

Submission to the Law Society of South Australia:  
Guidelines on the Legal Representation of Children in the Youth Court  
(Care and Protection) Jurisdiction

From: Penny Wright, Guardian for Children and Young People and Training Centre Visitor

27 May 2022

In 1997, the Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission conducted a comprehensive inquiry into children and the legal process. At the conclusion of the inquiry, the ALRC recommended that legal professional bodies should develop clear standards for the representation of children in child protection proceedings, in consultation with young people and relevant youth agencies.<sup>1</sup>

However, 25 years later, South Australia still does not have these guidelines in place. This leaves children and young people vulnerable to inconsistent practices and the individual judgment of professionals who are working in a complex and evolving field.

In my role as Guardian for Children and Young People, I enthusiastically welcome the Law Society of South Australia's intention to develop relevant guidelines. I submit that the below matters should be considered and addressed in the drafting process.

---

### ***1. Consulting with children and young people***

Article 12 of the Convention on the Rights of the Child (UNCRC) provides:

*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*<sup>2</sup>

As noted above, and consistent with the child's right to be heard, the ALRC recommended that children and young people be consulted in the development of legal representation guidelines.<sup>3</sup>

I am pleased to note that legal professional bodies in a number of jurisdictions – particularly the Northern Territory<sup>4</sup> and New South Wales<sup>5</sup> – expressly acknowledged the role that direct consultation with children and young people played in the development of their guidelines.

---

<sup>1</sup> Australian Law Reform Commission (ALRC), *Seen and heard: priority for children in the legal process (ALRC Report 84)* (September 1997), Chapter 13.

<sup>2</sup> United Nations General Assembly, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>3</sup> ALRC report (n 1), recommendation 70.

<sup>4</sup> Law Society Northern Territory, *Protocols for lawyers representing children* (2017).

<sup>5</sup> The Law Society of New South Wales (LSNSW), *Representation principles for children's lawyers* (4<sup>th</sup> ed, August 2014).

Inclusion of children and young people's voices enhances the authority of these documents and provides important insight in building a body of best practice.

If necessary, further guidance about consultation with children and young people may be available from the CREATE foundation (who are skilled in promoting the voice of children and young people already in care), the Department for Child Protection (who run various consultative committees including 'No Capes for Change' and youth advisory committees) and the Commissioners for Children and Young People, and Aboriginal Children and Young People (both of whom conduct consultations with children and young people in South Australia, generally).

In addition, OGCYP has found it very helpful to consult and be guided by young adults who have recently left care, who are able to offer insights and reflections about their experiences in care, from a stance of slight distance and growing maturity. Relationships Australia (Post Care Support Services) may be able to assist in this regard.

I look forward to hearing about the Law Society of South Australia's consultation process to ascertain and act on the views of children and young people.

## ***2. Equal access to legal representation***

In South Australia, children and young people must be represented by a lawyer in child protection proceedings, unless the child or young person makes 'an informed and independent decision' not to be represented.<sup>6</sup>

The lawyer must act on the child or young person's instructions ('direct representation'), unless the child or young person has not given, or is not capable of giving, instructions to a lawyer. In these circumstances, the lawyer must act in accordance with their own view of the best interests of the child or young person ('best interests representation').<sup>7</sup>

Assessing the extent to which a child or young person is willing and able to provide instructions to a lawyer is a complex matter. Children may be non-verbal or present as reluctant to engage in verbal interviews due to complex and interrelated factors, including age, gender, disability, experiences of trauma, cultural and linguistic barriers. In this context, erroneous assumptions that a child or young person does not have capacity to provide instructions may arise due to biases, culturally unsafe practices or knowledge and skill limitations surrounding appropriate communication techniques.

The United Nations Committee on the Rights of the Child has emphasised:

*Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences ....*

---

<sup>6</sup> *Children and Young Person (Safety) Act 2017(SA)*, s 64(1).

<sup>7</sup> *Ibid*, s 63(1)(a)(b).

*States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disability should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.<sup>8</sup>*

Geographical barriers may also limit a child or young person's ability to access legal representation on an equal basis to their peers. My office is aware of occasions where children and young people living in remote and rural areas were not provided an opportunity to meet face-to-face with their Adelaide-based lawyer. Where telephone is the primary communication method, a lawyer lacks important observational information, and it may be challenging to build a relationship of trust with a child or young person. This method of communication often exacerbates a child or young person's feelings of anxiety or marginalisation.

