
ALRC 84

Seen and heard: priority for children in the legal process

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The Australian Law Reform Commission was reconstituted under the *Australian Law Reform Commission Act 1996* having started operation in 1975. The main office of the Commission is at Level 10, 133 Castlereagh Street, Sydney, NSW, 2000, Australia. The Commission also maintains a small office in Canberra.

The Australian Law Reform Commission

16. Children's involvement in family law proceedings

Introduction

16.1 Many Australian children grow up in families where the parents divorce.[1] The experience and process of family breakdown and family disputes can be a disruptive and destructive time for families and children. While many aspects of the breakdown of parents' relationships affect children, they are particularly affected by disputes over parental responsibility. For many children, family law proceedings are the first contact they have with courts and formal legal processes.

16.2 The Family Court was established in 1976 by the Family Law Act. It is a federal court with power to make decisions about matters relating to marriage, divorce, spousal maintenance and parental responsibility for children.[2]

16.3 The traditional adversarial model of litigation has been modified somewhat in the Family Court in matters involving children, in particular by the requirement that the best interests of the child be the paramount consideration.[3] The Family Court has also developed alternative dispute resolution processes such as counselling and mediation. There has been recognition recently of the need for the wishes of children to be heard in family law proceedings.[4] There is also growing recognition that the harmful effects of these proceedings on children can be reduced by giving them the opportunity to participate appropriately in decision making. However, the focus of family law litigation remains on the parental contest. The processes often do not serve the needs or interests of children or allow their effective participation.

16.4 These observations also apply to State and Territory generalist magistrates courts empowered to deal with family law matters.[5] In addition, these magistrates generally have little specialist training in family matters and varying levels of interest in the jurisdiction. Family law litigants in magistrates' courts have limited access to the alternative dispute resolution processes of the Family Court or to expert assistance from court counsellors.[6]

16.5 This chapter seeks to formulate better arrangements to promote children's appropriate participation in the resolution of family disputes by the Family Court.

The best interests principle

Introduction

16.6 The fundamental principle in international and Australian law concerning children is that all decisions made and actions taken should be in their 'best interests'. CROC requires that

> in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[7]

16.7 The Family Law Act requires the court to have regard to 'the need to protect the rights of children and to promote their welfare' in any matter with which it deals under the Act.[8] The best interests of the child is to be the paramount consideration.[9] The aim of the Family Law Act with respect to children is

> ...to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.[10]

The best interests principle as the basis of decisions

16.8 In Australia the meaning of the term 'best interests of the child' has been explored most comprehensively in the family law area. The Family Law Act lists the factors that the court must consider in determining the child's best interests, beginning with any wishes expressed by the child.[11] Care and protection legislation in most States and Territories also requires consideration of the child's best interests.[12]

16.9 The principle has been criticised on the basis that it lacks certainty.[13]

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge primarily be concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic productivity of the child when he grows up?...[I]f the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.[14]

> ...the diversity of values and circumstances which would affect decisions...precludes any realistic expectation that decisions would not be made according to the idiosyncratic opinion of individual judges — that, in other words, using a 'principle' like 'best interests' in the exercise of a welfare power would mean there are no rules at all.[15]

It has been suggested that, even where legislation provides guidance as to the factors to consider in making a decision about a child's best interests, that guidance remains normative rather than objective.[16] It is argued that the best interests principle '...has been used to affect a wide variety of preferences about children's custody'.[17]

16.10 However, submissions to the Inquiry generally considered the principle to be a useful basis for decision making concerning children.[18] It is said to ensure that children's interests are preferred over those of any other party, an important consideration because children's participation in proceedings is so limited.[19] It also allows each matter to be considered and determined on its own particular merits and allows changing community expectations to be taken into account in determining cases.

The scope of the best interests principle

16.11 The Family Law Act specifically requires the court to regard the best interests of the child as the paramount consideration when making parenting orders[20] and some other orders.[21] The court must consider a number of matters in determining the best interests of the child in those cases.[22] In deciding whether to make consent orders the court may, but need not, consider those matters.[23]

16.12 The scope of the current provisions requiring the consideration of the best interests of the child may be too narrow. Before the *Family Law Reform Act 1995* (Cth) came into force a single over-arching provision required the consideration of the welfare of the child in all proceedings with respect to the child.[24] This requirement had been interpreted to apply to procedural as well as substantive issues.[25] Justice Chisholm has suggested that the ability of the court to consider the best interests of the child in determining procedural issues may be in doubt as a result of the 1995 amendments.[26] He considered that '...the purpose of this...change...is far from clear'.[27]

> It may have been intended to give more force to the principle by repetition [in the separate sections rather than in a global statement]. But although repetition is a feature of the Act, it seems obvious that a single over-arching statement would be stronger and more compelling...Another possible explanation is that it may have been intended to limit the operation of the principle.[28]

16.13 In addition, the current provisions may not go far enough to establish, consistent with CROC, that the child's best interests should be at least a primary consideration in all decisions concerning them.[29] The High Court has held that matters 'concerning children' should be interpreted very broadly.[30] Therefore, greater scope should be given to the consideration of children's best interests under the Family Law Act.

16.14 Both these concerns can be addressed by including in the Family Law Act a requirement that in all actions of the court concerning children, the best interests of the

child shall be a primary consideration. This would allow a balancing of considerations where the child's best interests need not be considered paramount but merely one of a number of considerations. It would address the concern that the emphasis given to children's best interests may be read down following the 1995 amendments. It would also more appropriately reflect CROC's require-ments.[31] Such a provision would not interfere with the requirement in the Family Law Act that a child's interests be the paramount consideration in determining applications that most directly affect the child such as applications for parenting orders.[32] This provision should not apply to matters relating to the maintenance of children.[33] The considerations to be taken into account in maintenance deter-minations are, appropriately, expressly limited under the Act.[34] For these reasons, we recommend that in all actions concerning children the child's best interests should be a primary consideration unless the legislation expressly states otherwise.

Recommendation 135. In all actions of a court under the Family Law Act concerning children, unless the Act expressly states otherwise, the best interests of the child should be a primary consideration.
Implementation. Section 43 of the Family Law Act should be amended to reflect the provisions of article 3(1) of CROC in relation to all areas of the Act not subject to the present best interests requirement.

Assessing the best interests of the child

16.15 The Family Law Act lists the factors the court must consider in determining a child's best interests as

- **any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes**
- the nature of the child's relationship with each parent and other persons
- the likely effect of any change in the child's circumstances including the likely effect on the child of any separation from either of his or her parents or any other person with whom he or she has been living
- the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis
- the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs
- the child's maturity, sex, background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks relevant
- the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or

other behaviour or by being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person
- the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents
- any family violence involving the child or a member of the child's family
- any family violence order that applies to the child or a member of the child's family
- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child
- any other fact or circumstance that the court thinks relevant.[35]

16.16 Submissions to the Inquiry generally approved these factors.[36] However the wording of the factors indicates that they were intended only for considering issues related to parenting orders. The list should be broadened to be relevant to all types of proceedings in which the best interests of the child are the paramount or a primary consideration.[37] Further guidance could be of particular use in relation to deliberations in the court's welfare jurisdiction.[38]

Recommendation 136. The factors relevant to a consideration of the best interests of the child, enumerated in the Family Law Act, should also include factors relevant to all areas of decision-making to which the best interests principle applies, and in particular to location and recovery of children, adoption and the welfare of children. **Implementation.** Section 68F(2) of the Family Law Act should be redrafted accordingly.

Alternative dispute resolution

Introduction

16.17 In any proceedings involving children under the Family Law Act, a party or a child's representative can apply for court counselling assistance. The court can also order the parties to attend counselling with a family and child counsellor or welfare officer. In either case, the parties (with or without the child) are then interviewed by a family and child counsellor or welfare officer to discuss the welfare of the child and to try to resolve any differences.[39] As well as providing counselling services, the Family Court can divert parties from litigation by referring them to conciliation,[40] mediation[41] or arbitration.[42] Close to 75% of cases filed in the Family Court are at least partly resolved during the voluntary counselling stage of the proceedings.[43] Statistics are not kept on the numbers of children participating in these alternative dispute resolution processes.[44]

Children's participation in alternative dispute resolution

16.18 The little research available suggests that children may benefit from involvement in Family Court mediation, conciliation and counselling processes.[45] In a Scottish study of 28 children who had been involved in conciliation, 24 children indicated that they had benefitted from their attendance. Most of those children mentioned an improvement in communication and some also said that conciliation had allowed them to express their feelings to someone who knew how they felt.[46] The federal Attorney-General's Department considered that children's needs

> ...can be considered more effectively in the mediation or counselling process and they will receive a positive image of their parents communicating, negotiating and reaching agreements. This involvement will also enhance the prospects of the agreement surviving in the future.[47]

16.19 Some submissions to the Inquiry suggested that all children should be involved in these alternative dispute resolution programs following the separation of their parents.[48] On the other hand, the federal Attorney-General's Department submitted

> [f]or some there is a reluctance to involve children directly because of a desire to protect them from the dispute as much as possible and in mediation, not to put responsibility for adult decision making on children.[49]

The submission from Brenda House noted that some children

> ...have said that they do not want to make any decisions, that they want their parents to decide on what arrangements should exist...For some children the emotional burden of trying to 'balance' their parents is enormous.[50]

The Australian Association of Social Workers told the Inquiry

> [t]he outcome of counselling for many children is often for them to express a wish for the parents to leave them out of the dispute. The message may be salutary for the parents.[51]

These points are well made. Children should not be required to become involved in alternative dispute resolution processes. Rather, the degree of children's involvement should be determined in each case on the basis of the wishes and needs of the child involved. Ensuring that in each case the child's participation in these processes is appropriate may be difficult but the challenge should not be avoided. Relationships Australia strongly endorsed

> ...the rights of children to be kept fully informed on what decisions are being made which affect them and who is making these decisions, at all stages of any proceedings, through mediation, child and family counselling, court counselling and litigation. Children need to know what is going on, what their rights are. They need to have the opportunity to be heard and supported in this by people with expertise in working with children, and if possible, not to be put in a decision making role which draws them into the cross fire of their parents' conflicts.[52]

16.20 DRP 3 proposed research to gather statistics to allow an assessment of the various alternative dispute resolution processes.[53] We suggested that research should assess the use made of counselling for, and conciliation and mediation involving, children and the

origin of the applications for children to become involved. The research could also consider the results of those processes involving children compared to those where children were not involved.

16.21 Since the draft recommendation was made, the Attorney-General's Department has funded research, to be completed by March 1998, to recommend '...best practice approaches for counselling and mediation services to ensure that the needs of children are more effectively addressed'.[54] In particular, the research is to report on the most effective interventions to assist parents and children to deal with children's experience of separation, to explore the experiences and perspectives of children and parents in the process and to recommend appropriate strategies to ensure a focus is maintained on the needs and perspectives of children.[55] As a result of this continuing research, the Attorney-General's Department 'takes a cautious approach' to the draft recommendation.[56] The Inquiry commends this research and we have, as a result, amended our recommendation. After the completion of this research, however, statistics should continue to be collected and published by the Family Court.

16.22 Relationships Australia has suggested that these statistics should also be collected from those services funded under the Attorney-General's Family Services Program but provided outside the Family Court.[57] We agree. These statistics should also be collected and provided to the Family Court where these services have been used after the filing of a court application.

Recommendation 137. The Family Court should collect statistics on children's participation in counselling, mediation and conciliation processes, including the origin of applications in which children's involvement is requested, the number of matters in which children are involved and the results, including long-term outcomes, of those matters in which children participate in counselling or mediation compared with those where they do not. These statistics should be collected for all post-filing primary dispute resolution processes, including those funded under the Family Services Program.
Implementation. The Family Court should collect these statistics and publish them in its Annual Report.

The provision of alternative dispute resolution services

16.23 The Attorney-General is currently considering the most appropriate arrangements for the provision of alternative dispute resolution services in family disputes.[58] A Discussion Paper, *Delivery of Primary Dispute Resolution Services in Family Law,* was released in August 1997 to evaluate the structure of the current service delivery in this area.[59] The Attorney-General's Department has foreshadowed that '...a significant proportion of the counselling and mediation services now provided by the Family Court may be moved to the community sector'.[60]

16.24 Whatever structure is introduced for the provision of alternative dispute resolution processes, minimum criteria should apply for all service providers.[61] Present recruitment criteria for Family Court counsellors includes the following.

- A recognised degree or diploma in Psychology, Social Work or related discipline is essential. Eligibility for membership of the APS or AASW would be an advantage.
- At least 5 years relevant post-graduate experience, including at least 2 years working with family relationships is essential.
- At least 2 years experience working with children, including the assessment of children and family relationships is essential.[62]

These same criteria should apply to all service providers.

16.25 Family Court counsellors, mediators, court report writers and private practitioners providing family and child counselling or other alternative dispute resolution services also require continuing training to ensure that their knowledge and skills are up-to-date.[63] Training should focus on legal issues for children in family law, child development and communication with children. It should provide up-to-date information on issues surrounding disclosure of child abuse, family dynamics concerning abuse and best practice for dealing with such allegations.[64] Training is also important for all other staff dealing with family law matters who are likely to have contact with children.[65]

16.26 DRP 3 proposed that counselling and mediation services should be available to all courts, including State and Territory magistrates' courts, exercising federal family law jurisdiction.[66] It suggested that these services could be supplied in part by extending telephone counselling services and counselling circuits and making use of video links and other new technologies in appropriate cases. Whatever the outcome of the Attorney-General's review of alternative dispute resolution services in family law,[67] the recommendation that services be available to all litigants involved in family disputes remains relevant.[68]

Recommendation 138. All providers of primary dispute resolution services associated with family disputes, whether employed within or outside the Family Court, should have

- a recognised degree or diploma in psychology, social work or related discipline
- at least 5 years' relevant post-graduate experience, including at least 2 years' working with family relationships
- at least 2 years' experience working with children, including the assessment of children and family relationships.

Implementation. The Attorney-General should specify that these standards are the

minimum training and experience requirements for external providers of primary dispute resolution services associated with family disputes.

Recommendation 139. All providers of primary dispute resolution services associated with family disputes should receive continuing training in children's matters. Training should include material on legal issues for children in the family law system, child development and communication and, particularly, issues surrounding the disclosure of, family dynamics concerning and best practice for dealing with allegations of child abuse.
Implementation. The Family Court should develop appropriate continuing training programs to ensure the currency of the skills of its counselling and mediation staff. The Attorney-General should specify that all external providers of primary dispute resolution services should receive similar training.

Recommendation 140. Counselling and mediation services should be available to all litigants involved in family disputes regardless of the court they are before. These services could be supplied in part by extend-ing telephone counselling services or counselling circuits and by making use of video links and other new technologies in appropriate cases.
Implementation. Depending on the results of the Attorney-General's review of alternative dispute resolution services in family law, the Family Court should consider appropriate mechanisms to ensure the provision of these services and should be resourced adequately to put these mechanisms in place.

Family Court practice and procedure: the right of the child to be heard

Introduction

16.27 Children are often assumed to be unduly traumatised by being directly involved in litigation concerning the breakdown of their parents' relationship. They are said to be manipulated by parents into giving evidence or expressing wishes favourable to one parent or even to manipulate the parents themselves to achieve their own ends. It is argued that the court must be sensitive to the difference between what a child wants and what he or she needs and that, while a child may express a wish to participate, this may not be in his or her long term best interest.[69] One commentator has suggested that, by involving children in family disputes, children are not being given the opportunity to participate but rather the responsibility to decide something their parents cannot agree upon themselves.[70] These remain factors for concern.

16.28 However, there is a difference between asking a child to participate directly or to give evidence in relation to disputes of fact (which should generally be

avoided)[71] and allowing a child the opportunity to express his or her wishes on a particular matter. Children's participation in Family Court proceedings requires flexibility to ensure that the level and kind of participation is suitable for the needs and capacities of the individual child.

16.29 Children should not be required or pressured to do so but mature children should be able to participate appropriately, even to the extent of becoming witnesses or parties in litigation, where they freely indicate a desire to do so.[72] In those cases, the involvement of children in the family decision-making process can be of real benefit to the children, to the court and ultimately to achieving the best decision.[73] Failure to hear directly from children in proceedings in which they are the subject is said to be 'indicative of a conservatism'[74] and to involve 'notions consistent with children being possessions rather than humans'.[75] CROC requires the child to be provided with the opportunity to be heard in any judicial or administrative proceedings affecting him or her either directly or through a representative.[76]

16.30 If children are not directly involved in family law proceedings as witnesses or parties the rule against hearsay must be, and is, relaxed.[77] This reduces the potential for legal argument as to admissibility of evidence of children's views and provides flexibility to ensure that the best interests of children are promoted in each case.[78] It has led to the introduction of a number of mechanisms for hearing from children without directly involving them. Children are commonly heard in family law litigation through expert witnesses, court counsellors' reports or though a child's representative appointed for that purpose.[79]

The role of the judge

16.31 Many submissions to the Inquiry suggested that the adversarial model of litigation is inappropriate for the Family Court and particularly for children's matters.[80]

> The adversarial mode frequently sets the stage for the children to become the battleground and/or weapons in the parental conflict. As victims, their lives may become distorted permanently.[81]

When the Family Court was first established, it was intended that it avoid the problems associated with the traditional adversarial system. However, some early cases counselled against relaxation of the adversarial model.[82] More recently, the court has held that '[p]roceedings in relation to the welfare of children are not strictly adversarial...'[83]

16.32 Considerable flexibility exists in children's cases[84] and the available mechanisms ought to be appropriately utilised.[85] Family Court judges are given more latitude in children's matters than judges in most other courts to inquire into the issues to be determined.[86] The judges are also given more scope than those in other courts to ascertain the best interests of the child by asking questions of witnesses of their own motion.[87] They are not limited to the material produced by the parties but can suggest that the parties call additional evidence or follow a particular line of questioning.[88]

However, a judge's decision may be overturned on appeal if the Full Court considers that the judge was too interventionist and interfered with counsels' conduct of the case.[89] Activist judging is promoted in all jurisdictions and has been considered in ALRC Issues Paper 20, *Rethinking Federal Civil Proceedings*.[90]

Recommendation 141. Judges and magistrates deciding family law matters should be encouraged to intervene appropriately to assist the determination of the best interests of the child in Family Court children's matters.
Implementation. The Family Court should consider implementing a training program for judges and, with State and Territory agreement, magistrates exercising federal family jurisdiction on more inquisitorial approaches to determining the best interests of the child. The court should also consider preparing suitable guidelines to assist judicial officers in this regard.

Simplified procedures

16.33 In January 1996 the Family Court introduced simplified procedures.[91] They were designed to reduce the complexity and cost of proceedings[92] and to encourage an attitudinal shift from litigation to negotiation.[93] They were adopted in recognition of the fact that only 5% of cases commenced in the Family Court proceed to trial.[94]

16.34 The procedures require that initiating applications contain minimal information such as the necessary details about the parties and the orders sought. This means that it can sometimes be difficult to determine what issues are in dispute even at the directions hearing.[95] This can be problematic if issues of child abuse are involved in the matter but are not disclosed to the registrar at the directions hearing or if there is a question of whether a legal representative should be appointed for the child for other reasons. It also makes it difficult to determine whether a family report should be prepared.[96] The procedures may therefore render children invisible at the early stages of the litigation. The Family Court has established a committee to monitor the workings of the procedures.[97]

Recommendation 142. Through consultation and research, the Family Court should determine how best to assess at the earliest possible time the need to appoint a legal representative for the child.
Implementation. The Family Court committee monitoring the simplified procedures should conduct such an investigation.

