



THE LAW SOCIETY  
OF NEW SOUTH WALES

# Representation Principles for Children's Lawyers

3rd Edition  
September 2007

#### ENDORSEMENT

The Representation Principles for Children's Lawyers are an ongoing project conducted by the Family Issues Committee of the Law Society of New South Wales. 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. This third edition was adopted by Council on 20 September 2007.

#### ACKNOWLEDGEMENTS

The American Bar Association, Standards of practice for lawyers who represent children in abuse and neglect cases (5 February 1996) and Louise Akenson, Guidelines for Lawyers Acting for Children and Young People in the Children's Court (August 1999) (A project of The Victoria Law Foundation) have been used in the drafting of these Representation Principles.

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 (assisted by staff member Sherida Currie); 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.

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

Members of the 2007 Family Issues Committee, Judith Walker, Associate Professor Geoff Monahan, Rod Best & Alexandra Harland have updated these guidelines to reflect recent legislative amendments.

#### 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 Legal Officer 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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# Contents

<b>Preface to the 2nd Edition</b> .....	5
<b>Definitions</b> .....	6
'Child' .....	6
'Direct representative' .....	6
'Best interests representative' .....	6
'Guardian ad litem' .....	6
'Case Guardian' .....	6
<b>A. Who is the Client?</b> .....	7
PRINCIPLE A1 Client of a direct representative .....	7
PRINCIPLE A2 Client of a best interests representative .....	7
PRINCIPLE A3 Client where a guardian ad litem or next friend has been appointed .....	8
<b>B. Role of Practitioner</b> .....	9
PRINCIPLE B1 Role of the practitioner .....	9
PRINCIPLE B2 Role where child is incapable of giving instructions .....	10
PRINCIPLE B3 Determination of best interests of the child .....	10
PRINCIPLE B4 Should not act as both direct representative and best interests representative .....	11
<b>C. Capacity to give Instructions</b> .....	12
PRINCIPLE C1 Determining whether child has capacity to give instructions ..	12
PRINCIPLE C2 Enhancing child's capacity .....	12
PRINCIPLE C3 Limited capacity .....	13
<b>D. Taking Instructions and Preferences</b> .....	14
PRINCIPLE D1 Seeing the child .....	14
PRINCIPLE D2 Direct representative relationship with child .....	15
PRINCIPLE D3 Best interests representative relationship with child .....	15
PRINCIPLE D4 Time and venue of meeting with child .....	16
PRINCIPLE D5 Support persons .....	17
PRINCIPLE D6 Communication .....	18
<b>E. Duties of Representation</b> .....	20
PRINCIPLE E1 Communication .....	20
PRINCIPLE E2 General obligations of direct representative .....	21
General obligations of best interests representative .....	23
Statutory obligations of best interests representative .....	25

## CONTENTS

PRINCIPLE E3	Consideration of alternative forms of dispute resolution . . . .	26
PRINCIPLE E4	Whether a child should give evidence . . . . .	27
PRINCIPLE E5	Questioning a child witness . . . . .	28
PRINCIPLE E6	Protecting a child witness giving evidence . . . . .	28
PRINCIPLE E7	Safety of the child . . . . .	29
PRINCIPLE E8	Continuity . . . . .	29
<b>F. Confidentiality</b>		<b>30</b>
PRINCIPLE F1	General rule of confidentiality . . . . .	30
PRINCIPLE F2	Explanation of confidential relationship . . . . .	31
PRINCIPLE F3	Disclosure of confidential information . . . . .	31
PRINCIPLE F4	Client legal privilege . . . . .	32
<b>G. Conflict of Interest</b>		<b>33</b>
PRINCIPLE G1	General rule of conflict of interest . . . . .	33
PRINCIPLE G2	Specific conflict of interest situations . . . . .	33
<b>H. Access to Documents and Reports</b>		<b>34</b>
PRINCIPLE H1	Access to documents by child client . . . . .	34
<b>I. Interaction with Third Parties</b>		<b>35</b>
PRINCIPLE I1	Referral to third party services . . . . .	35
<b>J. Ending the Relationship</b>		<b>36</b>
PRINCIPLE J1	Preparing child for end of relationship with practitioner . . . .	36
PRINCIPLE J2	Right to dismiss direct representative . . . . .	37
APPENDIX		
<b>Issues for elaboration and consideration</b>		<b>38</b>

### CHILDREN'S COMMENTS

*The children's comments that accompany these Representation Principles are taken from "This is what I think of you", a report produced by UNICEF Australia and the Legal Aid Commission of NSW*

# Preface to the Third 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).

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 Family Issues Committee thanks everybody who has been involved with the development of first three 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.