Guidelines should clearly communicate the role of expert guidance from social scientists when taking instructions from children and young people, as well as the obligation to afford all children and young people equal opportunity to access legal representation on a direct instructions basis, to the extent that they are willing and able. To be responsive to the individual and varied needs of children and young people, specific guidance is required regarding communication and representation principles for:

- Aboriginal children and young people;
- Children and young people from linguistically and culturally diverse backgrounds;
- Children and young people with disability;
- Children and young people who have, or are alleged to have, suffered sexual abuse;
- Young children; and
- Children and young people living in remote and rural areas.

### ***3. The child's right to directly participate in proceedings***

Children and young people may wish to speak directly to the Court, even in circumstances where they are represented by a lawyer. Taking this step can aid a child or young person to feel in control of their own safety and wellbeing, and the decisions that will affect their life.

In South Australia, a child or young person must be given a reasonable opportunity to personally present their views to the Court about their ongoing care and protection.<sup>9</sup> Guidelines should ensure that children and young people are informed of, and understand, that they have the right to speak personally to the Court.

---

<sup>8</sup> United Nations Committee on the Rights of the Child, *General comment no 12 (2009): The right of the child to be heard*, 51<sup>st</sup> sess, UN Doc CRC/C/GC/12 (20 July 2009), 7.

<sup>9</sup> *Children and Young People (Safety) Act 2017* (SA), s 62(1).

#### ***4. The child's right not to be heard***

Under Article 12 of the UNCRC, the child's right to express their views freely also encompasses a right not to express their views, if they so choose.<sup>10</sup>

Children and young people who are involved in child protection proceedings will often be subject to extensive interviewing by various professionals. This is particularly true for children who have suffered, or are alleged to have suffered, sexual abuse or other serious crimes, as involvement in criminal proceedings may require child forensic interviews, medical examinations and providing evidence in court. Children and young people in these circumstances are vulnerable to retraumatising experiences and other forms of 'systems abuse'. As highlighted by the United Nations Committee on the Rights of the Child, 'the "hearing" of a child is a difficult process that can have a traumatic impact on the child'.<sup>11</sup>

Specific guidance is required regarding appropriate protections against systems abuse. Particular attention should be given to the needs, circumstances and rights of children who have suffered, or are alleged to have suffered, sexual abuse. This includes:

- Only arranging medical, psychological or other professional examinations of the child or young person when this is necessary to inform the proceedings;
- Engaging expert guidance from social scientists regarding the appropriate extent and style of interviews with children and young people, including methods to ascertain a child or young person's views without unnecessarily revisiting traumatic events;
- Adopting individualised participation and interview approaches that account for the child or young person's age, gender, development and potential trauma 'triggers';
- Utilising vulnerable witness strategies and protections where appropriate, including alternatives to providing face-to-face evidence in court;
- Providing appropriate referrals to support children and young people who experience distress associated with interviews or the proceedings; and
- Respecting the wishes of a child or young person, if they choose not to participate in interviews or provide evidence in legal proceedings.

#### ***5. Clear guidance for determining the best interests of the child or young person***

The best interests representative may have a vital role in providing an independent perspective to the court to inform best interests decision-making. However, best interests representation comes with considerable challenges. Lawyers may feel pressured to adopt a role in the proceedings outside their area of expertise, more 'akin to the role of a psychologist or social worker than that of a legal advocate'.<sup>12</sup> The model also poses a risk that lawyers are overly influenced by their own subjective worldview when making submissions.

---

<sup>10</sup> Ibid.

<sup>11</sup> Ibid, 7-8.

<sup>12</sup> ALRC (n 1) [13.61].