Family reports

16.35 If the care, welfare and development of a child is relevant to proceedings under the Family Law Act, the court may direct a family and child counsellor or welfare officer to

prepare a family report on such matters as the court thinks desirable.[98] Family reports are prepared in almost 60% of contested cases involving children that proceed to trial.[99] They are commonly ordered where the age and maturity of the child suggests that he or she would be capable of articulating perceptions and wishes and also in cases where child abuse is alleged.[100] The counsellor or welfare officer who prepared the report is generally required to be available for cross-examination on it.[101]

16.36 These reports are highly influential. They prompt settlement or are followed by judges in 76% of cases for which they are prepared.[102] A current study in the Canberra and Melbourne registries of the Family Court indicates

> ...the most frequent reference of the judge and judicial registrar in reasons for the decision, apart from the individual's circumstance and credibility, was to the findings of the family report.[103]

Family reports were described to the Inquiry as

> ...one of the primary and purest ways in which a child may be heard in Family Law proceedings and their wishes ascertained without the need for the child to give direct evidence.[104]

DRP 3 suggested that family reports are a useful tool and that their use is integral to the increasing focus on children's participation in matters that affect them.[105] For many children, family reports provide a suitable vehicle for the expression of their wishes and opinions without burdening them with decision making responsibility.[106]

16.37 Submissions to the Inquiry suggested that some Family Court counsellors lack the expertise to prepare family reports in cases where allegations of child abuse have been made.[107] In many cases where the State or Territory care and protection department does not investigate allegations of abuse adequately or at all the family report becomes, in effect, a child protection assessment.[108] However, as family reporter preparers are attached to the court, they are generally aware of the legislative requirements of the decision makers and are able to be held accountable by the court.

16.38 DRP 3 suggested that the stage at which family reports are prepared should be reassessed.[109] Generally, family reports are ordered at the prehearing conference no earlier than 14 weeks before the hearing to allow the report to be produced three weeks prior to the hearing.[110] This may be 12 to 18 months after proceedings have begun. Many submissions agreed that reports should be prepared earlier in the process than they are at present[111] and suggested that family reports can be useful in determining appropriate interim orders.[112] Delays in reaching the final hearing in the court mean that interim orders are frequently decisive in the case. The provision of reports at this stage gives a sounder base for these decisions. It was also suggested that earlier reports will encourage earlier settlements.[113] The Family Court has noted in this respect that reports '...are not prepared for the purpose of settlement, even though they may be used for such ends'.[114]

16.39 On the other hand, court resources were cited by some as a reason why family reports are not ordered earlier in the proceedings.[115] In addition, family reports are said to be intrusive and may be traumatic for children.[116] National Legal Aid summed up these concerns in noting

> ...there is currently up to a two year wait before a Hearing in some Registries so there exists a fine balance between issuing Family Reports too early. Early Reports may assist in bringing about early settlements, but if a matter does not settle and a Report then needs to be updated at a later time, the question of costs arise and possible systems abuse of children.[117]

16.40 On balance, the Inquiry considers that the Family Court should order family reports earlier in proceedings. An early report may be used as the basis for a later report if needed. It is particularly important that court counsellors become involved in the process earlier than they do at present if they are to play an expanded role in investigating and providing information to the court on the best interests of the child. At recommendation 80 we recommended that the role of court counsellors providing reports should be expanded to include greater investigative functions. This was made in the context of the recommendation that representatives for children should conduct the litigation, wherever possible, on the directions of the child.[118] An expanded role for court counsellors as investigators of the child's objective best interests requires the early involvement of the report writer.

Recommendation 143. The Family Court should review the timing of ordering family reports to ensure that the report can be used to promote settlement while avoiding unnecessary procedures and distress for children and families.
Implementation. The Family Court should conduct a review of its family report procedures and amend the practice accordingly.

Experts

16.41 The court may also receive evidence of the views of children, without hearing from children directly, by the use of outside experts. Expert evidence may be introduced by a number of avenues. The court may appoint experts to inquire into and report on any issue of fact or opinion.[119] These experts may be appointed on the application of any party or on the court's own motion. The expert is to be agreed upon by the parties or may be nominated by the court.[120] The court also has the option of seeking the assistance of assessors.[121]

16.42 In its submission on DRP 3 the Family Court agreed that on occasions individual expert reports are requested and ordered under O 30A instead of family reports where a family report would be satisfactory. These orders may sometimes be made as a result of resource constraints and may be made in inappropriate circumstances.[122] National Legal Aid pointed out that increasing the use of expert evidence has cost implications for legal aid as it is often required to fund these reports.[123]

16.43 Wherever the issues in contention are appropriately within the areas of expertise of court counsellors, family reports should be used to provide the court with evidence about family functioning and dynamics and the wishes of the children concerned.[124] However, there will be many areas outside the discipline and training of court counsellors.[125] As the Family Court noted in its submission, the issues to be addressed will determine the appropriate professional for the task.[126] A Case Management Guideline could clarify these matters.

16.44 The Family Law Act provides for the appointment of an assessor to assist the court in hearing and determining proceedings or particular parts of proceedings.[127] Assessors were intended to assist the court to resolve disputes quickly and efficiently. Matters were to be referred to assessors for examination and report back to the court.[128] Assessors have not been widely used and there are no cases reporting their use. The court could benefit from exploring the greater use of assessors in children's cases.

16.45 Parties may also obtain independent expert evidence in limited circumstances and subject to direction from the court.[129] A particular problem regarding these experts occurs in cases where child abuse is alleged by a party or the child. In these cases, children are often examined or interviewed by the different experts hired by the parties, in addition to court counsellors and court-approved expert witnesses. The Family Law Act provides that if, after the initial examination or interview of the child by an expert witness, a child is interviewed or examined by any other expert without prior leave of the court, evidence of the examination is not admissible in any proceedings under the Act.[130] The Family Court suggested that this provision should be strengthened and that a recommendation be made to prevent interviews being carried out without the leave of the court. It suggested that merely rendering inadmissible evidence obtained from an unsanctioned examination does not sufficiently protect the child.[131] Evidence to the Inquiry suggested that, despite the current provisions in the Family Law Act, children in this situation may be subject to systems abuse due to over-interviewing by numerous expert witnesses.[132]

16.46 Where an application has been made to have a child further examined or interviewed by more than one expert witness, the Family Law Act sets out the factors that the court must consider in deciding whether to grant leave to have the child further examined.[133] These factors do not specifically include the opinion or wishes of the child although the court is able to consider '...any other matter that the court thinks is relevant'.[134] DRP 3 proposed that the section be amended to include a specific consideration of the wishes of the child in deciding whether or not to allow the child to be examined by an expert.[135] The Family Law Reform and Assistance Association supported that draft recommendation.[136]

16.47 National Legal Aid pointed out that the court already has power to consider any other matter it thinks relevant in deciding whether to have the child further examined.[137] Section 68F of the Family Law Act already specifically states that the wishes of the child should be taken into account in considering the best interests of the

child. National Legal Aid considered that this allows the court to take the wishes of the child into account when considering whether to have the child interviewed. However, section 68F does not specifically require the court to have regard to the best interests of the child in considering whether to grant leave to have the child interviewed. Therefore, there is some uncertainty as to whether the requirement to have regard to the wishes of the child is implicitly imported on that ground.[138] Where a child is to be interviewed more than once, the child is necessarily involved in the proceedings and has the right to have his or her views taken into account.

Recommendation 144. More effective use should be made of the power under O 30A of the Family Law Rules to appoint experts to assist the court by inquiring into and reporting on issues concerning children.
Implementation. The Family Court should give consideration to the present and potential use of these rules and consult with the legal profession and expert witnesses concerning effective use of experts.

Recommendation 145. The greater use of assessors in children's matters in the Family Court should be explored and, if appropriate, encouraged.
Implementation. The Family Court should consider making more use of this procedure and preparing suitable case management guidelines.

Recommendation 146. The Family Court should collect and maintain statistics concerning the number of times experts, including Family Court counsellors, interview each child in each litigated matter in the Family Court. These statistics should be used to conduct a regular assessment of whether children are over-interviewed during family law proceedings.
Implementation. The Family Court should establish a database, collect these statistics and publish them in its Annual Report.

Recommendation 147. In deciding whether to grant an application that a child be interviewed or examined by an expert, the court should consider any wishes expressed by the child as well as the other specified considerations.
Implementation. Section 102A(3) of the Family Law Act should be amended to this effect.

Parenting plans

16.48 Parenting plans are written agreements between parents on matters concerning their children.[139] They are intended to encourage co-operation between the parties in preference to litigation. They may deal with residence, contact, maintenance or any other aspect of parental responsibility for a child.[140] Parents are encouraged to, but need not necessarily, regard the best interests of the child as paramount.[141] There is no provision in the Family Law Act for the involvement of children in the development of a parenting plan.

16.49 A parenting plan may be registered in the Family Court if the court considers registration appropriate having regard to the best interests of the child.[142] In deciding whether to register a parenting plan, the court need not determine the child's best interests in accordance with the specific statutory principles set out in section 68F(2). To be registered in court, parenting plans must have been developed after consultation with a family and child counsellor or following independent legal advice as to the meaning and effect of the plan.[143] Once a plan is registered, the provisions operate as though they are orders of the court.[144] Registration of parenting plans may be unilateral. Between July and September 1996, 179 parenting plans were registered in the Family Court of Australia and the Family Court of Western Australia.[145]

16.50 These registration requirements may mean that parenting plans do not promote appropriately flexible parenting arrangements which are able to adapt with changed circumstances over time.[146] Parenting plans should be an effective alternative to court orders,[147] encouraging parents to take a co-operative long term approach to their children's welfare, and able to accommodate changes in circumstance. The National Children's and Youth Law Centre pointed out that parents may be unable to focus properly on the wishes or interests of their children in the emotional turmoil of separation.[148] Another submission suggested that a review mechanism should be established to take account of changed circumstances.[149]

16.51 In its response to DRP 3, the Attorney-General's Department noted that it '...supports the aim of [the draft recommendation] that the provisions allowing registration of parenting plans be monitored and reviewed over the next 12 months'.[150] The Department suggested that a consideration of whether, and to what extent, registration prevents or inhibits flexible parenting arrangements may best be conducted as a longitudinal study by the Family Law Council. As an initial step, a sample of registered parenting plans may be usefully scrutinised to determine whether their provisions, on their face, are likely to inhibit flexible parenting.

16.52 DRP 3 noted that the legislation makes no provision for children to be involved in developing a parenting plan. They may be the subject of a plan but need not be a party to it. It suggested that parents should be encouraged to involve their children in the development of parenting plans and that counsellors should also involve children as appropriate. National Legal Aid disagreed with the draft recommendation on the basis that '...it would be too open to abuse and the further manipulation of children'.[151] In its submission on IP 18, the federal Attorney-General's Department noted

> [t]here are no specific provisions which would guarantee such participation. It would only occur to the extent that the professionals involved seek to involve them. Parenting plans are designed for the assistance of separating parents at a low level of conflict. In such circumstances it is quite likely that they would be open to involving children in the process.[152]

16.53 In any situation of family breakdown there is potential for the parents to manipulate or inappropriately involve of children. Parenting plans are essentially directed to co-operative parents who ought to take account of the opinions and wishes of the

children concerned. The involvement of legal representatives or counsellors in the promotion of co-operative arrangements between parents should assist parents to focus on the needs, perspectives and best interests of their children. Children's wishes would, at first instance, be relayed to court counsellors by the parents. Where the counsellor is satisfied that the parents are sufficiently co-operative in the best interests of their children to ensure that children are not subject to inappropriate manipulation, counsellors should generally consider speaking to verbal children to ensure they understand the arrangements proposed.

16.54 The federal Attorney-General's Department has expressed support for these recommendations but noted that children's involvement '...should be done very carefully, and the responsibility for decision making should not be inappropriately placed on the child'.[153] We agree with this caveat but suggest that a culture of appropriately involving children in the choices to be made in developing parenting plans should be fostered. Children who are capable of and willing to have a say in their family circumstances should have the opportunity to do so.[154] This should be formally recognised in legislation to ensure the opportunity is afforded to children to participate in appropriate cases.

Recommendation 148. The Family Law Council should monitor the operation of parenting plans over the next 12 months and assess

- whether and to what extent registration is likely to prevent or inhibit flexible parenting arrangements
- whether registered parenting plans are based on appropriate and careful assessments of the best interests of the children by parents
- whether the court, in registering parenting plans, in fact considers any or all of the relevant principles of s 68F(2) of the Family Law Act.

In the light of this research, the Attorney-General should review the provisions allowing registration of parenting plans.

- If the research indicates that registration of parenting plans is likely to prevent flexible approaches to parenting, the Family Law Act should be amended to remove or modify the registration provisions.
- If parenting plans continue to be registrable, rules specifying the information that must be filed along with the plan should require sufficient detail to allow the court to scrutinise the plan closely and ensure that the long term best interests of the child are protected.

Implementation. The Family Law Council should undertake this research and the Attorney-General and the Family Court should take appropriate action as a result of the research.

Recommendation 149. Parents should be encouraged to involve their children in the preparation of parenting plans to the extent appropriate to the child's age, maturity and wishes.
Implementation. Section 63B of the Family Law Act should be amended to this effect.

Recommendation 150. Where parenting plans are developed with the assistance of family or child counsellors, counsellors should involve children who are the subject of the plan in its formulation to the extent appropriate to the child's age and maturity and commensurate with the child's wishes.
Implementation. A provision should be inserted into the Family Law Act to this effect.

Children's evidence

16.55 The Family Law Act does not prohibit children from giving evidence but the Family Law Rules state that leave of the court must be obtained before a child may be called as a witness, remain in the courtroom or swear an affidavit for the purposes of the proceedings unless he or she is a party or seeking to become a party.[155] There have been few instances of a judge allowing a child to give evidence in the Family Court.[156]

16.56 The court generally considers that children should be removed '...as far as possible, from forensic partisanship in spousal conflict'.[157] The court takes steps to ensure that parties do not introduce the evidence of children without thought for the effect giving that evidence may have on the integrity and development of the child. However, in many cases, evidence of children's wishes as to the outcome of litigation of the matter may be helpful to the court in determining the issues, instructive to the parties and beneficial for the development of the child. In most cases, the court would prefer to use those mechanisms already discussed to hear from the child without subjecting the child to cross-examination in open court.

16.57 One submission to the Inquiry suggested that children who are to give evidence in the Family Court should be provided with witness preparation and support.[158] The Inquiry agrees. The recommendations in Chapter 14 regarding child witnesses are intended to apply to children who give evidence in the Family Court.

Recommendation 151. The Family Court practice that children generally not be called to give evidence should be retained where the evidence proposed to be given by a child relates to disputes of fact between the parties. However, where the child is of sufficient maturity and is anxious to give evidence concerning his or her wishes about a parenting order the practice should be relaxed.
Implementation. A Family Law Rule should be made to this effect.

Children as parties

16.58 Children may be heard in family law proceedings by initiating proceedings on their own behalf.[159] Children of appropriate age and maturity should be informed of their right to institute proceedings, to instruct legal representatives on their own behalf or to join applications. The Inquiry was told that children are often dissuaded from intervening when they express a wish to participate in family law proceedings as parties. One submission noted

> [m]uch of the resistance appears to be associated with a failure to recognise the competence of young people in forming their own views and a failure to take seriously the right of children to be heard.[160]

16.59 Children should not have to institute or join proceedings merely to express their wishes or participate in litigation concerning their living arrangements. However, in some circumstances it may be appropriate for a child to become a party to proceedings. These could include situations where a parent is 'litigation weary' and the child is able to present cogent reasons as to why arrangements should change.[161] Practitioners and court officers acknowledge that children of a certain age who are unhappy with the results of litigation concerning their living arrangements will 'vote with their feet'. These children should have access to the court to formalise their arrangements. That they are not in a position to do so may well undermine the stability of their new living arrangements.

16.60 The Geelong Rape Crisis Centre supported the draft recommendation that children be provided with information about their ability to initiate proceedings but suggested that a variety of mediums, for example video or audio tapes, should be used to provide the relevant information to children.[162] We agree.

Recommendation 152. Children should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their rights to seek legal advice or initiate proceedings. Brochures and other appropriate mediums should be produced to provide this information and should be directed to at least two developmental and literacy levels of children. The brochures should be provided to both the applicant and the respondent at the early stages of the proceedings to be passed along to the children concerned.
Implementation. The Family Court should prepare brochures that provide this information.

Children interviewed by a judicial officer

16.61 The Family Law Rules provide that a judge, judicial registrar or magistrate may interview a child in chambers or elsewhere.[163] If the child is separately represented, the child's representative must consent before the child may be interviewed by the

judicial officer.[164] Evidence of anything said during this interview is inadmissible in court, although the judicial officer may take the discussion into account in the decision making process.[165] The judicial interview is another mechanism by which children may be heard in family law proceedings. Judicial officers rarely interview children in this way. It has been noted that '...this practice, never widespread, has (thankfully) all but vanished'.[166] This opinion expresses the almost universal advice given to the Inquiry concerning the practice[167] and there has been at least one case where the Full Court criticised the use of the option.[168] National Legal Aid noted that all evidence should be heard in open court and that judges in any event may not have the necessary expertise for interviewing children.[169] The option of a judicial officer speaking to a child in chambers is quite rightly used very sparingly. However, in the interests of flexibility, the option should remain available.[170]

Recommendation 153. The option of a judicial officer interviewing a child in chambers should remain available but be employed only in rare circumstances where the best interests of the child justify a judicial interview.

Vulnerable children and the Family Court

Indigenous children

16.62 Submissions indicate that the relationship between Indigenous people and the Family Court is problematic.[171] This may be the result of a historical legacy including

> ...an association of the Court with previous 'welfare' policies which resulted in the removal of indigenous children from their families.[172]

Australia's Indigenous population is predominantly young.[173] This highlights the importance of ensuring that Indigenous families are properly served by the Family Court. Initiatives in recent years are making the Family Court more aware of issues of concern to Indigenous families and children.

16.63 The Family Law Act explicitly requires the court to take into account 'any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders' in assessing a child's best interests.[174] In *B and R and Separate Representative* the Full Court held that the Family Court has an obligation to receive evidence relevant to the unique experience of Indigenous Australian people in determining the best interests of Indigenous children.[175]

16.64 The Family Court is also taking administrative steps to facilitate the participation of Indigenous people in family law processes. It has established the Aboriginal and Torres Strait Islander Awareness Committee to consider the extent to which Indigenous people use the court, to increase the awareness of officers of the court of problems

confronting Indigenous people and to make the services of the court more relevant to Indigenous people.[176]

16.65 These developments are relatively recent and progress is currently affected by funding constraints.[177] Their impact is yet to be fully realised. The relevance of the court to Indigenous families and children will be affected by the extent to which the court is able to take account of the involvement of extended families in dispute resolution and of the extent of family violence in family breakdown among Indigenous communities.[178]

16.66 Statistics kept by the Family Court do not record the Aboriginality of parties or children who are the subject of proceedings. This makes monitoring the effects of the initiatives almost impossible. The Family Court is presently considering how it can best collect the statistics suggested in DRP 3.[179] National Legal Aid suggested that keeping statistics on Aboriginality '...could result in improper manipulation and misrepresentation of Aboriginal litigants by assorted community groups'.[180] However, the collection of these statistics is justified by the importance of an accurate understanding of the extent and manner of use of the court by different client groups and particularly Indigenous people. As the submission from the Education Centre Against Violence noted, '[a]ccess to justice has not traditionally been equitable for indigenous people and specific strategies should address this'.[181]

Recommendation 154. The Family Court should continue to promote the access of Indigenous families and children to the court and continue its work in liaising with Indigenous communities. The court should continue research to ensure that its processes are adapted to take account of the dynamics of dispute resolution among Indigenous communities, particularly in relation to the involvement of extended families and family violence.
Implementation. The Family Court should undertake research in consultation with relevant community organisations and maintain programs to ensure appropriate access of Indigenous children and families to the court.

Recommendation 155. The Family Court should take urgent action to collect and publish comprehensive statistics in relation to the number of applications made to the court involving Indigenous parties or children. Statistics should be collected and maintained regarding the passage of those applications through the court and their outcomes.
Implementation. The Family Court should establish a database, collect these statistics and publish them in its Annual Report.

Children from non-English speaking backgrounds

16.67 Many people from non-English speaking backgrounds have difficulty accessing Family Court services. This may be due to language or cultural barriers. Some

communities are unfamiliar with the notion of a court determining family disputes and have traditionally relied upon extended family networks to assist in the resolution of family disputes. However, for many families those extended family networks are not available in Australia. It is important that the Family Court be accessible and relevant to all Australians, particularly to those families which may be suffering some social and cultural dislocation as well as the trauma of family breakdown. To address these issues, the Family Court has introduced a number of strategies to make it less intimidating for people, such as producing information audiotapes and pamphlets in community languages.[182] None of the initiatives is aimed specifically at children.

