE B2 - Role where child is incapable of giving instructions***

Where the practitioner considers that the child is unable to instruct the practitioner in the proceedings as a whole, the practitioner should ensure that the court is aware of the practitioner’s concerns about the child and take appropriate steps to achieve a fair and just outcome for the child.

### ***Commentary***

A child who is unable to give instructions should still be represented. It is the duty of a practitioner appointed or retained to directly represent a child to obtain professional advice in the form of a report on whether the child is capable of giving instructions (see Principle C1).

In criminal proceedings, the practitioner should consider making an application for the matter to be dismissed, or for the court to deal with the child under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) if the report writer advises that the child is developmentally disabled, suffering from mental illness or from a mental condition for which treatment is available. If the application is unsuccessful, the practitioner will need to consider raising the issue of fitness with the court in the usual way.<sup>1</sup>

In care and protection proceedings, the practitioner should make an application to the court to declare that the child or young person is incapable of giving instructions and to appoint a guardian ad litem for the child. The practitioner will then act on the instructions of the guardian ad litem (see s 100(4), *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

## ***PRINCIPLE B3 - Determination of best interests of the child***

The determination of the child’s best interests should be based on objective criteria addressing the child’s specific needs and preferences, and the goal of expeditious resolution of the case.

### ***Commentary***

A best interests representative is required to make a judgement as to the best interests of the child. This judgement should be made on an objective basis, based upon consideration of all available material, including the preferences expressed by the child. Nothing about legal training or traditional legal roles necessarily qualifies practitioners to make decisions on behalf of children. Best interests representatives should seek the assistance of behavioural science and child development experts

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<sup>1</sup> See the extensive judgment on these points by Marien J in *Police v AR*, Children’s Law News May 2010. See also *Mantel v Molyneux* [2005] NSWSC 955 at 28.

where this would assist the representative to determine the best interests of the child. The role of the best interests representative is further set out in Principle E2.

***PRINCIPLE B4 - Should not act as both direct representative and best interests representative***

**A practitioner should not act simultaneously as both a direct representative and a best interests representative for the same child. If circumstances arise during proceedings that indicate the need to change from one mode of representation to the other, the practitioner should inform the court.**

***Commentary***

A practitioner should never act as both a direct representative and a best interests representative for the same child. In some cases a practitioner may establish a direct relationship with the child, and commence to act on the child's instructions. If the child withdraws instructions, or refuses to continue to give instructions to the practitioner, the practitioner should not seek to become a best interests representative. The direct relationship between the practitioner and child client is established under a different set of circumstances, and may have encouraged the child to be more open with a direct representative than with a best interests representative.

If the child withdraws or refuses to continue to give instructions, the direct representative should inform the court that they do not have instructions from the client on the matter. If the situation is such that the child's case cannot proceed, the direct representative should consider whether they should request the court to appoint a different direct representative, or ask the court to determine the child's capacity to give instructions.

***Some young defendants, particularly girls, described circumstances where their lawyer had represented them in both capacities, with extremely negative results. The most pressing example was where "my lawyer ... got me separated from my child." - female, 18 years.***

***In this case, the young person received a probation order that prohibited her from residing with her mother who had custody of her child. The young person stated that her lawyer requested that such a condition form part of the court order.***

***"The worst thing about lawyers is that they make decisions for you." - male, 16 years***

## C. Capacity to give Instructions

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### ***PRINCIPLE C1 - Determining whether child has capacity to give instructions***

In determining whether the child is capable of giving instructions, the child's willingness to participate and ability to communicate should guide the practitioner rather than any assessment of the 'good judgement' or level of maturity of the child.

#### ***Commentary***

Child development literature suggests that the skills required to be capable of giving instructions are regularly attained by age six or seven. However, it is the practitioner's responsibility to make an assessment based upon the capacity of the individual child. Socioeconomic factors can affect the learning and verbal skills of children. The practitioner should consider whether a perceived incapacity could be overcome by developmentally appropriate communication, or by adopting a different approach in taking instructions. In instances in which the practitioner concludes that the child may be suffering mental impairment, developmental delay or advancement, or intellectual disability, the practitioner should seek expert advice from a child development or other relevant professional.

### ***PRINCIPLE C2 - Enhancing child's capacity***

The practitioner should seek to enhance the child's capacity to provide instructions by structuring all communications to take into account the child's age, level of education, cultural context and degree of language acquisition.

#### ***Commentary***

Practitioners should be mindful that a child's capacity to give instructions will depend to a significant degree on the practitioner's skills in interviewing children and the child's stage of cognitive development. Adults frequently underestimate the knowledge and understanding of children, and their capacity to work through problems and provide a cogent view as to what is in their interests. If necessary, practitioners should consider seeking the assistance of appropriate behavioural scientists to assist them to ascertain the wishes and directions of younger children. Further discussion of appropriate communication with child clients can be found under Principle D6.

### ***PRINCIPLE C3 - Limited capacity***

#### **(a) Limited instructions**

Where the client is capable and willing to provide instructions in relation to some, but not all, issues, the practitioner should directly represent the child in relation to those issues in which instructions have been received. In such cases, the practitioner should make procedural decisions with a view to advancing the child's stated position and elicit whatever information and assistance the child is willing and capable to provide.

**(b) Disability**

**An ongoing, pre-existing condition may affect a child's capacity to give instructions or it may affect a child's ability to communicate instructions clearly. Practitioners should seek help from appropriate service providers.**

***Commentary***

A child may have the capacity to give instructions in relation to some aspects of the case but not others. If the client is incapable of, or unwilling to, provide instructions on a particular issue or issues, the practitioner should inform the court that instructions are limited to certain issues. This may happen when the entire legal issue before the court is too complex for the child to understand, yet the child is able to instruct on their preferences relevant to the issue. In other circumstances the child may be reluctant to give instructions on a particular issue, but willing to instruct on other relevant issues.

Where a disability makes it difficult for the child to provide or communicate instructions, the practitioner should seek appropriate professional assistance to enhance the child's ability to give clear instructions or views.

Practitioners should be alert to factors that may temporarily limit a child's capacity to provide instructions, for example if the child is affected by drugs and/or alcohol, suffering trauma or is in a distressed emotional state. In these circumstances, the practitioner should seek an adjournment and ensure that the short-term needs of the child are addressed.

Where reluctance to instruct results from shyness, nervousness or fear, the practitioner should make further efforts to make the child feel comfortable and safe.

***"I like it when my lawyer builds my confidence."*** - male, 17 years

***"They don't take disabilities into account."*** - female, 17 years

## D. Taking Instructions and Preferences

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### ***PRINCIPLE D1 - Seeing the child***

Other than in exceptional circumstances, his or her legal representative must see every child before going to court. The practitioner should see the child as soon as possible after their appointment, and, where possible, well before the first hearing.

### ***Commentary***

It is acknowledged that increasingly, the first meeting between a child and a legal representative in criminal matters may be by way of an Audio Visual Link (AVL).

However, all efforts should be made to meet with the child before each and every court date at which the child must appear to prepare him or her for what is usually a very confusing and sometimes frightening experience. In addition, changes in placement, school suspensions, in-patient hospitalisations, and other changes affecting the child's immediate environment warrant meeting with the child again.

In-person meetings allow the practitioner to explain to the child what is happening, what alternatives might be available, and what will happen next. Problems in communication might also be more easily overcome. This is important in establishing a relationship of trust with the child and is of value even if the child is non-verbal. It also allows the practitioner to get a sense of who they are representing and to assess the child's circumstances, often leading to a greater understanding of the case.

Where funding is limited, practitioners should not use this as a reason not to make every effort to meet with the child as often as is necessary to fully prepare him or her for each appearance.

***“Why can’t kids see the person who is making these decisions? I think it’s wrong that they can decide what should happen in your life without seeing you.”<sup>2</sup>***

***“I usually met with my lawyer in person beforehand but when I was coming from custody she was just there at court.”*** – male, 19 years (2013)

***“When I was under 18 I would speak to my lawyer once for about 2 seconds before I went into court and then never again.”*** – male, 18 years (2013)

***“You kind of have to. I hate doing it over the phone.”*** – female, 18 years (2013)

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<sup>2</sup> Lyon, C. (2000), Children's participation in private law proceedings with particular emphasis on the question of meetings between the judge and the child in family proceedings, in M. Thorpe & E. Clarke (Eds.) No fault or flaw: The future of the Family Law Act 1996, papers presented at the President's Third Inter-disciplinary Conference on Family Law, Dartington Hall, Totnes, 24-26 September, 1999.

*“I’d rather meet in person – I like to speak to people face to face.”* – male, 20 years, on meeting by way of AVL (2013)

*“When I meet the lawyer by AVL I don’t actually know who’s in the room, even if the lawyer has told me. I prefer to meet face to face.”* - male, 19 years (2013)

## **PRINCIPLE D2 - Direct representative relationship with child**

Where the practitioner is acting as a direct representative:

- The practitioner should meet with the child client often enough to maintain and develop the lawyer-client relationship; and
- Sufficient time should be devoted to ensure that the child client understands the nature of the proceedings and that the practitioner has understood the child client’s directions.
- The practitioner should identify the options available to the child client and advise about possible consequences.

### **Commentary**

The direct representative should not hurry a child client to give instructions. Sufficient time should be set aside to ensure that the interview can proceed at the child client’s pace.

As with any client, the direct representative may counsel against the pursuit of a particular position sought by the child client. The direct representative should recognise the power dynamics inherent in adult/child relationships, and that the child may be manipulated, intimidated, or overly dependent upon the views of an adult, including the views put forward by the direct representative. Therefore, the direct representative should ensure that the decision the child client ultimately makes reflects his or her actual position. The direct representative must also be prepared to allow the child client to change course or even withdraw instructions.

While the child client is entitled to determine the overall objectives to be pursued, the direct representative, as any adult’s legal representative, may make certain decisions with respect to the manner of achieving those objectives, particularly in relation to procedural matters. Rules relating to the practitioner’s duty to the court apply to all practitioners in all roles (see Rules 17 – 28 *Solicitors’ Rules*).