To mitigate this risk and support practitioners to navigate the ethical, legal and professional hurdles they may face, it is important to provide clear guidance regarding the role of a best interests representative and related matters. This includes:

- Promoting the child or young person's right to express their views freely, and for those views to be given due weight in accordance with their age and maturity, as a matter of primacy;
- Providing objective criteria for lawyers to consider and apply in making best interests submissions;
- Outlining appropriate investigation processes and relevant circumstances to engage expert evidence and guidance; and
- Emphasising the obligation to put all relevant evidence before the Court, including the voice of the child or young person, even when the evidence does not support the best interests representative's submission.<sup>13</sup>

#### ***6. The role of a separate advocate, to supplement best interests representation***

In the experience of my office, common themes in complaints from children and young people involved in legal proceedings include perceptions that their lawyer did not:

- listen to them;
- spend time with them; or
- explain concepts, events and outcomes in ways that they could understand.

Although these issues are not specific to best interests representation, they can be exacerbated by the model. The best interests representative must consider the views of the child or young person, but, ultimately, they are not bound to act in accordance with the child or young person's instructions. As such, the relationship between the child or young person and a best interests representative can become strained – particularly if the lawyer makes submissions that are not in accordance with the child or young person's views.

The independent nature of the role will require or lead to an 'arms-length' approach in many instances. This can be distressing for children and young people and fail to meet their communication and information needs. Additionally, in some matters the lawyer may be required to spend time negotiating with other parties or attending to their duty to the court and not have the capacity to stand beside the child client to the degree necessary to support them to understand and participate appropriately in the court process.

In these circumstances, there is a significant support gap for vulnerable children and young people, which may impact the extent to which their views are heard by the court, as well as their understanding of the processes and decisions which will affect their lives.

To address this support gap, guidelines should make provision for the role of a separate advocate, with appropriate skills and training in supporting children and young people, when they are being represented on a best interests basis. The role of an advocate may include explaining processes and outcomes of the proceedings to the child or young person, as well as

---

<sup>13</sup> See *ibid*, recommendation 72.

advocating for appropriate inclusion of their voice in the proceedings. An advocate may, but need not, be a lawyer.

Providing children and young people with an advocate in addition to a best interests representative supports the following goals:

- Promoting the child or young person's right to be heard;
- Ensuring children and young people have support and assistance at all stages of the legal proceedings;
- Reducing the potential for re-traumatising experiences associated with not having control or understanding legal processes; and
- Enabling 'the fair process effect', improving children and young people's satisfaction with the outcomes of legal proceedings through promoting fair and transparent processes.

### ***7. Setting the standards high***

The nuance and complexity of the above matters demonstrates the need to set the bar high when developing guidelines for the representation of children and young people in child protection proceedings. High standards reflect the expertise required to work with children and young people in child and disability friendly, culturally safe and trauma informed ways.

As noted by Commissioner Nyland in the final report for the Child Protection Systems Royal Commission:

*Child protection is a specialised area of legal work. Lawyers who practise in the area need a sound understanding of areas such as child development, attachment theory and the developmental consequences of abuse and neglect. It is tempting to view this sort of information as common sense or instinctive. It is a specialist area of knowledge that can be taught, but it does not commonly form part of legal training.<sup>14</sup>*

Many of the issues which may arise, as discussed above, are directly related to the skill and professionalism of the lawyer. In this context, guidelines play an important role in setting professional responsibilities and training requirements to ensure this work is completed by appropriately qualified lawyers. Consistent with recommendations of the Nyland Report<sup>15</sup> and the Layton Review,<sup>16</sup> guidelines should include training and ongoing professional development requirements for legal practitioners who represent children and young people in child protection proceedings.

I acknowledge that ensuring all children and young people have access to appropriately trained and qualified legal representation comes at a cost. Meeting the rights of children and young people in this respect requires appropriate funding for duty lawyers and legal aid grants, which match the standards set by guidelines.

---

<sup>14</sup> The Hon Margaret Nyland AM, Commissioner, *The life they deserve: Child Protection Systems Royal Commission report* (vol 1, August 2016), 216.

<sup>15</sup> *Ibid*, recommendation 71.

<sup>16</sup> Robyn Layton QC, *Our best investment: A state plan to protect and advance the interests of children* (March 2003), recommendation 125.

As a final comment, I echo the aspiration of the New South Wales Law Society (NSWLS), as expressed in the Preface to the NSWLS Representation Principles for Children’s Lawyers:

*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.<sup>17</sup>*

---

<sup>17</sup> NSWLS (n 5) 7.