16.68 In its report on *Multiculturalism and the Law,* the ALRC recommended that all federally funded support services, including the Family Court, have a component included in their grants or budgets to be applied to developing comprehensive and detailed access and equity plans.[183] These plans could be of particular benefit in assisting the Family Court to eliminate barriers to people of non-English speaking background, including children, accessing its services.

16.69 The House of Representatives Standing Committee on Community Affairs recently made a number of recommendations to promote access and equity principles in the provision of government services.[184] For example, the Committee recommended that cross-cultural communication training be incorporated as an essential element of staff development across all levels of government[185] and that the practice of supplementing interpreting and translating services by the employment of bilingual/bicultural staff be adopted across all government agencies that provide services.[186] The Inquiry supports the implementation of these recommendations in the Family Court. The Family Court has pointed out that there is a limited budget for interpreters.[187]

Recommendation 156 The Family Court should develop an access and equity plan to assist it in eliminating barriers which people of non-English speaking background, including children, experience in accessing its services.
Implementation. The Family Court should develop this strategy.

Children in rural and remote areas

16.70 The Family Court has 21 registries or sub-registries throughout Australia located in capital cities and some major regional centres.[188] Outside these urban centres, applicants may choose to make use of the State or Territory magistrates' court network which has been invested with family law jurisdiction.[189] The Family Court provides some counselling services on a circuit basis but there may then be difficulty in accessing them in a timely manner. Remote areas have no access to counselling services. The alternative to these options for people in rural or remote areas is to travel sometimes very long distances to the nearest Family Court. The ability of people living in remote areas to obtain access to the Family Court is an issue of particular concern to Indigenous communities.

16.71 The court has indicated its willingness to travel to some remote locations. However, as the court points out, these services are costly and cannot presently be provided at the level required.[190] Access to the court may also be provided for people in rural and remote areas by the greater use of processes such as video-links or telephone services. The Family Court is able to hear evidence or sub-missions by video link or telephone from any place within or outside Australia.[191] Before doing so, the court must be satisfied that the arrangement is more convenient than requiring live evidence or submissions.[192] Full use should be made of this capacity. The Inquiry is aware that one registry has a toll free number. This service should be expanded, promoted and resourced on a national scale.

16.72 In general, however, the Family Court will only remain accessible through the maintenance of its regional registries. The Family Court is aware of the priority of this issue and noted in its submission that registry closures 'were the least favoured option of the court', a step taken only after other measures were instituted.[193] Counselling circuits to rural areas should be maintained at an acceptable standard particularly if court counsellors take on a greater investigative role.[194] The Inquiry's recommendations concerning the introduction of a specialised family and children's magistracy and a specialist federal magistracy should assist in the provision of family dispute resolution services in rural areas.[195]

Recommendation 157. Closure of Family Court registries should be treated as a least favoured option for dealing with funding constraints in the Family Court. The continuation of circuits of the counselling service to rural and remote areas is particularly important. The Family Court should attempt to expand or promote on a national scale toll free telephone access to the court. It should consider making greater use of its ability to take evidence by video link or telephone, particularly from parties living in rural or remote communities.
Implementation. The Family Court should investigate the use of communication technologies to provide greater access to Family Court services for rural families and children.

Young people with intellectual disabilities

16.73 The needs of children with disabilities must be considered by the Family Court in determining any parenting orders.[196] Specialist skills may be needed in providing reports and expert advice to the court when the children involved have special needs. Reports ordered under O 30A of the Family Law Rules may be particularly relevant here.[197] This may include advising on the support needs of the child and devising suitable options for the care of the child. The guidelines in *Re K* on appointing a child's representative do not refer specifically to children with disabilities.[198] However, the criteria in that case are wide enough to ensure that children with disabilities are provided with a child's representative as appropriate. Sensitivity and care are required to ensure

that children with disabilities can participate in the decision making process to a degree commensurate with their abilities and willingness.

16.74 Of particular relevance to children with disabilities is the Family Court's statutory welfare power.[199] This power has been used to authorise special medical procedures for children,[200] most frequently the sterilisation of young women with profound intellectual disabilities.[201]

16.75 States also retain the right to determine sterilisation applications for children with intellectual disabilities. The Family Court has developed co-operative arrangements with other relevant agencies in Victoria and Queensland in regard to sterilisation applications.[202] Children with intellectual disabilities should not be sterilised without approval from either the Family Court or a State or Territory authority such as the NSW Guardianship Board but evidence indicates that many unauthorised operations are performed.[203] Approval rates vary greatly. Since January 1994 the NSW Guardianship Board approved only one out of seven such applications brought before it while the Family Court approved the procedure or refused to exercise jurisdiction to prevent it from being performed in seven of the eight reported cases it has dealt with.[204]

16.76 One submission to the Inquiry urged an awareness that parents with children with a profound disability struggle for many years to facilitate their children's development and provide for their basic care. The submission urged

> ...consideration of these issues needs to be a two way street, because at the end of the day it remains the parents of the young people and young adults who provide their primary care...[205]

There can be little disagreement with this but the procedure is one of such significance that taking the decision to an independent third party is in all parties' interests. Parents must be given every opportunity to consider alternatives to sterilisation procedures. In fact, the Family Law Rules require affidavits to be filed indicating that the procedure is necessary and there is no appropriate alternative.[206]

16.77 Although the Family Court has accepted the need for guidelines for these proceedings,[207] no comprehensive or detailed guidance is available. DRP 3 suggested that further guidance is needed to ensure that the procedures are used only when strictly necessary in the best interests of the child.[208] That suggestion received some support in submissions.[209] The Family Law Council has also recommended that appropriate guidelines be developed.[210] National Legal Aid disagreed with the draft recommendation, arguing that '....such guidelines already exist in the Family Court and are contained in the Family Law Act'. It also argued that this may throw up a new threshold test of 'strictly necessary'.[211] However,the numbers of sterilisations apparently performed without court approval indicate the need for guidelines to ensure that an application is approved only as a last resort.

16.78 Concerns have been raised about the child's right to participate and be heard in sterilisation application proceedings and the standard of advocacy provided to them.[212]

The degree of participation of children who are the subject of the application should depend on individual capacity — clearly a 16 year old with a mental age of 7 is still capable of expressing an opinion.[213] The child may, and generally would, be appointed a next friend or child's representative for the hearing.[214]

16.79 A number of submissions expressed some concern that DRP 3 dealt with only sterilisation of young women with intellectual disabilities.[215] One submission urged that '...neither the Commissions nor the implementers of this report be entrapped by the emphasis upon sterilisation alone'.[216] Another submission urged that the Inquiry 'recognise the far reaching implications for children' of the statutory welfare jurisdiction of the court.[217] The submission pointed out that equivalent jurisdictions internationally have addressed a broader range of procedures than sterilisation of intellectually disabled young women and that the Australian jurisdiction is beginning to deal with a broader range of matters.[218]

16.80 One submission proposed that guidelines be developed to encompass the range of procedures that may be sanctioned under the special medical procedures provisions of the Family Law Rules.[219] It argued for further direction to ensure that the court is able to take account of the wishes of the child in all these cases.[220] Recommendations 70-76 deal with the requirements of a legal representative for children before the Family Court.[221] These requirements provide an appropriate level of participation for children, commensurate with the ability and willingness of the child concerned to participate. The recommended guidelines in relation to the welfare jurisdiction should include an express requirement that the child participate in the proceedings to the extent that he or she is able and willing to do so.

Recommendation 158. An awareness campaign should be conducted to provide medical practitioners with information about the legal requirements for approval for the conduct of sterilisation operations on young people with an intellectual disability.
Implementation. The Attorney-General, through his department, should co-ordinate and conduct this campaign.

Recommendation 159. Research should be conducted to establish the comparative levels of approval of sterilisation applications in each jurisdiction by the various courts and bodies with this responsibility. This research should investigate the reasons for any discrepancy to ensure that procedures allow for appropriate exploration of alternatives to the sterilisation application.
Implementation. The Family Court should conduct such research in co-operation with relevant State and Territory agencies.

Recommendation 160. Guidelines should be developed to regulate the pre-hearing processes for applications for approval of special medical procedures under the Family Court welfare jurisdiction. These guidelines should ensure that the

procedures are used only where strictly necessary in the best interests of the child. The guidelines should require that parties be provided with information about all alternatives to the procedure, that all options have been explored prior to the hearing and that suitable counselling has been undertaken. They should also ensure that the child has participated as appropriate.
Implementation. The Family Court should consider developing such guidelines for inclusion in O 23B of the Family Law Rules or in case management guidelines as appropriate.

Footnotes

1 In 1993, 48 055 children were involved in a divorce of their parents: D De Vaus & I Wolcott *Australian Family Profiles: Social and Demographic Patterns* AIFS Melbourne 1997, 32. See also paras 2.70-74.

2 The jurisdiction of the Family Court is discussed in ch 15. For a philosophical and policy history of the Family Court see L Star *Counsel of Perfection: The Family Court of Australia* Oxford University Press Melbourne 1996.

3 See paras 16.31-32.

4 Particularly with the introduction of the *Family Law Reform Act 1995* (Cth).

5 See paras 15.61-70 for a discussion of the role of magistrates in family law.

6 In remote areas there is no access to such assistance at all while metropolitan courts and major rural circuits may be able to access some Family Court resources.

7 art 3.

8 s 43.

9 Prior to 11 June 1996, the principle was known as the 'welfare principle'. It is discussed further in the context of representation at ch 13.

10 s 60B(1).

11 s 68F(2). See para 16.15.

12 *Children's Services Act 1986* (ACT) s 5; *Children (Care and Protection) Act 1987* (NSW) s 55(a); *Children's Services Act 1965* (Qld) s 52(2); *Children's Protection*

Act 1993 (SA) s 4; *Community Welfare Act 1983* (NT) s 9; *Community Services Act 1970* (Vic) s 41. The proposed Tas legislation, the Children, Young People and their Families Bill (1997), also is intended to contain such a provision: cl 8(2)(a). See also Tas Government *IP Submission 210*.

13 JL Dolgin 'Why has the best interests standard survived?: The historic and social context' (1996) 16 *Children's Legal Rights Journal* 1, 2.

14 RH Mnookin 'Child custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 260.

15 M Rayner 'Protection and promotion of the best interests of the child' *Paper* Children's Rights: The Next Step Conference Brisbane 3–5 April 1997, 9.

16 See JL Dolgin 'Why has the best interests standard survived?: The historic and social context' (1996) 16 *Children's Legal Rights Journal* 1, 3.

17 id 6.

18 eg Feminist Lawyers *IP Submission 177*. However, there was some limited disagreement with the proposition: eg Parents Without Rights *IP Submission 32* suggested that '...the judiciary and the legal professions are not qualified to decide what is in the best interests of the child. We believe that only parents, with guidance from properly trained counsellors, are the best ones to make the decision as to what is in the best interests of their own children'.

19 This issue is discussed in more detail at paras 16.18-22, 16.27-61.

20 s 65E.

21 ie location orders (s 67L), recovery orders (s 67V), orders relating to the welfare of the child (s 67ZC(2)) and some orders relating to adoption (s 60G(2)) although the Family Court's jurisdiction is limited in this regard. Adoption remains largely a matter of State and Territory jurisdiction. The *Adoption of Children Act 1965* (NSW) has recently been the subject of review by the NSWLRC Report 81 *Review of the Adoption of Children Act 1965* (NSW) NSWLRC Sydney 1997.

22 These are outlined in Family Court Act s 68F(2). See also para 16.15.

23 Family Law Act s 68F(3). The court may also register a parenting plan, discussed in detail at paras 15.48-54, when it considers it appropriate to do so in the best interests of the child: s 63E(3). In those cases, the court may, but need not, consider the matters outlined in s 68F(2) of the Act.

24

Family Law Act s 64(1). The *Family Law Reform Act 1995* (Cth) replaced the term 'welfare' with the phrase 'best interests'. It was not intended to change the meaning of the requirement: see Hansard (H of R) 30 May 1991, 4455.

25 See R Chisholm 'Assessing the impact of the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 183.

26 ibid.

27 ibid.

28 ibid.

29 art 3.

30 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

31 art 3.

32 See para 16.11.

33 Family Law Act Pt VII Div 7.

34 s 66J.

35 s 68F(2).

36 eg Federation of Community Legal Centres (Vic) *IP Submission 129;* SA Children's Interest Bureau *IP Submission 156;* Burnside *IP Submission 214.*

37 See para 16.11.

38 See para 15.51.

39 Family Law Act ss 62C, 62F.

40 Family Law Act Pt III Div 4.

41 Family Law Act Pt III Div 4 Subdiv A.

42 Family Law Act Pt III Div 5 Subdiv B. Arbitration is rarely used in the Family Court at present.

43 At least one substantive issue is settled during the voluntary stage of counselling in close to 75% of cases: Office of the Chief Executive, Family Court of Australia *Submission to the Joint Standing Committee on Certain Aspects of the Operation*

and Interpretation of the Family Law Act, Term of Reference (a) Family Court of Australia Sydney 1992. See also D Smith *TR Submission 46.* However, this is not to suggest that these processes are responsible for an amicable settlement of an entire dispute: Society for the Best Interests of the Child *DRP Submission 34.*

44 In relation to mediation, the position seems little different from that in NZ where it has been noted that '[a]lthough most family mediators do not seek directly the views of children in the mediation process, some have advocated the limited involvement of children in mediation to ascertain their wishes and to provide a check that parents' arrangements are in accord with the children's wishes': J Pryor & F Seymour 'Making decisions about children after parental separation' (1996) 8 *Child and Family Law Quarterly* 240.

45 ibid. See also D Bagshaw 'Children of divorce in Britain and the United States: Current issues in relation to child custody and access' (1992) 6 *Australian Journal of Family Law* 32.

46 F Garwood *Children in Conciliation: A Study of the Involvement of Children of the Lothian Family Conciliation Service* Scottish Association of Family Conciliation Services Edinburgh 1989. See also D Bagshaw 'Children of divorce in Britain and the United States: Current issues in relation to child custody and access' (1992) 6 *Australian Journal of Family Law* 32; Working Party Report *Giving Children a Voice in Mediation* National Family Mediation Council 1995.

47 *IP Submission 178.*

48 eg Disability Services Office SA *IP Submission 205;* Law Society of NSW *IP Submission 209.*

49 *IP Submission 178.*

50 *DRP Submission 65.*

51 *IP Submission 207.*

52 Relationships Australia *DRP Submission 70.*

53 Draft rec 8.3.

54 Attorney-General's Dept *DRP Submission 52.*

55 See Legal Aid & Family Services, Attorney-General's Dept *Research Consultancy in Family and Child Counselling and Family and Child Mediation Terms of Reference* unpublished 1997.

56 Attorney-General's Dept *DRP Submission 52.*

57 *DRP Submission 70.*

58 See D Williams 'Family Law — Future directions' *Speech* National Press Club Canberra 15 October 1996, 20ff.

59 Attorney-General's Dept *Delivery of Primary Dispute Resolution Services in Family Law* Attorney-General's Dept Canberra 1997.

60 Attorney-General's Dept *DRP Submission 52.*

61 Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

62 Chief Justice's Chambers Family Court of Australia *DRP Submission 64.* APS is the Australian Psychologists' Society. AASW is the Australian Association of Social Workers.

63 See Attorney-General's Dept *IP Submission 178.*

64 See ch 15 for a discussion of the Family Court's involvement in dealing with allegations of child abuse.

65 Training for legal representatives and judicial officers in family law are addressed at recs 84-86, 134.

66 Draft rec 8.4.

67 See para 16.23.

68 The Family Court supported the recommendation in principle subject to the outcome of the Attorney-General's review: Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

69 A Banning 'Children as witnesses in the Family Court' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1991, 199.

70 RE Emery Renegotiating Family Relationships Guildford Press New York 1994, 137. See also Australian Psychological Society *IP Submission 131.*

71 See paras 16.55-57.

72 The Family Law Act makes it clear that children should not be required to express any wishes: s 68H.

73 See eg Defence For Children International *IP Submission 204;* Feminist Lawyers *IP Submission 177;* Family Court of Australia *Representing the Child's Interests*

in the Family Court of Australia: Report to the Chief Justice of the Family Court of Australia Family Court of Australia Brisbane 1996, 62.

74 Law Society of NSW *IP Submission 209.*

75 I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 2.

76 art 12(2).

77 The Evidence Act applies to the Family Court wherever the Family Law Act is silent on evidentiary matters: Evidence Act s 8(1). Family Law Act s 100A suspends the operation of the hearsay rule in relation to proceedings under Pt VII of the Act which deals specifically with matters relating to children. The court may give whatever weight to hearsay evidence it thinks fit: s 100A(2). See ch 14 for a discussion of general rules of evidence.

78 The principle that the best interests of the child are paramount has been determined to apply to the admissibility of evidence: *Hutchings v Clarke* (1993) 16 Fam LR 452; *Benson v Hughes* (1994) 17 Fam LR 761. See also *S and P* (1990) FLC ¶92–159. The principle has also been applied to the question of whether to exercise jurisdiction and to restrain a person from bringing proceedings: ZP and PS (1994) 17 Fam LR 600; *Monticelli and McTiernan* (1995) 19 Fam LR 108. The Inquiry is satisfied that the best interests principle should continue to apply where relevant in procedural matters. Rec 135 is intended to broaden the application of the principle.

79 Representation of children is discussed in ch 13.

80 eg Federation of Community Legal Centres (Vic) *IP Submission 129;* Oz Child Legal Service *IP Submission 195.*

81 LL Schwartz 'Enabling children of divorce to win' (1994) 32 *Family and Conciliation Courts Review* 80.

82 See *In the Marriage of Wood* (1976) 11 ALR 657, 661. See also *Watson ex parte Armstrong* (1976) 136 CLR 248.

83 *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485, 498. See also *In the Marriage of Lonard* (1976) 2 Fam LR 11, 116. We do not propose to make detailed comments or recommendations about the adversarial system in children's cases in this Inquiry as the ALRC is presently reviewing the adversarial system of litigation in the Family Court.

84

In *In the Marriage of Bartlett* (1994) 17 Fam LR 405, 413 the Full Court noted that in deciding children's cases the court has a positive obligation to make orders reflecting the paramountcy of the welfare of the child.

85 This recommendation is particularly important in the light of the recommendations made in relation to the representation of children in the Family Court: see ch 13.

86 See *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 363, 373–374.

87 Family Law Rules O 30 r 5.

88 *In the Marriage of Lonard* (1976) 2 Fam LR 11, 116.

89 K Murray 'Consideration of the child witness in the Family Court' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1988, 192. Several appeals have dealt with the limits of the court's ability to intervene or comment on proceedings: eg *Separate Representative v JHE and GAW* (1993) FLC ¶92–376 and *Stiffle and Stiffle* (1988) FLC ¶91–977.

90 ALRC Sydney 1997.

91 The procedures are complemented by a case management system. Cases are assigned to a particular 'track' according to their degree of complexity. Complex cases are referred to a judge manager while more straightforward matters are referred to trial as soon as possible: Family Court Case Management Guidelines No 1 of 1997 ch 6.

92 Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 3.

93 K Derkley 'Reform or fiasco: The Family Court's new procedures may backfire, lawyers say' (1996) 70(3) *Law Institute Journal* 8, 9.

94 Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 2.

95 I Kennedy 'Simplified procedures — The new regime' 11(1) *Australian Family Lawyer* 20.

96 This decision should be made at the first directions hearing: see rec 78.

97 I Kennedy 'Simplified procedures — The new regime' 11(1) *Australian Family Lawyer* 20.

98 Family Law Act s 62G(1), (2). See also s 55A(2).

99 Family Court statistics quoted in D Smith *TR Submission 46.* See also Attorney-General's Dept *IP Submission 178.*

100 I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 12.

101 ibid.

102 T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' Paper Children at Risk: Now and in the Future Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997, 15.