Where a practitioner is acting as a direct representative in care and protection proceedings, the need to receive instructions should not, by itself, justify the attendance of the child at court for care proceedings (see s 96(2A) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)).



### **PRINCIPLE D3 - Best interests representative relationship with child**

Where the practitioner is acting as a best interests representative, the practitioner should meet with the child, explain their role, and seek the views of the child as well as other information that may be relevant to the child and their well-being. The practitioner should identify the options available to the child client and advise as to possible consequences.

#### **Commentary**

While best interests representatives do not take instructions from the child, the representative should meet with the child, seek the views of the child and present these to the court, as a part of their role. The general principles regarding taking instructions from children are relevant to this part of the best interests representative's role. A major role of the best interests representative is to keep the child informed of progress of the litigation. The best interests representative should also act to minimise the trauma to the child associated with the proceedings.

*"I met her once ... We shook hands. She said her name and left"* – female, aged 15 -17, on ICL in Family Court<sup>3</sup>

*"It was a bit, um, worrying, but, like, you didn't know what was going to happen, because I know for a long time that she wasn't doing much ... Because it was a long time before I finally met her. When I met her, I remember she, like, explained what she did to, like, help me, but then ... she really didn't do much after that. I didn't really remember her doing anything."* - male, aged 12 – 14, on ICL in Family Court<sup>4</sup>

### **PRINCIPLE D4 - Time and venue of meeting with child**

Contact with the child should occur where and when it is comfortable and convenient for the child, not merely where and when it is convenient for the practitioner.

#### **Commentary**

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. Confidentiality issues should especially be considered when determining where the interview will take place. Practitioners should seek instructions as to who can be advised of the visit. The practitioner should also be mindful of their own safety, and the appropriateness of seeing a child at another location.

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<sup>3</sup> Kaspiew et al (2013), Section 8.5.2 Views on contact with the ICL, Independent Children's Lawyers Study Final Report, p 155

<sup>4</sup> See Note 3.

The practitioner should concentrate on facilitating openness and putting the child at ease. To that end, it is important for the practitioner to communicate with the child at the child's level. 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 and providing age-appropriate activities for siblings who may also be in attendance. Practitioners need to be flexible with seating arrangements and should try to remove obstacles such as desks and computers from between the practitioner and client, although consider that some clients may appreciate having a 'safety' desk in front of them. Practitioners may also need to consider other forms of communication e.g. pencil and paper communication, that will allow the child to express him or herself more comfortably.

Every effort should be made to accommodate the convenience of children. Keeping child clients waiting for a long time will only add to their anxiety. Older children may have to come alone to appointments, but may face difficulties in remembering appointment times, finding an address, or having access to transport. Follow up calls and reminder calls with the child are essential as are clear information about time, date, address and purpose.

***"They are always so busy."*** - male, 17 years

***"Lawyers should come talk to you earlier."*** - female, 14 years

***"They put pressure on you to be quick."*** - female, 15 years

***"Never for very long. It's pretty pointless - they don't sit with you long enough to get your side of the story."*** – male, 19 years (2013)

***"They don't really understand my case before they get into court – sometimes they're still reading over the brief when they're talking to the judge. They should just talk to me for longer before they get in there."*** – male, 19 years (2013)

### ***PRINCIPLE D5 - Support persons***

The practitioner should consider whether the child would benefit from the support of a trusted adult during the interview process. It is essential that the practitioner seek the child's view on this issue. The support person should only be invited at the request of, or with the consent of, the child.

### ***Commentary***

Many children need or would benefit from having a trusted adult with them during the interview with the practitioner. In many cases, this will be a parent or carer. Where such a relationship does not exist, is dysfunctional, or inappropriate, the practitioner should be careful to make further enquiries. A youth

worker, community elder, a school counsellor, a pastoral care person, or older peer can be substituted where the child is clear about the nature of the meeting with the practitioner, and is completely comfortable with the presence of the support person.

The support person may also be used to enhance the child's ability to give clear instructions or views, e.g. an interpreter, behavioural science worker. In all cases the child should be asked his or her views before a support person is invited to attend.

Children have the right to exclude support persons, including parents, from the room at any time. This issue may become particularly relevant when giving instructions on sensitive issues. It is generally acknowledged that people like family members can exert pressure on a child.

Practitioners should be alert for signs of uneasiness in the relationship between the child and the support person, and tactfully suggest that the support person leave the room if this would benefit the child. Where the child is represented in a best interests capacity, the practitioner should see the child alone, although there may be circumstances where the family member might initially meet the child representative with the child to assist in settling the child and then leave.

In family law and care matters, it will not be appropriate to have family members present during the interviews as family members will often either be parties themselves to the proceedings or potential witnesses.

Where a support person is to be present with the child, the practitioner should ensure that the child understands that the support person may not be subject to the same confidentiality requirements as the practitioner. In particular, where the child is directly represented, the practitioner must consider the fact that the presence of the support person will affect client legal privilege, and ensure the child understands the effect this will have on their legal rights and protection of confidential information they may wish to disclose to the direct representative.

***“They should ask you first, ‘Do you want your mum in the room?’”*** – female, 14 years

***“Sometimes my caseworker was with me, but my lawyer always asked if she wanted them to be there. They have to ask that don’t they?”*** – female, 18 years (2013)

***“They sometimes assume you want the support person there, but I don’t actually mind.”*** – male, 19 years (2013)

***“My sister translated what the lawyer was saying into words that I could understand – she simplified what the lawyer was saying because the lawyer didn’t do that. It was alright because my sister was there, but the lawyer used words I didn’t understand.”*** – female, 20 years (2013)

## ***PRINCIPLE D6 - Communication***

The practitioner should use language appropriate to the age, maturity, level of education, cultural context and degree of language proficiency of the child.

Preference should be given to face-to-face communication with the child rather than communication by telephone or in writing.

### ***Commentary***

Practitioners representing children should undergo some training in child development and children's language patterns. They should not assume that years of legal experience, having their own children, or success in the courtroom means that they are good communicators with children.

It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect – this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc.

Practitioners should explain the reason why they are asking questions of the child. At the same time, they should be alert to sensitive matters. For example, be careful about asking unnecessary questions or asking questions about matters that are fully covered in file briefing notes or other available material.

In family law matters there are topics about which the ICL should avoid talking to the children. The most obvious example is where there is an allegation that the child has been sexually, physically or emotionally abused. In these cases invariably the child will be interviewed by a court appointed expert and may have already been interviewed by other adults such as police. The ICL could contaminate the child's evidence and multiple interviews could amount to further abuse of the child.

Basic rules for practitioners are:

- Always make time to speak with the child;
- Treat the child with respect;
- Explain the practitioner's role and the process to be followed;
- Provide an overview of the interview/consultation so the child knows what to expect;
- Speak slowly; use short sentences and simple, everyday vocabulary;
- Pause often to allow the child time to process what you are saying, to ask questions, or to interrupt;
- Provide information in short segments, rather than all at once – take breaks when it seems that the child's concentration has faded;
- Invite the child to ask questions regularly and prompt them to indicate his or her understanding;
- Be aware that a child may not recognise that they have not understood what you have said;

- Before asking questions, the practitioner should inform the child that it is acceptable for the child to say “I don’t know” and that a question repeated at any stage does not indicate the child’s answer was wrong or inappropriate;
- Be aware that a child may interpret what you say literally;
- Provide concrete examples when explaining concepts or legal strategies – avoid the use of metaphors and figures of speech;
- Respond constructively to the child’s suggestions or instructions;
- Be aware of cultural or religious sensitivities;
- Be aware of the special communication needs of children with disabilities. Consider non-verbal methods where the child is developmentally disabled, very young or has problems verbalising, e.g. using diagrams, pictures and videos;
- Be aware of and sensitive to relevant factors in the child’s family background or other circumstances that may affect the child’s ability to communicate. This includes any form of abuse or trauma that the child has suffered;
- Seek further assistance from others (being careful to preserve confidentiality) if necessary.

***“The best thing about a lawyer is when they talk in a way that you can understand.”*** - female, 14 years

***“The worst thing about my lawyer was that she asked really personal questions.”*** - female, 15 years

***“They talk down to us and don’t speak our language.”*** - female, 15 years

***“The best lawyers understand you and listen to what you have to say.”*** - female, 17 years

***“They can be very businessman like – lawyers should be more friendly. I know I’m going to get treated like that in court, so I want my lawyer to be more personable.”*** – male, 19 years (2013)

***“Sometimes I feel like I couldn’t talk to my lawyer as much as I wanted. When I had [name] I didn’t have their contact number and I could only see them when they wanted to see me. I found it hard to get in touch with them”*** – male, 19 years (2013)

***“My lawyer gave me a lot of respect. She didn’t judge me, she just listened.”*** – male, 21 years (2013)

***“She had this, I think, air about her that she had more important things to do, um, she – she didn’t really – she clearly doesn’t think we have a clue, um, and I’, - I’m very smart ... The worst bit would be her not listening, I suppose, disregarding what we had to say and then***

***representing the wrong – representing views that weren’t actually ours.”*** - male, 15 – 17 years,  
on ICL in Family Court<sup>5</sup>

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<sup>5</sup> Kaspiew et al (2013), 8.5 Experiences of young people, Independent Children’s Lawyers Study Final Report, p 160.

## E. Duties of Representation

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### ***PRINCIPLE E1 - Communication***

**The practitioner communicates the realistic expectations of the proceedings and ensures that the child understands the practitioner's role and capacity to effect change.**

### ***Commentary***

The practitioner should use language appropriate to the age, maturity, level of education, cultural context and degree of language proficiency of the child. Preference should be given to face-to-face communication with the child rather than communication by telephone or in writing.

Communication in this context is the process of establishing a relationship of trust, of providing an environment that is confidential and supportive, and building in checkpoints along the way to ensure that the child really understands what is going on.