*Family Issues Committee  
September 2007*

# 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*, or as an independent children’s lawyer (ICL), formerly child representative, in the *Family Law Act*. The role of the ICL is set out in s.68LA of the *Family Law Act*.

## ‘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.

## ‘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?

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## 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 could 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 the Legal Aid Commission 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 consistent 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, for example, where there are statutory provisions as in s.68LA of the *Family Law Act* and s.99-99D of the *Children and Young Persons (Care and Protection) Act* which set out the model of representation. A direct representation model is the same model used for ordinary practitioner-client relationships, 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.

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).

#### CHILDREN'S VOICES

***"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 has determined that the child is unable or unwilling to instruct the practitioner in the proceedings as a whole, the practitioner should represent the child as a best interests representative. The practitioner should inform the court that the child is incapable of giving instructions, and the child will therefore be represented in the best interests capacity in the proceedings.

#### Commentary

A child who is unable or unwilling to give instructions should still be represented. It is the duty of a practitioner appointed or retained to directly represent a child to ascertain whether they are capable of giving instructions (see Principle C1). If the child is not capable of giving instructions, the practitioner should bring this to the attention of the court and seek for a best interests representative to be appointed. In some jurisdictions the law or the court may declare that the practitioner is to act as a best interests representative.

## 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 qualify practitioners to make decisions on behalf of children. Best interests representatives should seek the assistance of behavioural science and child experts 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.

## Should not act as both direct representative and best interests representative

A practitioner should not act as both a direct representative and a best interests representative for the same child. When a practitioner has been appointed to serve in both roles, the practitioner should elect to directly represent the child, and advise the court of this situation. Where this is not possible, the practitioner should decline the appointment. This is particularly the case if the practitioner has established a direct practitioner-client relationship with the child.

### Commentary

There is potential for conflict in having a practitioner acting upon the instructions of a child while having responsibility to determine the best interests of the child. To avoid any such conflict, a practitioner should never act as both a direct representative and a best interests representative for the same person.

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 a child to be more open than with a best interests representative. The child's trust in the legal system is likely to be damaged if a former direct representative expresses a different opinion to the court in that child's perceived best interests contrary to the child's expressed wishes.

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 suggest to the court that a best interests representative be appointed.

#### CHILDREN'S COMMENTS

*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 is got me separated from my child."*

girl, 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."*

boy, 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. The practitioner should consider whether the client suffers mental impairment, developmental delay or advancement, or intellectual disability. Socio-economic 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 a different approach in taking instructions.

### PRINCIPLE C2

#### **Enhancing child's capacity**

**The practitioner should seek to enhance the child's capacity to provide instructions by structuring all communications to account for 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, 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 distress 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.

#### CHILDREN'S COMMENTS

***"I like it when my lawyer builds my confidence."***

boy, 17 years

***"They don't take disabilities into account."***

girl, 17 years

## D. Taking Instructions and Preferences

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### PRINCIPLE D1

#### Seeing the child

Other than in exceptional circumstances, his or her independent children's representative must see every child. The practitioner should see the child as soon as possible and, where possible, well before the first hearing.

#### Commentary

It is acknowledged that funding deficiencies often make it difficult for practitioners to spend time with the child they are representing. 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.

#### CHILDREN'S COMMENTS

***"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."***

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 of 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.

## 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 as to 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 – 24 Solicitors' Rules).

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*.

## 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, 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.

#### 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.

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 are essential as are clear information as to time, date, address and purpose.