103 T Brown et al Monash University *IP Submission 47.*

104 Oz Child Legal Service *IP Submission 195.*

105 para 8.17.

106 It is important to remember that a family report may not adequately discharge the obligation under CROC to provide children who desire to participate directly in proceedings with an opportunity to be heard as required by art 12(2). Some submissions to the Inquiry raised this issue: eg Youth Advocacy Centre *IP Submission 20;* Burnside *IP Submission 214.*

107 See eg J Benfer, E Drew & K Shepherd *IP Submission 119;* Coalition of Community Groups *DRP Submission 10.*

108 J Benfer, E Drew & K Shepherd *IP Submission 119.*

109 Draft rec 8.11.

110 Family Court Case Management Guidelines No 1 of 1997 para 8.11. These guidelines also provide that family reports should not be ordered at the first directions hearing except in exceptional circumstances or where child abuse has been alleged: No 1 of 1997 para 2.12.

111 eg Family Law Reform and Assistance Association *DRP Submission 48;* National Legal Aid *DRP Submission 58;* Australian Psychological Society *IP Submission 131;* Oz Child Legal Service *IP Submission 195.*

112 '....the intervention of independent evidence in the form of a Family Report at the interim stage will, in many cases, see the unsuccessful party accept the interim order and avoid an ongoing dispute. For this category of cases, early intervention would represent a better targeting of finite Court resources and more

appropriately place the wishes of children before the court': Law Society of NSW *IP Submission 209.*

113 eg Australian Psychological Society *IP Submission 131;* Oz Child Legal Service *IP Submission 195.*

114 DRP Submission 64.

115 See Chief Justice's Chambers Family Court of Australia *DRP Submission 64;* National Legal Aid *DRP Submission 58.*

116 See eg SA Children's Interest Bureau *IP Submission 156;* Chief Justice's Chambers Family Court of Australia *DRP Submission 64.* See also ALRC Report 73 *For the Sake of the Kids: Complex Contact Cases and the Family Court* ALRC Sydney 1995 paras 3.34–38.

117 National Legal Aid *DRP Submission 58.*

118 See rec 70.

119 Family Law Rules O 30A r 3(1).

120 Family Law Rules O 30A r 3(2).

121 Family Law Act s 102B.

122 Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

123 *DRP Submission 58.*

124 Evidence to the Inquiry is that these family reports are generally useful: see para 16.36.

125 See para 16.24.

126 *DRP Submission 64.*

127 s 102B. See also Family Law Rules O 30B.

128 *Hansard* (H of R) 30 May 1991, 4455.

129 Family Law Act s 102A.

130 s 102A(1), (2). However, evidence of such examinations may be admitted if the court is satisfied that it relates to relevant matters on which the evidence already before the court is inadequate, that the court will not be able to determine the

proceedings properly without the evidence and that the welfare of the child is likely to be served by the admission of the evidence: s 102A(4).

131 However, in particular cases the court should perhaps consider making an order that a child not be further examined or interviewed. In these circumstances, it would be possible to commence contempt proceedings against a party who violates the order.

132 eg Confidential oral submission 7 August 1997. See also paras 14.27-31.

133 s 102A (3).

134 Family Law Act s 102A(3)(e).

135 Draft rec 8.13.

136 *DRP Submission 48.*

137 Under Family Law Act s 102A(3)(e).

138 See para 16.30 for a discussion of whether the best interests principle applies to matters of procedure under the Family Law Act.

139 Family Law Act s 63C(1).

140 Family Law Act s 63C(2).

141 Family Law Act ss 63B, 63C(2).

142 Family Law Act s 63E.

143 Family Law Act s 63E(2)(b). The court may vary provisions in the plan only if it considers the variation required in the best interests of the child: s 63F. The court may also set aside a plan if it considers that the concurrence of a party was obtained by fraud, duress or undue influence: s 63H(1)(a).

144 Except where they involve a child and a third party ie other than a biological parent: Family Law Act s 63F. See also s 63G.

145 Family Court of Australia *Outcomes Report* unpublished October 1996. However, it may be that there are more parenting plans being registered in State or Territory magistrates courts in their exercise of family law jurisdiction. Statistics are not available on this issue.

146 The original recommendation upon which parenting plans were based did not envisage that they would be registered but would be '...flexible and capable of

easy alteration to meet the changing needs of the child': Family Law Council *Patterns of Parenting After Separation* AGPS Canberra 1992, 42.

147 B Hughes *The Registration of Parenting Plans: Section 63E of the Family Law Reform Act 1995* unpublished September 1996, 4.

148 *DRP Submission 59.* See also Women's Legal Service *DRP Submission 68.*

149 A McNicol *DRP Submission 39.*

150 Attorney-General's Dept *DRP Submission 52.* This draft recommendation also received support from the Taxi Employees' League *DRP Submission 21.*

151 *DRP Submission 58.*

152 *IP Submission 178.*

153 *DRP Submission 52.*

154 It has been suggested to the Inquiry that where parenting plans are prepared with the assistance of a counsellor, the counsellor could consider asking to speak to the children the subject of the plan to ensure they understand the arrangement proposed: Australian Psychological Society *IP Submission 131.*

155 O 23 r 5(5), (6).

156 I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 1. In the early case of *Foley and Foley* (1978) FLC ¶90–511, 77 680 the Family Court listed factors to consider in determining whether a child should give evidence including whether the evidence is reasonably available from an alternative source and the maturity of the child.

157 *Cooper and Cooper* (1980) FLC ¶90–870, 75, 509.

158 Kreative Kids *DRP Submission 35.*

159 The Family Law Act specifically states that children may institute proceedings for parenting orders (s 65C), maintenance orders (s 66F) and any other order under the Act unless a contrary intention appears (s 69C(2)).

160 SA Minister for Family and Community Services *IP Submission 110.*

161 ibid.

162 *DRP Submission 61.*

163

O 23 r 5. Generally, interviews in chambers are conducted in the presence of a counsellor from the Family Court Counselling Service: J Treyvaud 'Consideration of the child witness in the Family Court — A Victorian perspective' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1988, 196.

164

Family Law Rules O 23 r 5(4).

165

J Treyvaud 'Consideration of the child witness in the Family Court — A Victorian perspective' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1988, 196.

166

I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 1.

167

However, Community Services Australia *IP Submission 201* suggested it could be a useful tool if conducted within appropriate guidelines. The SA Children's Interest Bureau *IP Submission 156* suggested that children have clear notions of the power of judges and report they want to tell the person who will make the decision.

168

Demetriou and Demetriou (1976) FLC ¶90–102.

169

DRP Submission 58. Relationships Australia *DRP Submission 70* also expressed concern that judges may not have the appropriate expertise and training to hear children's views and interpret their wishes.

170

National Children's and Youth Law Centre *DRP Submission 59* agreed with the proposal.

171

eg Aboriginal Legal Service of WA *IP Submission 75;* Oz Child Legal Service *IP Submission 195.* In this regard see particularly National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997.

172

A Nicholson 'Family Court initiatives with Aboriginal and Torres Strait Islander communities' (1995) 3(76) Aboriginal Law Bulletin 15. It is estimated that between 1883 and 1969 in NSW one in six Indigenous children were taken from their parents: ALRC Report 31 The Recognition of Aboriginal Customary Laws AGPS Canberra 1986, 234-235. See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing them Home* HREOC Sydney 1997, 36–37. This report cites studies that place the extent of removal higher than this.

173

See para 2.5.

174

Family Law Act s 68F(2)(f).

175

In that case the court noted that '[t]he history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are, too, unique. Evidence which makes reference to these types of experiences and struggles...addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child...': *B and R and Separate Representative* (1995) FLC ¶92–461.

176

A Nicholson 'Family Court initiatives with Aboriginal and Torres Strait Islander communities' (1995) 3(76) *Aboriginal Law Bulletin* 15. To this end, judicial officers and court staff have been or are to be provided with cross-cultural awareness training and a component of the child representative training course concerns representation of Indigenous children: *National Training Program for the Separate Representatives of Children Appointed under the Family Law Act in the Family Court of Australia* College of Law, Law Council of Australia & Legal Aid Commission Canberra 1996. In addition, several Aboriginal family consultants have been appointed in the NT and in North Qld: Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 7.

177

See eg Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

178

See P Grose 'An Indigenous imperative: The rationale for the recognition of Aboriginal dispute resolution mechanisms' (1995) 12(4) *Mediation Quarterly* 327.

179

Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

180

DRP Submission 58.

181

DRP Submission 43. See also P Eastaugh *DRP Submission 29.*

182

Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 9–10, 18.

183

Report 57 *Multiculturalism and the Law* ALRC Sydney 1992, 89. It was anticipated that the plans would outline what the service does or proposes to do to identify and overcome barriers to the use of the service.

184

A Fair Go For All: Report on Migrant Access and Equity AGPS Canberra 1996.

185

id 48.

186

id 88.

187

Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

188

Australian National Audit Office *Use of Justice Statement Funds and Financial Position: Family Court of Australia* Audit Report No 4 1996–97 AGPS Canberra 1996, 9.

189 For a fuller discussion of the exercise of federal jurisdiction by courts of summary jurisdiction, see ch 15.

190 Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 7.

191 Family Law Rules O 30 r 2AAA.

192 Family Law Rules O 30 r 2AAA(3), (4).

193 Chief Justice's Chambers Family Court of Australia *DRP Submission 64.*

194 See rec 80.

195 See recs 130, 132.

196 Mental Health Legal Centre *DRP Submission 54* suggested that '...the recommendations should [deal with] the needs and rights, including resources and supports required, by children and young people with any disabilities. The scope for addressing service and support needs in the context of family law proceedings should be explored'.

197 See para 16.41.

198 (1994) FLC ¶92–461, 80, 758. One criterion suggests that a representative be appointed '[w]here there are issues of significant medical, psychiatric or psychological illness...in relation to either party or a child' (80,774). This would ensure that many children with disabilities would be provided with a representative. There is also provision for a representative to be appointed in relation to applications in the court's welfare jurisdiction (80, 775). This is discussed later in this section.

199 Family Law Act s 67ZC.

200 Family Law Rules O 23B r 1; *Secretary, Dept of Health & Community Services v JMB & SMB* (1992) 15 Fam LR 392 *(Marion's case); P v P* (1994) 17 Fam LR 457.

201 As a result of constitutional limitations, the court can only exercise this power in relation to young women who are the children of a marriage or ex-nuptial young women resident in the Territories. However, see rec 123.

202

S Brady 'Invasive and irreversible: The sterilisation of intellectually disabled children' (1996) 21 *Alternative Law Journal* 160, 163.

203

H Carter 'Disabled girls "illegally sterilised"' *The Advertiser* 15 April 1997; M Sweet 'Court warns doctors on illegal sterilisation' *The Sydney Morning Herald* 16 April 1997. See also S Brady 'The extended jurisdiction — Potential hearing impairments in the legal process' *Paper* 29th Australian Legal Convention Law Council of Australia Brisbane 24–28 September 1995, 106.

204

J Ford 'The sterilisation of young women with an intellectual disability: A comparison between the Family Court of Australia and the Guardianship Board of NSW' (1996) 10(3) *Australian Journal of Family Law* 236.

205

P Eastaugh *DRP Submission 29.*

206

O 23B r 5.

207

See S Brady 'The extended jurisdiction — Potential hearing impairments in the legal process' *Paper* 29th Australian Legal Convention Law Council of Australia Brisbane 24–28 September 1995, 107.

208

Draft rec 8.23.

209

Education Centre Against Violence *DRP Submission 43;* the Autistic Association of NSW *DRP Submission 40;* S Brady *DRP Submission 49.*

210

Family Law Council *Sterilisation and Other Medical Procedures on Children* AGPS Canberra 1994, 62.

211

DRP Submission 58.

212

See eg S Brady 'Invasive and irreversible: The sterilisation of intellectually disabled children' (1996) 21 *Alternative Law Journal* 160, 162. See also S Brady *IP Submission 153.*

213

Brenda House *DRP Submission 65* noted that '...caution must be exercised when considering the opinion of an intellectually disabled teenager...Their wishes may be a long way from reality '.

214

Family Law Rules O 23B r 7.

215

Autistic Association of NSW *DRP Submission 40;* Mental Health Legal Centre *DRP Submission 54;* S Brady *DRP Submission 49.*

216

Autistic Association of NSW *DRP Submission 40.*

217

S Brady *DRP Submission 49.* See also rec 123.

218 See eg *GWW & CMW* (unreported) Family Court of Australia 21 January 1997.

219 O 23B.

220 S Brady *DRP Submission 49.*

221 The Family Court has held that a child's representative should generally be appointed in matters under the court's welfare jurisdiction and particularly under the special medical procedures provisions: *Re K* (1994) ¶92–461, 80,775.

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4. Children in the legal process

Introduction

4.1 When the state interacts with families for the protection, assistance and control of children, it does so through its legal processes. All children are involved with some legal processes through their participation at school, in employment and in consumer transactions. On the other hand, a significant percentage of children have explicit, direct and extensive contact with formal legal processes at the point of this interaction between the state and the family, particularly in care and protection and juvenile justice proceedings. The bulk of the Inquiry's efforts has been concentrated on children's involvement in formal legal processes.

4.2 Although children are involved with the state's legal processes, they are not always able to participate in them. Some children are too young to participate formally, and others, although old enough to understand and take part in the process, may not want to participate. Other children may be unaware of legal services and processes or may not have the skills and confidence necessary to fill out forms, seek information, give evidence and otherwise participate in legal processes. The legal process itself may discourage or inhibit participation by children.

Barriers to participation

Introduction

4.3 Formidable barriers prevent or limit children's participation in legal processes. One of these barriers relates to children's developmental capacity and is not entirely amenable to improvement. Other barriers are created by the assumptions of an adult legal system about the legal capacities of children to participate and by the processes themselves that were designed by and for adults. This Report has attempted to address these barriers through recommendations that set out what children need to know to deal with the legal process (developmental capacity), how children should be engaged appropriately within the legal process (legal capacity) and how to ensure that the legal process itself does not add to the problem (the adult system).

Developmental and legal capacity to participate

4.4 Formal participation by children in legal processes requires that children understand the process and its requirements, and have the intellectual, emotional and psychological skills necessary to negotiate the process and to persist in their pursuit of a particular goal. Many adults do not have these abilities and have considerable difficulties in dealing with legal processes. However, these difficulties are significantly magnified for children. Indeed, these skills themselves are often associated with levels of development and maturity. Many children are unlikely to have the skills and experience necessary to participate successfully in legal processes without assistance.

4.5 Traditionally, the law has used general assumptions about children's developmental capacities to decide a particular child's legal capacity to participate in legal processes. These assumptions applied to all children what may be true of only a few. For example, young children have been traditionally viewed as incompetent to give evidence based on assumptions that they are untruthful, suggestible, prone to fantasy and unable to make accurate and reliable observations about events.[1]

4.6 Assumptions about children's incapacity mean that some children are by definition ineligible to participate in some legal processes. Current examples include prohibitions on children under 18 years of age being parties to civil actions[2] and evidentiary rules concerning whether children are competent to give evidence and whether their evidence must be independently corroborated.[3] Laws regarding ages of consent for sexual activity[4] and marriage[5] are other instances where age is used to classify children based on assumptions about the soundness of their judgment and their capacities to make fair and accurate assessments of their interests.

4.7 Psychological studies have recently allowed a fuller, more sophisticated understanding of children's cognitive abilities.[6] They have prompted a re-evaluation of rules regarding children's capacities to participate in legal processes and focused attention on the individual child rather than on general rules for all children. Such an approach has been adopted in the common law in Australia, following the House of Lords' decision in *Gillick*[7] and the High Court's decision in *Marion's case*.[8] In these cases, in the context of medical advice and treatment, the increasing competence of children to make their own decisions was recognised and confirmed at law.

4.8 Variations in developmental capacity do not depend solely on age. Age is a relevant differentiating factor in determining legal capacity to participate in legal processes, but as Deane J noted

> [t]he extent of the legal capacity of a young person to make legal decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of a particular young person.[9]

4.9 Article 12 of CROC embodies this principle of an evolving capacity to participate. It is recognised that children who are capable of forming a view have the right to express that view in all matters affecting them, and to have that view

taken into account and given due weight in accordance with the age and maturity of the individual child.

An adult system

4.10 Even where a child has the developmental and legal capacities to participate in legal processes, appropriate participation can be extremely difficult because the processes themselves are not designed for participation by children. Laws and regulations are made and implemented by adults, and the attributes, decision-making processes and language used in legal processes reflect this fact. A number of submissions pointed to the difficulties posed by the current operation of adult-oriented legal and administrative processes in relation to children.[10]

The barriers in practice — inhibiting children's participation

Introduction

4.11 Throughout this reference, the Inquiry has attempted to focus on the barriers of developmental ability, legal capacity and legal systems designed by and for adults. Evidence to the Inquiry documented numerous problems related to each of these barriers currently facing children involved in the legal process.

Stereotypes and discrimination

4.12 Children may be discriminated against simply because they are not adults.[11] While age differentiation may be justifiable in some circumstances, age distinctions may be imposed in an arbitrary manner to streamline the adminstration of laws and policies relating to large numbers of people.[12] The arbitrary nature of many of these age limits has been criticised.[13]

4.13 Children may also be treated differently by legal processes and its other participants as a result of stereotypes about their characters and abilities. In addition to the traditional assumptions about children's capacities to participate,[14] children and young people often face outright discrimination based on the stereotype that young people are prone to unlawful behaviour. Laws that prohibit young people from gathering in certain places or that enforce curfews may be the result of an unjustified belief that young people commit crimes in these circumstances.[15] Certainly, the media have contributed to this stereotype of young people. One survey of articles in *The West Australian* showed that from 1990 to 1992 63% of all articles about young people related to youth crime.[16] In the Inquiry's survey of young people, 633 out of 786 (80.5%) believed that the media never or only sometimes portrays young people positively and 630 respondents out of 771 (81.7%) believed that the media never or only sometimes portrays young people truthfully.

4.14 Young people around Australia described to the Inquiry many instances of discriminatory treatment, including being harassed by police, shopkeepers and security guards.[17] For example, 11.3% of the respondents to the Inquiry's survey of young people indicated that, when buying goods, they found the retailers 'suspicious' of them, 'assuming young people will shoplift'.[18] One submission to the Inquiry even described this stereotype being held by the lawyers who were there to help young people in court.

> Darryl...said [that] when he appeared in court, 'I didn't know what a duty lawyer was, and then some guy in a suit came into the court and sat next to me and the Magistrate read the charge and asked for a plea. I was about to stand up and say 'not guilty' when this guy in the suit stood up and said 'guilty your Worship', and then he turned to me and said 'oh you are pleading guilty aren't you?'[19]

4.15 In addition, in the Inquiry's survey of young people, 66% of respondents believed that police never or only sometimes treated young people fairly and 79% believed that police never or only sometimes treat young people equally.[20] Further, out of 410 specific comments on how police treat young people, 40.2% were about police using violence against young people or treating them unfairly or disrespectfully.

Children do not complain or seek redress

4.16 The formal legal processes that most directly involve children are the family law, care and protection and criminal law systems. Yet in almost all of these systems, children are not there because they want to be. It is very rarely the child who initiates these proceedings. Rather, children are brought into these systems because parents, police officers, social workers, teachers, doctors, counsellors and others seek to resolve an issue through the legal process.

4.17 Over the course of the Inquiry, we were told of children's lack of participation in legal processes because of their reluctance to complain or seek redress when they had problems.[21] For example, it is typical of children's involvement in legal processes that no children had approached the NSW Community Services Appeals Tribunal directly regarding the care and protection system or their out of home placements,[22] that the ACT Legal Aid Commission had never been approached by a child directly requesting separate representation in family proceedings,[23] and that only 2% of the complaints received by the NSW Community Services Commission were from children, even though more than 70% of complaints about care and protection are about children's issues.[24] One practitioner explained this lack of participation in complaints processes.