It is also the way in which instructions or preferences are made known to the practitioner. The information a child gives in interviews can be misleading unless practitioners have understood how to ask children developmentally appropriate questions and how to interpret their answers accurately.

The child needs to understand the role of the practitioner (particularly whether the role is that of a direct representative or best interests representative), the nature of the proceedings and have an appreciation of the possible consequences of the court proceedings, both in the short-term and long-term. These should be explained in language appropriate to the child. It is important to ask the child to explain back to you what they think your job is and why they are at court, in their own words, to ensure that true understanding has been attained.

The direct representative has a duty to explain to the child such information as will assist the child in having maximum input in determination of the particular position at issue. The direct representative should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings.

The direct representative should communicate with the child client to assist the client to understand what is expected to happen before, during and after each hearing. The child client should be shown the courtroom, or at least a diagram of the courtroom, before the hearing and be shown where the participants will be seated. It is helpful for a direct representative to ensure that the child's family and/or support persons are not confused, as this could adversely affect the child client.

***“We both decided what should happen in court.”*** - female, 16 years

***“There are so many people in there – who are they?”*** - female, 15 years

***“I’ve never been told who’s who in the court room”*** - male, 18 years (2013)

***“Sometimes they did explain what would happen and sometimes not.”*** - male, 19 years (2013)

***“He tried to explain, but I didn’t really care.”*** - male, 17 years (2013)

***“He listened to me, but he mostly did what he wanted – he was really controlling the process.”*** - female, 20 years (2013)

## **PRINCIPLE E2 (Part 1) - General obligations of direct representative**

The direct representative should represent the child in a competent and professional way in accordance with the Solicitors’ Rules and general legal requirements.

In particular the direct representative should:

- Actively advocate the child’s position.
- Advise the child concerning:
  - the subject matter of the litigation,
  - their rights and options,
  - the court system,
  - the proceedings,
  - the practitioner’s role,
  - the role of other parties,
  - the relationship of confidentiality,
  - what to expect in the legal process,
  - the possible outcomes and their consequences for the child.
- Obtain copies of all court documents and evidence relevant to the case.
- Participate in all pre-trial hearings or conferences, hearings, negotiations, alternative dispute resolution processes, and discovery that affect the child’s case.
- Inform other parties and their legal representatives that he or she is representing the child and expects reasonable notification prior to any changes in circumstances of the case or the underlying social situation that affect the child and the child’s family.



- **Attempt to reduce case delays.**
- **Identify appropriate family and professional resources for the child.**
- **Ensure the court enters a written judgment or order consistent with the verbal judgment or order of the court.**
- **Consider and discuss with the child client the desirability and possibility of appeals or further applications.**

### ***Commentary***

A child client is owed the same duties of competence, loyalty, confidentiality and professional representation as an adult client.

In some jurisdictions the child may choose to attend at court but is not required to do so. The practitioner should discuss their options with the child client and monitor their preferences during the proceedings.

The direct representative's presence at and active participation in all telephone or other conferences and hearings is critical, unless the hearing involves issues completely unrelated to the child. Although the child's position may overlap with the position of one or more other parties (e.g. parents, third-party caretakers or a government agency), the direct representative should be prepared to participate fully in any joint proceedings and not merely defer to other parties.

The direct representative should actively advocate in accordance with the child client's instructions and preferences. Where the child client is in court, the direct representative should help the child client to understand the progress of proceedings and explain the submissions being made. Before closing submissions, the direct representative should quickly consult with the child client to ensure that all aspects of the instructions have been put to the court.

Where the child client's instructions are confusing or inconsistent, then those instructions should be put to the court as is. The direct representative should not impose structure upon the child client's instructions when it is not there. This is not, however, a license to not properly obtain instructions. Any confusion or inconsistency should not be a result of the representative's failure to clarify instructions, or provide professional counsel.

Practitioners should be sensitive to the child client's expectations of progress in a matter and the disruption that may be caused by adjournments. Delays can be harmful, particularly where the child is at risk or their living environment has been adversely affected by the case (including being in custody). Delays can also impact adversely on the child's evidence. However, there may be some circumstances when delay may be beneficial to the child. The direct representative should always consider the effect

that delay will have upon the child client's case and well-being. In cases where the child is giving evidence, the direct representative could request that such cases be given priority in case listings or seek a fixed hearing date for the child to give evidence. The direct representative should consider the use of settlement negotiations and other dispute resolution mechanisms where these would be appropriate.

Part of the direct representative's role is to consider referral to appropriate non-legal services and resources which may assist the child client, including counselling, educational and health services, substance abuse programs, housing and other forms of assistance for which the child client may qualify. Support persons in the form of family members, friends, neighbours, teachers, or services such as educational support or recreational opportunities may also be considered. The desirability of obtaining reports from experts or calling expert witnesses should also be considered. In all cases the direct representative should discuss suggestions with the child client, and should not make referrals without the child client's authorisation.

The direct representative should explain to the child client the legal possibility and merit of an appeal or alternative or further applications, and also the ramifications of filing an appeal or further applications, including the potential for delaying implementation of services or other court orders, and what would happen pending the outcome of the appeal or further application.

***“Lawyers should give their legal advice and own opinion on your charges.”*** - male, 17 years

***“When my lawyer talks to the judge I don’t understand what they are talking about.”*** - male, 17 years

***“They say stuff in court which I didn’t tell them to.”*** - male, 17 years

***“He was good at speaking to me and the judge.”*** - female, 16 years

***“Why do they adjourn all the time?”*** - lots of participants

***“I didn’t know what happened in court – the escorts told me.”*** - male, 17 years

***“Some of them do explain it all after court – they turn the big words into little words.”*** - male, 17 years

***“My lawyer didn’t listen to what I wanted. Many times I basically got handed my arse for things that happened when I was 12 or 13 when I was 16 because of lawyers not listening to what I wanted to do.”*** – male, 21 years (2013)

*“I spoke up in court because my lawyer wasn’t representing me properly - I felt like only the prosecutor was standing there paying attention and listening to me.”* – male, 19 years (2013)

*“My lawyer said I could appeal but I didn’t want to because I didn’t get locked up. I should’ve gone ahead with the appeal, I realise now that I’m a bit older.”* – male, 21 years (2013)

*“I appealed one of my cases and ended up getting another 3 months on my sentence, but my lawyer explained that that might happen. It was a confusing process.”* – male, 20 years (2013)

## **PRINCIPLE E2 (Part 2) - General obligations of best interests representative**

The best interests representative should represent the child’s best interests in a competent and professional way in accordance with the Solicitors’ Rules and general legal requirements, even though the child is not the client of the representative and the representative is not acting on the instructions of the child.

In particular the best interests representative should:

- Advise the child concerning:
  - the subject matter of the litigation,
  - their rights and options,
  - the court system,
  - the proceedings,
  - the practitioner’s role,
  - the role of other parties,
  - the relationship of confidentiality,
  - what to expect in the legal process,
  - the possible outcomes and their consequences for the child.
- Obtain copies of all court documents and evidence relevant to the case.
- Participate in all pre-trial hearings or conferences, hearings, negotiations, alternative dispute resolution processes, and discovery that affect the child’s case.
- Inform other parties and their legal representatives that he or she is acting as the best interests representative for the child and expects reasonable notification prior to any changes in circumstances of the case or the underlying social situation that affect the child and the child’s family.
- Attempt to reduce case delays.

- Identify appropriate family and professional resources for the child.
- Ensure the court enters a written judgment or order consistent with the verbal judgment or order of the court.
- Consider and discuss with the child the possibility of appeals or applications.
- In *In the matter of P and P* (1995) FLC 92-615 the court defined the role of the best interests representative in the Family Court. A best interests representative should:
  - Act in an independent and unfettered way in the best interests of the child.
  - 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.
  - Inform the court by proper means of the child's wishes in relation to any matter in the proceedings. In this regard, the representative is not bound to make submissions on the child's instructions but is bound to bring the child's express wishes to the court's attention.
  - Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the child's welfare is before the court.
  - Test by cross-examination where appropriate the evidence of parties and their witnesses.
  - 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.
  - Minimise the trauma to the child associated with the proceedings.
  - Facilitate an agreed resolution to the proceedings.

### ***Commentary***

The overriding duty of the best interests representative is to ensure that the child's long term best interests are served by the decision of the court. The court is only able to reach this decision by having all relevant evidence before it. It is therefore the duty of the best interests representative to ensure that all relevant evidence is presented to court. The duty also entails undertaking investigations to seek all relevant evidence.

In many cases the representative will be unable to interview other parties, particularly where they have individual legal representation. This can only be done with the consent of the party's representative (see *Solicitors' Rule 33*).

The representative is required to make judgements about expert evidence or reports necessary to assist the court, and ensure that this evidence is made available, and to cross-examine all witnesses and question the accuracy of evidence called by other parties where this touches upon the child's welfare.

In all possible circumstances children should have an opportunity to have their views heard in court and administrative proceedings. Where a best interests representative has been appointed, it is an important part of the best interests representative's duty to seek the preferences of the child and ensure that these are placed before the court, even if the representative ultimately submits an alternative option to the court in the best interests of the child.

There is a danger that a child involved in legal proceedings may be subjected to 'systems abuse'. 'Systems abuse' occurs when children are subjected to excessive and potentially harmful investigations, interviews and reports. While most such investigations, interviews and reports are intended to provide information to assist the court in reaching a determination, a child may be traumatised by retelling or reliving facts, or by simply being the subject of repetitive and persistent questioning. The best interests representative should ensure that the relevant and appropriate, but not excessive, interviews and reports are conducted, attempting to balance the need for information and the best interests of the child. In this regard the representative should consider not only those interviews and reports undertaken at the request of him or herself, but also those requested by other parties or the court. Adequate briefing of third parties preparing reports may assist to reduce the details the child is required to provide. The paragraph on delays in Principle E2 (Part 1) also applies here.

While the best interests representative does not directly represent the child, it is the role of the best interests representative to ensure that the child understands the outcomes of proceedings, including interim orders. Wherever possible the best interests representative should explain orders to the child on the same day as the order or judgment is delivered.