#### CHILDREN'S COMMENTS

***"They are always so busy."***  
boy, 17 years

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

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



## 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.

#### CHILDREN'S COMMENTS

*"They should ask you first, 'Do you want your mum in the room?'"*

girl, 14 years

## 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 language training. 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 which the Independent Children's Lawyer should avoid talking to the children about. The most obvious example is where there is an allegation of abuse. In these cases invariably the child will be interviewed by a court appointed expert and may have already been interviewed by the other adults such as Police. The Independent Children's Lawyer could contaminate the child's evidence and multiple interviews could amount to further abuse for the child.

Basic rules for practitioners are:

- Use plain English;
- Explain the practitioner's role and the process to be followed;
- Speak slowly, allowing the child time to ask questions or to interrupt;
- Treat the child with respect.
- Provide an overview of the interview/consultation so the child knows what to expect.
- Provide concrete examples when explaining concepts or legal strategies.
- Be aware of cultural or religious sensitivities.
- Respond constructively to the child's suggestions or instructions.
- Always make time to speak to the child.
- 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

#### CHILDREN'S COMMENTS

*"The best thing about a lawyer is when they talk in a way that you can understand."*

*girl, 14 years*

*"The worst thing about my lawyer was that she asked really personal questions."*

*mother, 15 years*

*"They talk down to us and don't speak our language."*

*girl, 15 years*

*"The best lawyers understand you and listen to what you have to say."*

*girl, 17 years*

her understanding. 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 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.

## 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 properly.

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.

#### CHILDREN'S COMMENTS

***"We both decided what should happen in court. "***

girl, 16 years

***"There are so many people in there – who are they?"***

girl, 15 years

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.

## 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 is entitled not to attend hearings – the practitioner should monitor the child client's preferences at all times.

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, help the child client to understand the progress of proceedings and explain the submissions being made. Before closing submissions, 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 which 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,

#### CHILDREN'S COMMENTS

***"Lawyers should give their legal advice and own opinion on your charges."***

boy, 17 years

***"When my lawyer talks to the judge I don't understand what they are talking about."***

boy, 17 years

***"They say stuff in court which I didn't tell them to."***

boy, 17 years

***"He was good at speaking to me and the judge."***

girl, 16 years

***"Why do they adjourn all the time?"***

lots of participants

***"I didn't know what happened in court – the escorts told me."***

boy, 17 years

***"Some of them do explain it all after court – they turn the big words into little words."***

boy, 17 years

## **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 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 the possibility of appeals or further applications.

### **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 31).

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 accuracy of evidence called by other parties where this touches upon the child's welfare.

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 (unless they are too young to understand the issues) 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.



## **Statutory obligations of best interests representative**

The court in *P and P* (1995) FLC 92-615 defined the role of the best interests representative as being to:

- 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.

In the *Family Law Act* the requirements for the role of independent children's lawyer are set out in s.68LA. The provisions of this section reflect the principles set out in *P and P* but also address what has been a difficult area for best interests representatives – confidentiality and disclosure of information. The ICL is not under an obligation to disclose to the court and cannot be required to disclose to a court any information that the child communicates to the ICL. However, this is subject to the further provisions in the section that the ICL may disclose such information if that is considered to be in the best interests of a child even if this disclosure is made against the wishes of the child. Such situations are most likely to arise if the information disclosed raises safety issues. Also significant are the provisions of s.67ZA which include independent children's lawyers amongst the persons required to notify a prescribed child welfare authority (unless it is known that the authority has previously been notified) if there are reasonable grounds for suspecting that a child has been abused or ill treated or subjected to behaviour which psychologically harms the child or the child is at risk of these things.

### **Commentary**

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 corresponding direct representative principle E2 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.

#### CHILDREN'S COMMENTS

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

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

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

### 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 possible detrimental effects on the child participating in alternative forms of dispute resolution. Factors to consider include:

- Power dynamics between the child and other parties.
- Existence of or allegations of abuse.
- The long term relationships of the parties
- Need for an authoritative decision from a court.
- Advantages of early resolution of dispute.

## 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.
- Necessity of the child's direct evidence.
- Availability of video-conferencing or remote facilities for the giving of evidence.
- 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 to a direct representative and a best interests representative. Section 100B of the *Family Law Act* provides that the court must give leave before a child is able to swear an affidavit or be called as a witness.