> Children are understandably reluctant to speak out against these people [lawyers, magistrates, social workers, foster carers] because of the obvious power imbalance, especially when they know they may have to deal with the lawyer [or other professional] again or appear before the magistrate again later.[25]

4.18 Many participants in our consultations and public hearings described the problem as a lack of access. According to one young person, '[k]ids are not aware of where they can go to get a lawyer.'[26] A Family Court Registrar said the Registry of the Family Court

> ...does not get much child-related work from community legal centres or solicitors. Children do not appear to access these services. There have only been a few cases where children have applied to the court as parties.[27]

The Inquiry was also told that young people are often not aware of procedures for seeking redress.[28]

4.19 Young people themselves often spoke about why children and young people do not make complaints. For example, at one meeting with Indigenous young people in Sydney, not one of the young people in attendance considered that making complaints was worth it, particularly when the complaint was about alleged abuse by police.[29] When the young people did complain, their experiences with the process confirmed this assessment. One young person in Queensland who complained about police misconduct, with the assistance of the Youth Advocacy Centre, said

> [t]he police interviewed me and then three months later sent me a letter explaining what they said 'really' happened. I won't complain again.[30]

Another young person who went to the Ombudsman with a complaint about the police said that it came to nothing. She found it a waste of time 'because the Ombudsman and the other public officials don't care about kids...they're on the side of police'.[31] Other young people described their complaints being 'lost' or ignored.[32]

Children may not understand the legal process

4.20 The Inquiry received considerable evidence that children's participation in the legal process is often hindered because they do not understand it. For example, one young person who was the main witness in a criminal trial described how he did not really understand the role of the crown prosecutor, and would have preferred to have his own solicitor acting as 'his' solicitor in the criminal case. He felt that the crown prosecutor had abandoned him and had not properly protected him, and this made giving evidence much more difficult. His youth worker explained that

> ...young people simply don't understand what's going on...First, they don't understand the impact of the words used. Its too complex...Secondly, young people often withdraw from the situation because it is just too overwhelming.[33]

4.21 These problems arise in all kinds of legal processes, but they seem to be particularly evident in processes that involve courts. As one practitioner pointed out '[m]any children come out of court saying they don't understand a word of it'.[34] Another adult participant in the juvenile justice system talked about 'the incredible lack of understanding by young people [in the Northern Territory's Don Dale Detention Centre] about the juvenile justice system' and said

> [b]asically, they don't know what guilty means, who the prosecutor is, or sometimes even who the judge is. A major contributing factor [in the Northern Territory] is the lack of interpreters.[35]

4.22 Young people emphasised to the Inquiry that they found the legal system practically incomprehensible.

> It's like they all speak another language. You need an interpreter.[36]

> All young people in the court system should have a support person to assist them and make sure they understand what's happening in court.[37]

> The court rarely gives an explanation of the meaning of the sentence or bond and what it entails...When you go to court, you don't always understand what's happening. There is no-one there to explain things to you.[38]

> Benefit application forms contain a lot of jargon...they're difficult to fill out without help.[39]

In the Inquiry's survey of young people, out of the 138 respondents who were in detention facilities and who answered the relevant question, more than half (52%) indicated that they never or only sometimes understood what was happening when they were in court.[40]

Children are marginalised by the legal system and its other participants

4.23 Young people across Australia told the Inquiry of their perception that they are not listened to and that neither judicial officers nor other adult participants in legal processes take account of or care about their views. No aspect of the legal system escaped these consistent and persistent allegations of marginalisation.

4.24 For example, the Inquiry's survey of young people revealed that of the 134 respondents who were in detention and who answered the relevant question, 38% did not think that their lawyer had told the court what they had asked him or her to say. In addition, 70% stated that the judge or magistrate did not let them have a say in their case.[41] Many young people we spoke to commented about their marginalisation by court processes and legal representatives.

> **Judges don't care what happens to the kids in their courtrooms and they don't understand them...they should have to really look into why things are going wrong for a kid and try to fix it.[42]**

> **Kids don't get enough opportunity to express their views when they're in court. There should be more opportunities for them to say what they think...Kids are not given the chance to say anything in court, even when they ask to.[43]**

> **Lawyers acting for young people rarely ask their opinions on anything...There's no point in seeing lawyers. Lawyers and judges don't really care about kids.[44]**

> [Solicitors] only do what they're told if the kid insists...Kids are just a number to duty solicitors.[45]

4.25 These perceptions reflect children's real experiences of legal processes. They were confirmed by other participants in these legal processes. In the public hearings and in private meetings, the Inquiry heard many examples of representatives in family law proceedings refusing to speak with their child clients or of children who were distraught after hearings because their legal representative had not done what the child had instructed.[46] One young girl, aged 12, even telephoned the Inquiry to seek our intervention in Family Court proceedings on her behalf. She was caught up in a long running Family Court case, and although she had been interviewed by various social workers, counsellors, psychologists and police officers she had never been interviewed by the legal representative appointed to her case. She believed that no-one had told the judge what her wishes were.[47] Some children may also feel marginalised by the court system because it is

> [an] adversarial system...dominated by legal strategising by competing parties to maximise their chances of winning the case...The interests of the child often get lost between the warring parties.[48]

4.26 Court processes were not the only legal processes to receive scathing criticism from young people. Service delivery agencies and schools were also seen by young people as uncaring bureaucracies in which the child's voice was often ignored. For example, one young person described a situation in which he had applied for Abstudy's living away from home allowance after he moved out of his house. He felt that there was no-one to talk to at the relevant department about the problems he was experiencing in this application process.

> I was passed from person to person when I telephoned. No-one took responsibility for my case.[49]

4.27 Another young man who had experienced the care and protection system said that he was not allowed any involvement in decisions regarding his placement with various foster parents. Sometimes he did not even know the reasons why his placement was being changed.[50] Another young person described a social worker's refusal of his request to meet prospective foster parents before being moved.[51] Other young people confirmed that lack of consultation by child welfare workers was a consistent problem in all care and protection systems.

> **Kids don't have any rights when dealing with the Department of Family, Youth and Children's Services. Kids are told what to do rather than consulted. Social workers don't listen to kids' wishes.[52]**

The Inquiry's survey of young people found that of the young people in detention facilities who had also had some involvement with care and protection systems, 72% felt that they did not have enough say in the decisions made.[53]

4.28 Schools too seemed to ignore children when making decisions about them. Many young people deplored their lack of participation in disciplinary proceedings in schools, commenting that young people are given no voice in suspension, exclusion and transfer decisions.[54]

> When you get expelled or suspended from school you don't get an opportunity to defend yourself and explain your side of the story...Schools don't investigate matters properly before making a decision to expel a student.[55]

Another young person described being 'expelled from all Queensland state schools forever'. He said that he did not even see a school counsellor until after he was excluded from school.[56]

Agency complexities inhibit children's participation

4.29 Young people and professionals alike commented that the complexities of legal processes inhibit participation.

> Young people can lodge an appeal against cessation or suspension of benefits but it is a lengthy and complex process. Many children don't appeal because it is too difficult.[57]

> Young people often have to work out their entitlements for themselves as there is very little information available...you have to know a benefit exists before you can apply for it.[58]

> Young people need someone to go with them and help them deal with government agencies. Without this kind of support, it's very easy to be discouraged and give up after the first time.[59]

> It's ironic that young people need to rely on advocates to get things that should be theirs by right.[60]

4.30 Some complexities result from the jurisdictional divisions discussed in Chapter 3. The current jurisdictional arrangements affect children's participation in legal processes in two different ways. First, responsibilities for children's matters are fragmented between a number of different agencies and levels of government.[61] As one professional explained, '[d]ealing with government agencies can be very confusing for young people. They may have contact with 20–30 agencies.'[62] Second, this division of responsibility between governments and between agencies means that some children are left without the assistance of any agency, even when there are supposed to be mechanisms to co-ordinate agency involvement. Children in this situation may have no legal process in which to participate. These two barriers to children's participation in legal processes are discussed in detail in Chapter 5.

4.31 According to one practitioner, as a result of these problems many young people are more damaged by the legal system designed to help them than by the activities that led them there in the first place.[63]

Disadvantages of adverse outcomes

Introduction

4.32 Issues surrounding children's abilities to participate in legal processes affect all children because almost all children have some involvement with legal processes in the formal education system and in transactions as consumers of goods and services. However, participation is a particular issue for children who have extensive contact with legal and administrative systems, who depend on those systems to protect and provide for them and who may be without assistance in dealing with these legal processes. This group of children may include those who are involved in care and protection systems, excluded from school, in receipt of income support or housing assistance or in the juvenile justice system.

4.33 Children in this group are extremely vulnerable in dealing with legal processes. For many, this contact may be related to disadvantages they already face due to family breakdown, socio-economic and educational disadvantages, systems abuse and disabilities. Their involvement in these processes may be extensive and they may not always have the support of their families. These factors may add to their disadvantage.

4.34 Contact with legal processes may affect these children's lives in many ways. For many of these children the contact produces a satisfactory result. For example, a child may receive income support that allows him or her to complete school or a child may enter foster care and receive the support his or her parents were not able to provide.

4.35 However, legal processes are interlinked in complex and sometimes little understood ways. Should one legal process fail to address the underlying problems, contact with that process may increase the risk for some children that they will have further, and increasingly adverse, contact with other parts of the legal system. For example, damaging consequences are apparent in the links between the education, income or social support and care and protection systems.[64] Children in detention centres often represent the failures of these systems to meet the needs of the children involved.

Education

4.36 There is considerable evidence that early school-leaving (leaving school before reaching the compulsory attendance age) is strongly correlated with unemployment, poverty and homelessness.[65] Children who are suspended or excluded from school or whose intellectual and emotional needs are not identified and adequately addressed may therefore suffer further and greater disadvantage and contact with other legal processes. Those children who fail in the school system, whether from emotional, behavioral or intellectual difficulties, may be at risk of criminal offending.[66]

4.37 In one NSW study on children serving detention orders, 82.2% of the young people interviewed had already left school before being incarcerated.[67] Of those who had left school and were at least 15 years old at the time of their arrest for the offence for which they were serving the detention order, 33.3% had left school before they had turned 15.[68] Over half of the respondents stated that they had truanted from school on average at least one week out of every school month, 79.3% said that they had been suspended or excluded from school at least once in their lives and 30.1% said that they had been

suspended or excluded from school at least 5 times.[69] The South Australian Department of Family and Community Services has also found that young people entering its juvenile justice system tend to have poor literacy and numeracy: 25% have a reading age of less than 10 years old and 50% do not have survival level numeracy skills.[70]

4.38 These links between education and delinquency may reflect the correlations between inadequate education, unemployment and crime. The unskilled, under-educated and unemployed are grossly over-represented in criminal statistics.[71] For children who have been excluded from school, the links may also be a result of the alienation, low self-esteem and rejection that is often felt by these children.[72]

Income and social support

4.39 Contact with income and social support systems may be correlated with children's involvement in care and protection and juvenile justice systems. One case study reported to the Inquiry illustrates these links.

> Eric was homeless as his step-father had told him to leave home. In order to get money for food and shelter Eric agreed to sell a bike which he had a fair idea was stolen. He was to split the proceeds [of] $40.00 with a friend...Eric was arrested and held in custody for three days until his case could be heard...Eric already had a 'failure to appear' on his record. In explaining why he didn't appear he said that when you are homeless, its wet, you tend to lose things like little bits of paper and you lose track of what day it is, and so he didn't appear.[73]

4.40 Low socio-economic status may increase the risk of children becoming involved in the juvenile justice system. For example, one NSW study on juvenile theft offenders in detention found that the most common reasons for offending given by shoplifting offenders were to obtain clothes or money for clothes (20.6%) or food or money for food (17.6%).[74] The most common reason for offending given by break and enter offenders was to obtain money (31.4%).[75] Participation in juvenile crime has also been linked to unemployment and homelessness.[76] In a study of 400 young people aged 14 to 17 in Melbourne, more than 30% thought that young people in their age group committed crimes to supplement their incomes or for survival purposes.[77] However, low socio-economic status is not always or a sole predictor of juvenile crime. Other developmental, familial, peer and school-related factors are also predictors.[78]

4.41 Economic disadvantage also correlates to involvement in care and protection systems, although child neglect and abuse is also related to a number of interlinked factors.[79] Poverty may contribute to family instability or stress which in turn leads to an increased risk of child neglect.[80] This link between poverty and child abuse does not mean that poverty itself leads to abuse or neglect. Poverty may be a factor which increases family stresses and affects parents' emotional well-being. This stress, coupled with lack of community resources, may tend to increase the vulnerability of children in low income families to abuse or neglect.[81] Lack of social support for families also increases the risk of involvement in care and protection systems. One study has found

that poor child care facilities, a high turnover of residents and weak neighbour ties provide conditions which increase the risk of neglect.[82]

Care and protection

4.42 Another case study illustrates that there may be a link between care and protection and juvenile justice systems.

> Robert is 14 years old. His parents are from a non-English speaking background and have separated. He has been in care since the age of six, consisting of foster care, an adoptive placement and five Department of Community Services Residential Care placements. Robert has been diagnosed as having a conduct disorder and several assessments suggest that he is 'functioning at a mild level of intellectual disability.' Robert has been subject to criminal charges on numerous occasions, including assault, malicious damage and break, enter and steal. Some of these resulted from departmental staff pressing charges for incidents within the DOCS residential care settings. Some of the charges were later dismissed by the Children's Court under the NSW Mental Health (Criminal Procedures) Act 1990. The Magistrate acknowledged that Robert's conduct disorder, borderline developmental disability and disrupted history played a major part in his behaviour.[83]

4.43 Children who have been extensively involved in the care and protection system are drifting into the juvenile justice system at alarming rates. A NSW study revealed that wards of the state were 15 times more likely to enter a juvenile justice detention centre than the rest of the juvenile population.[84] In Victoria, 21% of the children in care over 10 years of age at April 1995 had been formally processed as offenders during the period from May 1993 to May 1995 — a rate substantially higher than that for adolescents in the general community.[85]

4.44 Statistics are unavailable from other jurisdictions. However, evidence to the Inquiry, particularly from young people, indicates that the situation is no better elsewhere. The Inquiry's survey of young people revealed that 41% of the 113 respondents in detention facilities who answered the question about involvement in care and protection systems had been involved in welfare proceedings.[86]

4.45 The link between the need for care and protection and criminal behaviour might be partly the result of family background and influences, particularly those factors associated with parenting behaviour and style.[87] When a caretaker is neglectful of a child, neglect being defined as some failure on the part of the caretaker to provide conditions essential for the child's healthy development, there is more chance that the child will be involved in some kind of delinquent behaviour, from self reported moderate delinquency to assault and homicide.[88]

4.46 However, the care and protection system itself often fails to provide an environment conducive to a child's healthy development, compounding the problem and the risk for many children.[89] The drift of children from care and protection systems into the juvenile justice system may therefore be the result of a failure by the family services department to provide an appropriate caretaker or of systems abuse.[90] Certainly, the number of children who become homeless while under care and protection orders

indicates that care and protection systems are not adequately caring for many children. A report on SAAP revealed that 18.7% of SAAP clients under the age of 14 were under care and protection orders before they obtained SAAP assistance, as were 17.1% of 14 to 15 year old clients and 8.1% of those aged 16 to 17.[91] In Victoria, 23% of children given emergency accommodation by one agency during April 1995 were identified as children currently in care.[92]

4.47 The care and protection system also often fails to deal adequately with the education of the children in its care, bringing into play the links between education and juvenile justice. One NSW study showed that 23.4% of the former state wards who were interviewed had left school before they completed Year 10 and 35.6% had completed Year 12 prior to leaving wardship. By comparison, only 5% of young people who lived at home and were interviewed for the study had left school before Year 10 and 80% completed Year 12.[93] Another NSW study found that more than half of former wards had completed only Year 10 or less of schooling, that almost half were unemployed 12 months after being discharged from wardship and that almost half said that they were having difficulties 'making ends meet'.[94]

4.48 Instability caused by changes in placement is another influential factor for children in care. The NSW study on former wards noted that the average number of placements for a child in care was 8.4, the median being 6.5. Of these former wards, 76.9% had three or more placements while in care, 28.6% had at least ten placements and one young person had 32 placements.[95] However, those children who had spent at least 75% of their time in care in one long-term placement had attended fewer schools, were happier, were more likely to have completed at least Year 10 at school, more likely to report that they were able to 'make ends meet', less likely to say they missed out on affection and less likely to have thought about or have attempted suicide.[96]

4.49 Children leaving care often do not receive the support they require. As has been noted by other reports, leaving care is '...a crisis which brings to the surface past deficits in care and attainment; it often requires, but does not receive, a major input of services and support'.[97] There is a history within all care and protection jurisdictions of limited provision for the transition of young people into independent living.[98] Young people leaving care often experience inadequate housing, unemployment, loneliness, depression and poverty.[99] Both the HREOC and the parliamentary committee reports on homelessness note the over-representation of former wards among the homeless and the inadequacy of the assistance these young people receive after they leave care.[100] These figures support other international studies on young people leaving care that show about one third of young people leaving care become homeless at some point.[101] As shown in paragraph 4.40, lack of income and social support may be related to involvement in juvenile justice systems.

4.50 The link between care and protection and juvenile justice systems may also be more direct. Children in care are often charged and taken into police custody when those responsible for their care and protection believe that being in a more restrictive juvenile justice facility is in a particular child's 'best interests'.[102] Child welfare workers

routinely use the juvenile justice system as a treatment, punishment and holding mechanism for children whom they find difficult to manage.[103]

Problems of particular groups — varied experiences of children

Introduction

4.51 All children are disadvantaged to varying degrees in their participation in legal processes.[104] Some children have particular problems. Children in different situations have very different experiences in their contact with legal processes. Evidence to the Inquiry described the experiences of children in rural and remote areas, Indigenous children, children from non-English speaking backgrounds and children with disabilities.

Children living in rural and remote areas

4.52 Children in rural and remote communities face particular difficulties in relation to availability of goods and services, education and employment opportunities, support services and other resources. Rural residents find welfare and community services inadequate and inaccessible and believe that rural and remote areas are not receiving an equitable share of economic and social resources. These areas have less than half the range of general community services available in urban areas and the services are more expensive to operate than in urban communities.[105]

> The vast array of urban welfare services are either unavailable in rural and remote areas or are so inaccessible and under-resourced as to be virtually nonexistent.[106]

4.53 Rural and remote children involved with legal processes also experience problems such as access to appropriate and timely legal services, detention facilities that are not designed to accommodate young people and children's detention or care facilities that are hundreds of kilometres away from their families.

> For young people in rural and remote communities, numerous factors make their...situation more difficult: limited access to services, inflexible program requirements and a general lack of understanding by bureaucracies [of] the unique needs of rural communities. Young people in rural and remote communities are disadvantaged by their lack of access to subsidised services such as transport, health care, charity organisations and public housing which are available to young people in larger metropolitan areas. In financial crisis, rural young people rarely have access to a social worker or local financial support like their urban counterparts.[107]

Children from non-English speaking backgrounds

4.54 Children from non-English speaking backgrounds are not a homogenous group. They have different cultural traditions, and may include first, second and even later generation immigrants, male and female children, those from high and low socio-economic backgrounds and so on. Accordingly, these children do not all have the same

needs or problems. However, they may often face common difficulties with regard to their participation in legal processes.

4.55 Although Australia's population is made up of approximately two hundred different ethnic groups, many government services continue to be offered as if all people were of Anglo-Australian background and familiar with processes in Australia.[108] In general, children of non-English speaking background tend to find the legal processes involved in obtaining these services bewildering and marginalizing.[109] They are conducted in a language with which they are not familiar and rely on a high level of communication, both written and spoken, containing highly technical terms unlikely ever to have been part of their experience.[110] As a result, many children of non-English speaking background do not have access to the government services available to them.[111]

4.56 Accessible and reliable interpreters are often critical to the administration of justice for children suspected of a crime, yet only three Australian jurisdictions provide individuals with a statutory right to an interpreter when being questioned by police.[112] State and Territory police forces have different rules regarding the use of professional interpreters and there is a great deal of discretion exercised by individual police officers in judging whether a person has adequate English skills.[113]

4.57 Children of non-English speaking background may also encounter

- inadequate and inappropriately targeted information concerning law, procedures, rights and obligations
- legal and correctional institutions inadequately dealing with their particular needs and problems
- problematic relations with police
- inadequate research and evaluation of multicultural issues in the juvenile justice area.