***"The best thing about my lawyer is that she gave me choices."*** - female, 15 years

***"They don't explain procedures in court."*** - female, 17 years

***"Yes, she ran through things, but it didn't happen like that in court."*** - female, 16 years

***"Um, I probably would have told her that it probably would be better had she just actually represented me ... I still don't know where she got her facts from, but I think it would have been better if she had actually represented me ... [She could have done that by] taking my viewpoints***

*and not making decisions about what was best for me before actually meeting with me. And stating them and getting a chance to know me ... Like, not meeting me prior to that, I think that was very dodgy, 'cos she already made the viewpoint. I don't know where that came from that she had, and at least doing that to see my point of view."* – male, 15–17 years<sup>6</sup>

### **PRINCIPLE E3 - Consideration of alternative forms of dispute resolution**

Legal practitioners representing children should consider whether it would be appropriate to use alternative forms of dispute resolution, including negotiation, to seek expeditious resolution of the case.

#### **Commentary**

Legal practitioners representing children should consider the appropriateness of the child participating in conferencing, mediation, negotiation (through legal representatives or otherwise), or other forms of dispute resolution. In some jurisdictions dispute resolution services may be required or provided as part of the proceedings.

While practitioners should seek to minimise delays and promote permanency for the child, the practitioner should consider the potential benefits for, and the possible detrimental effects on, the child participating in alternative forms of dispute resolution. Factors to consider include:

- The legislative requirements for alternative dispute resolution.
- The nature of the power dynamics between the child and other parties.
- The existence or allegations of abuse.
- The long term relationships between the parties.
- The need for an authoritative decision from a court.
- The advantages of early resolution of the issues in question.
- The advantages and disadvantages of involving the child and members of their family, extended family and other carers in decision making.

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<sup>6</sup> Kaspiw et al (2013), 8.5 Experiences of young people, *Independent Children's Lawyers Study Final Report*, p 161.

### ***PRINCIPLE E4 - Whether a child should give evidence***

When determining whether to call a child as a witness, or to consent to the child being called as a witness by another party, practitioners should consider the following:

- The child's need or desire to give evidence.
- Any repercussions from giving evidence.
- The necessity of the child's direct evidence.
- The availability of video-conferencing or remote facilities for the giving of evidence.
- The use of written or audio-taped statements as alternatives to the child's direct evidence.
- The availability of other evidence which may substitute for direct evidence from the child.
- The child's developmental ability to provide direct evidence and withstand possible cross-examination.

### ***Commentary***

These considerations, subject to relevant statutory provisions, apply equally to a direct representative and a best interests representative. In some jurisdictions, the court must give leave for the child to be called as a witness. A direct representative is ultimately bound by the child client's direction concerning the giving of evidence.

Giving evidence can promote the child's self-respect and dignity, as well as being useful to the court. However, it is often a stressful and horrifying experience for children.

Evidence from children has traditionally been viewed as unreliable. Behavioural science experts now generally discount this view. The practitioner should ensure that, where a child is required to give evidence, the legal processes ensure that the child is able to give reliable and accurate evidence, and that stress placed on the child is minimised.

All child witnesses should be prepared for and understand the purpose and process of the trial. Where the witness is not the client of the practitioner, the practitioner should ensure the child witness understands the practitioner's role and their relationship. This will not only help to minimise the stress on the child, but will assist them to give better evidence.

***“I was in the witness stand and it was extremely confronting knowing everyone in the room was judging me.” – male, 19 years (2013)***

***“I spoke up in court because my lawyer wasn’t representing me properly - I felt like only the prosecutor was standing there paying attention and listening to me.” – male, 20 years (2013)***

### ***PRINCIPLE E5 - Questioning a child witness***

**When examining a child witness, practitioners should ensure that questions put to the child are phrased in a way that they can understand.**

#### ***Commentary***

This principle should apply to all practitioners in any proceedings where a child gives evidence, not merely to those practitioners representing children. The quality of a child witness’s evidence can depend on the communication skills and expertise of the interviewer and/or the questioner in court. Where appropriate the legal practitioner should request that legal processes be modified to ensure that as far as possible child witnesses can give reliable, comprehensive information as required.

### ***PRINCIPLE E6 - Protecting a child witness giving evidence***

**When a child is being cross-examined by another party, practitioners should be vigilant about monitoring the phrasing of questions and should object to inappropriate questioning where necessary, particularly where such questioning will confuse, intimidate or upset the child.**

#### ***Commentary***

The language and formalities of the courtroom are incomprehensible to most children and can intimidate and confuse child witnesses. Practitioners often use complicated sentence structures deliberately during cross-examination to confuse the witness, and frequently interrupt witnesses to restrict their accounts and to retain tight control over the testimony.

Children are particularly vulnerable to cross-examination intended to intimidate and confuse the witness. Representatives, indeed all practitioners, should be vigilant in monitoring cross-examination of child witnesses, and object to inappropriate questioning when it arises. Principle E5 above encourages practitioners to put questions in language that the child witness can understand. Rule 21.2.3 of the *Solicitors’ Rules* requires that a practitioner not make allegations or suggestions against any person that are principally made in order to harass or embarrass the person. In some instances legislation or court rules outlining procedures for particular courts preclude the use of intimidating, harassing or other inappropriate forms of questioning. Practitioners should bring these requirements and professional principles to the court’s attention where appropriate.

***“It was definitely intimidating. A lot of the time the opposition would confuse you and get you to say something you didn’t want to say. It’s a daunting thing to do.” - female, 21 years (2013)***



### ***PRINCIPLE E7 - Safety of the child***

**The practitioner should minimise risk to the safety of the child when the child is required to attend interviews, hearings, or any other proceedings.**

#### ***Commentary***

The practitioner should consider any risk posed to the child by other parties, publication of names and facts as well as access by the general public. In some cases, verbal or visual contact alone could be a risk. When the child is required to attend proceedings, the practitioner should check the physical environment such as the layout of the hearing rooms to minimise the adverse effects on the child's well-being. If such risks cannot be avoided, the practitioner should bring this to the attention of the court and seek appropriate orders.

***"They keep away the baddies from us."*** - female, 10 years

### ***PRINCIPLE E8 - Continuity***

**The practitioner should be consistently available to represent the child or ensure that incoming practitioners are properly briefed.**

#### ***Commentary***

Continuity of representation is particularly important for children. Practitioners should do whatever they can to promote consistency. While a practitioner should endeavour to ensure continuity of representation, this may not always be possible.

The reality that other practitioners may appear on duty days or for procedural matters should be explained to the child. However, the child should be reassured that the practitioner will be the one who will represent him or her at hearings and whenever important decisions are made.

Where it is necessary that another practitioner represent the child for a period of time or for the remainder of a matter, the reasons for the change in representation should be explained to the child, and, wherever possible, the child should be introduced to the new practitioner. A direct representative should consult with the child client prior to referral of the matter to another practitioner.

Practitioners should ensure that file notes properly record both the legal issues and matters of importance about the child.

***"I hate it when you get a different lawyer every time you go to court."*** - male, 17 years

***"Sometimes you get the worst one and then different ones."*** - female, 15 years

***“One time I had 4 different lawyers. It feels like they’re abandoning you and you just end up with a fill in who doesn’t understand the case from the start. It’s good to have one solicitor who you know and like because then you can trust them.”*** – male, 18 years (2013)

***“I hated having different lawyers. That person may not have had time to go through your file, they don’t know you or your circumstances, you have to explain everything again. It’s unprofessional.”*** – female, 21 years (2013)

## F. Confidentiality

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### ***PRINCIPLE F1 - General rule of confidentiality***

A practitioner representing a child as a direct representative owes the same duty of confidentiality as would be owed to an adult client. The practitioner must not disclose any confidential information without the authorisation of the child, unless the practitioner is permitted or compelled by law to disclose or in other circumstances required by the Solicitors' Rules.

A practitioner representing the child as a best interests representative also has a duty of confidentiality to the child.

### ***Commentary***

Rule 9 of the *Solicitors' Rules* sets out the duty of confidentiality, which a practitioner owes to the client. A child client is entitled to the same protection of these provisions as any other client and has a right to confidentiality in communications between himself/herself and his/her legal representative. Rule 9.2 specifies circumstances in which disclosure of confidential information is permitted. Rule 10, which restricts a practitioner acting against a former client, is also applicable to child clients.

At present, it is unclear whether the law requires a practitioner to reveal confidential information where the welfare of the child is affected. There are clearly specific statutory requirements to disclose and/or legal protection for good faith disclosures of certain information. These are generally set out in child welfare legislation in each State and Territory and also in the *Family Law Act 1975* (Cth). In most cases where the child is at serious risk of harm there will be a legal option for the practitioner to report information, which will remove the risk. Principle F3 should guide practitioners in determining when, how and to whom confidential information should be disclosed.

Some practitioners assert that there is no duty of confidentiality between a child and a best interests representative, because no client-practitioner relationship is said to exist. In the interests of assisting the development of trust between the representative and the child, the child should have the protection of a confidential relationship with the best interests representative. Children in this situation do not, however, have the protection of client legal privilege.

It is particularly important for the best interests representative to explain their role to the child, the nature of their confidential relationship, and the limitations of that relationship. If the child wants to disclose information they have not disclosed to another person, the best interests representative should seek the assistance of a third party, such as a counsellor, to lead the 'disclosure interview' with the child. This is in order that the best interests representative avoids becoming a witness in the proceedings.

***They shouldn't speak about my charges in front of my mum."*** - female, 15 years

***"They should ask me first if it's OK to tell."*** - female, 9 years

***"He should tell the judge everything. [If I don't want my lawyer to tell], well, it's the judge so [my lawyer] should tell him everything."*** - female, 10 years

## ***PRINCIPLE F2 - Explanation of confidential relationship***

Practitioners should explain, in terms appropriate to the child, the confidential nature of the relationship between the practitioner and child client. This includes explanation of the circumstances in which the practitioner may disclose confidential information. This explanation should be undertaken before commencing to interview and/or take instructions from the child, and be repeated as often as is necessary.

