

# Guidelines for Child Representatives in Protection Proceedings

*These Guidelines have been endorsed by the Children's Court of WA and the Family Court of WA.*

## 1. ASSESSING CAPACITY

### 1.1 PROCESS OF ASSESSMENT

#### 1.1.1 Legislative requirements

A Child Representative appointed by the Court should represent a child on instructions where that child has 'sufficient maturity and understanding' to give instructions and wishes to do so. Where a child does not have 'sufficient maturity and understanding to instruct' the Child Representative will represent that child on the basis of his or her best interests. Any questions about whether a child is able to instruct will be determined by the Court.

#### 1.1.2 Procedure for determining capacity

Upon appointment all Child Representatives must complete the *Separate Representation Child Assessment Form* in circumstances where the child is of school age.

It is initially the responsibility of the Child Representative to determine the capacity of the child.

The Child Representative should inform the Court of the basis in which the child will be represented at the earliest opportunity, preferably the next Court date following appointment. It is not intended that the assessment of capacity will delay the progression of the proceedings but rather be undertaken alongside other procedural processes.

Where a party to the proceedings disputes the assessment of the Child Representative, that party should consider making an application to the Court for determination of the issue. In the event of such an application being made the Child Representative should consider whether expert evidence is required.

Issues in respect of the capacity of a child to instruct should be raised by the concerned party to the proceedings at the earliest opportunity and will be determined by the Court in the event that it is not resolved.

If the Court determines that the Child Representative should act on a different basis to his or her assessment, the Child Representative should decide whether, in the circumstances of the matter, it is appropriate for him or her to continue to represent the child.

## **2. TYPES OF REPRESENTATION**

### **2.1 BEST INTERESTS**

A best interests Child Representative is appointed to represent and promote the best interests of the child or children in child protection proceedings.

The views of the Child Representative acting in the best interests of a child should be based on, and supported by, evidence, and not influenced by the Child Representative's personal view or opinion.

### **2.2 ACTING ON INSTRUCTIONS**

A Child Representative acting on instructions must take instructions from a child as they would do for a party to the proceedings.

If a child is deemed to have 'sufficient maturity and understanding' to instruct, the Child Representative must act on instructions whether or not they believe the child's instructions reflect his or her best interests.

### **2.3 CONFLICT**

A Child Representative should not act both on instructions and best interests in respect of different children in the same family unless those instructions are consistent with the best interests of all of the children.

In the event that the Child Representative does not consider that there is a conflict in such circumstances and this is disputed by a party, the issue is to be determined by the Court.

If a child instructs his or her solicitor to remain silent on a particular issue, the Child Representative should explain the implications of this decision to the child. It is the

responsibility of the Child Representative to inform the Court that the child is choosing to remain silent to the issues in question.

## **3. COMMUNICATION WITH A CHILD CLIENT**

The following principles apply to all communication between a Child Representative and the child regardless of whether the child is being represented on best interests or instruction, unless stated otherwise.

### **3.1 COMMUNICATION**

#### ***3.1.1 Meeting the child***

It is expected that a Child Representative will meet with the child they represent except in exceptional circumstances. The Child Representative should meet with the child as soon as possible, and where possible, before the next mention date following the Child Representative's appointment.

#### ***3.1.2 Location and timing***

A Child Representative should meet with a child at a time and location that is convenient and comfortable for the child.

#### ***3.1.3 Ongoing contact***

A Child Representative acting on instructions should communicate with his or her child client often enough to:

- develop and maintain a lawyer client relationship;
- ensure that the child understands the nature of the proceedings and is advised as to the likely outcomes;
- ensure the Child Representative clearly understands the child's instructions;
- ensure that the child understands the Child Representative's advice; and
- keep the child up to date with the progress of the matter.

A "best interests" Child Representative should communicate with his or her child client often enough to develop sufficient rapport to:

- elicit information relevant to establishing what is in the best interests of that child;
- ascertain the child's view; and
- keep the child up to date with the progress of the matter, as appropriate.

Unless the child is very young, or there are exceptional circumstances, Child Representatives are encouraged to communicate with the child on at least 3 occasions.