Indigenous children

4.58 Many Indigenous children come from rural and remote areas and are affected by the same problems as other rural and remote children in their contact with legal processes.[114] Many have difficulties similar to those facing children of non-English speaking background, due to language and/or cultural barriers. For Indigenous children these problems may be exacerbated by an expectation that they speak 'standard' English or that their mannerisms and understandings are the same as those of other Australian English speakers.[115]

4.59 In addition, the difficulties that commonly arise in all children's involvement in legal processes, including barriers to access, lack of understanding, marginalisation and agency complexities, affect Indigenous children on a greater scale. Indigenous children are vastly over-represented in those legal processes that have links with adverse outcomes and other legal processes.[116] Statistics from New South Wales indicate that Indigenous children are over-represented in exclusion and suspension proceedings.[117] In the care and

protection system, they are over-represented in each stage of the process, from notification to substantiation to placement away from home.[118] They are over-represented in each stage of juvenile justice processes, from charges, arrest and appearances in court to the more serious sentences.[119] The extensive contact by Indigenous children with these legal processes is of great concern to the Inquiry.

4.60 The operation of legal processes, particularly those involved in the care and protection and juvenile justice systems, must also be viewed against past practices which have discriminated against Indigenous peoples. The forced separation of Aboriginal children from their families has caused widespread breakdown of family relationships and structures and loss of personal, family and cultural identity among Indigenous people. Past assimilation policies and practices which tore apart families and communities continue to have a negative impact on individuals, families and communities.[120]

Children with disabilities

4.61 Children with disabilities are not a homogenous group. The term 'disability' includes behavioral problems, learning disabilities, physical or intellectual impairments and psychological and psychiatric conditions.[121] Children with certain of these disabilities may be over-represented in the educational discipline, care and protection and juvenile justice legal processes.[122]

4.62 When the same discipline code is applied equally to all students in a school, it can have a harsh effect on students with certain disabilities — particularly those with disabilities that have a behavioral element.[123] For example, the Inquiry was informed that a young person with Tourette's Syndrome had been suspended from school numerous times for swearing, even though he was unable to control his outbursts.[124] Students with disabilities are also frequently targeted as scapegoats for the misbehaviour of other children.[125]

4.63 Children with physical, behavioral and intellectual disabilities are more susceptible to child abuse.[126] In particular, children with intellectual disabilities are over-represented as victims of crime, particularly of sexual assault.[127] One submission to the Inquiry noted that women and girls with 'impaired mental functioning' are believed to make up more than 29% of all victims of rape.[128] These children may be frequently involved in care and protection or criminal witness processes.

4.64 Intellectually impaired children or those with learning disabilities may also constitute a significant percentage of children in detention facilities.[129] A study undertaken in NSW prisons in 1988 found that 12 to 13% of the prison population had an intellectual disability, that is, approximately four times that of the general population.[130] Although this research does not relate to children, it indicates a trend that may also be present in the juvenile justice system. Research conducted by the South Australian Department of Family and Community Services on young people entering its juvenile justice system indicates that many of these young people could be classified as

intellectually impaired — 28% were of borderline or below average intellectual functioning.[131]

4.65 Given their contact with these legal processes, children with disabilities may be particularly vulnerable to the adverse outcomes associated with some legal processes. Submissions to the Inquiry also drew attention to areas in which children with disabilities may be particularly disadvantaged within the legal system, including an inability to communicate,[132] susceptibility to manipulation (particularly in the context of questioning and investigations)[133] and barriers to participation based on stereotypes of their abilities to participate.

National co-ordination is needed

4.66 This chapter has shown that Australia has not secured real participation for children in many of its legal processes. These problems affect children in each jurisdiction and in each legal process examined in the Inquiry. Notwithstanding the Commonwealth's co-ordination initiatives described in Chapter 3, children who are dealt with by the Family Court, who are in care or who ought to be in care, who are drifting from the care and protection system to the juvenile justice system, or who are left to their own devices by government service delivery agencies also face problems caused by the jurisdictional division between governments and agencies.

4.67 Submissions to the Inquiry argued that the welfare of children is a national issue that requires Commonwealth oversight and assistance in developing best practice models for dealing with children. They argued that Commonwealth co-ordination is necessary to ensure better delivery of services to children by all levels of government. As Chapter 3 has detailed, the Commonwealth already funds research, provides services to children, and develops and promotes a co-ordinated approach to policy on some children's issues. The following chapters recommend that the Commonwealth should undertake a better focused, more effective role in this regard.

Footnotes

1
See paras 14.15-18.

2
See paras 13.6-7; cf ages of criminal responsibility at paras 13.4-5, 18.12-20.

3
See paras 14.16-18.

4
See para 18.23.

5

A young person cannot marry until he or she reaches 18. There is provision for court approval for marriage in exceptional circumstances where one of the parties is 16 or 17 years old: *Marriage Act 1961* (Cth) Pt II, s 12.

6 eg see paras 14.19-24 for recent research in the area of children's abilities to be reliable, accurate witnesses.

7 *Gillick v Norfolk and Wisbech Area Health Authority* (1985) 3 All ER 402.

8 *Secretary, Department of Health and Community Services v JWB and another* (1992) 175 CLR 215, 293.

9 ibid.

10 eg SA Dept of Family and Community Services *IP Submission 100.*

11 See paras 11.9-10.

12 See paras 18.23-27 for a description of some of these age-related restrictions.

13 See R Ludbrook *Youthism: Age Discrimination and Young People*National Children's and Youth Law Centre Sydney 1995.

14 See paras 4.4-4.6.

15 See paras 18.67-72.

16 H Sercombe 'Easy pickings: The Children's Court and the economy of news production' *Paper* Youth 93: The Regeneration Conference Hobart 3–5 November 1995 quoted in C Cuneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 112.

17 Adelaide Focus Group 29 April 1996; Wagga Wagga Focus Group 9 May 1996; Darwin Focus Group 15 July 1996; Alice Springs Focus Group 19 July 1996; Rockhampton Focus Group 2 August 1996; Tranby College Focus Group 10 May 1997. See also paras 18.63-64, 18.69.

18 Survey Question 12. Of the 674 total responses, 76 stated that the most common problem with buying goods was that the retailer was suspicious of young people or assumed they would shoplift.

19 Youth Advocacy Centre *IP Submission 120*.

20 Survey Question 21. There were 768 responses to the question of whether police treat young people fairly and 763 responses to the question of whether police treat young people equally.

21 See paras 2.153-163.

22 R Gurr, President NSW Community Services Appeal Tribunal Minutes of Meeting Sydney 9 August 1996.

23 C Staniforth, CEO ACT Legal Aid Commission Minutes of Meeting Canberra 6 May 1996.

24 NSW Community Services Commission *IP Submission 211*.

25 Bendigo Practitioners' Forum 31 May 1996.

26 Brisbane Focus Group 29 July 1996.

27 L Foster, Registry Manager Newcastle Family Court Registry Minutes of Meeting Newcastle 3 May 1996.

28 A Male, Director-General Qld Dept of Families, Youth and Community Care Minutes of Meeting Brisbane 31 July 1996; Adelaide Focus Group 29 April 1996; Darwin Focus Group 15 July 1996.

29 Tranby College Focus Group 10 June 1997.

30 Brisbane Focus Group 29 July 1996.

31 Newcastle Focus Group 13 May 1996.

32 Rockhampton Focus Group 2 August 1996; Tranby College Focus Group 10 June 1997.

33 Confidential Minutes of Meeting Sydney 5 November 1996.

34 Bendigo Practitioners' Forum 31 May 1996.

35 G Dooley, NT Aboriginal Juvenile Justice Advisory Committee Minutes of Meeting Darwin 16 July 1996.

36 Rockhampton Focus Group 2 August 1996.

37 Hobart Focus Group 30 May 1996.

38 Newcastle Focus Group 13 May 1996.

39 Alice Springs Focus Group 19 July 1996.

40

Survey Question 6.1. There were a total of 208 respondents to the survey who were in detention. Some of these respondents did not answer all of the questions in the survey.

41 Survey Questions 6.3(b), 6.4(a). There were 135 responses to the question of whether the judge/magistrate had let the young person have a say in the case.

42 Tranby College Focus Group 10 June 1997.

43 Newcastle Focus Group 13 May 1996.

44 Newcastle Focus Group 13 May 1996.

45 Brisbane Focus Group 29 July 1996.

46 eg Bendigo Practitioners' Forum 31 May 1996.

47 Confidential oral submission 7 August 1997.

48 M Hanger, B Nurcombe et al Children and Family Therapy Unit Brisbane Royal Children's Hospital Minutes of Meeting Brisbane 29 July 1996.

49 Tranby College Focus Group 10 June 1997.

50 Residents of Malmsbury Youth Training Centre Minutes of Meeting Bendigo 31 May 1996.

51 Alice Springs Focus Group 19 July 1996.

52 Alice Springs Focus Group 19 July 1996.

53 Survey Question 6.9(b). There were 208 respondents to the survey who were in detention centres, 113 of whom answered the question about involvement in care and protection proceedings. Of these, 46 (41%) indicated that they had some involvement with the care and protection system and 33 of these believed that they had not had enough say in the decisions made.

54 Canberra Focus Group 6 May 1996; Hobart Focus Group 30 May 1996.

55 Hobart Focus Group 30 May 1996.

56 Brisbane Focus Group 29 July 1996.

57 K Wright, Youth Accommodation and Support Service *Public Hearing Submission* Alice Springs 18 June 1996 .

58

Alice Springs Focus Group 19 July 1996.

59 Hobart Focus Group 30 May 1996.

60 D Williams, Youth Network of Tas *Public Hearing Submission* Hobart 30 May 1996.

61 See paras 5.3-4.

62 Youth Justice Coalition Minutes of Meeting Perth 1 July 1996.

63 Bendigo Practitioners' Forum 31 May 1996.

64 Links between education, socio-economic factors and crime do not necessarily imply a causal relationship between these factors. Care must be taken in interpreting these links.

65 NYARS *Under-Age School Leaving* National Clearinghouse for Youth Studies Hobart 1997, 29.

66 ibid.

67 P Salmelainen *The Correlates of Juvenile Offending Frequency: A Study of Juvenile Theft Offenders in Detention* NSW Bureau of Crime Statistics and Research Sydney 1995, 13.

68 ibid.

69 ibid.

70 SA Dept of Family and Community Services *IP Submission 110*.

71 NYARS *Under-Age School Leaving* National Clearinghouse for Youth Studies Hobart 1997, 29.

72 See R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 109.

73 Federation of Community Legal Centres (Vic) *IP Submission 129.*

74 P Salmelainen *The Correlates of Juvenile Offending Frequency: A Study of Juvenile Theft Offenders in Detention* NSW Bureau of Crime Statistics and Research Sydney 1995, 21.

75 id 25.

76

K Freeman 'Young people and crime' (1996) (32) *Crime and Justice Bulletin* 5.

77 R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 58.

78 K Freeman 'Young people and crime' (1996) (32) *Crime and Justice Bulletin* 5.

79 Children from economically disadvantaged families come to the notice of the care and protection system at a greater than average rate: see M James 'Child Abuse and neglect: Incidence and prevention' *Issues in Child Abuse Prevention No 1* National Child Protection Clearing House Canberra 1994. See also P Salmelainen 'Child neglect: Its causes and its role in delinquency' (1996) (33) *Crime and Justice Bulletin*.

80 For a review of the literature on this subject see P Salmelainen 'Child neglect: Its causes and its role in delinquency' (1996) (33) *Crime and Justice Bulletin* 4–8.

81 id 5.

82 id 12.

83 NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996, 13.

84 id 8.

85 Vic Auditor General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 266. See paras 2.75-121 for the incidence of contact between the youth population in general and the juvenile justice system.

86 Survey Question 6.9. There were 208 respondents in detention. The 46 positive responses to this question made up 22% of all respondents in detention.

87 For a review of the literature on this subject see P Salmelainen'Child neglect: Its causes and its role in delinquency ' (1996) (33) *Crime and Justice Bulletin* 3–4.

88 ibid.

89 See paras 17.5-14.

90 See paras 17.5-14 in relation to systems abuse and other forms of neglect while in care.

91

AIHW *SAAP National Data Collection: Mid-year Report July-December 1996* AIHW Canberra 1997, 90, table 129.

92

Vic Auditor General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 263.

93

J Cashmore & M Paxman *Wards Leaving Care: A Longitudinal Study* Social Policy Research Centre Sydney 1996, 150. See also paras 2.32-38 for national statistics on school retention rates for the general youth population.

94

J Cashmore & M Paxman *Wards Leaving Care: A Longitudinal Study* Social Policy Research Centre Sydney 1996, iii. This paper also noted a similar UK study which showed that children in care were more likely to be unemployed, to lack educational qualifications, to be living in poverty, to change accommodation frequently and to be confused about their pasts and unsettled in their present relationships.

95

id 27.

96

id ii.

97

id 3.

98

SA Dept of Family and Community Services *IP Submission 110*.

99

S Wilson et al *Breaking the Cycle: Taking Responsibility for Independence* Children Australia Melbourne 1994, 25.

100

HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989; House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra 1995.

101

RP Barth 'On their own: The experiences of youth after foster care' (1990) 7 *Child and Adolescent Social Work Journal* 419.

102

NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996, 16–17.

103

ibid.

104

See paras 4.3-10.

105

C Croce 'Towards a national rural youth policy' (1994) *Transitions* 26.

106

ibid.

107 ibid.

108 SA Multicultural & Ethnic Affairs Commission *IP Submission 86*.

109 Multicultural Interest Group *IP Submission 137*.

110 ibid.

111 P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 18.

112 See para 18.120.

113 J Chan 'Police accountability in a multicultural society' (1995) 6(4) *Criminology Australia* 3.

114 See paras 4.52-53.

115 The differences between Indigenous and non-Indigenous speakers' English usage have been well documented: see para 18.114.

116 See paras 4.36-50 for a description of these processes and the links between them.

117 See para 2.47.

118 See para 2.68, table 2.16.

119 See paras 2.82-83, 2.85-86, 2.90, 2.97, 2.100, 2.118-119.

120 Aboriginal Legal Service of WA *IP Submission 75*. This point was extensively documented in the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997.

121 See para 2.9 for statistics on children with disabilities.

122 S Moran *IP Submission 73.*

123 C Flynn *Disability Discrimination in Schools* National Children's and Youth Law Centre Sydney 1997, 27.

124 Dept of Families, Youth and Community Care Minutes of Meeting Brisbane 31 July 1996.

125

C Flynn *Disability Discrimination in Schools* National Children's and Youth Law Centre Sydney 1997, 27.

126 See B Verdugo et al 'The maltreatment of intellectually handicapped children and adolescents' (1995) 19(2) *Child Abuse and Neglect* 205; Qld Advocacy *IP Submission 104*.

127 See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1996, 33–34.

128 Qld Advocacy *IP Submission 104*.

129 See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1996, 25–26.

130 id 25. This study used a definition of intellectual disability which included both the results of intelligence tests and social and adaptive skills.

131 SA Dept of Family and Community Services *IP Submission 110*.

132 Qld Advocacy *IP Submission 104*.

133 Australian Psychological Society *IP Submission 131*.

The Australian Law Reform Commission

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ALRC 84

1. Introduction

Background to the reference

The reference

1.1 On 28 August 1995, the then federal Attorney-General, the Honourable Michael Lavarch MP, referred jointly to the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) an Inquiry into children and the legal process. The terms of reference are reproduced at page 3.

The Commissions

1.2 The ALRC is an independent statutory corporation established by the *Australian Law Reform Commission Act 1996* (Cth) to examine, on referral from the Attorney-General, legal matters requiring reform. In relation to those matters referred to it, the ALRC is required to

- review federal law for the purposes of developing and reforming the law
- consider proposals for the making, consolidation or repeal of relevant laws
- consider proposals for uniformity between State and Territory law and federal law
- consider proposals for complementary federal, State and Territory law.[1]

1.3 HREOC is an independent federal statutory authority established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It has a variety of powers to promote and protect the human rights of all people in Australia. In particular, HREOC can

- inquire into acts or practices that may infringe on human rights
- make recommendations to remedy those infringements

- report on any actions that should be taken by Australia in order to comply with relevant international instruments.[2]

The federal Government has recently proposed to restructure HREOC and rename it the Human Rights and Responsibilities Commission.[3]

The terms of reference

1.4 The terms of reference require consideration of legislative and non-legislative measures that should be taken to address a number of different issues surrounding children and legal processes. These issues include legal representation and advocacy for children and their access to legal processes, the appropriateness of procedures by which children give evidence, the appropriateness and effectiveness of the legal process in protecting child consumers, and issues relating to children in federal jurisdictions. In addition, the terms of reference require the Inquiry to examine the particular needs of those children for whom the Commonwealth has a special responsibility, as well as issues relating to children in Australia's remote communities.

1.5 In considering these issues, the Inquiry has had regard to the Commonwealth's responsibilities for children arising under the Constitution and international human rights obligations, including those arising under the United Nations Convention on the Rights of the Child (CROC), as well as to relevant law, practice and experience in some overseas jurisdictions.

History of the reference

Request for submissions on the terms of the reference

1.6 Initially, the Inquiry sought submissions on the terms of reference. We received 169 submissions during September and October 1995, with suggestions on what specific issues the Inquiry should address within the broader area of children and the legal process.

Issues Papers and submissions

1.7 In March 1996, the Inquiry released two issues papers entitled *Speaking for Ourselves: Children and the Legal Process*. The first of these, Issues Paper 17 (IP 17), was a brief document aimed specifically at young people. Issues Paper 18 (IP 18), was a more comprehensive overview of the issues. Both documents called for comments.

1.8 We received 225 written submissions from individuals, organisations and government departments on the questions raised in our issues papers. This material has been invaluable to the Inquiry in assessing community concerns and priorities.

Public hearings

1.9 From April to August 1996, the Inquiry held a series of public hearings throughout Australia to take oral submissions from interested persons. Public hearings were held in Sydney, Adelaide, Canberra, Wagga Wagga, Newcastle, Melbourne, Hobart, Perth, Kalgoorlie, Darwin, Alice Springs, Brisbane, Rockhampton and Parramatta. We heard oral submissions from over 170 people. This process enabled the Inquiry to hear directly from community members, including many young people, and organisations about their concerns regarding children and the legal process.

Practitioners' forums

1.10 As part of the consultation process, the Inquiry also held a series of meetings with legal practitioners, and in some instances medical professionals and youth workers, in most of the cities that we visited for public hearings. These forums enabled the Inquiry to obtain detailed evidence from practitioners in different areas of children's involvement in the legal process.

Focus groups and surveys

1.11 As well as holding public hearings, the Inquiry endeavoured to meet with groups of young people in each of the places visited. Approximately 100 young people participated in these focus groups around Australia. The number of participants at each meeting varied from 2 to 16 young people. Each group provided the Inquiry with extremely useful information about children's impressions and experiences of legal processes. We thank the National Children's and Youth Law Centre for its assistance in organising these focus groups.

1.12 In April 1996 the Inquiry distributed approximately 2000 copies of a specialised survey on legal issues to young people in government and independent schools and in detention centres throughout Australia. The 843 responses we received have been entered on a data base. The focus groups and the surveys provided the Inquiry with detailed, first-hand information about children's views on their experiences with the legal process and their suggestions regarding these processes.

Statistical information

1.13 The Inquiry requested, and was provided with, statistical information on children's involvement with legal processes from judges, courts and tribunals, government agencies such as family services, education and juvenile justice departments, Directors of Public Prosecutions (DPPs), legal aid commissions and the Australian Bureau of Statistics (ABS). These statistics, many of which had never before been collected or reported on a national scale, provide a detailed picture of the extent to which children are involved in the legal process and were of great assistance in the preparation of this Report.

Consultations

1.14 Over the course of the Inquiry, we also consulted directly with individuals and organisations who have extensive dealings with children in different legal processes or who are experts in legal processes that affect children. The information and assistance received during these processes was of great benefit to the Inquiry, providing additional insight about the experiences of children in the legal process and informing the directions of our research.