### ***Commentary***

Practitioners should ensure that children understand the confidential nature of the relationship between practitioner and client, including circumstances in which the practitioner can release confidential information.

## ***PRINCIPLE F3 - Disclosure of confidential information***

Where the practitioner is obliged to disclose confidential information in accordance with the law, the practitioner should first seek the child's authority to disclose. The practitioner should explain the reason why the disclosure should or must be made. In all cases, the minimum amount of information necessary to relieve the practitioner's obligations should be disclosed.

### ***Commentary***

A situation may arise where a child provides information to the practitioner which indicates that the child has been, or is at risk of being, abused or ill-treated or subjected to behaviour which psychologically harms them. The practitioner should discuss with the child the advantages of bringing the matter to the attention of relevant authorities, and seek permission to disclose the information. If the child refuses to authorise disclosure, the practitioner may only proceed to disclose in situations where the law permits or compels disclosure (see *Solicitors' Rules* 9.2 and specific circumstances set out in these principles). The child should be advised of a practitioner's intention to disclose despite the child's refusal to authorise.

Relevant laws relating to disclosure of confidential information in specific jurisdictions are incorporated into these principles. These laws set out the practitioner's ability or obligation to disclose. Only the minimum information required to fulfil the practitioner's obligation or to relieve the risk to the child should be disclosed without the child's authority.

In situations where the child client of a direct representative is at risk but refuses to authorise disclosure, the practitioner should explore alternatives other than disclosure with the child that may relieve the risk. This is likely to involve appropriate professional or community services, having regard to the extent of the child's consent.

***“They should ask me before telling anything about me in court.”*** - female, 15 years

***“They should ask me first if it’s OK to tell.”*** - female, 9 years

***“Sometimes they just open their trap and then ask ‘Was I supposed to say that?’”*** – male, 16 years (2013)

### ***PRINCIPLE F4 - Client legal privilege***

**The rule of evidence in relation to client legal privilege applies to confidential communications between child clients and their direct legal representatives.**

#### ***Commentary***

As with general rules relating to confidentiality, the direct representative should advise the child client of the existence of client legal privilege, and the fact that disclosure of confidential information to a third party by the child client may result in the loss of client legal privilege. Direct representatives should consider the existence of client professional privilege and refrain from conducting joint interviews with child clients or providing information to third parties. The presence of support persons during an interview with a child client will also affect client legal privilege.

## G. Conflict of Interest

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### ***PRINCIPLE G1 - General rule of conflict of interest***

The Solicitors' Rules in relation to conflict of interest and the duty to avoid conflicts of interest owed by a legal representative to a client apply to all practitioners representing children.

#### ***Commentary***

Rule 10 of the *Solicitors' Rules* prohibits a practitioner from acting against a former client. Rule 11 of the *Solicitors' Rules* requires a practitioner to consider whether there would be any conflict of interest in acting for more than one party. These rules apply to practitioners representing children.

It is particularly important where children are involved to anticipate conflict, as a change of lawyer can be unsettling for a child. If there are real or apparent risks of a conflict arising, individual representation should be arranged for all of the children capable of providing instructions. Situations where the practitioner represents more than one party should be continuously monitored for conflict of interest situations. For example, a care and protection matter involving two siblings may commence with one legal representative for both siblings, who at the time indicate similar positions, but develop into a conflict of interest situation when the siblings subsequently desire different results. In such cases, the situation and any required actions or options as a result of the conflict should be explained to the children. In some situations the practitioner may need to withdraw completely, particularly where he or she has obtained confidential information from one child that would have a significant effect on the case of the child. In such a situation a conflict of interest will occur if the representative continues to act for any of the children.

Particular care should be taken when considering representing co-accused in a criminal matter, due to the potential for conflict.

A practitioner should not undertake to represent a child in a direct representation capacity and a best interests capacity at the same time.

### ***PRINCIPLE G2 - Specific conflict of interest situations***

A practitioner should not under any circumstances undertake the following joint representations, which involve inherent conflicts of interest:

- Child and parent in proceedings for juvenile/criminal justice, care and protection, adoption, medical decision making, civil commitment where the parent is the movant, or residence/access applications.
- Child and government agency in the same matter.

## H. Access to Documents and Reports

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### ***PRINCIPLE H1 - Access to documents by child client***

A child client is entitled to access documents held by the direct representative that have been created or received by the direct representative for the purposes of the child client's matter. Direct representatives should ensure that any legal or court-ordered restrictions in relation to documents are followed, and otherwise consider the impact on the child client who accesses case related documentation.

### ***Commentary***

General rules relating to client access to documentation held by practitioners can be found in Rule 14 of the *Solicitors' Rules*. These rules apply equally to child clients. However, direct representatives should consider the capacity of child clients to understand the documentation, and the potential emotional impact the documentation may have upon the child client (particularly reports concerning the child client). The direct representative must follow court-ordered or other legal restrictions placed upon documentation.

The provision of documents to child clients should be consistent with the child client's capacity to comprehend the contents of the document. Direct representatives should ensure the information contained in the documents is presented to the child client in a manner they can understand, taking into consideration the child client's ability to read, the terms contained in documents and reports, and the stress and time limitations placed on the child client.

Many documents and reports may contain information likely to distress the child client. The direct representative should consult with the author of a document or report as to whether any information in the document is unknown to the child client and is likely to cause distress. Wherever possible, this information should be imparted to the child client by the author of the document, who should explain matters that may not have been addressed in the document itself. If the child client does not feel comfortable communicating with the author of the document, another person familiar to the child client with experience in the area should impart the information to the child client.

Where a best interests representative is providing a child with access to documents or reports, the same considerations as to the capacity of the child to comprehend and the potential emotional impact on the child should be applied. In addition, the best interests representative must have regard to court orders and any legislative requirements governing disclosure in these situations.

# I. Interaction with Third Parties

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## ***PRINCIPLE I1 - Referral to third party services***

Where the practitioner considers it necessary to employ the services of another professional or service provider to further the case, the child should be consulted about the involvement of the third party and advised about the nature and purpose of the referral.

### ***Commentary***

In a number of circumstances other professionals and service providers will be required, including interpreters, barristers, doctors, counsellors and other social service workers. Third parties should only be consulted or involved where they would benefit the child. In a direct representation situation, third parties should be consulted or involved only with the authority of the child client. In all cases the practitioner should explain the need for the third party and the role that third party will play, e.g. what type of information the third party will provide or what service they will perform for the child. The situation regarding support persons is further discussed under Principle D5.

Where the third party must be provided with confidential information to enable performance of his or her services, the practitioner can only provide this information with the child's authority.

Practitioners should ensure that the third party is properly briefed, to avoid having the child providing details of the case again unless this is absolutely necessary.

***“The best thing about my lawyer is that she had a social worker to help her and me.”*** - female, 14 years

***“Sometimes I didn’t have a call – the lawyer and the judge had decided between them who I should see.”*** - male, 19 years (2013)



## J. Ending the Relationship

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### ***PRINCIPLE J1 - Preparing child for end of relationship with practitioner***

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

### ***Commentary***

As a professional, the practitioner should follow standard practice for ending any practitioner-client relationship including debriefing, explanation of orders or outcomes, the potential for appeals or further applications, and an invitation to make further enquiries. This should be done both orally and in writing.

As a child's representative, the practitioner must also consider the personal relationship with the child. In some cases the child may regard his or her lawyer as the last champion, while others may have had a problematic relationship with the practitioner.

Practitioners must exercise caution and a great degree of sensitivity when ending the professional relationship with the child.

Practitioners should inform the child that he or she can be contacted if the child has any problems arising from the case. However, over-dependence on the practitioner should be discouraged. Practitioners may consider appropriate referrals to other non-legal services, and providing information to the child about available services including youth services, clubs, health facilities, counselling services, and telephone help lines.

While a practitioner should endeavour to ensure continuity of representation, this may not always be possible. Where it is necessary that another practitioner represent the child for a period of time or for the remainder of a matter, the reasons for change in representation should be explained and, wherever possible, the child should be introduced to the new practitioner. A direct representative should consult with the child client prior to referral of the matter to another practitioner.

***"After court my lawyer comes to see me and explains."*** - male, 16 years

***"I think that your lawyer should stay in contact, especially if you are homeless and you don't know other people who can help you, or if you have more court dates."*** - male, 16 years

***"They should check in on you or if you are in lock up."*** - male, 17 years

***"I don't want any contact – there are enough other people in my life."*** - male, 18 years

## ***PRINCIPLE J2 - Right to dismiss direct representative***

**A child client has the right to dismiss their direct representative, regardless of how or by whom the direct representative was appointed.**

### ***Commentary***

Just as an adult client has the right to dismiss their legal representative, a child client is entitled to express dissatisfaction with the services provided by their direct representative and/or dismiss their direct representative. If a child client expresses dissatisfaction with the legal services provided, the direct representative should provide the child client with contact details for appropriate professional complaints bodies. If the direct representative was appointed by the court and the client wishes to dismiss the representative, the representative should advise the court of the dismissal.

As a best interests representative is not the legal representative for the child and does not act upon the instructions of the child, the child cannot dismiss the best interests representative even if he or she is unhappy with the performance or conclusions reached by the representative. If a best interests representative becomes aware of the child's dissatisfaction and that dissatisfaction cannot be resolved, the representative should bring this to the attention of the Court and seek specific directions.

## **APPENDIX**

### ***Issues for elaboration and consideration***

Submissions are invited on issues relevant to representing child clients in the criminal, care and protection, family law, civil and administrative law jurisdictions.