Where possible, communication should be in person or, if not possible or practicable, by video link rather than telephone conversations or written communication.

At the first meeting the child should be provided with a method of contacting the Child Representative in between Court appearances or formal meetings.

#### **3.1.4 Explanations to the child**

Child Representatives should clearly explain, having regard to the age and the circumstances of the child, at each stage of the proceedings, as appropriate:

- the nature of the proceedings;
- the Child Representative's role, including the limitations of that role, such as confidentiality;
- the role of other parties, their legal representatives and the role of the judicial officer;
- what to expect from the legal process;
- the possible outcomes and consequences for the child; and
- if the child wishes to have his or her views put to the Court, how those views will be communicated to the Court and how the Court may deal with these views.

#### **3.1.5 Preparing a child for the end of the relationship with his or her Child Representative**

The Child Representative should prepare the child for the end of the relationship before the end of the case. The Child Representative should explain the fact that the Child Representative's role will be over at the end of the case and discuss the options available to the child in the event that the child requires further support.

## **3.2 COMMUNICATION STYLE**

### ***3.2.1 Enhancing a child's ability to understand the legal proceedings***

All communications should take into account a child's age, level of education, cultural context and degree of language acquisition.

Child Representatives should:

- Make time to speak to the child;
- Be aware of any sensitive or relevant factors in the child's family background or other circumstances that may affect the child;
- Treat the child with respect;
- Use plain English;
- Provide an overview of the meeting so the child knows what to expect;
- Speak slowly, allowing the child time 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;
- 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;
- Avoid leading questions;
- Provide concrete examples when explaining concepts or legal strategies;
- Respond constructively and respectfully to the child's suggestions or instructions;
- Invite the child to ask questions regularly and prompt them to indicate his or her understanding;
- Consider the use of non-verbal methods (e.g. using diagrams, pictures and videos) where appropriate;
- Seek further assistance from others (being careful to preserve confidentiality) if necessary.

### ***3.2.2 Role of the support persons***

Generally the child should be seen alone or in the company of an independent person.

At the request of the child a support person can be present during meetings with his or her Child Representative.

The role of the support person is limited to providing support and they should have his or her role explained to them by the Child Representative before the meeting.

### **3.2.3 Trauma and other Considerations**

The Child Representative should aim to minimise the trauma to the child associated with the proceedings, causing no additional harm to the child. The priority for the Child Representative is to ensure that re-traumatising or further trauma does not occur before and during legal proceedings.

Many children entering the care of the CEO of the Department for Child Protection and Family Support and the Children's Court process have suffered acute and/or long term trauma. Both may potentially impact on a child's ability to adequately communicate.

Where it is apparent to the Child Representative that a child has recently suffered acute trauma that is temporarily impacting his or her ability to adequately communicate, or prolonged trauma and there is a risk of re-traumatising the child, the Child Representative should raise the need for appropriate services or specialist treatment with the Department for Child Protection and Family Support, before proceeding with the meeting.

As a consequence of trauma, intellectual impairment or other cause, the Child Representative may need assistance from a professional such as a speech pathologist, social worker, psychologist or other communication intermediary to communicate with the child in relation to the proceedings. This should be organised with the assistance of the Department for Child Protection and Family Support without compromising the child's right to separate representation and confidentiality.

### **3.2.4 Cultural considerations**

The Child Representative should consider:

- the child's English language skills;
- the child being unfamiliar with the social and legal concepts involved in the proceedings;
- seeking to identify support services that may be appropriate;
- the need to use interpreter services;

- that the child may be fearful of isolation by his or her community, or fearful of his or her community becoming aware of the proceedings;
- that the child may be fearful of Courts, the Department for Child Protection and Family Support, Government Departments and/or authorities;
- that the child may be fearful of expressing wishes that are based upon, or contrary to, religious or cultural beliefs and background;
- the cultural appropriateness of the gender of the allocated Child Representative; and
- the capacity of the extended family and community network to promote the best interests of the child.

### ***3.2.5 Indigenous children***

Child Representatives should liaise with the Department for Child Protection and Family Support's Aboriginal Practice Leader, or an appropriate Aboriginal or Torres Strait Islander consultant, to assist in considering the needs of the child to maintain a connection to culture and country and how this can most effectively be achieved.