1.15 The honourary consultants for this Inquiry provided continuing assistance throughout the reference.[4] In addition to meetings held on 8 December 1995 and 5 March 1997, the consultants provided detailed comments on specific chapters of this Report and on the general direction of our research. We also sought comments from academics and experts in various fields of children's law. The Inquiry is grateful for the assistance of our consultants and other experts.

Draft Recommendations Paper

1.16 A Draft Recommendations Paper (DRP 3) entitled *A Matter of Priority: Children and the Legal Process* was released on 20 May 1997 to give an indication of the directions of the Inquiry in terms of priority issues of concern and proposals for reform. As the Inquiry covered an extremely wide range of issues, DRP 3 gave a brief introduction to each subject, outlined the key issues and arguments and provided drafts of the suggested recommendations. It sought the comments of interested persons or organisations on all these issues.

1.17 The Inquiry received 92 submissions on DRP 3. The great majority of these submissions were supportive of the draft recommendations, although many also had further suggestions and comments on specific recommendations. The import of these submissions is discussed in appropriate sections throughout this Report.

The Report, its scope and its context

Introduction

1.18 This is the first inquiry in Australia that has considered in such breadth issues relating to children and the legal process. Even so, the Inquiry had the benefit of considering numerous reports and previous recommendations in many of the subject areas covered in the reference. A substantial body of work was contained in these previous reports. The repetition of concerns about successive generations of children and the consistency of our findings with those made in many of these reports reflect the persistent problems facing children in the legal process and emphasise the priority that they should now receive.

1.19 The Inquiry's terms of reference were concerned with issues surrounding children's participation within the legal process. The Inquiry was not concerned with the substance of the laws, rights or entitlements of children within these processes, except as these relate to the processes themselves. Many submissions to the Inquiry suggested that we

should address issues such as the levels of income support provided to young people, the law with respect to joint custody of children, the appropriateness of detention for child asylum seekers and the problems of drug abuse among young people. However, these issues are beyond the terms of the reference.

1.20 The focus of the Inquiry on a broad range of legal processes enabled consideration of children's involvement in these processes from a national perspective. This focus permitted a wide and detailed examination of legal processes in different jurisdictions, the relationships between these processes and across portfolios and the consequences of children's involvement in one or more of the processes. In some areas, the legal processes examined were within State and Territory jurisdictions. These examinations were undertaken on the basis that they were necessary and relevant to the terms of reference.

Definition of 'child'

1.21 In law, there is an 'instantaneous transformation' from childhood to adulthood at a specified age.[5] In Australia a person is considered to be legally an adult at the age of 18. This is the age at which a person can vote, marry without prior consent of court, enter into contracts, initiate and defend civil litigation on his or her own behalf and exercise a host of other adult legal rights and responsibilities.[6] International law, as set out in CROC, also defines a child as a person under the age of 18.[7] The Inquiry has adopted this definition.

1.22 The term 'young people' is often used in relation to people between the ages of 12 and 25. For the sake of clarity, the term 'child' will be used throughout this Report unless it is clear that only those aged 12 to 18 are being considered, in which case the term 'young people' will be used.

1.23 Chapter 2 provides statistical data on children in Australia. In that chapter, and throughout this Report, we attempt to identify and profile the children who are involved with the legal process and the manner and appropriateness of their involvement. Chapters 3 and 4 analyse the social, legal and political context in which issues concerning children and the legal process arise.

Definition of 'the legal process'

1.24 For the purposes of this Inquiry, the legal process is interpreted broadly to include administrative processes, interaction with law enforcement and regulatory agencies, and court processes. Legal processes are the processes by which

- individuals assert and enforce their legal rights
- government agencies and courts regulate and assist those individuals
- individuals, agencies and governments alike are held accountable for their actions.

1.25 Part B of the Report focuses on processes involved in decision making in the context of administrative and other services for children and Part C deals with the formal legal

processes for children, including those associated with courts and the exercise of judicial power.

Assumptions about children and the legal process

1.26 The Inquiry has made assumptions relevant to the role that children are expected or able to play in the legal process. It is assumed that the family has primary responsibility for caring for children and preparing them for adulthood.[8] However, children's development throughout childhood is a responsibility jointly shared with the state. This joint effort between families and the state should encourage the development of an individual capable of participating in and contributing to society. This assumption is exemplified in the provision of education for all children, in the assistance offered by the state to families so that they can better care for their children, by the state's intervention in some families and by its further responsibility for children who are without family support or unable to live with their families. These assumptions concerning the roles of family and governments inform the recommendations in this Report

1.27 Within the legal system the traditional view has been that children are objects of concern to the legal system, the subjects of the law and of the legal process but not participants in the legal process. Early international declarations regarding children's 'rights' were concerned principally with the enumeration of children's economic, social and psychological needs. This reflected the assumption that children could and should rely on the exclusive protection and participation of adults in the legal process to ensure the exercise of their rights.[9] This view was premised on the assumption that children do not and should not have the capacity themselves to participate in legal processes to enforce their rights.

1.28 This assumption about children's rights and their participation in the legal process is changing and it is in the context of this change that this Report is written. Changes in substantive and procedural law reflect a growing appreciation that children's abilities and capacities to make decisions develop as they mature, and that children should be afforded a progressive right to participate in legal processes that affect them. Chapter 3 further analyses these changing assumptions.

1.29 Many of these developments in the law relating to children's participation are articulated in CROC, which has been almost universally ratified.[10] Given the diversity of its States Parties and breadth of coverage, CROC is clear evidence of customary international norms regarding the rights and responsibilities of children. While CROC is not incorporated in its entirety into the domestic law of Australia, it is a strong statement of Australia's commitment to children's rights and their participation in legal processes.[11]

Children's participation in the legal process

1.30 The Inquiry has received extensive evidence of the problems and failures of legal processes for children. Of particular concern is evidence of

- discrimination against children, despite Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) to guarantee equal treatment before the law[12]
- failures, to some degree by each of the institutions of the legal process, to accommodate the changing notions of children's evolving maturity, responsibilities and abilities, and in particular a consistent failure to consult with and listen to children in matters that affect them
- the marginalisation of children involved in the legal process, whether by teachers, social workers, lawyers or judges, when decisions that are of significant concern to children are being made
- a lack of co-ordination in the delivery of, and serious deficiencies in, much needed services to children, particularly to those who are already vulnerable
- the systems abuse of children involved in legal processes, particularly the appalling state of care and protection systems throughout Australia and the manner in which child witnesses are treated
- the increasingly punitive approach to children in a number of juvenile justice systems
- the discriminatory impact of certain legal processes resulting in the over-representation of some groups, particularly Indigenous children, in the juvenile justice and care and protection systems
- the concentration of specialist services and programs in metropolitan areas, disadvantaging rural and remote children in their access to services, the legal process and advocacy
- inconsistencies in legislation dealing with legal capacities and liabilities of children.

1.31 Appropriate participation by children in legal processes is often difficult because legal processes are not designed for children. In making our recommendations, the Inquiry has had regard to the barriers that an adult legal system presents for children. Our emphasis is on appropriate and effective participation for children. The Inquiry does not advocate wholesale involvement of children in all legal matters or processes. However, where children are mature enough and willing to participate in the legal process, that participation should be on the basis that children are the beneficiaries of all of the law's protections.

Format of the Report

1.32 This Report is divided into three sections. The chapters in Part A detail and analyse the assumptions and conclusions on which the Report is based. In Parts B and C, the Inquiry explores the various legal processes in which children may be involved. We have made detailed recommendations in these later chapters about how children's participation in legal processes can be effectively and appropriately assisted.

Footnotes

1 s 21.

2 s 11(1)(f).

3 D Williams, Attorney-General and Minister for Justice *Media Release* 23 September 1997.

4 A list of consultants is included at appendix A.

5 R Ludbrook 'Children and the political process' (1996) 2(2) *Australian Journal of Human Rights* 278, 283.

6 However, see paras 4.4-9 for a discussion of the changing views of the appropriate and varying ages used to define childhood.

7 A child is defined as a person under the age of 18 unless the relevant national law specifies an earlier age of majority: art 1.

8 See CROC preamble.

9 G Van Bueren (ed) *International Documents on Children* Martinus Nijhoff Dordrecht 1993, xv.

10 As of 15 September 1997 only the USA and Somalia had not ratified CROC.

11 The effect of CROC in Australia is discussed in more detail at paras 3.20-22.

12 art 26.

Guidelines for child representatives

Practice directions and guidelines

1. The Purpose of these Guidelines

This document is intended to provide guidance to the Child's Representative in fulfilling his/her role.

The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the Family Court, with information about the Court's general expectations of Child's Representatives. It also sets out these expectations as they relate to children in circumstances of family violence, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Straight Islander children, and where applications arise for the authorization of special medical procedures and other orders relating to the welfare of children.

This is a public document that is made available by the Court. In addition, the Guidelines will be used in the training of Child's Representatives.

2. Introduction

The role of the Child's Representative is unique. The lawyer appointed to represent and promote the best interests of a child in family law proceedings has special responsibilities.

Decisions in particular cases as to how the Child's Representative progresses the case and how he/she involves the child in the case are ultimately in the Child's Representative's discretion.

The Child's Representative is expected to use his/her professional judgment and skill, subject to any directions or orders of the Court. The availability of funding is a practical constraint.

The way in which the Child Representative acts may not always meet with the approval of the parties or the child, but this does not mean that the Child's Representative has failed in his/her professional responsibilities.

A glossary of terms used in the guidelines appears at the end of this document to assist readers in understanding them.

3. Statement of Principles

The appointment of a Child's Representative is one means of giving effect in family law proceedings to the United Nations Convention on the Rights of the Child which states that:

> **In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Article 3)**
>
> **Parties shall assure to the child who is capable of forming his or her 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. (Article 12.1)**
>
> **For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either**

directly or through a representative or an appropriate body consistent with the procedural rules of national law. (Article 12.2)

4. The role of the Child's Representative

The best interests of the child will ordinarily be served by the Child's Representative enabling the child to be involved in decision-making about the proceedings. However, this does not mean that the child is the decision maker. Among the factors that indicate the appropriate degree of involvement in an individual case are:

the extent that the child wishes to be involved; and

the extent that is appropriate for the child having regard to the child's age, developmental level, cognitive abilities, emotional state and the child's wishes are.

These factors may change over the course of the Child's Representative's appointment.

The Child's Representative is to act impartially and in a manner which is unfettered by considerations other than the best interests of the child.

The Child's Representative must be truly independent of the Court and the parties to the proceedings.

The professional relationship provided by the Child's Representative will be one of a skilful, competent and impartial best interests advocate. It is the right of the child to establish a professional relationship with his or her Child's Representative.

The Child's Representative should seek to work together with any Child and Family Counsellor or external expert involved in the case to promote the best interests of the child.

The Child's Representative should assist the parties to reach a resolution, whether by negotiation or judicial determination, that is in the child's best interests.

The Child's Representative should bring to the attention of the Court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

The Child's Representative is to promote the timely resolution of the proceedings that is consistent with the best interests of the child.

The Child's Representative does not take instructions from the child but is required to ensure the Court is fully informed of the child's wishes, in an admissible form where possible.

The Child's Representative is to ensure that the views and attitudes brought to bear on the issues before the Court are drawn from and supported by the admissible evidence and not from a personal view or opinion of the case.

The Child's Representative is expected and encouraged to seek peer and professional support and advice where the case raises issues that are beyond his or her expertise. This may involve making applications to the Court for directions in relation to the future conduct of the matter.

5. Relationship with the Child

The child has a right to establish a professional relationship with the Child's Representative.

In considering any wishes expressed by the child and the steps to be taken in a matter the Child's Representative is to be aware:

- that each child will have different emotional, cognitive and intellectual developmental levels, family structures, family dynamics, sibling relationships, religious and cultural backgrounds; and

- that children are vulnerable to external pressures when involved in residence, specific issues and contact disputation.

5.1 Information which should be explained to the child

When the Child's Representative meets the child, s/he should explain to the extent that is appropriate for the child:

- the role of the Child's Representative including the limitations of the role;

- the Court process (including any anticipated interlocutory stages); and

- the other agencies that may be involved and the reasons for their involvement.

The Child's Representative is to ensure that the child is aware that information provided by the child to the Child's Representative may have to be communicated to the Court, the child's parents or other persons or agencies. A strategy should be developed in consultation with any Child and Family Counsellor involved in the case and with the child as to the manner in which this is done. The aim is to minimise the potential for any adverse reaction towards the child.

Despite the inability to guarantee the child a confidential relationship, the Child's Representative should, however, strive to establish a relationship of trust and respect. This is assisted by explaining the role of the Child's Representative, including:

- how the child can have a say and make his/her wishes and views known during the process;

- that where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the Child's Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court;

- the involvement of any report writer, the nature and purpose of the report, the use to which the report will be put and that all parties will see the report; and

- how the Child's Representative can be contacted by the child.

5.2 Limitations of the Role of the Child's Representative

The Child's Representative should guard against stepping beyond his or her professional role and should seek guidance from a counsellor or other professional when necessary.

The Child's Representative cannot guarantee the child a confidential relationship. In addition to explaining this limitation at the commencement of the relationship, it may be necessary to periodically remind the child.

It is not the role of the Child's Representative to:-

- conduct disclosure interviews;
- become a witness in the proceedings; or
- conduct therapy or counselling with the child.

The Child's Representative should be alert and sensitive to the risk of a child becoming over dependent upon him or her and should consider seeking peer or professional advice in responding to such a situation.

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

5.3 Children's Wishes

The Child's Representative should seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others.

A child who is unwilling to express a wish must not be pressured to do so and must be reassured that it is his or her right not to express a wish even where another member of the sibling group does want to express a wish.

The Child's Representative should ensure that there are opportunities for the child to be advised about significant developments in his or her matter if the child so wishes, and should ensure that the child has the opportunity to express any further wishes or any refinement or change to previously expressed wishes.

The Child's Representative must take into account that the weight to be given to the child's wishes will depend on a number of factors, and is expected to be familiar with caselaw on the subject.

In preparing to make submissions on the evidence as to the weight to be placed on the wishes of the child, the Child's Representative may consult with the Order 30A expert, Child and Family Counsellor or other relevant expert in relation to:

- the content of the child's wishes;
- the contexts in which those wishes both arise and are expressed;
- the willingness of the child to express wishes; and
- any relevant factors associated with the child's capacity to communicate.

The Child's Representative is to ensure that any wishes expressed by the child are fully put before the Court and so far as possible, are in admissible form. This includes wishes that the Child's Representative may consider trivial but the child considers important.

The Child's Representative is to also arrange for evidence to be before the Court as to how the child would feel if the Court did not reach a conclusion which accorded with the child's wishes.

5.4 Making submissions contrary to the Child's wishes

If the Child's Representative considers that the evidence indicates that the best interests of the child will be promoted by orders which are contrary to the child's wishes, the Child's Representative is to:

- advise the child that he/she intends to make submissions contrary to the child's wishes;
- ensure that the child's wishes are before the Court, together with the arguments which promote the adoption by the Court of the child's wishes;
- make submissions which promote the adoption by the Court of orders which are in accordance with the child's best interests;
- provide clear and cogent submissions as to why the child's wishes do not promote the child's best interests; and
- explain to the child at the conclusion of the proceedings why he/she made a submission that was contrary to the child's wishes (if there has not been an opportunity to do so prior to the conclusion of the proceedings).

6. General procedures to be followed when a Child's Representative has been appointed

6.1 Who should be advised?

The Child's Representative must file and serve an Address for Service to advise the Court and the parties of his/her appointment.

The Child's Representative is to advise all necessary agencies, for example the Family Court Mediation Section and the State Welfare Authority, of his/her appointment.

The Child's Representative is to make contact with the State Welfare Authority and seek information about:

- the extent of any child protection involvement with the child or family, in particular, any abuse or neglect notifications and investigations; and
- if there has been any such involvement, whether the Authority intends to become involved in the family law proceedings or is considering the initiation of other legal proceedings.

Where the Child's Representative considers it is necessary to advise other individuals and organisations such as, the child's school or therapists, of the appointment, the Child's

Representative shall seek (if appropriate to the age and degree of understanding of the child) and take into account any views of the child.

The Child's Representative is to advise the parties of his/her role in the presence of the parties' legal representatives.

The Child's Representative and any Child and Family Counsellor involved in the case have joint responsibility to initiate liaison to clarify roles and to identify any particular needs of the child.

6.2 Meeting the Child

It is expected that the Child's Representative will meet the child unless there are exceptional circumstances or significant practical limitations. These occasions should be extremely rare. An assessment may be made in consultation with any Child and Family Counsellor involved in the case as to whether, where and how to meet the child.

6.3 Consultation between the Child's Representative, Child and Family Counsellor

After a Case Assessment Conference, or any resolution event conducted under privilege, the Child and Family Counsellor may be in a position to provide information to the Child's Representative of the following:

- a preliminary overview of the dynamics of the separated family and the way this is impacting on the child;
- other agencies involved with the family;
- recommendations for case management;
- whether the child should be involved in further counselling and/or whether therapy is indicated;
- whether there are any urgent issues; and
- details of any child abuse notifications made.

Consultation between the Child's Representative and any Child and Family Counsellor involved in the case should be ongoing. This includes an external Child and Family Counsellor. The Child's Representative should not seek a detailed account of what took place during privileged counselling.

6.4 Relationship with the Parties and their Legal Representatives

A Child's Representative is to remain independent, objective and focused upon promoting the child's best interests in all dealings throughout the proceedings.

The parties and their legal representatives should be encouraged to be non-adversarial where possible and to maintain a focus on the child's best interests. The Child's Representative should promote this approach whenever appropriate.

The Child's Representative should as soon as practicable inform the parties of their role and use their best endeavours to ensure the parties understand the Child's Representative's role within the proceedings.

Where parties are legally represented, communication between the Child's Representative and the parties should normally be through the legal representatives.

The Child's Representative may need to have direct contact with the parties during the course of the proceedings. Such contact must have the consent of the party concerned and should normally be arranged through the parties' legal representatives. If one or more parties are unrepresented, the Child's Representative is to communicate directly with the party and should advise the other parties of the fact of any meeting with an unrepresented party.

The Child's Representative is not required to communicate to the other parties the substance of his or her conversations with the child.

The Child's Representative must at all times be and be seen to be independent and at arm's length from any other party to the proceedings.

The Child's Representative is to act as an "honest broker" on behalf of the child in any negotiations with the other parties and their legal representatives.

Once the Child's Representative has formed a preliminary view as to the outcomes which will best promote the child's best interests, the Child's Representative will consult with the child and take into consideration any expressed wishes of the child, as may be appropriate in all the circumstances. The Child's Representative will then communicate his/her views and details of proposed orders to the parties where possible.

If during the period of appointment of a Child's Representative there are proceedings between other parties in respect of contravention of an order, generally the role of the Child's Representative ought not be an active one. However, this is subject to the proviso that where the Child's Representative considers (a) that such proceedings are detrimental to the best interests of the child or (b) that the presence of the Child's Representative may further the best interests of the child, then it is appropriate for the Child's Representative to be present and, if necessary, to seek to appear on the proceedings The Child's Representative must, however, be served with the application and any supporting material, and be notified by the parties of any findings and sanctions imposed by the Court.

6.5 Case Planning

The Child's Representative is to seek to develop a case plan at the earliest opportunity in consultation with any Child and Family Counsellor involved in the case.

In the case plan, the Child's Representative:

- canvasses the nature of any reports or examinations which will involve the child;
- develops a strategy for the involvement of the child in any examination/assessment process;

- liaises with any Child and Family Counsellor involved in the case, relevant government departments, contact centres, schools and agencies to bring together relevant information to assist the Court in assessing and determining the best interests of the child;

- develops opportunities for the matter to reach an agreed outcome which best promotes the child's best interests;

- provides information, support, and assistance as required for or requested by the child during the process of litigation, whether directly or by way of appropriate referral;

- is vigilant and makes every endeavour to minimise systems abuse of the child; and

- if it is thought that some form of expert report may help to resolve the matter at an early stage, the Child's Representative should consider seeking to obtain such a report during the resolution phase of the proceedings.