The following issues are important but are not regarded as exhaustive:

#### *Criminal Jurisdiction*

- Capacity to give instructions and the *doli incapax* principle.
- Importance of considering *doli incapax* principle.
- Particular importance of effective communication with regard to a decision to plead guilty.
- The issues raised by the use of AVL for interviewing and taking instructions from children
- Representation and police interviews.
- Participation and understanding.
- Competence of representation.
- Legal aid in criminal proceedings.
- Representation of Indigenous and rural children.
- Overlap between criminal matters and other matters, in particular care and protection matters.
- The role of a children's lawyer in youth justice conferences and other alternatives to court.

#### *Care and Protection Jurisdiction*

Practitioners representing children in this jurisdiction must be familiar with and appropriately comply with the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Important issues to take note of include:

- Definitions of child and young person under the Act.
- Child's participation.
- Proceedings conducted in non-adversarial manner.
- Child appearing in own right.
- Models of representation.
- Access to information.
- Support persons.
- Duty to explain proceedings.
- Alternative Dispute Resolution.
- Child giving evidence.
- Safety, welfare and wellbeing of the child.
- Appearance of lawyer.

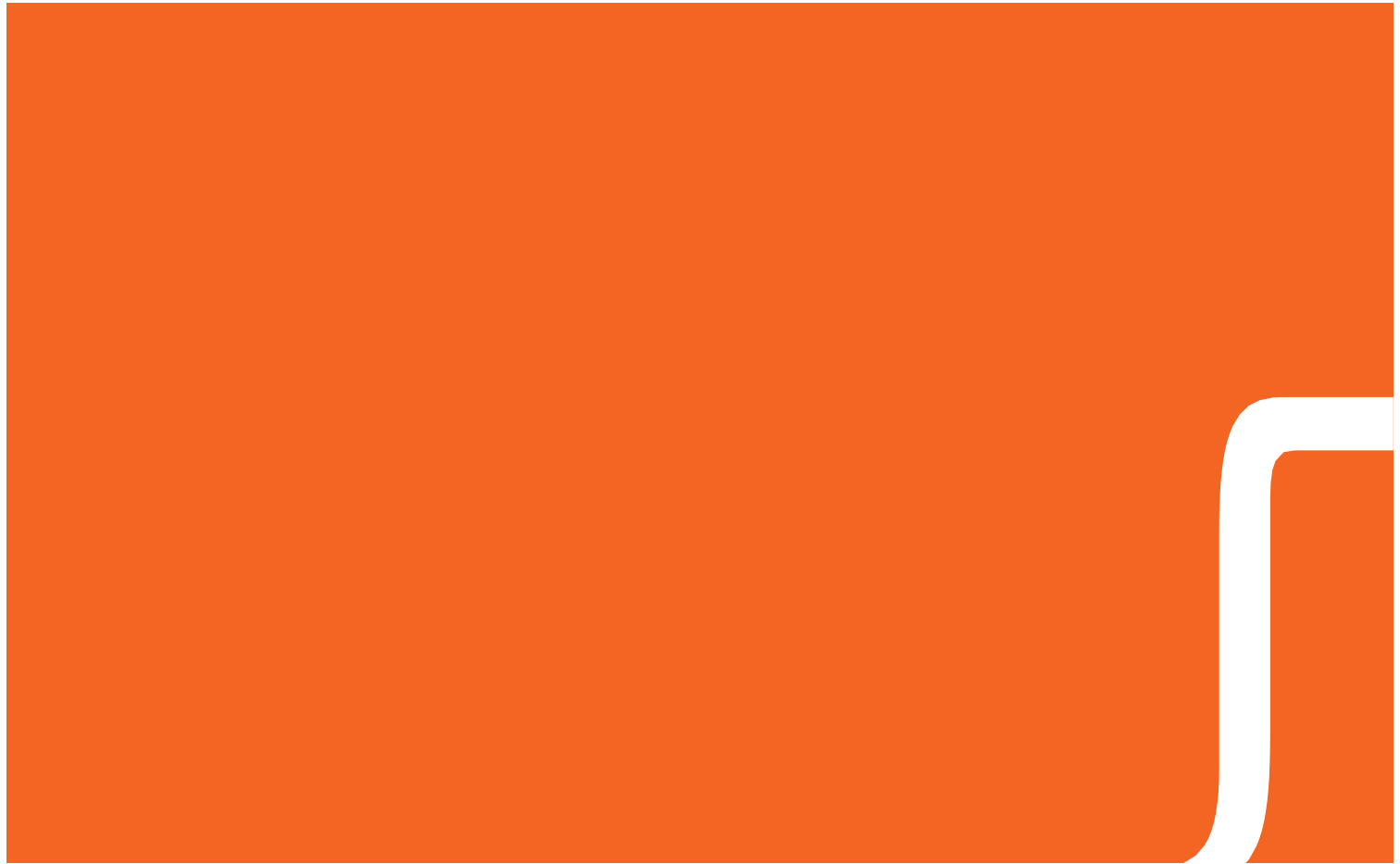
- Dismissal.
- Long term relationships.

#### *Family Law Jurisdiction*

- Direct representative relationship.
- Best interests principle.
- Best interests representation.
- Appointment of Independent Children's Lawyer.
- Role of Independent Children's Lawyer.
- Case Guardian.
- Calling a child to give evidence.
- Relationships with third parties.
- Confidentiality.
- Reporting risk to children.
- Support persons.
- Confidentiality (family reports).
- Ending the relationship.

#### *Civil and Administrative Law Jurisdictions*

- Guardian ad litem and standing.
- Costs.
- Alternative Dispute Resolution.



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# JOINT CHILD PROTECTION RESPONSE PROGRAM (JCPRP)

## *CRITERIA FOR ENTRY INTO THE PROGRAM*

(for application at Joint Referral Unit – JRU)

December 2021

The JCPRP Criteria for entry into the program have been developed to enable the most vulnerable children and young people to receive a specialist joint response. These Criteria reflect the principles and objectives that underpin the JCPRP as described in the Statement of Intent<sup>1</sup>, including that the safety, welfare and wellbeing of children and young people is paramount.

Referrals to the program must meet one or more of the three abuse categories:

1. Sexual Abuse
2. Serious Physical Abuse
3. Serious Neglect

The 'Factors to Consider' in this document have been developed to help inform professional judgement by the JRU. The 'Factors to Consider' do not replace the JCPRP *Criteria for Entry into the Program* but serve as complementary practice considerations and reflective prompts.

The JRU will consider the information available from all three agencies so that vulnerable children and young people who are most in need of a specialist JCPRP response receive one. The JRU will use professional judgement to:

- determine whether there is reported evidence of abuse in line with the criteria
- identify how a child or young person's age and vulnerabilities (including their communication needs), as well as the nature of the offence will determine the response required
- identify whether the list of factors to consider within the criteria apply and impact on the type of response the report requires

For all referrals the JRU will consider whether a child or young person requires a specialist<sup>2</sup> tri-agency response.

Reports which do not meet the JCPRP Criteria for Entry into the Program are referred for local response to the following:

- Community Services Centre (CSC) - *if there is a report of a child or young person residing in NSW*
- Police Area Command or Police District (PAC/PD) - *if there is information to indicate a criminal offence has been committed.*<sup>3</sup>
- NSW Health service - *if there is information to indicate a health response is required.*

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<sup>1</sup> JCPRP Statement of Intent September 2018

<sup>2</sup> Specialist tri-agency response is offered by the JCPR Program as per the Statement of Intent. Tri-agency response can also occur in the form of a response by local Community Service Centres, Police Area Commands/Districts and/or NSW Health services.

<sup>3</sup> Referrals to PAC/PD are based on where the offence has been committed rather than where the child / young person lives.

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## KEY TERMS APPLYING TO ALL ABUSE CATEGORIES

**AGE OF CHILD/YOUNG PERSON** Refers to age of the child or young person at the time the report is being considered by the JRU.

**VULNERABLE PERSON** [Part 6, Chapter 6 of the Criminal Procedure Act 1986](#) legislates for the electronically recording of the evidence in chief of a vulnerable person by a police officer. A 'vulnerable person' is defined as a child under the age of 16 or a person with cognitive impairment. The decision as to whether the evidence of a vulnerable person with cognitive impairment (including a young person aged 16 < 18 years) can be recorded either electronically or as a written statement is a matter for the police based on the available information. Not all young people with cognitive impairment require a specially trained police officer to obtain their evidence electronically. Consider all identified communication needs and whether the young person requires a specialist joint response or if the matter can be referred for local response to a PAC/PD, CSC and appropriate health service.

**COGNITIVE IMPAIRMENT** For the purposes of the JCPRP Criteria, 'cognitive impairment' is defined under the Criminal Procedure Act and includes any of the following:

- a) An intellectual disability,
- b) A developmental disorder (including an autistic spectrum disorder),
- c) A neurological disorder,
- d) Dementia
- e) A severe mental illness,
- f) A brain injury

In relation to *cognitive impairment due to severe mental illness*, 'severe mental illness' has been further defined by NSW Health as:

A diagnosis (or description of symptoms) of psychosis or bipolar disorder OR another severe disorder (e.g.

Post-Traumatic Stress Disorder, Eating Disorder, Self-harming Behaviour) with a high impact on functioning, and one or a combination of the following factors apply<sup>4</sup>:

- a) the child/young person needs hospitalisation due to the diagnosis or symptoms
- b) the diagnosis or symptoms substantially interferes with or limits the child/ young person's role or functioning in family, school, or community activities (e.g. more than 60 days out of role in the past year),
- c) the child/young person is experiencing very high distress as a result of the diagnosis or symptoms
- d) the child or young person is unable to attend school/activities at the current time due to the diagnosis or symptoms.

## **DOLI INCAPAX**

Under section 5 of the Children's (Criminal Proceedings) Act 1987, the age of criminal responsibility in NSW is 10 years. However *doli incapax* is used to describe a rebuttable presumption that children aged 10 years or more and less than 14 to be "incapable of crime or wrongdoing".