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.

The amendments to the *Family Law Act* introduced new provisions in child related proceedings in July 2007. Practice Direction No 2 of 2006 relates to the less adversarial proceedings and provides for the possibility of a Judge speaking directly with children. Paragraph 9.2 of the Practice Direction provides that "in the discretion of the Judge, and in appropriate cases, the Judge may interview the child. This will generally be done with the consent of the child and after taking into account the evidence of any relevant report writer or expert involved in the case on these issues. The Judge may direct that other persons, such as the independent children's lawyer, or a family consultant may be present at such an interview." The Court is likely to develop further guidelines relating to circumstances when interviewing children may be considered, and about appropriate procedures. The independent children's lawyer will have an important role in discussing issues about such an interview with the child.

## 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 A.35(c) 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.

## 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 layout of the hearing rooms, etc to minimise the adverse effects on the child's well being. If such risks cannot be avoided, practitioner should bring this to the attention of the court and seek appropriate orders.

#### CHILDREN'S COMMENTS

***"They keep away the baddies from us."***

girl, 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 and 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 on 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 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.

#### CHILDREN'S COMMENTS

***"I hate it when you get a different lawyer every time you go to court."***

boy, 17 years

***"Sometimes you get the worst one and then different ones."***

girl, 15 years

Practitioners should ensure that file notes properly record both the legal issues and matters of importance about the child (subject, of course, to the child's consent).

## 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 2.1 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. Rules 2.1.2 and 2.1.3 specify circumstances in which disclosure of confidential information is permitted. Rule 3, 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 provisions of the *Family Law Act* – see in particular ss68LA and 67ZA referred to on page 18. 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.

The provisions of the *Family Law Act* which sets out details of the role of the independent children's lawyer addresses the issues of confidentiality. In the interests of assisting to develop trust between the representative and the child, the child should have the protection of a confidential relationship with the best interests representative to as great an extent as the representative considers appropriate. Children in this situation do not, however, have the protection of client legal privilege.

Section 68LA of the *Family Law Act* provides for disclosure of information communicated by a child, if the independent children's lawyer considers the disclosure is in the best interests of the child.

#### CHILDREN'S COMMENTS

***They shouldn't speak about my charges in front of my mum."***

girl, 15 years

***"They should ask me first if it's OK to tell."***

girl, 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."***

girl, 10 years

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.

## 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, 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 is at serious risk of harm. 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 2.1.2 and 2.1.3 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 included in these principles. These laws set out the practitioner's ability or obligation to disclose. Only the minimum information required to fulfil the

#### CHILDREN'S COMMENTS

***"They should ask me before telling anything about me in court."***

girl, 15 years

***"They should ask me first if it's OK to tell."***

girl, 9 years

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.

#### 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 3 of the Solicitors' Rules prohibits a practitioner from acting against a former client. Rule 9 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. In another example, in a care and protection matter a solicitor may act for a sibling on a best interests basis. If one of these siblings reaches the age of giving instructions and those instructions would be different to what the solicitor would be submitting on a best interests basis, the solicitor should cease acting for the child and another representative should be sought.

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 at the same time as a child in a best interests capacity.

## 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 criminal/juvenile 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 8 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. It is generally not appropriate to show the child court documents including the family report.

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.

#### CHILDREN'S COMMENTS

*"The best thing about my lawyer is that she had a social worker to help her and me."*

mother, 14 years

## 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.

Where the practitioner is an independent children's lawyer, 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 about available youth services, clubs, health facilities, counselling services, telephone help lines etc.

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.

#### CHILDREN'S COMMENTS

*"After court my lawyer comes to see me and explains."*

boy, 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."*

boy, 16 years

*"They should check in on you or if you are in lock up."*

boy, 17 years

*"I don't want any contact – there are enough other people in my life."*

boy, 18 years

## **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.

## Issues for elaboration and consideration

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Further 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.
- 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.

### Care and Protection

Practitioners representing children in this jurisdiction should consider the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Important issues 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.