The strategy outlining the involvement of the child in the examination/assessment process has the following primary aims:

- to ascertain the level of involvement that the child wishes to have in the court proceedings;

- to provide the child with opportunities to express his or her wishes in relation to with whom they live and who they see, to the extent that the child wants to express any wish;

- to provide evidence of matters relevant to the child's best interests and in particular the relationship of the child and the parties;

- to prevent the systems abuse of the child as a result of the child being over-interviewed; and

- to be in accordance with the Chief Justice's Family Violence Policy, other relevant best practice guidelines and applicable protocols for dealing with matters involving family violence. No process should be pursued which departs from these guidelines.

6.6 Changing, Reviewing or Terminating the Appointment of the Child's Representative

The appointment of a Child's Representative for sibling groups can present special difficulties. Cases may arise where the Child's Representative may need to give consideration to the Court making a further assessment as to whether the proceedings require another Child's Representative to be appointed.

The Child's Representative should consider the usefulness of the order for representation of the child from time to time during the course of a case. The matter should be relisted and an order sought from the Court discharging the appointment if the Child's Representative is of the opinion that:

- there is no useful purpose or no further purpose served by the order for the representation of the child;
- the Child's Representative's relationship with the child has broken down irretrievably to the extent that it is not possible to represent his or her best interests;
- continuation of the appointment would be adverse to the best interests of the child; or
- practical circumstances make it impracticable to represent the best interests of the child.

The Child's Representative should ensure that arrangements are made to inform the child or children of any alterations to the arrangements affecting their representation in accordance with their age, developmental level, cognitive abilities and emotional state.

6.7 Reports

The Child's Representative's communications with a Child and Family Counsellor or expert are not privileged. Evidence of these communications may be included in a report or given in oral evidence.

If a Child and Family Counsellor or other expert is requested to prepare a report, the Child's Representative should, to the extent that the issue is not the subject of an order by the Court:

- liaise as appropriate with the other parties concerning the nature of the report, the identity of the report writer, the terms of reference, the persons who should participate in the assessment, and the material to be provided to the report writer;
- satisfy him/herself that the report writer has the appropriate qualifications and experience to conduct the assessment, prepare the report and give evidence for the particular case;
- facilitate the participation of the child and other relevant persons in the assessment as appropriate;
- ensure that the report writer is provided with the information and documentation necessary to complete the assessment, including any order concerning the parameters of the report;
- liaise with the report writer and facilitate the timely release of the report; and
- convene a conference of experts where appropriate and seek an agreed statement as to the outcomes of that conference.

If a dispute concerning the preparation of a report appears to require judicial intervention, the Child's Representative should consider applying for legal aid to list the matter to seek appropriate directions and orders from the Court.

Where the report is a family report or an Order 30A report, the writer is the Court's witness. The Child's Representative is not bound to make submissions which adopt the recommendations made by the report writer or any expert called in the proceedings.

Evidence given by an expert or Child and Family Counsellor or other expert is one part of the total evidence and must be evaluated within that context.

It is not the role of the Child's Representative to direct the methodology to be used by the family report writer or Order 30A expert. The methodology must be based upon the author's sound clinical experience.

6.8 Interim Hearings

Time constraints and the circumscribed nature of interim hearings may result in the Child's Representative not having the opportunity to fully investigate the child's circumstances. However where possible, the Child's Representative should have issued subpoenas to relevant agencies and be in a position to tender relevant material. Such evidence is particularly helpful to the Court where allegations of unacceptable risk are present in the case.

In circumstances where little is known about the child's situation the Child's Representative should be circumspect and should not feel compelled to make a submission as to the child's best interests, presenting rather an analysis of the available options to the extent possible.

The Child's Representative should ensure so far as is possible, that the child's wishes are made known to the Court in admissible form.

6.9 Final hearing (The Trial)

In the event that the matter proceeds to trial, the Child's Representative should comply with all procedural and timetable requirements. The Child's Representative should identify and obtain relevant documentation, organise the preparation of appropriate Order 30A expert and other reports and arrange for relevant witnesses such as State Welfare Authority officers, police officers, school teachers or similar persons to give evidence.

Where the Court is to make interim or procedural orders, the Child's Representative should consider whether they adequately promote the best interests of the child and make submissions as appropriate. The Child's Representative should also consider whether to seek the child's views on the matter and should inform the Court of the wishes, if any, of the child.

The Child's Representative is to promote the timely resolution of the proceedings that is consistent with the best interests of the child.

Where the Child's Representative has formed a preliminary view as to the outcomes which will best promote the child's best interests, it may be appropriate to inform the Court at the commencement of the hearing of those views and where appropriate, provide details of draft orders.

The Child's Representative is to arrange for the collation of all relevant and reasonably available evidence including expert evidence where appropriate, and otherwise ensure to the extent possible, that all evidence relevant to the best interests of the child and the factors set out in section 68F(2) of the *Family Law Act* is before the Court. The Child's Representative is not responsible for adducing evidence to establish the case of a party.

The Child's Representative is to test by cross-examination or other processes where appropriate, the evidence of the parties and other witnesses, including witnesses who are called by the Child's Representative.

The Child's Representative is to make submissions evaluating the evidence and the proposals of each party and in doing so it is expected that the Child's Representative will consider any practical problems associated with, and possible solutions for, such proposals. In appropriate cases the Child's Representative will also make submissions as to the proposed terms of orders.

Children rarely give evidence in proceedings. However there may be cases where consideration is to be given to what direct role the child might have in giving evidence to the Court. If the Child's Representative believes that it may be appropriate for the child to give evidence, the Child's Representative should consult with the Child and Family Counsellor or Order 30A expert. Where a child of sufficient maturity wishes to give evidence, the child should be appropriately advised and the opportunity to apply to give direct evidence canvassed. The purpose of section 100B should be explained to the child.

6.10 At the Conclusion of Proceedings

The Child's Representative should consider whether leave should be sought to provide copies of the orders, reasons for judgment of the Court and any other material, including expert reports, to any relevant professional involved with the family.

In appropriate circumstances the Child's Representative has a responsibility to explain to the child, or to facilitate an explanation by a Child and Family Counsellor or other appropriate expert who has provided a report in the case:

- the orders made by the Court;
- the effect of those orders;
- if submissions were made by the Child's Representative that were contrary to the child's wishes, the reasons for so doing; and
- whether leave has been sought to provide copies of the orders, reasons for judgment of the Court and for any other material, including expert reports, to any relevant professional involved with the family and to whom the Child's Representative intends to forward such material.

In consultation with a Child and Family Counsellor or an appropriate expert in the case, the Child's Representative should determine who is the most appropriate person to explain the orders, taking into account their current respective relationships with the child.

Where the Child's Representative is appointed for a sibling group, consideration should be given to whether explanations are best provided on an individual or group basis.

The Child's Representative does not monitor final orders unless there are exceptional circumstances and there is an order to this effect.

The Child's Representative should prepare a concise report as to outcomes of the proceedings to be placed on the client file. It should be written in a manner that is

informative to any subsequent Child's Representative that may be appointed and easily understood by the child if he or she is able to access it in later life.

6.11 Appeals

A Child's Representative has a right to appeal orders made by the Court on behalf of the child.

The Child's Representative should consider whether an appeal is appropriate. An appeal should only be lodged where the interests of the child would be promoted by such a procedure and after taking the wishes of the child into account.

If one of the other parties appeals, the Child's Representative should inform the child and explain the process involved unless there are particular reasons not to do so, for example previously stated wishes of the child.

Where appropriate the Child's Representative should participate in the hearing of the appeal.

7. Family Violence and Abuse

Like all practitioners, the Child's Representative is expected to be familiar with the relevant provisions of the *Family Law Act 1975* (Cth), the Family Law Rules and the Chief Justice's Family Violence Policy for dealing with matters involving alleged family violence. The Child's Representative must also be familiar with other relevant best practice guidelines and applicable protocols between the Court and State and Territory departments responsible for the investigation of child abuse.

Family violence and abuse are serious issues whenever they have occurred and should always be presented as being so. They are factors pursuant to section 68F(2) of the Act of which a Court must take account. Their degree of relevance in a particular case should be considered with the assistance of a counsellor or other mental health professional that has knowledge of family violence and abuse issues. In appropriate cases a full assessment should be conducted by such a counsellor or other mental health professional prior to the matter being settled or heard by a Court.

Particular difficulties can arise for a Child's Representative where one or more of the parties is unrepresented. While it is not expected that a Child's Representative will present the case for an unrepresented party, the Child's Representative should ensure that as far as practicable, evidence concerning family violence and abuse that is relevant to the best interests of the child is put before the Court.

The Child's Representative is expected to be alert to any risk of harm to a child that may arise from the other parties, or the physical environment in which the child may be. It will usually be inappropriate for the Child Representative to bring the child into proximity with an alleged perpetrator of harm. Where this does occur, visual or verbal contact with a party may be harmful and it will be necessary to carefully consider whether interview arrangements and the physical setting need to be structured in particular ways in order to protect the child and/or accompanying family members.

8. Cross-cultural and/or Religious Matters

The Child's Representative needs to take particular care in matters involving cross-cultural and religious issues.

The Child's Representative should be aware of Article 14 of the United Nations Convention on the Rights of the Child which states:

- State Parties shall respect the right of the child to freedom of thought, conscience and religion.

- State Parties shall respect the rights and duties of parents and, when applicable, legal guardians to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

Strategies that are sensitive to culture and religion need to be developed as part of a case management plan for the child within the context of the proceedings. The Child and Family Counsellor who conducted privileged counselling in the case should provide valuable assistance in this area, in particular in assisting appropriate referrals to relevant experts.

During the course of a matter the Child's Representative needs to:

- be aware that the child's English language skills may be in early stages of development;

- be aware that the child may be unfamiliar with the social and legal concepts involved in the proceedings;

- seek to identify service options that are appropriate to the culture and or religion of the child, make these known to the child, and assist the child to access them if requested;

- utilise the expertise of any Child and Family Counsellor involved in the case as may be appropriate;

- be mindful of the need to use interpreter services during meetings and throughout the proceedings where either the child or a party is not proficient in the English language;

- understand that the child may be fearful of isolation by his or her community or fearful of his or her community becoming aware of the proceedings;

- be mindful that the child may be fearful of courts, government departments and authorities; and

- be mindful that the child may be fearful of expressing wishes that are based upon or contrary to religious or cultural beliefs and background.

The Child's Representative is to consider the broader community and extended family support available to the child in recognition of the important role that may be played by extended family members in the raising of the child. That is, the Child's Representative needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

In obtaining an Order 30A report, the Child's Representative should inquire as to the report writer's training and experience in working with families of the child's culture and their capacity to relate to such families in a sensitive and appropriate manner prior to allocating the report to that individual. The Child's Representative must be satisfied that the report writer has the necessary

training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the cultural issues pertaining to the case. The Order 30A expert, Child and Family Counsellor or other relevant expert retained in the case may assist with adducing this evidence before the Court.

9. Aboriginal and Torres Strait Islander Children

In representing indigenous children, there are clear and specific issues that a Child's Representative must consider. Foremost of these is section 68F(2) of the *Family Law Act* that specifies that in considering the best interests of a child, a judicial officer must consider "any need" the child may have "to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders."

The Child's Representative should be aware of Article 30 of the United Nations Convention on the Rights of the Child which states that an indigenous child:

> "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."

In cases involving an Aboriginal or Torres Strait Islander child, the Child's Representative should liaise with a Family Court Aboriginal or Torres Strait Islander Family Consultant or an agency to which they are referred by the Family Consultant, and as appropriate, facilitate liaison between the Consultant or agency with any Order 30A expert, family report writer or other relevant expert retained in the case. This liaison is for the purpose of assisting the Child's Representative to consider the need of the child to maintain "a connection to culture" and how this can most effectively be achieved in considering the case before the Court.

It is imperative that the Child's Representative be familiar with relevant judgments, articles and reports in relation to indigenous issues, in particular The Bringing Them Home Report of the Human Rights and Equal Opportunity Commission.

To effectively represent the interests of any indigenous child the Child's Representative must have a clear understanding of the importance of the indigenous child's "connection to culture" and to understand the means by which this connection can be maintained and enhanced in the context of the case before the Court.

The Child's Representative also needs to consider the broader community and extended family support available to the child in recognition of the important role played by extended family members in the raising of indigenous children. That is, the Child's Representative needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

In obtaining an Order 30A report, the Child's Representative should inquire as to the report writer's training and experience in working with indigenous families and their capacity to relate to indigenous families in a sensitive and appropriate manner prior to allocating the report to that individual. The Child's Representative must be satisfied that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the cultural issues pertaining to the case. The Order 30A expert, Child and Family Counsellor or other relevant expert retained in the case may assist with adducing this evidence before the Court.

10. Children with disabilities

Particular sensitivity is needed to ensure that children with physical, intellectual, mental and/or emotional disabilities can participate in the decision-making process involved in the proceedings to the extent of the child's abilities and wish to participate.

The Child's Representative should be aware of Article 23 of the United Nations Convention on the Rights of the Child which states that:

- State Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

The Child Representative will be assisted by liaison with the existing specialist supports to the child in ascertaining the child's capacity to communicate their wishes, how the expression of such views can be facilitated, and any other relevant needs the child may have.

In obtaining an Order 30A report, the Child's Representative should inquire as to the report writer's training and experience in working with children with disabilities prior to allocating the report to that individual. The Child's Representative must be satisfied that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the disability issues pertaining to the case. The Order 30A expert, Child and Family Counsellor or other relevant expert retained in the case may assist with adducing this evidence before the Court.

11. Special medical procedures and other parens patriae / welfare jurisdiction cases (section 67ZC)

The principles stated above apply so far as sterilisation and other parens patriae / welfare jurisdiction cases are concerned.

In special medical procedure cases, a primary duty of the Child's Representative is to establish whether expert evidence indicates that the child in question is Gillick competent.

The Child's Representative should be familiar with cases in which the Full Court has dealt with the issue and also of applicable Court guidelines and protocols relating to Special Medical Procedures.

Where the evidence indicates that a child is Gillick competent, the Child's Representative should list the matter for the Court to determine whether a next friend should be appointed so that the child is given an opportunity to present his or her own case to the Court.

Where the evidence indicates that a child is not Gillick competent the Child's Representative cannot consent to the proposed procedure. The Child's Representative should ensure the matter comes before the Court as quickly as possible.

The parens patriae / welfare jurisdiction is not an adversarial jurisdiction. The Child's Representative is to gather and file material indicating what options are available to the Court and make submissions about the benefits and detriments for the child of each available option.

12. Glossary of Terms

Case Assessment Conference

The first major event most people have at the Family Court after documents have been filed is called a Case Assessment Conference. The Case Assessment Conference provides an early opportunity to identify issues in dispute, reach an agreement, identify dispute resolution events to be undertaken by the parties and adopt a case management pathway.

Case Management Directions

A set of directions that the Court uses to help clients achieve a just resolution of their dispute that is prompt and economical. These directions must be followed.

Case Manager

A member of the Court's administrative staff who manages individual case files and is the primary contact person for parties and lawyers in respect to a case file.

Child and Family Counsellor

A Child and family Counsellor can be: a court counsellor; or a person authorised by an approved counselling organisation to offer family and child counselling on behalf of the organisation; or a person authorised under the regulations to offer family and child counselling. These counsellors are approved to offer marriage counselling, child counselling or counselling arising out of an individual or family's contact with the Court. This may also be available to a parent or adoptive parent, a child or a party to a marriage. The Court may order a Child and Family Counsellor to prepare a family report for the purposes of the proceedings.

Child Mediation

This involves discussing difficulties experienced (as an individual or as parents) regarding the arrangements for children during or after separation. The goal is to achieve an agreement which is in the best interests of children.

Court Events

Court events include conferences, mediation, hearings and other court appearances before judges, judicial registrars, registrars or deputy registrars.

Court Mediator

Court mediators are qualified social workers and psychologists with specialist experience in working with families who are experiencing separation. They are part of the Court's team trained in mediation.

Family Consultant

The Court employs male and female Aboriginal Family Consultants whose role is to assist Aboriginal and Torres Strait Islander clients to access the services of the Court. The consultants work within the Court's mediation service and assist counsellors and the Court to respond to the needs of indigenous clients, especially in relation to disputes involving children following separation.

Family Violence Policy

The Family Court has acknowledged that there are many circumstances where families are attending the Court where violence is a factor. To assist parties in the resolution of disputes, and to promote the safety of litigants, the Family Court has articulated its policy to guide litigants, practitioners and others of the approach taken by the Court in circumstances of family violence.

Gillick Competent

Before a child reaches the age at which he or she could consent to medical treatment under the relevant legislation, the child may be lawfully competent to consent to at least some procedures. This depends on whether the child is a 'mature minor' under the Gillick test, a test which was approved by the High Court of Australia in 1992. This means that the person has 'achieved a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.

Treatment may be provided to a child if the parent or guardian consents or, if the child consents and (a) the medical practitioner is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and wellbeing, and (b) that opinion is supported by the written opinion of another medical practitioner who has examined the child.

Honest Broker

A person who has accepted the role of negotiator in the dispute because their impartiality is unquestioned by either side.

Mediation Service

Services are offered by the Court to help settle disputes by agreement rather than a hearing. Sessions deal with child-related issues or combined child-related and financial issues. The way a session is structured will depend on the individual needs and circumstances of the family. Sessions can be conducted by mediators trained in law, social work or psychology who are expert in child-related and/or financial issues as relevant. In some instances a person may be ordered to attend a mediation session by the Court. Mediation sessions are privileged and anything said can not be used later in a trial. However, the mediator is obliged by the *Family Law Act* to notify the State Welfare Authority if an allegation of child abuse is made.

Next Friend

A person appointed by the Court to conduct proceedings on behalf of another person who is a party to the proceedings, but is infirmed or a child.

Order 30A Expert

A professional (such as a psychologist or psychiatrist) who has been appointed by the Court under Order 30A of the Family Law Rules to be involved in the proceedings.

Privileged Counselling

Privileged counselling involves a counselling session with a Child and Family Counsellor where the contents of that counselling remain confidential. The Court will usually direct parties in a children's case to such a session at an early stage of the proceedings.

Resolution Event

These are events such as mediation that take place during the period between the commencement of proceedings to the point at which it is decided that the matter should be prepared for trial.

State Welfare Authority

State Welfare Authorities are the government department which deals with child protection issues. They are usually notified by counsellors, teachers or others with responsibility for a child, where a concern about child abuse is raised.

Systems Abuse

Systems abuse occurs when a child is further traumatised by the systems (courts, child protection or other State Welfare Authority), which he/she encounters or which are appointed to make decisions about the child.

> "Systems abuse can be characterised as involving one or more of the following: the failure to consider children's needs; the unavailability of appropriate services for children; a failure to effectively organise and coordinate existing services; and institutional abuse (i.e.child maltreatment perpetrated within agencies or institutions with the responsibility for the care of children)."*

* Cashmore, J., Dolby, R. and Brennan, D. (1994), *Systems Abuse: Problems and Solutions, NSW Child Protection Council, Sydney.*

http://www.familycourt.gov.au/html/legislation.html

FAMILY LAW RULES 1984 - List of Regulations

FAMILY LAW RULES 1984
Order 23 Children

23. RULE 1 Definition
23. RULE 2 Child party — court may require next friend
23. RULE 3 Application for separate representation
23. RULE 4 Interviews
23. RULE 5 Child as a witness

FAMILY LAW RULES 1984
- ORDER 23 RULE 4
Interviews

(1)

A judicial officer may interview in chambers or elsewhere a child who is the subject of proceedings under Part VII of the Act.

(2)

However, if the child is separately represented in accordance with an order made under section 68L of the Act, the child must not be interviewed unless the child's representative consents.

(3)

The interview may be in the presence of a family and child counsellor, a welfare officer or another person specified by the judicial officer.

(5) For this rule, *judicial officer* means a Judge, Magistrate or Judicial Registrar or a Registrar approved for the purposes of Order 36A, subrule 2 (1D).