## **FACTORS TO CONSIDER FOR ALL ABUSE CATEGORIES**

- A. Consider the interdependencies between the following factors and how they impact the complexity of the required response: child protection history, complex family dynamics, health needs, criminal seriousness of alleged offences, and the criminal history/ profile of the POI or related parties.
- B. Any child or young person's cognitive impairment, sensory impairment or other communication needs which may be a barrier to a clear disclosure.
- C. The best interests of the children and young people involved and appropriate service provision for their needs. Does the referral require a specialist tri-agency response, including a major crime response from a Child Abuse Unit (CAU)?<sup>5</sup>
- D. Consideration should be given to the additional vulnerabilities of children under the age of 12.

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<sup>4</sup> Based on the description of 'severe mental illness' National Survey of Mental health of Children and Adolescents. N.B. Many children and young people displaying symptoms may not be diagnosed with a disorder due to their age.

<sup>5</sup> Any referral made as a result of a direct report to the NSWPF requires a NSWPF response.

- E. Complexity of the referral due to geographic responsibilities. For example, where the location of the reported abuse, the child's residence and/or the location of the POI cross PAC/PD boundaries or state jurisdictions, coordination of a multiagency response is usually best managed by JCPRP.<sup>6</sup>
- F. Existing Police investigation: Where PAC/PD police are making the report and have provided a comprehensive criminal investigation response, which has included one or more of the following:
- charging of the POI/s / child reported to have caused harm
  - electronically recorded interview of the child / vulnerable young person or a request for same to be conducted
  - statement from the young person being or will be obtained
- then the matter will remain with the PAC/PD where the criminal investigation has already commenced AND the report will be referred for a local response to a CSC and the relevant Health service.
- G. Where one or more of the partner agencies have already provided a comprehensive response to the reported information and have described this response to the JRU management team, a local response may be more appropriate than entry into the program for a specialist tri-agency response. Any single agency response to a matter requires that agency to satisfy the partner agencies how and why the response is considered comprehensive in the context of that agency's statutory obligation.
- H. Where a child or young person is being re-referred because they are now willing to participate in an investigative process, the need for a JCPRP response is to consider, on a case by case basis, the need for a new safety assessment as well as the need for a new health response. The extent of the previous JCPRP response also needs to be considered as a part of this assessment.

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<sup>6</sup> Where a child resides in another state but the offence occurred in NSW, unless the child is in the care of the Minister, the matter will be referred to the CAU for a police only response. Where a child resides in NSW but the offence occurred interstate, the matter will be transferred for a joint response within the program to ensure that the child who resides locally receives a coordinated multidisciplinary response.

## SEXUAL ABUSE

The JCPRP accepts a holistic definition of child sexual abuse as *any act which exposes a child or involves a child in sexual processes beyond his or her understanding and contrary to accepted community standards*<sup>7</sup>. However, not all types of sexual abuse meet the JCPRP Criteria for Entry into the Program. The following are definitions of key terms as they apply to the JCPRP Criteria. The 'factors to consider' should be reviewed alongside these definitions.

### KEY TERMS APPLYING TO SEXUAL ABUSE

#### SEXUAL INTERCOURSE<sup>8</sup>

- a. Penetration to any extent of the genitalia (including a surgically constructed vagina) of a female, or the anus of any person by:
  - i) Any part of the body of another person, or
  - ii) Any object manipulated by another person,Except where the penetration is carried out for proper medical purposes
- b. Introduction of any part of the penis of a person into the mouth of another person, or
- c. Cunnilingus, or
- d. The continuation of sexual intercourse without consent<sup>9</sup>

#### SEXUAL TOUCHING (formerly known as INDECENT ASSAULT)<sup>10</sup>:

A person touching another person:

- a. with any part of the body or with anything else, or
- b. through anything, including anything worn by the person doing the touching or by the person being touched, in circumstances where a reasonable person would consider the touching to be sexual.

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<sup>7</sup> [Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report Volume 1: Our Inquiry, December 2017, Page 19](#)

<sup>8</sup> [Crimes Act 1900 No 40, Division 10, s61HA](#)

<sup>9</sup> For the purpose of JCPRP criteria, this may apply to young people 16-18 who have withdrawn consent during sexual intercourse

<sup>10</sup> [Crimes Act 1900 No 40, Division 10, s61HB](#)

Matters to be taken into account in deciding whether a reasonable person would consider touching to be sexual include any of the following:

- a. whether the area of the body touched or doing the touching is the person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed
- b. whether the person doing the touching does so for the purpose of obtaining sexual arousal or sexual gratification
- c. whether any other aspect of the touching (including the circumstances in which it is done) makes it sexual.

Touching done for genuine medical or hygienic purposes is not sexual touching.

### **SEXUAL ACT (formerly known as ACT OF INDECENCY)<sup>11</sup>:**

An act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual.

Matters to be taken into account as to whether a reasonable person would consider the act to be sexual include any of the following:

- a. whether the area of the body involved in the act is a person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breast, whether or not sexually developed
- b. whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification
- c. whether any other circumstances of the act makes it sexual.

An act carried out for genuine medical or hygienic purposes is not a sexual act.

### **CONSENT**

The definition of consent is legislated under [s.61HE of the Crimes Act](#). A person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity. In most child sexual abuse offences the issue of

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<sup>11</sup> [Crime Act 1900 No 40, Division 10, s61HC](#)

`consent' does not apply because a child cannot consent, but there are some sexual abuse offences which may be referred to JRU where the prosecution would need to prove that the victim did not consent.

**SPECIAL CARE**

Defined under [Part 3, Division 10, Subdivision 11 of the Crimes Act 1900](#)

**CLOSE FAMILY MEMBER**

Defined under [Part 3, Division 10, Subdivision 12, of the Crimes Act 1900](#). In addition to the definitions in the Crimes Act 1900, 'Close Family Member' may also include, but is not limited to parent figures, aunts, uncles and/or cousins.

**PLACEMENT INSTABILITY**

Refers to a pattern of care arrangements ending prematurely, usually without planning. Stability may be but is not exclusively indicated when a child has had consistent permanent placement for a period of 12 months or more.

**HARMFUL SEXUAL BEHAVIOUR**

**Harmful sexual behaviour:** is a term used when it is believed that the sexual behaviour of a child has caused harm to the child themselves or harmed other children subjected to this behaviour. Determining "harm" experienced by any child must always encompass a broader consideration of all children's overall emotional, physical, psychological and relational development and wellbeing.

## CRITERIA FOR SEXUAL ABUSE

For the purpose of the JCPRP criteria 'reported evidence' of sexual abuse is indicated by one or a combination of the following, in circumstances where the person who abused the child or young person was aged 10 years or over at the time of the abuse:

- Disclosure by the child or young person that they have been sexually abused
- The reported sexual abuse has been witnessed by another person
- The POI / child with harmful sexual behaviour has made admissions that they have sexually abused the child or young person
- There is physical or forensic medical evidence available consistent with the reported sexual abuse<sup>12</sup>
- There is other evidence available consistent with the reported sexual abuse<sup>13</sup>
- There is shared agency information corroborating the reported sexual abuse

SEXUAL ABUSE	
Age of C/YP	Criteria
<13	Reported evidence of sexual intercourse, sexual touching or sexual act
13 to <16	<p>A. Reported evidence of sexual intercourse</p> <p>B. Reported evidence of sexual touching, or sexual act where one or a combination of the following factors indicating vulnerability also apply:</p> <ul style="list-style-type: none"> <li>i) The child has a 'cognitive impairment', sensory impairment or other communication needs.</li> <li>ii) The child is a close family member of, or is currently under the 'special care' or authority of the POI / child reported to have caused harm.</li> <li>iii) The child is living in the same dwelling as the POI/ child reported to have caused harm.</li> <li>iv) The child is in statutory care placed in a residential care facility and does not have an existing relationship with an allocated DCJ caseworker.</li> <li>v) The child is in statutory care with a recent history of placement instability and does not have an existing relationship with an allocated DCJ caseworker.</li> </ul>
16 to <18	Reported evidence of sexual intercourse, sexual touching or sexual act committed upon a young person who has not consented or cannot legally consent AND one or a combination of the following factors indicating vulnerability also apply:

<sup>12</sup> Including but not limited to sexually transmitted infections, pregnancy, unexplained bruising on or bleeding from genitals, presence of semen on child, unexplained bruises to breasts or other available forensic evidence.

<sup>13</sup> Including but not limited to telecommunications, child abuse material, diary entries, photographs/videos etc.

	<ul style="list-style-type: none"> <li>i) The young person has a 'cognitive impairment', sensory impairment or other communication needs that will require a Police officer to conduct an electronically recorded interview.</li> <li>ii) The young person is a close family member of, or is currently under the 'special care' or authority of the offender</li> <li>iii) The young person is in statutory care placed in a residential care facility and does not have an existing relationship with an allocated DCJ caseworker.</li> <li>iv) The young person is in statutory care with a recent history of placement instability and does not have an existing relationship with an allocated DCJ caseworker.</li> </ul>
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## FACTORS TO CONSIDER FOR SEXUAL ABUSE REFERRALS

### Factors which may indicate local referral

- A. For reports only involving children, consider the cognitive ability of a child aged 10-14 with harmful sexual behaviour, and whether there are reasonable grounds for the commencement of a criminal investigation in light of any impairment. Cognitive impairment should be justified by current medical evidence. Strong consideration for acceptance into JCPRP should be placed upon the criminal seriousness of the offence and the circumstances of aggravation. *Doli incapax* can be applied at the JRU in circumstances of clear evidence of cognitive impairment, for example, serious brain injury or developmental delay.
- B. Similar aged peers: Sexual offences where the child is 13 – to <16 years old, within three chronological years of the other party involved and has consented<sup>14</sup> to the sexual intercourse, touching and/or act, will be referred to the PAC/PD for investigation.<sup>15</sup>
- C. 'Grooming' offences<sup>16</sup> in themselves do not meet JCPRP criteria, however evidence of a pattern of behaviour indicative of grooming<sup>17</sup>, especially by a parent, caregiver or person in authority should be considered in the context of the reported information and weight given to the additional indicators of abuse.