### ***3.2.6 Children with disability***

Disability may affect a child's ability to communicate clearly. The Child Representative should seek help from appropriate services providers in these circumstances.

## **4. DUTIES OF CHILD REPRESENTATIVES**

### **4.1 GENERAL OBLIGATIONS**

The role of the Child Representative is unique. The lawyer appointed to represent and promote the best interests of the child in child protection proceedings has special responsibilities and is expected to use their professional judgement and skill subject to any orders of the court.

Decisions in particular cases as to how the Child Representative progresses the case and how the Child Representative involves the child are ultimately, subject to the statutory requirements of the *Children and Community Services Act 2004*, in the Child Representative's discretion.

#### **4.1.1 Conduct of case**

The Child Representative should, whether acting on the instructions or in the best interests of the child:

- Be child focussed and encourage the other parties to the proceedings to be child focussed;
- represent the child in a competent and professional way;
- develop, implement and communicate a plan for the ongoing engagement and involvement of the child, giving consideration to factors such as the extent to which the child wishes to be involved;
- obtain copies of all court documents and evidence relevant to the case;
- participate in all pre-hearing conferences, court hearings, negotiations, alternative dispute resolution processes, and, as appropriate, Signs of Safety meetings, inform other parties and their legal representatives, that he or she is representing the child and requires reasonable notification prior to any changes in the arrangements for the care of the child, the circumstances of the case, or the underlying social situation that affect the child and the child's family;
- be consistently available to represent the child or ensure that Child Representatives appearing on their behalf are properly briefed;
- attempt to reduce case delays; and
- identify appropriate family and professional resources for the child.

#### **4.1.2 Whether a child should give evidence**

It is not expected that children will 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, a Child Representative should consider the following\*:

- the child's desire to give evidence;
- the child's developmental capacity to provide direct evidence and withstand possible cross-examination;
- the child's understanding of legal process and the availability of support for them;
- any potential repercussions for the child from giving evidence;
- the availability of video-conferencing or remote facilities for the giving of evidence;
- alternatives to the child giving direct evidence such as the use of written or audio-taped statements as alternatives to the child's direct evidence; and
- the availability of other evidence which may substitute for direct evidence from the child.

\* *For further assistance refer to sections 106A-106T of the Evidence Act 1906. Although the Children's Court is not bound by the rules of evidence section 146(2) of the Children and Community Services Act 2004 allows the Children's Court to use these rules to inform itself. Also refer to section 150 of the Children and Community Services Act 2004 that requires leave of the Court before a child can be compelled to give evidence or be cross-examined.*

## **5. SPECIFIC DUTIES**

### **5.1 ACTING ON BEST INTERESTS**

#### **5.1.1 Conveying the views and wishes of the child to the Court**

Where a child wishes to express his or her views, the child representative must ensure that the Court is fully informed of the child's views. This should include anything the Child Representative thinks important.

Although a child must be provided with the opportunity to express his or her views free from external influences, a child must not be pressured to do so and must be reassured that it is his or her right not to express a view.

The best interests Child Representative should, in consultation with any other expert(s) involved in the case, seek to develop a case plan to promote the best interests of the child including:

- canvassing the nature of any reports or examinations that will involve the child;
- liaising with the Department for Child Protection and Family Support, any other relevant government departments, agencies or other professionals, to bring together relevant information to assist the Court in assessing and determining the best interests of the child;
- promoting the timely resolution of the proceedings;
- developing opportunities for the matter to reach an agreed outcome which best promotes the child's best interest;
- providing information, support and assistance as required for, or requested by the child during the process of litigation, whether directly or by way of appropriate referral; and
- vigilantly endeavouring to minimise systems abuse of the child.

#### ***5.1.2 Making submissions contrary to the views of the child***

If a Child Representative acting on best interests considers that the evidence indicates that the best interests of the child will be promoted by orders which are contrary to the child's views, the Child Representative must:

- advise the child that he or she intends to make submissions contrary to the child's views because he or she believes the evidence suggests that alternative Court orders are in the child's best interests;
- taking into account the child's maturity and understanding, explain to the child why he or she believes the submissions are in the child's best interest despite being contrary to the child's views;
- reassure the child that his or her views will be put before the Court, together with the arguments which support the child's views; and
- provide clear and cogent submissions to the Court as to why the child's views do not promote the child's best interests.