<sup>14</sup> [Crimes Act 1900 40, s61HE](#)

<sup>15</sup> [Crimes Act 40 s80AG](#). There is a statutory defence for certain child sexual abuse offences when the child or young person is of or above the age of 14 years and the age difference between the accused person is no more than 2 years. The prosecution must prove beyond reasonable doubt that the child or young person did not 'consent' to the offence.

<sup>16</sup> [Crimes Act 1900 No 40, Division 10, Subdivision 9](#)

<sup>17</sup> For definitions of grooming see [Patrick O'Leary, Emma Koh and Andrew Dare, 2017, \*Grooming and child sexual abuse in institutional contexts\*, Royal Commission in to Institutional Responses to Child Sexual Abuse, Sydney, pp. 7](#)



- D. 'Child Abuse Material' (CAM) offences<sup>18</sup> in themselves do not meet the JCPRP criteria, however if a known child under the age of 16 is identified in the CAM where there is evidence of child sexual abuse the matter should be considered. CAM involving peers (under the age of 18 years) taking, sharing and/or keeping nude photographs of themselves should be considered in the context of Section 91HAA<sup>19</sup>.
- E. In circumstances where a young person aged 16-<18 in residential care or in OOHC with a recent history of placement instability does not have an allocated DCJ caseworker, but has existing relationships at the CSC, consider whether consideration should be given to whether these relationships indicate that a local response by that CSC is in the best interest of the young person to maintain trust and continuity of casework.
- F. When the report indicates sexual touching or a sexual act by an POI who no longer presents a danger to the child or young person the advice of any treating mental health clinicians or counsellors can be taken into account as to the current capacity and willingness of the child or young person to be interviewed.

#### **Factors which may indicate entry into the program**

- G. In circumstances where a disclosure or information in a report lacks clarity, consideration should be given to behavioural changes or other indicators of abuse, particularly when the child is known to have disabilities, sensory impairment or other communication needs<sup>20</sup>
- H. Where it is unclear if the child is disclosing sexual touching or sexual intercourse and the difference would impact on the matter being accepted, the JRU should consider accepting the referral.
- I. Close family member: When applying the definition of close family member, the immediate proximity of the family member, the likelihood of future contact and ongoing risk should be factored into decision making. Consideration should also be given to different cultural concepts of family, particularly for Aboriginal and Torres Strait Islander communities; and to circumstances where the accused is the care giver (formal or informal) or has the psychological relationship with the child/young person equivalent to a parent, care giver or person in authority.
- J. Aboriginality: JCPRP is committed to improving access to the program for particularly vulnerable children and young people. Aboriginal children and young people may face a range of barriers to disclosure. In order to provide a flexible assessment process for sexual abuse reports involving Aboriginal children, Aboriginality is a factor to be considered by the JRU when determining whether to accept a referral for joint response but Aboriginality is not a criteria for a referral to be accepted. The JRU can decide to accept a referral for an Aboriginal child

<sup>18</sup> [Crimes Act 1900 40, Division 15A](#)

<sup>19</sup> [Crimes Act 1900 40, s91HAA](#) provides an exception to the possession of CAM having regard to the nature of the CAM, how the CAM was created, how the CAM came to be in the C/YP's possession, the vulnerability of the C/YP or the child depicted in the CAM and the relationship between the C/YP and the child depicted in the CAM.

<sup>20</sup> See '[traffic lights guide](#)', adapted from Brennan, H. and Graham, J., 2012. *Is This Normal?* Fortitude Valley, Qld. Family Planning Queensland.

or young person in circumstances when the age component of the criteria would not indicate this, but there is available information to suggest that the child or young person would benefit from a specialist joint response.

- K. Likelihood of further allegations and/or multiple victims being identified: Where there are multiple alleged victims of the same POI/s / child reported to have caused harm and the criteria would result in one referral being accepted but others referred to PAC/PD primarily due to the ages of the victim, then consideration should be given for entry into the program for all victims.

## SERIOUS PHYSICAL ABUSE

### KEY TERMS APPLYING TO SERIOUS PHYSICAL ABUSE

#### SERIOUS PHYSICAL INJURY

**From a medical perspective a serious physical injury is any injury** which requires or required immediate medical assessment/care in order to:

- a) treat persistent pain
- b) identify occult (i.e. hidden) injuries, including internal organ damage, and/or
- c) prevent permanent or serious deformity or disability.

The Injury Guide Table<sup>21</sup> details the range of injuries that medically are considered serious, having regard to the age and development of the child.

### CRITERIA FOR SERIOUS PHYSICAL ABUSE

For the purpose of the JCPRP Criteria 'reported evidence' of serious physical abuse is indicated by one or a combination of the following, in circumstances where the child has a serious physical injury and the person who inflicted the injury was aged 10 years or over at the time of the abuse, or the identity of the POI / child reported to have caused harm has not yet been determined:

- Disclosure by the child or young person that they have been physically abused
- The reported physical abuse has been witnessed by another person
- The POI /child reported to have caused harm has made admissions that they have physically abused the child or young person
- The injury is unexplained and is suspected of being inflicted
- The injury is inconsistent with the explanations provided based on medical professional opinion

SERIOUS PHYSICAL ABUSE	
Age of C/YP	Criteria
<10	Reported evidence of Serious Physical Abuse
10 to <16	Reported evidence of Serious Physical Abuse AND where one or a combination of the following factors indicating vulnerability also apply: A. The child has a 'cognitive impairment', sensory impairment or other communication needs.

<sup>21</sup> TAB A Serious Injury Table

	B. The child has a physical disability that causes them to be reliant on an adult for day to day person care.
16 to <18	Reported evidence of Serious Physical Abuse AND one or both of the following factors indicating vulnerability also applies: A. The young person has a 'cognitive impairment', sensory impairment or other communication needs that will require a Police officer to conduct an electronically recorded interview B. The young person has a physical disability which causes them to be reliant on the POI for day to day person care.

## FACTORS TO CONSIDER FOR SERIOUS PHYSICAL ABUSE REFERRALS

- A. Serious physical injury is defined within this criteria. However not all reports which meet the definition of serious physical injury (above) will require a specialist tri-agency response. Determining whether a serious physical injury will be accepted for a JCPRP response will include consideration of the age and vulnerability of the child; the context of the injury including need for immediate medical assessment/treatment; any disclosures made; as well as child protection history and risk factors. A new report about a past serious physical injury or assault, recently identified as having been non-accidental or suspicious, can also meet the criteria for the JCPRP where medical records or advice corroborates a serious injury having occurred and where safety and risk issues have not been addressed since the time of the injury.
- B. History of recurring bruising or injury: Medical guidance should be sought and professional judgement should be applied for recurring injuries, in that the presence of one or more injuries does not automatically meet criteria.
- C. Strangulation or suffocation will not always cause visible injuries but there is potential for severe internal injuries, particularly where loss of consciousness has occurred: All reports of strangulation/suffocation having occurred recently (in the past seven days) require immediate medical assessment.
- D. In circumstances where the injury is unexplained and suspected of being inflicted; or inconsistent with the explanation provided, and no POI is identified, it is presumed that the POI is over the age of criminal responsibility (10 years or older).
- E. The defence of lawful correction under [s.61AA of the Crimes Act 1900](#) may be raised in criminal proceedings, however, lawful correction can only be applied by a parent or carer of the child and must be reasonable having regard to the age, health, maturity or other characteristics of the child and the nature of the alleged misbehaviour. Lawful correction does not include unreasonable application of physical force (unless trivial or negligible) including force applied to any part of the head or neck of the child, or to any other part of the body in such a way as to cause harm for more than a short period.
- F. Where additional information is needed to determine whether an injury is serious, and the child is currently safe, the JRU may hold a matter for information gathering including obtaining a medical professional opinion.

- G. A decision by JRU to refer a physical abuse matter for local response does not negate the need to action an urgent medical assessment as part of that response.

## SERIOUS NEGLECT

### KEY TERMS APPLYING TO SERIOUS NEGLECT

#### SERIOUS NEGLECT

Intentional or reckless neglect of a child's necessities of life by a person who has a duty, power, responsibility and authority to provide care for that child; and the neglect has caused one or a combination of the following based on medical professional opinion:

- Serious physical harm
- Extreme malnutrition and/or dehydration causing threat to life
- Danger of death or serious consequences to physical health

### CRITERIA FOR SERIOUS NEGLECT

For the purpose of the JCPR Criteria 'reported evidence' of serious neglect is indicated by one or a combination of the following:

- Disclosure by the child or young person that they have been neglected
- The reported neglect has been witnessed by another person
- The POI has made admissions that they have neglected the child or young person
- There is other evidence available consistent with the reported neglect
- There is shared agency information corroborating the reported neglect

SERIOUS NEGLECT	
Age of C/YP	Criteria
<10	Reported evidence of Serious Neglect
10 to <16	Serious Neglect as defined above AND where one or a combination of the following factors indicating vulnerability also apply:

	<p>A. The child has a 'cognitive impairment', sensory impairment or other communication needs</p> <p>B. The child has a physical disability that causes them to be reliant on an adult for day to day person care.</p>
16 to <18	<p>Serious Neglect as defined above AND one or both of the following factors indicating vulnerability also applies:</p> <p>A. The young person has a 'cognitive impairment', sensory impairment or other communication needs that will require a Police officer to conduct an electronically recorded interview</p> <p>B. The young person has a physical disability which causes them to be reliant on the POI for day to day person care.</p>

## FACTORS TO CONSIDER FOR SERIOUS NEGLECT REFERRALS

- A. Take into consideration repeated or increased reports of neglect. The impact of neglect on a child may not be immediately evident, but ongoing effects of neglect can lead to cumulative and long term harm to the child.
- B. Consider vulnerabilities including age, disability and visibility in the community which may increase impact of the neglect.
- C. Remain child focused when evaluating reports of neglect: consider the extent of the impact of the neglect on the child.
- D. Alternative medical / health beliefs are not a justification for care omissions which cause serious harm as outlined above.
- E. Motor vehicle accidents will not be accepted for specialist joint response and will be referred for local response.