## **5.2 ACTING ON INSTRUCTIONS**

### **5.2.1 Advocacy**

The primary duty of a Child Representative acting on instructions is to advocate in the proceedings in accordance with the child's instructions. If the decision of the Court is contrary to the child's instructions the child should be advised on any possible basis for an appeal.

### **5.2.2 Access to documents on reports**

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

## **5.3 OTHER MATTERS<sup>1</sup>**

### **5.3.1 *When the Department for Child Protection and Family Support seeks a Protection Order during the course of Family Court Proceedings***

In circumstances where the Department for Child Protection and Family Support either commences protection proceedings in the Children's Court of WA or intervenes in Family Court proceedings seeking a Protection Order and an Independent Children's Lawyer\*(ICL) has been appointed in the Family Court proceedings to act in the best interests of the child/ren and the Court determines that a Child Representative should be appointed:

- The ICL should give consideration to their role as the representative for the child in the proceedings for a protection application with reference to **Assessing Capacity**<sup>2</sup> in these Guidelines;
- If the child does not have capacity to instruct the ICL can act as their Child Representative in the proceedings for a protection application;
- If the child has capacity to instruct and their instructions are in accordance/consistent with their best interests the ICL can act as their Child Representative in the proceedings for a protection application;

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<sup>1</sup> For the purpose of 5.3 Other Matters, "the Court" means either the Children's Court of WA or the Family Court of WA depending on which court has the conduct of the proceedings.

<sup>2</sup> see paragraph 1. Assessing Capacity p2

- If the child has capacity to instruct and the ICL considers that their instructions are not in accordance/consistent with their best interests the ICL should recommend to the Court that a Child Representative be appointed for the child and should inform the Court of the ICL's view in relation to whether there is a role for the ICL in the proceedings for a protection application, having regard to the circumstances of the case. If there is an issue in relation to the role of the ICL in the proceedings for a protection application the issue will be determined by the Court.
- An ICL should not act as a Child Representative both on instructions and best interests in respect of different children in the same family unless those instructions are consistent with the best interests of all of the children. In the event that the Child Representative does not consider that there is a conflict in such circumstances and this is disputed by a party, the issue is to be determined by the Court.<sup>3</sup>

### ***5.3.2 When Family Court Proceedings Commence during Protection Proceedings***

In circumstances where family court parenting order proceedings commence during protection proceedings in which a Child Representative has been appointed to act in the best interests of the child/ren and the Court determines that an Independent Children's Lawyer (ICL) should be appointed:

- The Child Representative should give consideration to their role as the ICL for the child in the family court proceedings with reference to The Guidelines for Independent Children's Lawyers<sup>4</sup>;

### ***5.3.3 Assisting the Court***

When circumstances arise such as those described in 5.3.1 of these Guidelines the Child Representative or Independent Children's Lawyer should, where possible, appear at the first return date of the new proceedings, to provide the Court with such information as the Court requires to assist the Court to determine the appropriateness of the appointment of a Child Representative or Independent Children's Lawyer and the issues referred to in 5.3.1 and 5.3.2.

## **6. OBLIGATIONS AT CONCLUSION**

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<sup>3</sup> See paragraph 2.3 Conflict p3 of these Guidelines.

## **6.1 EXPLANATIONS AS TO THE OUTCOME OF THE PROCEEDINGS**

### **1.2.1 *General explanation***

Except where it is inappropriate to do so due to factors such as age, the Child Representative has a responsibility to meet with the child and explain to the child:

- the orders made by the Court; and
- the consideration the judicial officer gave to the views of the child and the submissions of the Child Representative (in circumstances where a Child Representative is acting on instructions the submissions of the Child Representatives and the views of the child will be the same).

### **5.3.4 *Sibling groups***

Where a Child Representative represents a sibling group consideration should be given as to whether explanations should be provided on an individual or groups basis.

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